CIVIL SERVICE REFORM ISSUES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

JUNE 24, 1998

Serial No. 105–168

Printed for the use of the Committee on Government Reform and Oversight

U.S. GOVERNMENT PRINTING OFFICE

51–003 WASHINGTON : 1999

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-058181-8

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

DAN BURTON, Indiana, *Chairman*

BENJAMIN A. GILMAN, New York
J. DENNIS HASTERT, Illinois
CONSTANCE A. MORELLA, Maryland
CHRISTOPHER SHAYS, Connecticut
CHRISTOPHER COX, California
ILEANA ROS-LEHTINEN, Florida
JOHN M. McHUGH, New York
STEPHEN HORN, California
JOHN L. MICA, Florida
THOMAS M. DAVIS, Virginia
DAVID M. McINTOSH, Indiana
MARK E. SOUDER, Indiana
JOE SCARBOROUGH, Florida
JOHN B. SHADEGG, Arizona
STEVEN C. LATOURETTE, Ohio
MARSHALL "MARK" SANFORD, South Carolina
JOHN E. SUNUNU, New Hampshire
PETE SESSIONS, Texas
MICHAEL PAPPAS, New Jersey
VINCE SNOWBARGER, Kansas
BOB BARR, Georgia
DAN MILLER, Florida
RON LEWIS, Kentucky

HENRY A. WAXMAN, California
TOM LANTOS, California
ROBERT E. WISE, JR., West Virginia
MAJOR R. OWENS, New York
EDOLPHUS TOWNS, New York
PAUL E. KANJORSKI, Pennsylvania
GARY A. CONDIT, California
CAROLYN B. MALONEY, New York
THOMAS M. BARRETT, Wisconsin
ELEANOR HOLMES NORTON, Washington, DC
CHAKA FATTAH, Pennsylvania
ELIJAH E. CUMMINGS, Maryland
DENNIS J. KUCINICH, Ohio
ROD R. BLAGOJEVICH, Illinois
DANNY K. DAVIS, Illinois
JOHN F. TIERNEY, Massachusetts
JIM TURNER, Texas
THOMAS H. ALLEN, Maine
HAROLD E. FORD, JR., Tennessee

BERNARD SANDERS, Vermont
(Independent)

KEVIN BINGER, *Staff Director*
DANIEL R. MOLL, *Deputy Staff Director*
DAVID A. KASS, *Deputy Counsel and Parliamentarian*
JUDITH MCCOY, *Chief Clerk*
PHIL SCHILIRO, *Minority Staff Director*

SUBCOMMITTEE ON THE CIVIL SERVICE

JOHN L. MICA, Florida, *Chairman*

MICHAEL PAPPAS, New Jersey
CONSTANCE A. MORELLA, Maryland
CHRISTOPHER COX, California
PETE SESSIONS, Texas

ELIJAH E. CUMMINGS, Maryland
ELEANOR HOLMES NORTON, Washington, DC
HAROLD E. FORD, JR., Tennessee

EX OFFICIO

DAN BURTON, Indiana

HENRY A. WAXMAN, California

GEORGE NESTERCZUK, *Staff Director*
JEFF SHEA, *Professional Staff Member*
CHARLI COON, *Professional Staff Member*
JOHN CARDARELLI, *Clerk*
DENISE WILSON, *Minority Professional Staff Member*

CONTENTS

	Page
Hearing held on June 24, 1998	1
Statement of:	
Harnage, Bobby L., Sr., national president, American Federation of Government Employees; Robert Tobias, national president, National Treasury Employees Union; Albert Schmidt, national president, National Federation of Federal Employees; and William W. Pearman, president, FAA Conference, Federal Managers Association	132
Lachance, Janice, Director, U.S. Office of Personnel Management; and Mike Brostek, Associate Director, Federal Workforce and Management Issues, U.S. General Accounting Office, accompanied by Steve Altman	7
Norquist, Grover, president, Americans for Tax Reform; Robert E. Moffitt, vice president, domestic policy studies, the Heritage Foundation; Randel K. Johnson, vice president for labor policy, U.S. Chamber of Commerce; Patrick Korten, Cato Institute; John I. Just-Buddy, Bowie, MD	69
Letters, statements, etc., submitted for the record by:	
Brostek, Mike, Associate Director, Federal Workforce and Management Issues, U.S. General Accounting Office, prepared statement of	23
Harnage, Bobby L., Sr., national president, American Federation of Government Employees, prepared statement of	136
Johnson, Randel K., vice president for labor policy, U.S. Chamber of Commerce, prepared statement of	96
Just-Buddy, John I., Bowie, MD, prepared statement of	114
Korten, Patrick, Cato Institute, prepared statement of	107
Lachance, Janice, Director, U.S. Office of Personnel Management:	
Information concerning contribution-based pay	59
Information concerning surveys	57
Prepared statement of	11
Moffitt, Robert E., vice president, domestic policy studies, the Heritage Foundation, prepared statement of	79
Norquist, Grover, president, Americans for Tax Reform, prepared statement of	70
Pearman, William W., president, FAA Conference, Federal Managers Association, prepared statement of	181
Schmidt, Albert, national president, National Federation of Federal Employees, prepared statement of	174
Tobias, Robert, national president, National Treasury Employees Union, prepared statement of	162

CIVIL SERVICE REFORM ISSUES

WEDNESDAY, JUNE 24, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:14 a.m., in room 2247, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Mica, Pappas, Morella, Sessions, Cummings, and Norton.

Staff present: George Nesterczuk, staff director; Garry Ewing, counsel; Jeff Shea and Charli Coon, professional staff members; John Cardarelli, clerk; Edward J. Lynch, senior research director; and Denise Wilson, minority professional staff member.

Mr. MICA. Good morning. I would like to call this meeting of the House Civil Service Subcommittee to order, and thank you for coming in. We still have a couple of seats in the back here. If you all would like to come up, you are welcome. I apologize for the size of the room, but it is better, I guess, than having an empty hearing room and no one interested.

This morning the House Civil Service Subcommittee is going to consider civil service reform issues. I am going to open the hearing with an opening statement, then I will yield to other Members for opening statements.

The subcommittee this morning is meeting to discuss measures we propose to consider in a package of legislative reforms. We have held over 60 hearings in the past 3 years to examine or address problems in Federal personnel rules and procedures. A significant number of hearings focused on the vital questions of compensation: pay, life insurance, health insurance, and retirement benefits, all of which are important to our Federal employees and retirees.

As a result of those hearings, and with bipartisan cooperation, the House adopted a significant civil service reform bill during the last Congress. Several sound provisions in that bill dealt with personnel flexibilities, performance and accountability, and again, I think today and before we end this Congress, they deserve our renewed consideration. We have, therefore, started our legislative reform efforts this year using some of those same provisions. In addition, we have reached out to include new measures that have been requested by the administration or recommended by many of our colleagues in the House.

In the next few days we will make a determination about which specific provisions to carry in this year's civil service omnibus re-

form bill. Today, we have solicited views on our outline of our bill proposal from various Government agencies, citizens groups and Federal employee organizations. We hope that they will help us to decide which recommendations deserve consideration for enactment this year.

During my term and tenure as chairman, I have focused on the more important aspects of the committee's jurisdiction over the Federal human resources agenda. I firmly support a fair compensation system for Federal employees, which must include secure, reliable funding for the payment of future annuities. I am dedicated to the principle that excellence in performance and excellent performance in the Federal service should also be recognized and rewarded. I am equally convinced that we cannot properly reward our high achievers without developing both fair and effective methods of removing poor performers.

Finally, I have come to the conclusion that the complex and cumbersome appeals procedures available to Federal employees needs to be streamlined. As currently structured, those appeals channels impede effective management and obstruct efforts to enhance the caliber and reputation of public service.

The personnel proposals we are discussing today include several measures to deal with these issues. I am personally open to any alternative proposals that address these priorities in a responsible fashion. If any of our witnesses today or other employee groups disagree in any way with what is in the proposals they have seen to date, or any of the performance issues that have been brought forth or proposals that have been made public, I challenge them to submit their own proposals and recommendations to deal with these problems. This committee will seriously consider any proposal that would strengthen performance requirements and provide credible and effective tools for keeping and renewing good performers and for, in fact, removing poor performers. It is my hope that we can reach some agreement on these matters in the next few days and work together in a cooperative effort to craft appropriate language and legislative remedies.

The committee has a very narrow and rapidly closing window of opportunity. We will discuss the general scope of civil service legislation today. The subcommittee will, in fact, mark up any bill we introduce during the week following the Fourth of July work period, and we will pursue approval by the House in July prior to the August recess. This should leave time to complete discussions with our counterparts in the Senate. I have had some discussions there and they are ready to receive our proposals and have proposals of their own. I think that we can enact the items that we can agree on before the end of this year.

Although it is an ambitious schedule, I believe it can be accomplished. We have established a public record through hearings since 1995 and we have consulted openly about some of these proposals many times before. We will continue that open discussion throughout the coming weeks. I welcome everyone's participation in the process. Our goal is not merely to pass a bill. We need to enact any law or changes that will improve public service both for our Federal employees, retirees, and also for the American people.

Finally, let me say, as far as our agenda, I want to first congratulate the Members on their hard work, particularly the ranking member, Mr. Cummings from Maryland, for his fine efforts this year. We have passed veterans preference, and it will pass the Senate, we are quite confident. It has taken a while, but I thank everyone for their work on that.

We will pass life insurance reform. This life insurance issue needed to be addressed. We had not addressed it in 40 years, and it did need legislative remedies. We can get better coverage at lower cost and give more options to our Federal employees. This is making its way through the process and it will pass.

We will have, in some form, MSA's, which I believe will result in lower health care premiums for our employees, who experienced a 15 percent, on average increase. Some of that will be done outside the purview of this committee, but with the efforts of this committee.

We are addressing, and have addressed, the wrong retirement issue which has created a nightmare for some of our employees, and we have been working together. I believe that legislation will pass.

Last year we banded together and blocked the cutting of COLA's for our Federal retirees who were singled out, and I commend everyone for joining together in that effort.

We are also going to address, for the first time, the question of long-term care for our Federal employees, because they, like other Americans, should have the opportunity to avail themselves to some solutions to long-term care. I think we have done quite a bit, but we have some challenges before us.

With those opening comments, I also want to thank our staff, both on the minority side and the majority side. Prior to the last Congress, there were 54 staffers, 18 Republican and the balance Democrat, who handled civil service issues on, I believe, three subcommittees. We have handled it with seven staffers. And the minority has done yeomen's work in working on these many issues and an incredible number of hearings. I thank everyone for their cooperation to date and look forward to working with them in the future.

With that, I yield to our ranking member, the distinguished gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I, too, want to start off by thanking the bipartisan effort that brought us here, and I want to thank the staff for doing a very, very good job under very, very difficult circumstances, and I applaud you and I thank you.

Twenty years have passed since the enactment of the Civil Service Reform Act of 1978, the last major effort to adopt our civil service laws to the changing demands of the Federal workplace. The time has come for a comprehensive review and identification of any new reforms now needed.

Recent civil service reform activity was launched in 1993, with Vice President Al Gore's groundbreaking national performance review. The national performance review produced many recommendations for action in the human resources area. During the last Congress, hearings were held and omnibus civil service reform

legislation was introduced to implement many of the NPR recommendations. This subcommittee produced a bill which the House passed in 1996. The Senate, however, failed to act on the measure, leaving us to undertake this initiative once again.

The civil service reform package before us today contains a number of provisions that will effect changes in the Federal workplace. Those changes range from the good, to the bad, to the ugly. The noncontroversial good provisions encompass the following: language from legislation I introduced, H.R. 3221, which would ensure that children of Federal employees receive court ordered health benefits; and language from another bill I introduced, H.R. 2943, which would increase an employee's ability to use leave to serve as organ donors. Other noncontroversial items include: life insurance options, voluntary reductions in force, and the Federal Reserve Board consistency amendments.

The package also includes language from H.R. 2566, the CSRS retirement buyback provision. This bill was authored by my friend and colleague from Maryland, Congresswoman Connie Morella, and cosponsored by another friend and subcommittee member, the Delegate from the District of Columbia, Eleanor Holmes Norton. I deeply appreciate their strong and consistent efforts on behalf of Federal employees.

Other measures, such as the expanded use of demonstration projects, enhanced performance management, replacing the formal appellate process with alternative dispute resolution, and placing the Postal Service under non-Federal EEOC proceedings, have raised major concerns among employee groups. Highly problematic provisions include gutting official time, Hatch Act sanctions, drug conviction debarment, and a general prohibition of the pass-fail employee evaluation system. These latter provisions delve into areas that clearly require in-depth review and thorough hearings before their inclusion in any civil service reform bill. Frankly, the same must be said for investing retirement funds in the thrift savings plan, post-employment restrictions for political appointees, and the FECA reform.

I look forward to our hearings and thank Chairman Mica for his hard work and continued dedication to civil service reform. I also was very interested to hear all the things that we have accomplished, and I know that we could have only done it with a bipartisan effort, and I also appreciate his efforts with regard to that.

Today's hearing, however, can only be the first of many needed to carefully consider the very complex and controversial civil service reform proposals now on the table. Consequently, I eagerly await the opportunity to discuss the very crucial and critical provisions contained in the package before us, and I am fully prepared to delete and refine those items which are unworkable and unnecessary.

Thank you very much.

Mr. MICA. Thank you, Mr. Cummings. Now I would like to yield to our vice chairman of the panel, the gentleman from New Jersey, Mr. Pappas.

Mr. PAPPAS. Thank you, Mr. Chairman. I just want to thank you and the folks who are here to provide us with a pretty broad spec-

trum of viewpoints on an important matter, and I am looking forward to hearing their comments.

Mr. MICA. Thank you. And I now yield to the gentlewoman from Maryland, Mrs. Morella.

Mrs. MORELLA. Thank you, Mr. Chairman, and I want to also thank you for holding this hearing today and for your willingness to expand and to modify this civil service reform legislation at the suggestion of other Members. I am glad that we are moving ahead with this package.

The omnibus bill before us contains important components, including some major changes, some small but important changes and technical corrections. Each of us on the dais, on the panel, and in the audience feel very strongly about different parts of this bill, both in support of and in opposition to various provisions. It is clearly a work in progress.

Although this legislation is on a very fast track, it is critical that we continue to receive input from other Members, from OPM and from Federal employee representatives in order to reach consensus. Further, we must not let our resolve to pass important provisions be lost in the end-of-session flurry of activity.

I look forward to hearing from today's witnesses. This hearing is part of the consensus building process necessary to enact legislation to improve our civil service system. I note that you mention in your accomplishments the fact that all of this has taken place because we have worked together in a very bipartisan fashion, and you have been very open to all of our suggestions. Several provisions in this omnibus bill that are included are the direct result of legislation that I have introduced.

H.R. 2526 would bolster the Thrift Savings Plan by allowing Federal employees to contribute up to the IRS limit, $10,000. I am glad that provision is included in this bill.

Another piece of legislation I introduced is also included, legislation to allow Federal employees who left Federal service between November 1989 and February 1990, to buy back credit they had withdrawn from CSRS, as they could under prior law. Many agencies did not notify employees of a change in the law, causing a small number of employees to make bad decisions through no fault of their own. This is a fairness issue.

I have also been working on pay equity for Social Security appeals judges, to ensure their payment is at least equal to ALJs, whose cases they review. I look forward to moving forward with that provision.

I worked with FED board employees to ensure their service credit is transferable to the Federal Government.

I had hoped that the bill would contain provisions to include Federal physicians comparability allowance in his or her average pay for purposes of computing retirement. Under current law, the high three used to calculate a Federal physician's retirement annuity does not include the additional PCA component of his or her salary, whereas the 200-plus physicians receiving title 38 special pay have it included in their benefit calculations.

This bill contains titles to improve demonstration projects, enhance performance management, streamline the appeals process, improve employee compensation and benefits and bolster the GSP.

Each title contains several significant provisions and, although some have been discussed for a number of years, it is important that we understand the effects of every provision. That is why at this hearing I also want to applaud the staff for putting all of the segments of it together, and you, Mr. Chairman, for your leadership in listening to all of us, and for the ranking member and all of the other members of this committee who have worked so well together. We want to listen; we want to learn; we want to perfect. Today, we will hear from a variety of witnesses who will help us better understand each title.

Thank you, Mr. Chairman.

Mr. MICA. I thank the gentlewoman and yield now to the gentleman from Texas, Mr. Sessions.

Mr. SESSIONS. Thank you, Mr. Chairman, for giving us the opportunity today to discuss the very important issues involved in working with our Federal work force employees.

I am pleased with this subcommittee's efforts to keep me updated on the issues that we plan to address this year and appreciate your hard work and the staff. I am particularly excited about two portions in the proposed legislation that give Federal employees more flexibility and portability with their pensions.

The gentlewoman from Maryland, Mrs. Morella, has been a tireless advocate on behalf of Federal employees, and I applaud her efforts and try to support her whenever possible in what she is doing. Her bill, H.R. 2526, which has been incorporated into the proposed legislation, rightfully equalizes and treats fairly the tax treatment of Federal employees and private sector employees.

When the Republican Congress won the majority, one of the first legislative priorities was to comply with all of the laws that we enact. Congresswoman Morella's legislation continues this process by allowing Federal employees to contribute the maximum of $10,000 to their Thrift Savings Plan, regardless of their salary level. This is the same amount that our private sector counterparts currently enjoy when they contribute to their 401(k)'s.

The increased savings and portability of this legislation is exactly the kind of benefits we need in order to attract a quality Federal work force in our current tight labor market. Additionally, it protects taxpayers by removing the risk associated with the current unfunded liabilities in the Civil Service Retirement System and Federal Employee Retirement System.

These two goals are accomplished in section 402(h) of the proposed legislation. For the past few months, I have been working hard to provide legislative staff and political appointees a more flexible option for their own pension system. As you may know, these staffs are characterized by their short tenure and frequent moves between the Federal and private sector.

This proposed legislation would place the entire pension of legislative staff and political appointees into a defined contribution pension plan. This would give complete portability and control in the hands of those Federal employees. By allowing this option, the legislative branch would control the costs of its pension system because the Government is responsible only for a specified contribution each year and it would reduce its current unfunded liability. Under this plan, the Federal employer pays only a specified

amount into the worker's account each month and bears no further responsibility or costs for the funds. In other words, we reduce the Federal debt and the risk to the taxpayer while providing economic freedom, flexibility and opportunity to those Federal employees.

I am pleased with the efforts that this subcommittee is making. I applaud the individual efforts that are being made on workers' behalf, and I thank you, Mr. Chairman, for the time you have given us today.

Mr. MICA. I thank the gentleman and thank the other members of the panel for their opening statements. The record will remain open for additional statements, both from Members and from interested parties, at least for another week. We do welcome your input, even though we have not been able to get everyone on the various panels to testify today.

With those comments, what I would like to do is welcome our first panel. Our first panel is Janice Lachance, who is the Director of the Office of Personnel Management; Mr. Mike Brostek, Associate Director of the Federal Workforce and Management Issues of the U.S. General Accounting Office; and I believe he has with him an associate, Mr. Steve Altman, if that is correct, who is not on our witness list.

If I could ask the panelists to please stand, I will swear you in.

[Witnesses sworn.]

Mr. MICA. I think since you have all been here before, you know the routine. We ask you to summarize, if you can, and we will submit your lengthy statements for the record.

I want to welcome back our distinguished Director of the Office of Personnel Management. And in this corner, for the administration, we will hear from Janice Lachance.

STATEMENTS OF JANICE LACHANCE, DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT; AND MIKE BROSTEK, ASSOCIATE DIRECTOR, FEDERAL WORK FORCE AND MANAGEMENT ISSUES, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY STEVE ALTMAN

Ms. LACHANCE. Thank you, Mr. Chairman, I appreciate the opportunity to be here.

As you know, we at OPM have also been working on some ideas that we have for reform and we have been consulting extensively with stakeholders, and I am looking forward to working with you and the rest of the committee members and the staff to see what we can come to agreement on and see if we can move some of these very good ideas forward.

The guiding principle that we have used in our initiatives is to achieve an effective blend of flexibility and consistency across the Government's human resources system. We are crafting appropriate proposals that we believe will meet the needs of agencies and their employees, and we take our leadership role in that arena very seriously.

We share the interest of the subcommittee in preserving the integrity of the merit system. Merit principles remain at the core of all our proposals. Any proposals we would make for agency flexibilities would rest on a foundation of commitment to those and other principles, such as veterans preference and effective labor-

management relations under a collective bargaining framework. In addition, we believe the Government's interests are best served by maintaining consistent approaches in some areas, such as employee benefits and effective due process protections.

OPM's commitment to introducing further flexibility into the Government's human resources systems is clearly tied to an equal commitment to holding agencies accountable for using them effectively. Flexibility must be balanced with adequate and effective oversight. We believe that OPM's role and responsibility in this regard merits further clarification in the law.

Having noted our commitment to appropriate, consistent and effective oversight, let me return to the subject of flexibility. As you know, the Civil Service Reform Act of 1978, made a landmark change by providing OPM the authority to establish personnel demonstration projects where changes in personnel policies and procedures could be tested. Our experience in using that authority has been instructive and we have reached the point in a few areas where we are prepared to propose the extension of tested flexibilities governmentwide.

At the same time, some aspects of the demonstration project authority should be revised to make the approach work better for the agencies and for the Government as a whole. We were pleased to see in your discussion summary that you have some added flexibilities included in your proposals. A case in point where the current law presents problems concerns a demonstration project the Department of Agriculture is conducting. That project has been successful. However, it will expire next week because OPM has no authority to allow it to continue. We would be happy to share our ideas and work with you and your staff on ways to resolve this problem for agriculture, and to prevent similar situations in the future.

The successes and lessons of another set of demonstration projects have now thoroughly demonstrated that a broadbanding approach to position classification and pay administration should be made available to other agencies. We are considering and working on draft legislation to establish an authority, not a mandate, for agencies to use broadbanding. It would be based on the current classification scheme, and the general schedule would remain in place. We have undertaken an extensive effort to study our total compensation systems leading to the development of more far-reaching proposals for reforming employee compensation and benefits.

We recognize that broadbanding authority must be linked to greater accountability. That is why we are also looking at changes in the Government's performance management tools. Our goals here are to improve and recognize individual and group performance, strengthen accountability and enhance the tools available to resolve performance problems.

Proposals currently under consideration include better and more flexible staffing tools. In a world of changing missions, fluctuating funding levels and shifting labor markets, the Government must be able to offer recruitment and separation incentives at the same time.

As I noted earlier, we believe it is particularly important to preserve governmentwide values, like veterans preference and merit system principles, through effective oversight and accountability. Nothing could damage public confidence more over the long term than the perception that hiring, promotion and other staffing decisions are based on anything other than merit. Our proposals will include language to clarify OPM's oversight responsibility.

The outline of your proposal appears to indicate that you are seeking to address some of the same broad concerns we have. Like your proposal in the last Congress, your outline retains certain specific items on which we had agreed. We also appreciate the subcommittee's willingness to take into consideration some of the ideas that we advanced over the last year.

For example, we agreed that it is important to relax some of the current restrictions on demonstration projects. We are concerned, however, that your outline continues to include a reference to authorizing demonstration projects involving benefits. We remain strongly opposed to allowing waivers in demonstration projects of the retirement, insurance and leave statutes covering Federal workers. Modifying benefit provisions for a large number of employees could have a significant adverse effect on the retirement and insurance trust funds. Moreover, these programs are designed to deal with the needs of employees on a uniform long-term basis. Altering them, for even a very brief portion of any career, could have a serious and permanent effect on the lives of these employees. Consequently, we believe it would be unwise to permit waivers of benefit statutes.

We also believe that whatever changes are made in the demonstration project authority must include the flexibility to make projects permanent once they have been thoroughly tested and evaluated. Meanwhile, we still have the same concerns we expressed 2 years ago regarding your proposal to prescribe in law the additional amounts of service credit employees would receive based on their performance ratings for the purpose of establishing the order of retention in a RIF.

Last year OPM published final retention regulations which, by October 1, will provide agencies with options to allow full recognition of performance for employees covered by different numbers of summary rating levels within a competitive area. The statutory remedy you have proposed not only would eliminate the options we have provided, but would also prevent OPM from undertaking similar regulatory initiatives in the future.

We are disappointed in the proposed bar on two-tier performance evaluation systems. Done properly, this approach can actually strengthen performance appraisals by taking the focus off of specific performance ratings, thus allowing more time and energy to be devoted to substantive discussions of employees' strengths and development needs. Federal agencies have had very limited time to develop and use two-tier appraisal systems. We would like you to hold off until agencies have had an adequate opportunity to determine how effective they are.

We note that your outline includes a proposal that would change the current limitation on the calculation of overtime pay for employees at higher grade levels. We, too, are very concerned with

that issue and we would like to work with you to come up with a fair and probably a less costly solution than you have developed.

Also, regarding the proposal in your outline regarding the Railroad Retirement Board, we oppose in the strongest possible terms any efforts to extend credit, under the Civil Service Retirement System or the Federal Employees' Retirement System, to employment under the Railroad Retirement Board Retirement System. Such a provision would violate the most basic principle underlying CSRS and FERS; that they are programs through which the Government, as an employer, provides retirement benefits for its own employees. Employment under the Railroad Retirement System is private sector employment, and it is patently unjustifiable to allow individuals to earn credit under CSRS or FERS for this employment, just as it would be unreasonable to expect taxpayers to finance CSRS or FERS credits for an individual's employment with J.C. Penney or Sears.

In general, we believe the retirement provisions in the subcommittee's outline should be dealt with separately rather than being included in a package of this size, because these proposed changes would have a major budgetary impact and would affect the entire Federal work force. At the same time, we are very concerned that elements of this proposal that have already been introduced and are under consideration by Congress should not be delayed because of their inclusion in the subcommittee's proposal. At least some of these items are sufficiently noncontroversial as to be appropriate for House approval under suspension.

Thank you again for the opportunity to be here, and I am looking forward to working closely with you and the members of your staff.

[The prepared statement of Ms. Lachance follows:]

STATEMENT OF
JANICE R. LACHANCE
DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
U.S. HOUSE OF REPRESENTATIVES

on

"FEDERAL EMPLOYEES INTEGRITY, PERFORMANCE, AND COMPENSATION IMPROVEMENT ACT"

JUNE 24, 1998

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR INVITING ME HERE TODAY TO DISCUSS YOUR PROPOSAL TO MAKE VARIOUS STATUTORY CHANGES AFFECTING FEDERAL HUMAN RESOURCES MANAGEMENT. WE AT OPM HAVE ALSO BEEN WORKING ON PROPOSALS TO ACCOMPLISH SIMILAR OBJECTIVES AND SOME ADDITIONAL ONES. WE HAVE CONSULTED STAKEHOLDERS EXTENSIVELY AND HOPE TO WORK WITH THE COMMITTEE IN BRINGING SOME OF OUR PROPOSALS TO FRUITION.

- THE GUIDING PRINCIPLE FOR OUR INITIATIVES IS TO ACHIEVE AN EFFECTIVE BLEND OF FLEXIBILITY AND CONSISTENCY ACROSS THE GOVERNMENT'S HUMAN RESOURCES MANAGEMENT SYSTEMS. THE CASE FOR CREATING FURTHER FLEXIBILITY HAS BEEN MADE IN VARIOUS

FORUMS AND WITH VARIOUS RESULTS. OPM IS CRAFTING APPROPRIATE PROPOSALS THAT WE BELIEVE WOULD MEET THE NEEDS OF THE AGENCIES AND THEIR EMPLOYEES. WE TAKE OUR LEADERSHIP ROLE IN THIS REGARD VERY SERIOUSLY.

- WE SHARE THE INTEREST OF THIS SUBCOMMITTEE IN PRESERVING THE INTEGRITY OF THE MERIT SYSTEM. MERIT PRINCIPLES REMAIN AT THE CORE OF ALL OF OUR PROPOSALS. ANY PROPOSALS WE WOULD MAKE FOR AGENCY FLEXIBILITIES WOULD REST ON A FOUNDATION OF COMMITMENT TO THOSE AND OTHER PRINCIPLES, SUCH AS VETERANS PREFERENCE AND EFFECTIVE LABOR-MANAGEMENT RELATIONS UNDER A COLLECTIVE BARGAINING FRAMEWORK. IN ADDITION, WE BELIEVE THE GOVERNMENT'S INTERESTS ARE BEST SERVED BY MAINTAINING CONSISTENT APPROACHES IN SOME AREAS, SUCH AS EMPLOYEE BENEFITS AND EFFECTIVE DUE PROCESS PROTECTIONS.

- OPM'S COMMITMENT TO INTRODUCING FURTHER FLEXIBILITY INTO THE GOVERNMENT'S HUMAN RESOURCES SYSTEMS IS CLEARLY TIED TO AN EQUAL COMMITMENT TO HOLDING AGENCIES ACCOUNTABLE FOR USING THEM EFFECTIVELY. FLEXIBILITY MUST BE BALANCED WITH ADEQUATE AND EFFECTIVE OVERSIGHT. WE BELIEVE THAT OPM'S ROLE AND RESPONSIBILITY IN THIS REGARD MERITS FURTHER CLARIFICATION IN THE LAW.

- HAVING NOTED OUR COMMITMENT TO APPROPRIATE CONSISTENCY AND EFFECTIVE OVERSIGHT, LET ME RETURN TO THE SUBJECT OF FLEXIBILITY. AS YOU KNOW, THE CIVIL SERVICE REFORM ACT OF 1978 MADE A LANDMARK CHANGE BY PROVIDING OPM THE AUTHORITY TO ESTABLISH PERSONNEL DEMONSTRATION PROJECTS WHERE CHANGES IN PERSONNEL POLICIES AND PROCEDURES COULD BE TESTED. OUR EXPERIENCE IN USING THAT AUTHORITY HAS BEEN INSTRUCTIVE, AND WE HAVE REACHED THE POINT IN A FEW AREAS WHERE WE ARE PREPARED TO PROPOSE THE EXTENSION OF TESTED FLEXIBILITIES GOVERNMENTWIDE. I'LL SPEAK MORE ABOUT ONE SUCH AREA IN A MOMENT.

- AT THE SAME TIME, SOME ASPECTS OF THE DEMONSTRATION PROJECT AUTHORITY NEED TO BE REVISED TO MAKE THE APPROACH WORK BETTER FOR THE AGENCIES AND FOR THE GOVERNMENT AS A WHOLE. WE WERE PLEASED TO SEE IN YOUR DISCUSSION SUMMARY THAT YOU HAVE SOME ADDED FLEXIBILITIES INCLUDED IN THE OUTLINE OF YOUR PROPOSALS. A CASE IN POINT WHERE THE CURRENT LAW PRESENTS PROBLEMS CONCERNS A DEMONSTRATION PROJECT THE DEPARTMENT OF AGRICULTURE HAS CONDUCTED. THAT PROJECT HAS BEEN SUCCESSFUL. HOWEVER, IT WILL EXPIRE NEXT WEEK BECAUSE OPM HAS NO AUTHORITY TO ALLOW IT TO CONTINUE. WE WOULD BE HAPPY TO SHARE OUR IDEAS AND WORK WITH YOU AND YOUR STAFF ON WAYS TO RESOLVE THIS PROBLEM FOR AGRICULTURE AND TO PREVENT SIMILAR

SITUATIONS IN THE FUTURE.

THE SUCCESSES AND LESSONS OF ANOTHER SET OF DEMONSTRATION PROJECTS HAVE NOW THOROUGHLY DEMONSTRATED THAT A BROADBANDING APPROACH TO POSITION CLASSIFICATION AND PAY ADMINISTRATION SHOULD BE MADE AVAILABLE TO OTHER AGENCIES. OPM IS WORKING ON DRAFT LEGISLATION TO ESTABLISH AN AUTHORITY -- NOT A MANDATE – FOR AGENCIES TO USE BROADBANDING. IT WOULD BE BASED ON THE CURRENT CLASSIFICATION SCHEME, AND THE GENERAL SCHEDULE WOULD REMAIN IN PLACE. WE HAVE UNDERTAKEN AN EXTENSIVE EFFORT TO STUDY OUR TOTAL COMPENSATION SYSTEMS, LEADING TO THE DEVELOPMENT OF MORE FAR-REACHING PROPOSALS FOR REFORMING EMPLOYEE COMPENSATION AND BENEFITS.

WE RECOGNIZE THAT BROADBANDING AUTHORITY MUST BE LINKED TO GREATER ACCOUNTABILITY. THAT IS WHY WE ARE ALSO LOOKING AT CHANGES IN THE GOVERNMENT'S PERFORMANCE MANAGEMENT TOOLS. OUR GOALS HERE ARE TO IMPROVE AND RECOGNIZE INDIVIDUAL AND GROUP PERFORMANCE, STRENGTHEN ACCOUNTABILITY, AND ENHANCE THE TOOLS AVAILABLE TO RESOLVE PERFORMANCE PROBLEMS.

PROPOSALS CURRENTLY UNDER CONSIDERATION INCLUDE BETTER AND MORE FLEXIBLE STAFFING TOOLS. RECENT EXPERIENCE HAS SHOWN THAT THE

GOVERNMENT NEEDS FLEXIBLE TOOLS TO HELP RESTRUCTURE AND RESHAPE ITS WORKFORCE. IN A WORLD OF CHANGING MISSIONS, FLUCTUATING FUNDING LEVELS, AND SHIFTING LABOR MARKETS, THE GOVERNMENT MUST BE ABLE TO OFFER RECRUITMENT AND SEPARATION INCENTIVES AT THE SAME TIME.

AS I NOTED EARLIER, IN AN ENVIRONMENT OF ENHANCED FLEXIBILITY, WE BELIEVE IT IS PARTICULARLY IMPORTANT TO PRESERVE GOVERNMENTWIDE VALUES -- LIKE VETERANS PREFERENCE AND MERIT SYSTEM PRINCIPLES -- THROUGH EFFECTIVE OVERSIGHT AND ACCOUNTABILITY. NOTHING COULD DAMAGE PUBLIC CONFIDENCE IN GOVERNMENT MORE OVER THE LONG TERM THAN THE PERCEPTION THAT HIRING, PROMOTION, AND OTHER STAFFING DECISIONS ARE BASED ON CONSIDERATIONS OTHER THAN MERIT. OUR PROPOSALS WILL INCLUDE LANGUAGE TO CLARIFY OPM'S OVERSIGHT RESPONSIBILITY.

THE OUTLINE OF YOUR PROPOSAL APPEARS TO INDICATE THAT YOU ARE SEEKING TO ADDRESS SOME OF THE SAME BROAD CONCERNS WE HAVE. LIKE YOUR PROPOSAL IN THE LAST CONGRESS, YOUR OUTLINE RETAINS CERTAIN SPECIFIC ITEMS ON WHICH WE HAD AGREED. WE ALSO APPRECIATE THE SUBCOMMITTEE'S WILLINGNESS TO TAKE INTO CONSIDERATION SOME OF THE IDEAS WE HAVE ADVANCED OVER THE PAST YEAR.

AS YOU KNOW, WE AGREE THAT IT IS IMPORTANT TO RELAX SOME OF THE

CURRENT RESTRICTIONS ON PERSONNEL MANAGEMENT DEMONSTRATION PROJECTS. WE ARE CONCERNED, HOWEVER, THAT YOUR OUTLINE CONTINUES TO INCLUDE A REFERENCE TO AUTHORIZING DEMONSTRATION PROJECTS INVOLVING BENEFITS. WE REMAIN STRONGLY OPPOSED TO ALLOWING WAIVERS IN DEMONSTRATION PROJECTS OF THE RETIREMENT, INSURANCE, AND LEAVE STATUTES COVERING FEDERAL EMPLOYEES. MODIFYING BENEFIT PROVISIONS FOR A LARGE NUMBER OF EMPLOYEES COULD HAVE A VERY SIGNIFICANT ADVERSE EFFECT ON THE RETIREMENT AND INSURANCE TRUST FUNDS. MOREOVER, THESE PROGRAMS ARE DESIGNED TO DEAL WITH THE NEEDS OF EMPLOYEES ON A UNIFORM, LONG-TERM BASIS. ALTERING THE BENEFITS OF AFFECTED EMPLOYEES FOR EVEN A VERY BRIEF PORTION OF THEIR CAREERS COULD HAVE A VERY SERIOUS -- AND CERTAINLY A PERMANENT -- EFFECT ON THE LIVES OF THESE EMPLOYEES. ALSO, MODIFICATION OF THE BENEFITS STRUCTURES WOULD GIVE RISE TO EXTREMELY COMPLEX ADMINISTRATIVE PROBLEMS RELATING TO THE CONVERSION OF BENEFITS OF EMPLOYEES MOVING IN AND OUT OF THESE DEMONSTRATION PROJECTS. CONSEQUENTLY, WE BELIEVE IT WOULD BE UNWISE TO PERMIT WAIVERS OF BENEFITS STATUTES.

WE ALSO BELIEVE THAT WHATEVER CHANGES ARE MADE IN THE DEMONSTRATION PROJECT AUTHORITY MUST INCLUDE THE FLEXIBILITY TO MAKE PROJECTS PERMANENT ONCE THEY HAVE BEEN THOROUGHLY TESTED AND EVALUATED. THE PROPOSALS WE ARE DEVELOPING WOULD INCLUDE AN AUTHORITY FOR

OPM TO APPROVE PERMANENT ALTERNATIVE PERSONNEL SYSTEMS AND TO CONVERT SUCCESSFUL DEMONSTRATION PROJECTS TO THESE PERMANENT ALTERNATIVE SYSTEMS.

MEANWHILE, WE STILL HAVE THE SAME CONCERNS WE EXPRESSED 2 YEARS AGO REGARDING YOUR PROPOSAL TO PRESCRIBE IN LAW THE ADDITIONAL AMOUNT OF SERVICE CREDIT EMPLOYEES WOULD RECEIVE, BASED ON THEIR PERFORMANCE RATINGS, FOR THE PURPOSE OF ESTABLISHING THE ORDER OF RETENTION IN A REDUCTION IN FORCE. FIRST, THE NEW STATUTORY LANGUAGE YOU PROPOSE WOULD SEVERELY RESTRICT OUR ABILITY TO MANAGE THIS ASPECT OF PERFORMANCE MANAGEMENT, WHICH IN THE PAST HAS BEEN EFFECTIVELY ACCOMPLISHED THROUGH REGULATION. SECOND, THIS PROPOSAL WOULD NEARLY DOUBLE THE AMOUNT OF SERVICE CREDIT FOR PERFORMANCE THAT EMPLOYEES RECEIVE IN A REDUCTION IN FORCE. WE BELIEVE THESE AMOUNTS OF ADDITIONAL RETENTION SERVICE CREDIT BASED ON PERFORMANCE ARE EXCESSIVE.

FINALLY, THE PROPOSAL WOULD RESULT IN SERIOUS INEQUITIES FOR EMPLOYEES COVERED BY PERFORMANCE RATING SYSTEMS WITH FEWER THAN FIVE SUMMARY RATING LEVELS. LAST YEAR, OPM PUBLISHED FINAL RETENTION REGULATIONS WHICH, BY OCTOBER 1, 1998, WILL PROVIDE AGENCIES WITH OPTIONS TO ALLOW FULL RECOGNITION OF PERFORMANCE FOR EMPLOYEES COVERED BY DIFFERENT NUMBERS OF SUMMARY RATING LEVELS WITHIN A

COMPETITIVE AREA. THE STATUTORY REMEDY YOU HAVE PROPOSED NOT ONLY WOULD ELIMINATE THE OPTIONS WE HAVE PROVIDED, BUT WOULD ALSO PREVENT OPM FROM UNDERTAKING SIMILAR REGULATORY INITIATIVES IN THE FUTURE.

WE ARE DISAPPOINTED IN THE PROPOSED BAR ON TWO-TIER PERFORMANCE EVALUATION SYSTEMS. DONE PROPERLY, THIS APPROACH CAN ACTUALLY STRENGTHEN PERFORMANCE APPRAISALS BY TAKING THE FOCUS OFF OF SPECIFIC PERFORMANCE RATINGS, THUS ALLOWING MORE TIME AND ENERGY TO BE DEVOTED TO SUBSTANTIVE DISCUSSIONS OF EMPLOYEES' STRENGTHS AND DEVELOPMENT NEEDS. FEDERAL AGENCIES HAVE HAD VERY LIMITED TIME TO DEVELOP AND USE THE TWO-TIER APPRAISAL SYSTEMS. WE URGE THE SUBCOMMITTEE NOT TO PROHIBIT THEM UNTIL AGENCIES HAVE HAD AN ADEQUATE OPPORTUNITY TO DETERMINE HOW EFFECTIVE THEY ARE.

WE NOTE THAT YOUR OUTLINE INCLUDES A PROPOSAL THAT WOULD CHANGE THE CURRENT LIMITATION ON THE CALCULATION OF OVERTIME PAY FOR EMPLOYEES AT HIGHER GRADE LEVELS. WE, TOO, ARE EXAMINING THIS ISSUE CAREFULLY. HOWEVER, WE ARE CONCERNED THAT THE PROPOSAL CONTAINED IN YOUR OUTLINE WOULD PROVIDE BOTH SUPERVISORS AND NON-SUPERVISORS AT HIGH GRADE LEVELS WITH SUBSTANTIALLY MORE OVERTIME PAY THAN IS COMMONLY RECEIVED BY NON-FEDERAL EMPLOYEES IN SIMILAR POSITIONS. WE WOULD BE PLEASED TO WORK WITH THE SUBCOMMITTEE TO IDENTIFY A

LESS COSTLY, BUT FAIR, SOLUTION TO THIS PROBLEM.

ALSO, REGARDING THE ITEM IN YOUR OUTLINE RELATING TO THE RAILROAD RETIREMENT BOARD, WE OPPOSE IN THE STRONGEST POSSIBLE TERMS ANY EFFORT TO EXTEND CREDIT, UNDER THE CIVIL SERVICE RETIREMENT SYSTEM OR THE FEDERAL EMPLOYEES' RETIREMENT SYSTEM, TO EMPLOYMENT UNDER THE RAILROAD RETIREMENT BOARD RETIREMENT SYSTEM. SUCH A PROVISION WOULD VIOLATE THE MOST BASIC PRINCIPLE UNDERLYING CSRS AND FERS: THAT THEY ARE PROGRAMS THROUGH WHICH THE GOVERNMENT, AS AN EMPLOYER, PROVIDES RETIREMENT BENEFITS FOR ITS OWN EMPLOYEES. EMPLOYMENT UNDER THE RAILROAD RETIREMENT SYSTEM IS PRIVATE-SECTOR EMPLOYMENT. IT IS PATENTLY UNJUSTIFIABLE TO ALLOW INDIVIDUALS TO EARN CREDIT UNDER CSRS OR FERS FOR THIS EMPLOYMENT, JUST AS IT WOULD BE UNREASONABLE TO EXPECT TAXPAYERS TO FINANCE CSRS OR FERS CREDIT FOR AN INDIVIDUAL'S EMPLOYMENT WITH J.C. PENNEY OR SEARS OR ANY OTHER PRIVATE EMPLOYER.

IN GENERAL, WE BELIEVE THE RETIREMENT PROVISIONS IN THE SUBCOMMITTEE'S OUTLINE SHOULD BE DEALT WITH SEPARATELY, RATHER THAN BEING INCLUDED IN A PACKAGE OF THIS SIZE. BECAUSE THESE PROPOSED CHANGES WOULD HAVE A MAJOR BUDGETARY IMPACT AND WOULD AFFECT THE ENTIRE FEDERAL WORKFORCE, OPM RECOMMENDS THAT THEY SHOULD BE THE SUBJECT OF SEPARATE HEARINGS.

AT THE SAME TIME, WE ARE VERY CONCERNED THAT ELEMENTS OF THIS PROPOSAL THAT HAVE ALREADY BEEN INTRODUCED AND ARE UNDER CONSIDERATION BY CONGRESS SHOULD NOT BE DELAYED BECAUSE OF THEIR INCLUSION IN THE SUBCOMMITTEE'S PROPOSAL. FOR INSTANCE, THIS CONCERN WOULD APPLY TO OUR PROPOSAL TO CORRECT INEQUITIES IN THE COMPUTATION OF BENEFITS FOR CERTAIN LAW ENFORCEMENT OFFICERS AND THEIR SPOUSES, AS WELL AS OUR PROPOSAL TO ENSURE COVERAGE OF CHILDREN UNDER THE FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM, SUBJECT TO THE TERMS OF A COURT ORDER. AT LEAST SOME OF THESE ITEMS ARE SUFFICIENTLY NON-CONTROVERSIAL AS TO BE APPROPRIATE FOR HOUSE APPROVAL UNDER SUSPENSION.

THANK YOU AGAIN FOR THE OPPORTUNITY TO EXPRESS OUR VIEWS. I LOOK FORWARD TO WORKING CLOSELY WITH THE SUBCOMMITTEE IN THE DAYS AND WEEKS AHEAD TO ENSURE THAT CONGRESS CONSIDERS AND ENACTS THE MOST IMPORTANT AND NEEDED CHANGES AND ADDITIONS TO THE GOVERNMENT'S HUMAN RESOURCES MANAGEMENT SYSTEMS.

I WILL GLADLY RESPOND TO ANY QUESTIONS YOU MAY HAVE.

Mr. MICA. Thank you for your testimony.

Now we will hear from our representative of the GAO, Michael Brostek. Thank you and welcome, and you are recognized, sir.

Mr. BROSTEK. Good morning, Mr. Chairman and members of the subcommittee. I am pleased to be here today to discuss three issues to be included in the proposed Federal Employees Integrity, Performance, and Compensation Improvement Act of 1998. I will summarize my remarks on demonstration project authority, use of official time, and the administrative redress system.

In recent years, a popular bit of management wisdom has held that if an organization was standing still, it was falling behind because its competitors were continually improving. The saying still rings true. In recent years Federal agencies have had to deal with calls for better performance and growing demands to be more responsive to taxpayers while, at the same time, carefully husbanding scarce budgetary resources. Just as private organizations have looked to improve their bottom line performance through improved management of their employees, Federal agencies also are seeking to improve their human resource management practices. Agency officials have become more focused on adopting practices that are tailored to their particular managerial challenges and that can help them accomplish their missions.

The Civil Service Reform Act recognized that human resource management practices would need to evolve and provided for demonstration projects under which agencies could try out new techniques, assess their value, and adopt them permanently, if successful. But demonstration projects have been implemented only eight times in 20 years, a number that may not be yielding a rich enough body of tested human resource management techniques for agency managers to tap as they work to improve their agency's services to the public.

Turning to the charging of official time by union employees, I report today findings similar to those we presented to you in 1996; that is, the use of official time for union activities remains an established practice. Thirty-four agencies that we surveyed did not have comprehensive data on the extent to which official time is used, and no continuing reporting requirement exists for agencies to generate comprehensive data on their support for union activities.

More specifically, in two surveys that we did of 34 agencies, we found that many agencies had no formal record systems for compiling information on support provided to unions. The record systems that did exist varied in how data were defined, time periods for which data were collected and in other key respects. Accordingly, the information we collected was a mixture of estimates and somewhat incompatible compilations of data.

In total, for fiscal year 1996, the 34 agencies indicated that about 2.5 million hours was charged to official time, about 11,000 employees used official time, and around 460 employees charged 100 percent of their time to official time. Agencies also indicated that the value of official time charged was around $50 million. The value of office space, equipment, and other supplies for union activities was around $5 million, and travel and per diem expenses totaled around $3 million.

Agency officials also told us that they realized certain benefits from the use of official time. Twenty-three agencies said that use of official time improved labor-management relations, 14 said it helped in implementing changes, and 13 said it decreased grievances. Thirteen agencies noted, however, that using official time caused their employees to set aside their regular work.

Although more extensive and verifiable information than what we obtained might be useful for overseeing these activities, the benefit of having the information would need to be weighed against the cost of collecting it. Under provisions in the fiscal year 1998 appropriations, agencies are currently compiling information on official time use that OPM will report to Congress this coming December. OPM's information, combined with the information we provide today, may help Congress in determining whether additional reporting should be required.

The final issue I would like to discuss is the administrative redress system. The current administrative redress system has multiple avenues and many rules which govern how employees pursue their complaints. In total, we continue to view the system as inefficient, expensive, and time consuming. The burdens of the system could be reduced in various ways, including eliminating what are known as mixed case appeals. These cases, which involve both allegations of improper adverse actions against an employer, and of discrimination, are appealable both to the Merit Systems Protection Board and to the Equal Employment Opportunity Commission. To the extent options for reducing the burden of the current administrative redress system are considered, we believe that reform should uphold two principles; that of fair treatment for employees, and an efficiently managed Federal Government.

One technique for dealing with workplace conflicts, alternative dispute resolution, shows promise for reducing the volume of formal grievances that must be handled in the administrative redress system. Comprehensive data are not available on the results of ADR, but five companies and five agencies that we surveyed reported generally positive results, including reductions in the number of informal complaints that became formal complaints. For various reasons, however, including that ADR is not appropriate for some types of disputes, care should be taken in determining how much reliance agencies should place on ADR and in determining how ADR should relate to the formal redress processes.

This concludes my remarks. Mr. Altman and I would be happy to respond to questions.

[The prepared statement of Mr. Brostek follows:]

Civil Service Reform: Observations on Demonstration Authority, the Use of Official Time, and the Administrative Redress System

Summary Statement by
Michael Brostek, Associate Director
Federal Management and Workforce Issues

Two decades have passed since passage of the Civil Service Reform Act of 1978 (CSRA). Since then, as the pace of social, economic, and technological change has increased, Congress has responded with further refinements to the civil service. Today, Congress is again considering legislation that, like CSRA itself, is not intended to completely overhaul the civil service but rather to keep pace with the need to refine or modernize the system in several key areas. GAO discusses three issues addressed in the proposed legislation: personnel demonstration authority, the use of official time to support employee union activities, and the administrative redress system for federal employees.

- The personnel demonstration project authority provided by CSRA has been put to only limited use. There is some question as to whether this authority has accomplished, to the appropriate extent, the purpose for which it was intended–that is, determining whether specific changes in personnel management policies or procedures would result in improved federal personnel management. Enhancing the opportunities for agencies to pursue innovative human resource management (HRM) policies or procedures would be likely to create more knowledge about what works and what doesn't. As more agencies take steps to fashion their HRM approaches to support their missions and goals, it would be useful for them to have as many proven HRM approaches available to them as possible.

- If decisionmakers hope to resolve the question of the extent to which federal agencies use official time and other resources to support employee union activities, better data will be needed. But, recognizing that data gathering can be expensive, decisionmakers will need to balance the costs and benefits of the various options for doing so. This December, after the Office of Personnel Management (OPM) reports on its current effort to collect data from the agencies, decisionmakers may have a fuller picture of the issues involved in requiring agencies to report on the use of these resources, and may have more information with which to balance the costs and potential benefits of imposing this requirement in the future.

- GAO continues to view the administrative redress system for federal employees as inefficient, expensive, and time-consuming. Certain steps to relieve undue burdens on the system, such as eliminating "mixed case" appeals, would appear to make good sense, provided these actions upheld two fundamental principles: fair treatment for federal employees and an efficiently managed federal government. In addition, GAO's work on alternative dispute resolution (ADR) suggests that the current burden on the administrative redress system could be eased, at least in part, if agencies made ADR more widely available to their employees.

Civil Service Reform: Observations on Demonstration Authority, the Use of Official Time, and the Administrative Redress System

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to participate today in your discussion of the proposed Federal Employees Integrity, Performance, and Compensation Improvement Act of 1998. We feel that legislative efforts such as this to reexamine the civil service in a changing environment are both grounded in precedent and a fundamental congressional responsibility. They reflect the recognition that a capable and well-managed federal workforce is indispensable to the government's ability to fulfill its commitments to the American people.

Two decades have passed since Congress enacted the Civil Service Reform Act of 1978 (CSRA). Since then, as the pace of social, economic, and technological change has increased, Congress has responded with further refinements to the civil service. Congress created a new retirement system (the Federal Employees Retirement System (FERS)) in 1986; passed the Federal Employees Pay Comparability Act in 1990, putting into law the principle of locality pay; made changes to the Hatch Act in 1993; passed the Workforce Restructuring Act in 1994, which, while downsizing the federal workforce, provided broader training flexibility to make federal workers more employable; and passed the Family Friendly Leave Act in 1994. Today, Congress is again considering civil service

legislation that, like CSRA itself, is not intended to completely overhaul the civil service but rather to keep pace with the need to refine or modernize the system in several key areas.

I would like to discuss three of the issues addressed in the proposed legislation. First, I will briefly discuss the use of the Office of Personnel Management's (OPM) personnel demonstration project authority, which offers the opportunity for determining whether specific changes in personnel management policies or procedures would result in improved federal personnel management. After that, I will discuss two issues that are of long-standing concern to the Subcommittee, and on which we have testified in the past. The first of these is the use of official time and other resources to support federal workers' union activities.[1] The second is the administrative redress system, which was designed to protect federal employees against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. Drawing on additional work we have done, I will expand upon some of the information we presented in our earlier appearances before the Subcommittee and remark on these issues in the context of the new legislative proposals.

[1]"Official time" is time granted an employee by a federal organization to perform certain union activities when the employee would otherwise be in a duty status.

Although the legislation was still being drafted as this statement was being prepared, the Subcommittee staff provided us with an outline of the bill. My comments are based on our review of that outline.

DEMONSTRATION PROJECT AUTHORITY PROVIDES AN OPPORTUNITY TO TEST HUMAN RESOURCE MANAGEMENT PRACTICES THAT MAY BETTER SUPPORT AGENCIES' MISSIONS

In recent years, changes in social, economic, and technological conditions put new pressures on both public and private sector organizations, which had to deal with calls for better performance and growing demands for more responsive customer service, even as resources were becoming harder to come by. Many of these organizations have looked hard at their human resource management (HRM) approaches, found them outmoded or too confining, and turned to new ways of operating.[2]

The human resource management model that many of these organizations have chosen is more decentralized, more directly focused on mission accomplishment, and set up more to establish guiding principles than to prescribe detailed rules and procedures.[3] Under this model, an organization adopts its human resource management practices because they support the organization's needs and mission, rather than because they conform with practices that have been adopted elsewhere.

---

[2]Civil Service Reform: Changing Times Demand New Approaches (GAO/T-GGD-96-31, Oct. 12, 1995).

[3]GAO/T-GGD-96-31, Oct. 12, 1995.

In our previous work, we have recognized that to manage effectively for results, agencies need the flexibility to manage according to their needs and missions. Under the Government Performance and Results Act of 1993 (known as GPRA or the Results Act), managers are expected to be held accountable for results, but also to be given greater flexibility to manage.

In this context, it is important that agency managers have usable knowledge about human resource management practices that could enhance agency performance. Under CSRA, a provision was made for determining whether specific changes in personnel management policies or procedures would result in improved federal personnel management. OPM's personnel demonstration project authority allows the central personnel agency to waive certain civil service rules so that federal agencies can try new HRM approaches. OPM demonstration projects have focused on such areas as streamlined hiring, classification, compensation systems, and skill-based pay. CSRA specified that no more than 10 demonstration projects may be active at any given time, that each demonstration project may cover no more than 5,000 employees, and that projects generally may take no longer than 5 years to complete.

During the nearly 20 years in which OPM demonstration project authority has been available, it has been put to only limited use. According to OPM, only eight demonstration projects have been implemented since the passage of CSRA. Four OPM demonstration projects have been completed. Two of these projects–at Navy's China

Lake facility and the National Institutes of Standards and Technology (NIST)–have been made permanent by legislation. Two others (at the Departments of Agriculture and Commerce) are now active, and one (at the Department of Veterans Affairs) has been formally proposed and is expected to be implemented in the near future.[4]

When we surveyed officials at 26 agencies near the end of the demonstration program's first decade, two reasons for the limited use of the demonstration project authority were most widely cited: the time and resources required to develop and propose projects and the difficulty of getting project proposals through agencies' approval processes.[5] In studies of the demonstration project authority, both the Merit Systems Protection Board (MSPB) and OPM itself noted the frustrations some federal officials have experienced with the demonstration project development and approval process, both within their agencies and with OPM.[6] OPM said it believed that "the process should be redesigned or

---

[4]Five additional demonstration projects are active at Department of Defense facilities. These demonstration projects were authorized by Congress outside OPM demonstration authority, but were developed with input from OPM.

[5]Federal Personnel: Status of Personnel Research and Demonstration Projects (GAO/GGD-87-116BR, Sept. 1987). OPM has told us that these two reasons remain the most prominent.

[6]See Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change, Merit Systems Protection Board, December 1992; and Retrospective on the Demonstration Project Authority: Lessons Learned, Office of Personnel Management, December 1993.

better administered to achieve the always difficult task of reconciling OPM and agency interests in the name of innovation."[7]

There is some question, considering the limited use to which demonstration project authority has been put, as to whether it has accomplished, to an appropriate extent, the purpose for which it was intended–that is, determining whether specific changes in personnel management policies or procedures would result in improved federal personnel management. We believe that enhancing the opportunities for agencies to pursue innovative HRM policies or procedures would be likely to create more knowledge about what works and what doesn't–especially since agencies that implement demonstration projects are required to evaluate their results. As more agencies take steps to fashion their HRM approaches to support their missions and goals, it would be useful for them to have as many proven HRM approaches available to them as possible.

SUPPORT FOR FEDERAL EMPLOYEE UNION ACTIVITIES IS AN ESTABLISHED PRACTICE, BUT THE EXTENT OF THAT SUPPORT IS UNKNOWN

We last testified on the use of official time for union activities in September 1996.[8] At that time, we reported that (1) the use of official time for union activities was an

---

[7]Retrospective on the Demonstration Project Authority: Lessons Learned, Office of Personnel Management, December 1993.

[8]Federal Labor Relations: Official Time Used for Union Activities (GAO/T-GGD-96-191, Sept. 11, 1996).

established practice in the federal government; (2) based on our work at four federal entities, the total amount of official time used for union activities, the cost of that time, and the number of people using that time were unknown;[9] and (3) no reporting requirement existed for agencies to generate comprehensive data on their support of union activities. Our "bottom line" was that if decisionmakers hope to resolve the question of the extent to which agencies use official time and other resources to support the activities of federal employee unions, better data are needed. But, recognizing as well that data gathering can be expensive, we said that decisionmakers would need to balance the costs and benefits of the various options for doing so.

Since then, at the Subcommittee's request, we have done further, more extensive work on official time and other forms of support for federal employee union activities, twice surveying 34 federal organizations that employ about 87 percent of the more than 1 million nonpostal federal workers who are represented by unions and are covered by collective bargaining agreements (see app. I). But, as you will see, our additional work on official time yielded findings very similar to those we previously reported. We found that the use of official time remains an established practice, but that the 34 federal organizations that we surveyed, which included the 30 federal organizations with the greatest number of employees covered by collective bargaining agreements, were neither routinely collecting nor reporting the kinds of comprehensive data needed to accurately

---

[9]The four federal entities were the U.S. Postal Service, the Internal Revenue Service, the Social Security Administration, and the Department of Veterans Affairs.

portray the use of official time across the federal government. No permanent reporting requirement for the use of official time yet exists, but subsequent to our two surveys, both the House and Senate Committees on Appropriations directed OPM to report on the use of official time and other forms of support for union activities. OPM is to collect these data for the first 13 pay periods of calendar year 1998 and report to the Committees no later than December 1, 1998.

The Use of Official Time for Union Activities Is an Established Practice

As you know, CSRA allows federal employees to bargain collectively through labor organizations of their choice and thereby participate with agency management in the development of personnel policies and practices and other decisions that affect their working lives. For the most part, labor-management relations at the federal organizations we surveyed are governed by title VII of CSRA, which is administered by the Federal Labor Relations Authority (FLRA), an organization headed by a three-member panel that issues policy decisions and adjudicates labor-management disputes.

The charging of official time by union members for their participation in collective bargaining and FLRA-authorized activities is a matter of statutory right. Using official time for other union activities is negotiated. CSRA allows official time to be negotiated in any amount an agency and the union involved agree is reasonable, necessary, and in the public interest. However, CSRA specifies that activities that relate to internal union

business, such as the solicitation of members or the election of union officials, must be performed when in a nonduty status, that is, not on official time.

Among the union activities for which the use of official time can be negotiated are activities related to grievance procedures; meetings called by management on a collective bargaining agreement; joint labor-management committee meetings addressing such issues as safety and health; semiannual labor-management relations committee meetings; union-sponsored training and other training pertaining to labor relations; meetings with union representatives concerning grievances, appeals, or personal matters; and presentations of union views to officials of the executive branch, Congress, or other appropriate authority. Under some contracts, official time is authorized for travel to and from some of these meetings, but other contracts may either deny the use of official time for travel or not mention it.

We asked the 34 federal organizations we surveyed to describe the benefits and disadvantages, if any, of using official time for union activities. In response, 23 said that the use of official time improved labor-management relations. Fourteen of the federal organizations also said that using official time helped with the implementation of organizational changes; 13 said it decreased the number of grievances. The single disadvantage, as identified by 13 of the 34 federal organizations we surveyed, was that using official time for union activities caused employees to set aside their regular work.

The Extent of Official Time Use and Other Support for Union Activities Is Unknown

Regarding the extent of the use of official time and other support for union activities, the responses to our surveys were spotty at best. Therefore, although the data we obtained are the most extensive currently available, they are insufficient to accurately portray the total amount of resources used for union activities across the 34 federal organizations. Most of the respondents did not provide comprehensive data on these resources. None of them provided all of the data requested for the 8 fiscal years covered by our surveys. In some cases, the organizations provided data that covered only portions of fiscal years or were representative of calendar rather than fiscal years.

With limitations such as these in mind, we can report that, of the 34 federal organizations we surveyed, 32 provided information on the hours used for union activities during fiscal year 1996; these totaled almost 2.5 million hours. According to the survey responses from 27 of the federal organizations, about 11,000 employees used official time for union activities in 1996. About 460 employees spent 100 percent of their time on union activities at 23 federal organizations. Most of the information provided by the federal organizations regarding the amount of time spent on union activities and the number of employees using that time was based on reported data rather than estimates.[10]

[10]In this context, "reported data" means data either systematically captured in an existing database from payroll, personnel, or other official source or compiled for agency reports. Although we requested that the agencies provide us with reported data, we informed them that if reported data were unavailable, they should provide estimated data, along with the basis on which estimates were made.

Table 1: Data on Hours of Official Time Used for Union Activities and the Number of Employees Using That Time During Fiscal Year 1996, as Provided by the Federal Organizations

Resources used for union activities	Number of organizations that provided resources in fiscal year 1996[a]	Amount of resources used for union activities		
		Total reported data	Total estimated data	Total estimated and reported data
Hours of time that employees used for union activities	32	1,775,917	723,672	2,499,589
Number of employees who used official time for union activities	27	4,607[b]	6,320	10,927
Number of employees who spent 100 percent of their time on union activities	23	379	79	458

[a]The numbers of organizations identified as providing resources are those that affirmatively responded that they did provide such support. Some organizations responded that they did not provide one or more of the types of resources, and some organizations did not respond at all with answers regarding whether they provided one or more of the resources.

[b]In our report entitled Federal Labor Relations: Survey of Official Time Used for Union Activities (GAO/GGD-97-182R, Sept. 11, 1997), we indicated that 8,092 employees used official time for union activities in fiscal year 1996, as reported by the federal organizations. In response to a subsequent survey, federal agencies reported an additional 1,877 employees who used official time in 1996, and we included them in this table. In addition, the Department of the Air Force identified an error in a computer program used by the Defense Finance and Accounting Service (DFAS) to compute the number of employees who used official time. Accordingly, Air Force officials asked us to reduce their total number of employees who used time for union activities by 2,855. We have since reviewed the DFAS computer program and agree that it resulted in an overstatement of the number of employees who used official time. Because the DFAS program was used in computing figures for the Departments of the Army and the Navy as well, we have sought to avoid overstating the number of employees using official time by excluding from this table the number of employees using official time originally reported by the Army (1,926), the Navy (581), and the Air Force (2,855).

Source: GAO survey of federal organizations.

Of the 34 federal organizations surveyed, 29 provided information on the dollar value of the official time spent on union activities during fiscal year 1996; this dollar value totaled about $50 million. Twenty-three organizations indicated that, in 1996, they provided office space, equipment, telephone use, and supplies valued at over $5 million for union activities, and that over $3 million was spent on travel and per diem associated with union activities at 22 organizations. For the most part, the dollar values of the time, office equipment and related items, and travel and per diem reported by the federal organizations were based on estimates.

Table 2: Data on the Dollar Values of the Official Time, Office Space and Other Related Items, and Travel and Per Diem Used for Union Activities During Fiscal Year 1996, as Provided by the Federal Organizations

Resources used for union activities	Number of organizations that provided resources in fiscal year 1996[a]	Dollar value of resources used for union activities		
		Total reported data	Total estimated data	Total estimated and reported data
Official time used for union activities	29	$22,426,692	$27,095,784	$49,522,476
Office space, equipment, telephone use, and supplies	23	1,659,547	3,364,964	5,024,511
Travel and per diem	22	1,007,010	2,172,696	3,179,706

[a]The numbers of organizations identified as providing resources are those that affirmatively responded that they did provide such support. Some organizations responded that they did not provide one or more of the types of resources, and some organizations did not respond at all with answers regarding whether they provided one or more of the resources.

Source: GAO survey of federal organizations.

We found that the methodologies used for deriving estimates of the resources used for union activities varied greatly among the federal organizations. For example, one federal organization based its official time estimate on the current union contract entitlement. Another organization estimated the number of employees using official time by collecting estimates from its components; each component, however, based its estimate on a different methodology. Another federal organization used an average GS grade level to estimate the dollar value of the time spent on union activities. And yet another organization indicated that it estimated the dollar value of travel and per diem for one union on the basis of data reported for two other unions. Some of the organizations

indicated that their estimates were based on documents and records that were not comprehensive or complete. Others provided no bases at all for their estimates.[11]

No Reporting Requirement Has Been in Place, But an OPM Effort Is Currently Under Way

The overall lack of comprehensive or reliable data among the respondents to our two surveys was not surprising, considering, as we noted in our September 1996 testimony, that no reporting requirement existed for agencies to generate comprehensive data on their support of union activities.[12] Subsequent to our two surveys, however, the House and Senate Committees on Appropriations directed OPM, in consultation with the Office of Management and Budget (OMB), to report on the use of official time and other support for union activities among federal agencies. OPM is currently collecting data for the first 13 pay periods of calendar year 1998, and is expected to report to the Committees no later than December 1, 1998. OPM's guidance to the agencies requires them to report actual data, if available. Lacking that, they are to formulate estimates on the basis of the

[11]We did not assess (1) the completeness of the estimated data provided by the federal organizations or (2) the appropriateness of the bases on which the estimates were formed.

[12]In 1981, agencies were required by OPM, under Federal Personnel Manual Letter 711-161, to activate a recordkeeping system to capture official time charged for representational functions. However, the letter did not require agencies to report the yearly time charges to OPM. As a result, OPM never consolidated the amount of time charged governmentwide to union activities and had no information on agencies' compliance with the recordkeeping requirement. When the Federal Personnel Manual was abolished in 1994, all recordkeeping requirements regarding time spent on union activities were rescinded.

best available data or use standard statistical sampling techniques. If an estimate or sample is used, the methodology is to be documented and fully explained.

The Committees expect that the data provided by OPM will include a description of both the benefits and disadvantages, if any, of using official time for union activities and a list of specific activities undertaken by federal employees while using official time. The Committees also expect that OPM will report, for the 6-month period in 1998, (1) the total hours of official time that employees spent on the various activities identified; (2) the number of employees who used official time for these activities; (3) the number of employees who charged 100 percent of their work hours to official time, the number who charged 75 percent, and the number who charged 50 percent; (4) the dollar value of the official time, in terms of employee compensation, used for such activities; and (5) the dollar value of federally funded office space, equipment, telephone use, and supplies provided to unions.

When OPM's report is issued, decisionmakers may have more information than at present on the extent to which federal agencies are providing official time and other support for federal employee union activities. They may also have a fuller picture of the issues involved in requiring agencies to report on the use of these resources, and may have more information with which to balance the costs and potential benefits of imposing this requirement in the future.

THE ADMINISTRATIVE REDRESS SYSTEM REMAINS OVERBURDENED, BUT GREATER USE OF ALTERNATIVE DISPUTE RESOLUTION MAY OFFER SOME RELIEF

We first testified on the administrative redress system for federal employees in November 1995, when we stated that the complexity of the system and the variety of redress mechanisms it affords federal employees make it inefficient, expensive, and time-consuming.[13] Our view remains unchanged. Issues of jurisdictional overlap and multiple venues for complaints–particularly in the area of workplace discrimination–continue to afflict an already overburdened redress system. I would like to discuss two of these issues–"mixed case" appeals and the disproportionate share of discrimination cases brought by U.S. Postal Service employees. In addition, I would like to discuss the expectation that alternative dispute resolution (ADR), if used appropriately, may help lessen the demands on the redress system.

A System Marked by Jurisdictional Overlaps

The purpose of the current redress system, which grew out of CSRA and related legal and regulatory decisions over nearly 20 years, is to uphold the merit system by ensuring that federal employees are protected against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. While one of the purposes of CSRA was to streamline the previous redress system, the scheme that has

[13]Federal Employee Redress: An Opportunity for Reform (GAO/T-GGD-96-42, Nov. 29, 1995).

emerged is far from simple. Today, four independent adjudicatory agencies can handle employee complaints or appeals: MSPB, the Equal Employment Opportunity Commission (EEOC), the Office of Special Counsel (OSC), and FLRA. While these agencies' boundaries may appear to have been neatly drawn, in practice the redress system is a tangled web.

To begin with, a given case may be brought before more than one of these agencies–a circumstance that adds time-consuming steps to the redress process and may result in the adjudicatory agencies reviewing each other's decisions. Moreover, each of the adjudicatory agencies has its own procedures and its own body of case law.[14] Each varies from the next in its authority to order corrective actions and enforce its decisions.

Further, the law provides for additional review of the adjudicatory agencies' decisions–or, in the case of discrimination complaints, even de novo trials[15]–in the federal courts. Beginning in the employing agency, proceeding through one or more of the adjudicatory bodies, and then carried to its conclusion in court, a single case can–and often does–take years.

---

[14]EEOC has proposed substantial changes in the processing of federal employees' discrimination complaints. Intended to "address the continuing perception of unfairness and inefficiency in the federal sector complaint process," the proposals appear in EEOC's Notice of Proposed Rulemaking, Federal Register, February 20, 1998, Vol. 63, No. 34, pp. 8594-8606.

[15]In a de novo trial, a matter is tried anew as if it had not been heard before.

The "Mixed Case" Scenario

As we testified in July 1996, the most frequently cited example of jurisdictional overlap in the redress system is the so-called "mixed case," under which a career employee who has experienced an adverse action appealable to MSPB (such as a termination or suspension of more than 14 days) and who feels that the action was based on discrimination, can appeal to both MSPB and EEOC.[16] Under this scenario, the employee would first appeal to MSPB, with hearing results further appealable to MSPB's three-member Board. If the appellant is still unsatisfied, he or she can then appeal MSPB's decision to EEOC. If EEOC finds discrimination where MSPB did not, the two agencies try to reach an accommodation. In the event they cannot reach an accommodation, a three-member Special Panel is convened to reach a determination.[17] At this point, the employee who is still unsatisfied with the outcome can file a civil action in U.S. district court, where the case can begin again with a de novo trial.

Eliminating the mixed case scenario would appear to make good sense, especially in light of the record regarding mixed cases. First, few mixed cases coming before MSPB result in a finding of discrimination. In fiscal year 1997, for example, of the 1,833 mixed case appeals that MSPB decided, a finding of discrimination occurred in just 6. Second, when

[16]Civil Service Reform: Redress System Implications of the Omnibus Civil Service Reform Act of 1996 (GAO/T-GGD-96-160, July 16, 1996).

[17]Special Panels have been needed only rarely; three such panels have been convened in the past 18 years, and none since 1987.

EEOC reviews MSPB's decisions in mixed cases, it almost always agrees with them. Again during 1997, EEOC ruled on appellants' appeals of MSPB's findings of nondiscrimination in 124 cases. EEOC did not disagree with MSPB's findings in any of these cases.

Under the mixed case scenario, an appellant can--at no additional risk to his or her case--have two agencies review the appeal rather than one. MSPB and EEOC rarely differ in their determinations, but an employee has little to lose in asking both agencies to review the issue. Eliminating the possibility of mixed cases would eliminate both the jurisdictional overlap and the inefficiency that accompanies it. If the mixed case scenario were eliminated, appellants who were dissatisfied with the outcome of the administrative redress processes would still have recourse to the federal courts.

For purposes of comparison, it should be noted that legislative branch employees are provided different redress rights from those given executive branch employees. For example, since January 1996, congressional employees with discrimination complaints have been required to choose between two redress alternatives, one administrative and one judicial.[18] Under the administrative alternative, an employee files his or her complaint with the Office of Compliance--an independent legislative branch agency that

[18]The redress system for congressional employees was created by the Congressional Accountability Act of 1995. The act also specifies that, before a congressional employee chooses either redress alternative, he or she must go through counseling and mediation processes.

administers the process–with the results appealable to a five-member board. The board's decision can be appealed to the U.S. Court of Appeals for the Federal Circuit, which has a limited right of review. Under the judicial alternative, the employee bypasses the administrative process and files suit in U.S. District Court, with the opportunity to appeal the district court's decision to the appropriate U.S. Court of Appeals. The effect of this arrangement is to avoid the "two bites of the apple"–one administrative and the other judicial–currently available to executive branch employees.

Dual Filings at the Postal Service

The growing pressures on the administrative redress system–specifically, in the area of discrimination complaints–continue a trend on which we last testified in July 1996. The latest available data reveal that, from fiscal years 1991 to 1997, the number of discrimination complaints filed increased by 56 percent, the number of requests for a hearing before an EEOC administrative judge increased by 94 percent, and the number of appeals to EEOC of agency final decisions increased by about 61 percent. Meanwhile, the backlog of requests for EEOC hearings more than tripled, and the inventory of appeals to EEOC of agency final decisions increased by nearly 600 percent.

In our recent analyses of the rising number of federal employee discrimination complaints and of EEOC's growing hearings and appeals workload, one significant factor that stands out is the Postal Service. The number of postal workers' complaints has represented a

disproportionate and increasing share of federal employee complaint filings. In fiscal year 1996, for example, postal workers represented less than a third (31.2 percent) of the federal workforce but accounted for fully half (50 percent) of all the discrimination complaints filed by federal workers. In fiscal year 1991, postal workers represented less than a quarter (23.9 percent) of the federal workforce but accounted for about 44 percent of the complaints filed. Because postal workers' cases account for a large share of complaints filed, they represent a large share of EEOC's workload, accounting for 47 percent of the hearing requests filed with EEOC and 44 percent of the appeals to EEOC in fiscal year 1997.

We identified two factors that may help explain why postal workers account for so large a share of the complaint caseload. One is that while the number of nonpostal federal workers has been falling, the number of postal workers has been going up. Between fiscal years 1991 and 1996, the number of nonpostal federal workers decreased by about 18 percent (from 2,378,934 to 1,948,009), while the number of postal workers increased by about 18 percent (from 748,121 to 883,370). The other factor is that postal workers have been more likely than their nonpostal counterparts to file complaints. In fiscal year 1996, for example, there were 15 complaints filed for every 1,000 postal workers, compared with 6.8 complaints for every 1,000 nonpostal workers.

According to the Postal Service Manager for EEO Compliance and Appeals, one reason postal workers are more likely to file complaints than other federal workers is that postal

workers alleging discrimination who are covered under collective bargaining agreements have more redress opportunities than nonpostal federal workers covered under collective bargaining agreements. Unlike most other federal workers, postal workers can pursue two courses of action concurrently. They can (1) file a discrimination complaint under the federal employee discrimination complaint process and (2) file a grievance through procedures negotiated under the collective bargaining agreement.[19] The Postal Service told us that between 35 and 45 percent of postal workers who file a complaint under the federal employee discrimination complaint process also file a grievance. This opportunity for dual filings--that is, to take discrimination claims into two forums at once--allows postal employees to start two formal procedures based on one allegation. Restricting postal employees to one avenue of redress for their discrimination complaints would therefore reduce the total number of formal procedures arising from these complaints.

Alternative Dispute Resolution (ADR) Offers Some Measure of Relief for the Redress System

As we reported in August 1997, private companies and federal agencies have been moving toward the use of ADR as one way of reducing the burden of formal redress processes,

[19]Nonpostal employees who work for agencies subject to title 5 of the U.S. Code and who are covered under collective bargaining agreements must choose between these two courses of action. By filing a grievance, for example, a nonpostal employee forgoes the option of pursuing a complaint under the discrimination complaint process for federal employees.

particularly in the case of discrimination complaints.[20] The term ADR covers a wide variety of dispute resolution processes, such as mediation, usually involving intervention or facilitation by a neutral third party. While no comprehensive data were available on ADR results in the private or federal sectors, the five companies and five federal agencies that we studied reported generally positive experiences with their ADR programs.[21] For example, the Postal Service, which conducted a fairly extensive evaluation of a pilot mediation program in its North Florida District, found that mediation resolved nearly three-quarters (74 percent) of the cases in which it was used, and reduced by about one-half (from 43 percent to 22 percent) the proportion of informal discrimination complaints that became formal complaints. Based on its pilot program experiences, the Postal Service decided to adopt ADR throughout the organization. The Postal Service Manager of EEO Compliance and Appeals told us the Postal Service believes that its ADR program, once fully implemented, will have a substantial effect on future caseloads, both at the Postal Service and at EEOC.

---

[20]Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace (GAO/GGD-97-157, August 1997).

[21]The five companies were Brown & Root, Inc.; Hughes Electronics Corporation; the Polaroid Corporation; Rockwell International Corporation; and TRW Inc. In the federal sector, we studied the Department of Agriculture, the Department of the Air Force, the Postal Service, the Department of State, and the Walter Reed Army Medical Center. We included the Postal Service among federal agencies, even though it is an independent governmental establishment, because the Postal Service is bound by most of the same discrimination complaint processes that apply to most federal agencies. As mentioned earlier, however, postal workers are eligible to file discrimination complaints and grievances concurrently.

Since our report, there has been further emphasis on using ADR in workplace disputes. In May 1998, the President established the Alternative Dispute Resolution Working Group, chaired by the Attorney General, to facilitate and encourage agencies' use of ADR. In addition, EEOC's proposals for changes in the regulations governing the EEO complaint process for federal employees include a requirement for all agencies to establish or make available an ADR program during the informal or "pre-complaint" process. Federal employees would be able to choose between the ADR or the traditional counseling processes without affecting their right to file a formal complaint.

Based on our work, it appears that the wider use of ADR in the pre-complaint stage of the discrimination complaint process could help resolve many disputes before they become formal complaints. One reason is that, as EEOC has reported, there may be a sizeable number of disputes in the discrimination complaint system that may not involve discrimination issues at all. Rather, they reflect basic communications problems in the workplace, and may be in the EEO process as a result of employees' perceptions that there is no other forum available for airing general workplace concerns. EEOC reported that there is little question that these types of issues would be especially conducive to resolution through ADR. Moreover, ADR generally comes into play in the early stages of workplace disputes, and practitioners have told us that it is important to intervene in the early stages of such disputes, before the disputants' positions solidify and become more intractable.

While our work suggests that agencies would do well to make ADR more widely available to their employees, we need to be cautious in how much to expect of ADR programs or whether to make them a more formal part of the redress system. One reason for caution is that, although ADR programs have been widely perceived as beneficial, most ADR programs are relatively new and generally have yet to be evaluated. As a result, we found no comprehensive evaluative data on the extent to which ADR has saved time and money by avoiding formal redress or litigation. Further, practitioners have already noted that ADR is not always appropriate, as in cases, for example, when disciplinary action has been taken against an employee because of a violation of law. Further, the "A" in ADR stands for "alternative." To the extent that ADR has been effective in federal agencies, it has been effective as an alternative to the more formal redress processes. Customarily, employees participate in ADR by choice, and when they do, they sacrifice none of their rights of recourse to the more established, more structured, and generally better-known administrative redress processes. If employees are ever asked, not merely to try ADR as an alternative to the formal redress processes, but to rely upon ADR as a substitute for them, they may be wary of losing some of their workplace protections. We could, therefore, see less use of ADR in the future rather than more.

Another new policy toward ADR that has been suggested by some–that is, making use of ADR a mandatory part of the discrimination complaint process–might also have drawbacks. So far, the fact that ADR use among federal employees is voluntary has helped ensure, at least to some extent, that employees who participate in the process are

willing to try to make it work. If participation in ADR becomes mandatory, some complainants will participate in ADR merely because they have to. If that occurs, ADR may become just another step in an already lengthy redress process, and help make that process even lengthier and less efficient than it is today.

SUMMARY

In summary, Mr. Chairman, having noted the limited use to which personnel demonstration project authority has been put, we believe there is some question as to whether it has accomplished, to an appropriate extent, the purpose for which it was intended–that is, determining whether specific changes in personnel management policies or procedures would result in improved federal personnel management. We believe that enhancing the opportunities for agencies to pursue innovative HRM policies or procedures would be likely to create more knowledge about what works and what doesn't. As more agencies take steps to fashion their HRM approaches to support their missions and goals, it would be useful for them to have as many proven HRM approaches available to them as possible.

In another vein, our work has shown that if decisionmakers hope to resolve the question of the extent to which federal agencies use official time and other resources to support employee union activities, better data will be needed. But, recognizing as well that data gathering can be expensive, we believe that decisionmakers will need to balance the costs

and benefits of the various options for doing so. This December, after OPM reports on its current effort to collect data from the agencies, decisionmakers may have a fuller picture of the issues involved in requiring agencies to report on the use of these resources, and may have more information with which to balance the costs and potential benefits of imposing this requirement in the future.

Finally, we continue to view the administrative redress system for federal employees as inefficient, expensive, and time-consuming. Certain steps to relieve undue burdens on the system, such as eliminating mixed case appeals, would appear to make good sense, provided these actions upheld two fundamental principles: that of fair treatment for federal employees and of an efficiently managed federal government. In addition, our work on ADR suggests that, as one way of providing some relief to the administrative redress system, agencies would do well to make ADR more widely available to their employees.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions you or any other members of the Subcommittee may have.

(410256)

FEDERAL ORGANIZATIONS SURVEYED ON THE USE OF OFFICIAL TIME AND OTHER SUPPORT FOR UNION ACTIVITIES

Department of Veterans Affairs
Department of the Army
Department of the Navy
Department of the Air Force
Internal Revenue Service
Social Security Administration
Defense Logistics Agency
National Guard Bureau
Federal Aviation Administration
Bureau of Prisons
Immigration and Naturalization Service
Forest Service
National Aeronautics and Space Administration
Customs Service
Department of Labor
Defense Finance and Accounting Service
Tennessee Valley Authority
General Services Administration
Department of Energy
Environmental Protection Agency
Department of Housing and Urban Development
Department of State
National Park Service
Food Safety and Inspection Service
Indian Health Service
Federal Deposit Insurance Corporation
Bureau of the Census
Department of Education
National Oceanic and Atmospheric Administration
Equal Employment Opportunity Commission
National Labor Relations Board
Office of the Secretary of Defense
Corporation for National and Community Service
Bureau of Indian Affairs

Mr. MICA. Thank you, and I guess Mr. Altman does not have an opening statement. I thank our panelists.

A couple of quick questions. First, Ms. Lachance, I have heard you comment today on the two-tier evaluation system and not giving it enough time. It is my understanding we have had almost a 4-year trial of the two-tier evaluation. In Social Security, I believe it has been 1½ with 60,000 employees and the reports that we are getting back are not that favorable.

How much longer do you think we are going to have to give it to get a good evaluation?

Ms. LACHANCE. I think, overall, Mr. Chairman, the idea of performance appraisals ought to be left to individual agencies to decide. We all have very different missions, very different budget authorities, very different pressures that we are working under. I think the people that are best able to make the decision on the kind of appraisal system they want are the agencies themselves, in consultation with their managers and their bargaining unit representatives.

The idea of a pass-fail system is not a panacea. It will not solve all of the problems that we have with an appraisal system, but it is an idea that is worth trying. And if the Social Security Administration feels as though it is not working out, or any other agency is not happy with it, they can change to something different.

But the idea still remains, and I think they are finding this in the private sector as well, that pass-fail systems give people an opportunity to really focus on solving any performance or behavioral issues that an employee has and just takes the onus away of not being outstanding.

Mr. MICA. So would you be willing to allow us to give the option to the various agencies to adopt whatever evaluation and rewards system, performance——

Ms. LACHANCE. That is already in place and we have permitted agencies to do that.

Mr. MICA. And you have no problem with that particular flexibility, but when it comes to the question of allowing a variety of compensation-benefit packages, including retirement, life insurance, health insurance, annual leave, things of that sort, you want to keep that all intact and standard?

Ms. LACHANCE. Yes.

Mr. MICA. One of the problems I face as chair of the subcommittee is we are constantly besieged by agencies requesting to grant exceptions to some of those requirements that we have in place and that lack of flexibility that you are insisting upon.

For example, I have met with the IRS Commissioner. One of the problems he has is attracting folks due to the lack of portability of some of the benefits, and he wants 40 people at any salary range, just about——

Ms. LACHANCE. 175,000.

Mr. MICA. Exactly. And he is trying to attract folks from the private sector with certain expertise who do not want to come into the public sector because of your inflexibility. How do we deal with that?

Ms. LACHANCE. Well, unfortunately, I think we have to take a look at situations like the IRS differently than when we look at the

government as a whole. Unfortunately, the IRS is in a crisis situation, and I think we probably have to go further with them than we would normally.

But the fact is, I think it behooves us as a Government and as a single Federal employer to maintain some consistency across the board. We do not want to get in a situation where agencies are competing against each other for valuable employees, or that there is such a different system that people cannot move among agencies when it's appropriate or when they feel there is a better opportunity somewhere else. I think we have to look at these things as one system and then deal with the crisis and with the problems as they arise.

There is, however, within that, room for flexibility. And that is one of the reasons that we are taking a long look at broadbanding, which has a wonderful history in demonstration projects and which has been successful and that, we think, could be very, very helpful to agencies in moving people through the pay grades without some of these very constricting and restrictive time elements that are in place in the General Schedule.

Mr. MICA. Well, again, here is a letter, dated yesterday, from the Judicial Conference of the United States asking me to find a way to provide cafeteria-style benefits for their folks in the judicial branch. You say we are not in a crises, but we have agencies, FAA, and some of the transportation areas, HHS, some of the scientific community, the space programs, there are so many areas where you need expertise today and you need portability of benefits, and I think we are going to see even more of this.

I know your job is to keep everything in a box, but I think that we are going to have to address this problem in the real world that we are approaching, and we do not want just the second or third tier of personnel or expertise available in the Federal work force. So I think this is going to come back and haunt us.

I don't want to take too much more time, but I will submit a number of questions to you.

Just a quick question for Mr. Brostek. You spent some time talking about official time. I think Mr. Miller, from Florida, one of my colleagues, this is one of his legislative babies. One of the things that you pointed out is there is no good data. Do you think we should enact some provisions to, first, get that data? Maybe we should have some disclosure of the time.

The information that you have been able to compile seems a bit shaky because of, I believe you mentioned a variety of data that is incompatible. I think you used that term. Is there something we should do to first compile the data on a standardized basis?

Mr. BROSTEK. I think that is kind of a tough decision that we can't make. The tradeoff is——

Mr. MICA. But that would be helpful. At least you could do an evaluation. You are giving me guesstimates, is that correct?

Mr. BROSTEK. They are not our guesstimates, but they are frequently the guesstimates of the agency officials we contacted.

Yes, in fact, that is the case. That is the reason why I say it is a difficult tradeoff to make. In an ideal world, having perfect information is obviously going to be best for any kind of oversight process, but there is a cost associated with collecting the information.

We do not know exactly what the cost would be to have a standardized system, and we do not know how to balance that cost against the benefits. There is a judgment that needs to be made.

Mr. MICA. Maybe I didn't hear right. Did you testify to no data from 30 some agencies?

Mr. BROSTEK. We collected information from 34 agencies that represented a very high portion of the employees who are in the union.

Mr. MICA. What number did you say? Somewhere you had a number of agencies that did not have any data.

Mr. BROSTEK. Mr. Altman informs me there were two agencies without any data at all.

Mr. MICA. Two agencies. So you got some from the 30 some agencies?

Mr. BROSTEK. As I indicated, it was very inconsistent. We tried to collect information for a period of time, several different years, and an agency might have data in 1 year and not another; they might have information that they could give us from a records system for some of the types of information we were asking for, say the number of employees that were charging official time, but they might not have systems or records for office space so they would have to make an informed guesstimate of what that is.

Mr. MICA. Finally, could you tell the committee, or provide us later with who are the agencies that provide the data in some form that you consider adequate and/or reliable? Any off the top of your head you want to——

Mr. BROSTEK. We could not provide you any agency that we currently know to be adequate and reliable because we haven't actually gone in to look at their record systems to see how sound they are. Certainly the impression we have, from the survey we conducted and the responses we got on that survey about how they develop the data, and that would have been that for all the elements that we have talked about here, charging of official time, the office space and the travel and per diem, no agency had record systems for all of those pieces of information, to my knowledge.

Mr. MICA. All right. Thank you. I yield to our ranking member.

Mr. CUMMINGS. Ms. Lachance, can you talk briefly about this pass-fail system as opposed to the other system where you have the several tiers? Can you talk about the advantages, disadvantages on both?

Ms. LACHANCE. Sure, Congressman. I think what it comes down to is really the agency's decision about whether they want to focus on the label or perhaps focus on the problems that need to be resolved.

Each agency has a different culture. They should be allowed to have input in their choice in this matter. But the fact is that in the Federal Government, traditionally, when there is a five-tier system, we have always graded employees very highly. That says to us that perhaps people are more focused on the label, more focused on their rating, than they are in really a true exchange of information and a true dialog about some of the performance issues that should be on the table and should be discussed.

The pass-fail system, which in some agencies is working very well, and in some areas of the private sector is working very well,

is just taking the emphasis off of that. It really lets people just go in and deal with some of the issues that need to be discussed, that need to be worked on without the pressure of whether they are outstanding or whether they simply exceed fully successful. It is just a way to give people an opportunity to truly get at the problems.

Mr. CUMMINGS. That is what I thought. I have been managing people for 20 years in the private sector, now here in the public sector, and one of the things that I guess I have come to learn here, more than anyplace else, is that people really care about how they are viewed. In other words, they want to know when they are very good or excellent. Probably everybody in this room wants to know that whomever supervises them, if anyone, considers them excellent, very good, poor, fair, whatever.

I am trying to figure out how pass-fail enhances somebody telling an employee that what is on the table is improving your performance. Do you follow what I am saying? Maybe I am missing something, but it just seems to me if somebody said that I was good, and there is a very good and an excellent, it seems to me that if I am sitting down there, I am going to try to figure out how I get to excellent as opposed to just this thing of pass-fail.

If I walk in there and they say you have failed, I would be devastated, so I don't know how much conversation we are going to have anyway. I have already failed. Do you understand what I'm saying?

Ms. LACHANCE. Sure.

Mr. CUMMINGS. Morale is a piece of this. Then there's another piece that is involved in it, and that is just the whole idea of people wanting to know where they stand.

I think either system can lead to some dishonesty. If I don't like you, then you fail. Or if I have got some issues, maybe I don't like black people or I don't like white people, then I could fail you.

Ms. LACHANCE. Absolutely.

Mr. CUMMINGS. But on the other hand, if I have five tiers, poor, fair, and so on, I think that gives me, at least that gives an employee an opportunity to say, well, OK, maybe I was fair, but how do I improve that. But when you tell them they failed or you tell them they pass, and they say, well, I must have been doing pretty good. I don't know what it means, but I know I got past this line of failure. So help me.

Ms. LACHANCE. I understand. And certainly there is room in the Federal Government for both approaches, and I think that is the point that I am trying to make. Managers and people who supervise employees have an obligation to sit down and work with each person on their performance. In some situations it is easier for them just to take the labels off the table and have an honest discussion about how things are going, and it is easier in the context of everybody passing.

In other situations, it may be more appropriate for people to get very specific about how folks are doing and let them compare each other in the workplace and talk about it amongst themselves. But the idea is to get to the productive discussion. And we believe that each agency could choose or each component of an agency even could choose how best to accomplish that and what works best in

their own culture. The idea is to just get the label out of the way and improve performance, if improvement is needed.

Mr. CUMMINGS. Do you all ever do any surveys, has anyone, of how employees feel about one system or the other?

Ms. LACHANCE. Let me look into that and, if we have, I can get back with you on it.

[The information referred to follows:]

We do not know of any agencies that have done widespread surveys of employees to evaluate reactions to implementation of two-level appraisal programs (pass/fail) or to assess employee opinions regarding the ideal number of appraisal levels. Most Federal agencies were first given permission to use pass/fail in September 1995. Agencies' use of pass/fail has taken place gradually since then. For example, the Social Security Administration and the Department of Education initiated their pass/fail programs in September 1995 and May 1996, respectively, while the Department of the Interior phased in its own pass/fail program from January to September 1996. Agencies that have initiated pass/fail approaches have thusfar spent their limited resources on designing and implementing their new appraisal programs, rather than on evaluating them. In any event, it is not unusual for implementation of any program change to cause misunderstandings or have operational problems in the beginning. These can be worked out over time and should not be the basis for eliminating the change. Given the phased implementation and the rather limited experience with pass/fail, it is too early for any comprehensive analysis of its effectiveness.

Before 1995, some small agencies that were not subject to the performance appraisal requirements of title 5 implemented pass/fail appraisals. Results were mixed. The National Security Agency had about 4 years of experience with pass/fail and has returned to a five-level appraisal program for several reasons. These reasons include the agency's determination that supervisors were not giving employees sufficient feedback and that they needed more formal, recorded distinctions in performance levels for identifying employees for promotion consideration and for developmental needs. Improved program design might have avoided these problems. On the other hand, the Overseas Private Investment Corporation also has used pass/fail for 4 years and believes that its system has met management objectives. OPIC implemented the program in order to improve communications with employees. Each employee's performance is reviewed using a detailed set of objectives. Emphasis during supervisor-employee discussions is on the employee's performance on each objective, not on the appraisal "label." Although the agency has done no formal survey, it reports across-the-board satisfaction with the appraisal program. Employee complaints, common before institution of two-level appraisals, have been reduced substantially. Managers, employees, and employee union representatives are happy with the program.

A thorough evaluation of pass/fail would have to include an analysis of the appraisal programs replaced by pass/fail, the reasons why agencies decided to make a change, the objectives sought in implementing pass/fail, and a comparison of agency experience under the two different programs. Such an evaluation would take time to complete properly.

Mr. CUMMINGS. The reason why I ask that is because I am telling you I have learned that morale is a very significant thing. You can actually kill morale and spend all the money you want on pay raises and whatever and still not be productive. The bottom line is, when all the dust clears, whether you are effectively and efficiently carrying out responsibilities so that you can reach a goal. And I guess sometimes I get kind of concerned about the Federal Government and whether we are doing that.

Second, there is a question of whether there is a need to raise the overtime pay analyzed by OPM.

Ms. LACHANCE. We are looking at it. We do think there is an unfair situation with the cap. In fact, there are people who work overtime and who end up probably making less than their regular hourly rate, which we think is highly inappropriate. We want to find a solution that is both fair and cost effective, and we are working on that.

Mr. CUMMINGS. Well, that certainly leads to the next question. Have you put a timetable on that? Because you have people who may be working like slaves and whose families, they only have their kids for a certain amount of time. They want to send them to college, they want to give them violin lessons, they want to move into a new house, and if we wait 10 or 15 years, then they have missed out on a whole lot of life. We only have one life to live. This is no dress rehearsal. So I am just wondering what kind of timetable we are talking about.

Ms. LACHANCE. We are moving on it very quickly.

Mr. CUMMINGS. I don't know what that means, I'm sorry. Help me.

Ms. LACHANCE. I'm sorry, I'm afraid that I can't give you a specific time because we do want to work with our stakeholders, but we will make sure that it is a priority.

Mr. CUMMINGS. One of the things that I have applauded Mr. Mica on is his efforts to move things along speedily. I really appreciate that. I just do not want to be sitting here 3 years from now and have the same conversations, because I just think that it is a disservice to the people who work so hard to do what they do to uplift this Federal system that we have. But I would really like for you to get kind of specific with me when you get a chance, sooner than later.

Let me go on to something else. Even though under Title V, OPM is responsible for training policy, you are opposed to reporting on training activities of the Federal agencies. Is that true?

Ms. LACHANCE. Yes, sir.

Mr. CUMMINGS. Why?

Ms. LACHANCE. Again this is an agency-by-agency decision. They make their own priorities. There is really no governmentwide regulatory structure or statutory structure, and we are concerned, as my colleagues in GAO cited on the official time reports, we are concerned that another report just adds an administrative burden.

The agencies do track the efforts and the plans that they have for training and some specific information on training. We think the information could be obtained there when it is needed in a particular situation. But just the idea of creating another governmentwide report, we are concerned, would just add too much of a bur-

den and not really add to any information, add to the body of knowledge.

Mr. CUMMINGS. Why does OPM want to expand the number of demonstration projects now?

Ms. LACHANCE. We think that we have learned some extremely good lessons. Demonstration projects are a great way to try things out and see how they work, get a good evaluation, see whether situations ought to be applied governmentwide. If we have more of them, if we take some of the caps off, including the limit on the number of employees, if we can have more demonstration projects, we can test more issues that are coming up, more proposals that are being thought about, and then we have specific information to know whether or not to proceed with anything governmentwide.

Mr. CUMMINGS. Can you, off the top of your head, and I don't want to put you on the spot, but can you think of one or two demonstration projects that have been highly successful so we can get a feel for what you are talking about?

Ms. LACHANCE. Certainly. What I had discussed about broadbanding directly comes out of demonstration projects at the Department of the Navy's China Lake and at the National Institute of Standards and Technology, and both of those have been put into permanent statute through the legislative process. So that was a magnificent experiment and we are now proposing that we make that option available governmentwide.

Mr. CUMMINGS. Other than that? Because you had mentioned that earlier.

Ms. LACHANCE. We are looking at different kinds of pay setting systems, and those are in evaluation now. Skill-based pay, contribution-based pay, those are in the process now and we think they will provide valuable information for us.

Mr. CUMMINGS. When you say contribution-based pay, what do you mean?

Ms. LACHANCE. I am afraid I can't speak specifically to that one. It is relatively new, but we will be glad to get you some information on it.

Another one I had forgotten about, and I have just been reminded of, is the categorical ranking demonstration project at the USDA, which is going to expire in just a matter of days because we have no legislative authority to pursue it. Yet it has been highly successful and the stakeholders are pleased with it. The managers are tearing their hair out because it is going to expire, but our hands are tied when it comes to doing anything else about it for now.

[The information referred to follows:]

Contribution-based compensation systems (CCS) measure the employee's contribution to the mission of the organization. CCS allows for more employee involvement in the assessment process, increases communication between supervisors and employees, promotes a clear accountability for individual contribution, and provides an understandable basis for salary changes. An employee's contribution is measured by well developed and defined factors, each of which is relevant to the success of the organization. Examples of factors include technical problem solving, communications/reporting, and cooperation/supervision. Each factor will have levels of increasing contribution that correspond to the broadbank levels. The assessment process includes employee as well as supervisory input on the level of contribution and accomplishments in each of the factors. Greater levels of contribution lead to higher scores, which generally leads to greater impact on pay.

Mr. CUMMINGS. I have a lot of questions, but let me ask my last one. How would increasing the amount of service accredited employees would receive on their performance ratings, for purposes of establishing the order of retention and reduction in force, affect the two-tier performance system?

Ms. LACHANCE. Well, I think we would have to work on that. We are opposed to adding any more weight to performance in a RIF. First of all, I think we have to do everything we can to avoid RIFs. They are disruptive, they are costly and this is not the place to deal with poor performance. Dealing with poor performance should be done through the appraisal process, and so we are opposing that, and we would have to really take a good hard look at how we would meld this new proposal with an existing pass-fail system.

Mr. CUMMINGS. All right. Thank you.

Mr. MICA. I thank the gentleman and yield now to Mrs. Morella.

Mrs. MORELLA. Thank you, Mr. Chairman. Let me get to a simple question first, Ms. Lachance. Do you have any position on the TSP provisions? You think they are good, right?

Ms. LACHANCE. I think they are great.

Mrs. MORELLA. That's enough.

Ms. LACHANCE. Unfortunately, I am probably required to point out that there will be revenue implications and that we would have to work with my colleagues in the administration to resolve those.

Mrs. MORELLA. It is so dumb not to include it, particularly during a time where we keep talking about saving, looking to the future, investments.

So you potentially feel and OPM feels it is a great idea?

Ms. LACHANCE. Yes, ma'am.

Mrs. MORELLA. I don't see why we can't work that out.

You mentioned——

Ms. LACHANCE. I will do my best.

Mrs. MORELLA. Thank you. You mentioned the work that you are doing to come up with your own legislation on performance and demonstration projects, and again, I am going to try to get at you for some timetables.

Where are you in the process of developing your own plan? And then, will you be submitting your ideas where you disagree with the draft committee bill?

Ms. LACHANCE. Yes, yes. We are ready to sit down with the subcommittee and the staff and work with all of you almost immediately. We have some proposals that are further along than others, and we will be glad to share what we have uncovered and certainly, too, our conversations with stakeholders with you so that we could proceed quickly.

Mrs. MORELLA. So you are ready to start just about immediately? Because we would really like to get this legislation not only out on the floor, passed with everybody's consensus, but also to get it through the Senate too and on the President's desk.

Ms. LACHANCE. Yes, yes.

Mrs. MORELLA. How about your new compensation plan. I remember when you were first appointed, the big discussion about looking at the compensation plan. Where are you on that?

Ms. LACHANCE. Well, we have actually reorganized OPM to better deal with it and we have staffed up that operation. We are look-

ing at immediate flexibilities; again, the broadbanding proposal that we are trying to pursue; and we are going to look at other aspects of it in the process. Unfortunately, as you know, anything to do with compensation is a very lengthy process and has a lot of very strong interested parties, and we want to make sure that they are all included in our conversation.

Mrs. MORELLA. I was looking ahead at some of the testimony from Federal unions and it appears in terms of performance that they would like to see agencies have the opportunity to determine whether it be pass/fail or what it would be, and is this sort of your feeling too?

Ms. LACHANCE. Yes, yes, it is very consistent with current practice and also where we feel the issue should be.

Mrs. MORELLA. Any rate, you are just about ready to submit that too?

Ms. LACHANCE. We are ready to talk about it. I am not sure where we are in specific language or anything, but we can work with you and provide any sort of technical assistance that you need.

Mrs. MORELLA. You also mentioned in your testimony that recruitment and separation incentives, I believe you said they should be simultaneous.

Ms. LACHANCE. Yes.

Mrs. MORELLA. I just wondered, what recruitment and separation incentives do you think should be included?

Ms. LACHANCE. Well, unfortunately, Government agencies are dealing with very different, unique situations. At the same time that somebody is desperately trying to recruit people to deal with the Y2K issues, somebody else may be trying to downsize and wind down a program that has been terminated by Congress and the President.

So both of those things have to be going on at the same time, and what we want to do is try to make permanent some of the provisions that have worked in the past, like buyouts. We want to make sure that agencies know how to use recruitment bonuses and retention allowances, and that they are fully informed on all of those aspects.

Mrs. MORELLA. You will be submitting those to us soon?

Ms. LACHANCE. Yes.

Mrs. MORELLA. I noticed also I think with regard to demonstration programs, you would like to have the authority to make them permanent.

Ms. LACHANCE. Yes.

Mrs. MORELLA. Because you are concerned using the example that you used?

Ms. LACHANCE. That is a perfect example of something that is working extremely well, that the stakeholders believe in, that the managers are thrilled with, and it is literally going to come to a dead halt next week.

Mrs. MORELLA. How do you see Congress's role in that then?

Ms. LACHANCE. What we are hoping is that we can just eliminate that problem so when we do find something that works, then OPM has the authority to make it permanent. In the meantime, we are

working with USDA and Congress to see if we can't take care of their immediate problem.

Mrs. MORELLA. I have some other questions, but I noticed also there are a number of areas that you didn't mention and I assume that no mention means that they are probably OK.

Ms. LACHANCE. Well, maybe not.

Mrs. MORELLA. There are some sections that deal with the OPM appeals. I notice that Mr. Brostek talked about using the alternative dispute resolution more often. But there is also in this draft, and I emphasize draft, repealing the White House conversion opportunity, Hatch Act sanctions, and post employment restrictions for political employees. You just felt that wasn't within your purview that much?

Ms. LACHANCE. Sure. Let me see if I can very quickly go through those. The White House conversion authority, that is something that certainly parallels the Ramspeck Act which has been repealed. I think we are willing to live with Congress's will on that one. I am sorry, I think you said conversion authority for political appointees.

Mrs. MORELLA. Right.

Ms. LACHANCE. We are very, very strong in our belief that any citizen should be able to apply for a Federal job, that we should not eliminate any group of people from consideration, so we would be opposed to that provision.

I am sorry, I think you mentioned a third, but I can't remember.

Mrs. MORELLA. The Hatch Act sanctions.

Ms. LACHANCE. We think that is working just fine now. There is—it is interesting; I have learned a lot in this job. I am very lucky to have it, and one of the things I learned surprisingly in dealing with domestic violence and violence in the workplace is that you don't want the sanctions to be too severe because it actually means that people will not report or come forward with any suspicions or any concerns about someone's behavior. I would say that probably applies to the Hatch Act as well. We think the system is working fine and we don't see any need to increase those.

Mrs. MORELLA. That is probably a pretty simple thing, though. It is like if somebody has left employment, you know, should they not be held responsible for something that they did while they were there.

Let me go on to just Y2K. Are you OK onY2K?

Ms. LACHANCE. Yes.

Mrs. MORELLA. You are OK with Y2K?

Ms. LACHANCE. We are more than OK. We are going to be ready a full year ahead of time, and I can't wait to come back here and tell you that.

Mrs. MORELLA. I can't wait to look at your timetable that we have from my other committee.

Mr. Brostek, just very briefly, you were pretty succinct. You gave us a long testimony, but you are pretty succinct in pulling out the appropriate parts of it, and I think that basically what you have said is more demos are needed to really justify or point out what changes should take place. You need better data for the official time concept, and more ADRs for administrative redress.

Are you suggesting some areas that might be heavy with the time and disruption and the cost? I mean are you adding to the burden of kind of collecting more data?

Mr. BROSTEK. You are referring to the official time comments?

Mrs. MORELLA. Yes.

Mr. BROSTEK. Well, we didn't actually take a position that more data needs to be collected. We have documented that there is insufficient information if comprehensive data are needed to oversee this particular activity, support for union activities. There is not sufficient data to oversee that well now. There would also be a cost associated with getting that kind of information, and we haven't been able to judge how much cost would be involved, or to weigh that cost against the benefit of improved oversight. So we don't know where the bottom line is on that, but we have documented that the data are pretty spotty.

Mrs. MORELLA. Well, I appreciate you pointing out also the benefits of official time as you see it.

Any other response you have to what Ms. Lachance has said?

Mr. BROSTEK. One thing that I might note is that in the demonstration area, we have now I think maybe two or so active projects, and the issue might not be so much that we need an increase in the cap, but a more efficient use of the cap that we currently have, and whatever is inhibiting agencies from coming in and getting demo authorities established at this time might be a fruitful area to look at.

Mrs. MORELLA. Fine. I know I have taken enough time, Mr. Chairman. Thank you very much.

Mr. MICA. The Chair recognizes the gentleman from Texas, Mr. Sessions.

If he will yield to me for just a second.

Mr. SESSIONS. I would be pleased to.

Mr. MICA. I have a followup question to Mrs. Morella's question to the OPM Director.

You said that everything was copacetic with the Hatch Act, and yet under Malone Utley, the Merit Systems Protection Board has weakened some of the penalties imposed. They have said that if an individual, or a party resigns during a processing of a complaint, no penalty can be imposed. There is also a DeMeo decision too that also weakens the Board's ability, or the Hatch Act's ability to go after violations.

I understand that OPM filed a petition to reconsider Malone Utley, so there is some concern? It is not all——

Ms. LACHANCE. Yes. Well, there is concern with interpretation. I am not sure that we need a change in the statute. So actually, we are concerned with how the statute is being interpreted, but we think that the statutory language is sufficient.

Mr. MICA. But you are, in fact, appealing that?

Ms. LACHANCE. Yes, we are.

Mr. MICA. Thank you. I yield back. I thank the gentleman for yielding.

Mr. SESSIONS. Thank you, Mr. Chairman.

My first comments would be to Ms. Lachance, and I appreciate you allowing me to make some bit of observation here. On page 8

of your testimony you state, "We are disappointed in the proposed bar on two-tier performance evaluation systems."

I would like to join in with my colleague, Mr. Cummings, and state that I believe that this two-tier performance system is bad. It is not the way we should go, and I hope that you have heard from at least two people on this subcommittee that disagree with you. So I would like for you to hear that from me also.

Ms. LACHANCE. Thank you.

Mr. SESSIONS. Page 2 of your testimony says, "We believe the government's interests are best served by maintaining consistent approaches in some areas such as employee benefits and effective due process protections."

Part of the discussion that my chairman had with you dealt with portability of pension plans, the opportunity for more savings; my colleague, Mrs. Morella, talked about the importance of that, savings and investment and the opportunity for employees.

Does this consistent approach in any way have to do with what I would call the market system; in other words, what is offered out within corporations today and the law that other people in the private sector are allowed to utilize?

Ms. LACHANCE. I think what we are trying to get at is that compensation and benefits in the Federal Government ought to be a unified plan, and that somehow or other, peeling off a certain segment to test a new approach to retirement, or health benefits or something else that is so fundamentally important to people's lives and their livelihoods is something that we are going to be very, very cautious about. I take this responsibility that I have on behalf of Federal retirees and Federal employees very seriously. I know you all do as well. But I just want to make sure that everyone understands that we are going to be very, very cautious. Anything that we can do within the context of an overall strategy to improve the benefits I think is great and I will back you up completely.

Mr. SESSIONS. I find it interesting that, with great respect to you, and I know we are engaged now in some dialog and that is good, but "new" and "cautious?" What bothers me, because I am talking about what is established, not new, and what is not cautious, but actually the marketplace.

What I am interested in is Federal employees having the opportunity that any other citizen in this country would have, the ability to have portability, the availability to have their benefits a defined benefit package that is given to them so that they know where they stand, so if they were downsized, if they chose to leave, or if they had a change in their life, just like what would be out there in the private sector that I had an opportunity to enjoy—as you may know, I spent 16 years in the private sector. When I made a determination it was time for me to leave, I was able to take that package with me. Today, that is unavailable by and large to people in the Government. That is not new, this is something that is there, and I don't see the cautions that are necessary to protect people.

Ms. LACHANCE. In fact, the FERS retirement system is portable and it does have a savings component and it does very much look like the private sector, so I think in many ways, we have dealt with some of the issues, and that has been around for 10 years. I am perfectly willing to look at anything else that you feel may be ap-

propriate that we are not now doing. I just want to make sure it is in the context of an overall strategy, not something that is done in a piecemeal basis for a certain segment of employees.

Mr. SESSIONS. Really what you are saying is the TSP portion is portable?

Ms. LACHANCE. Yes.

Mr. BROSTEK. If I might interject, it is both the TSP portion and the Social Security of FERS that will be portable. There is a defined benefit portion that is one of the three chunks of the pie that are provided to the employees under FERS. That defined benefit portion is less portable than Social Security and the thrift savings plan.

Mr. SESSIONS. Well, I am hoping that in the short term that the word "new" can be marketplace and the word "cautious" can be what is happening out there today, and that we can get to that quicker.

I would like to now change some of the questioning and go directly to what Mr. Brostek talked about, but I would like to ask you.

We heard about the union activities. Once again, my background is I spent 16 years in dealing directly with communication workers of America, loved all 16 years of working with them, I do understand the need for activity between workers and management.

What is the rule, what are the rules, or what is the law in dealing with lobbying activities in relationship to this? He talked about union activities. What is the rule or the law? For instance, would there be any employees of the Federal Government that are being paid today that would be in this hearing or would come up on the Hill?

Ms. LACHANCE. I believe that it is appropriate for union representatives to represent the views of the union to Members of Congress.

Mr. SESSIONS. Paid for by the Federal Government, or paid on union time?

Ms. LACHANCE. Paid as part of official time.

Mr. SESSIONS. And you think that is correct?

Ms. LACHANCE. Yes, I do.

Mr. SESSIONS. Do you have any estimate or knowledge, Mr. Brostek, about the number of hours that they are paid to lobby as opposed to help in union activities within the business to make the workplace more conducive?

Mr. BROSTEK. We don't, sir.

Mr. SESSIONS. You don't?

Mr. BROSTEK. We have not been able to get that information.

Mr. SESSIONS. You have nothing there. Well, I will tell you that I am disturbed to hear that the administration believes that this lobbying effort is permissible as opposed to workplace enhancement activities directly related to job place performance. I am disappointed to hear that they would allow employees to be out of their workplace and I did not know that until today and I am deeply, deeply disturbed by that, and I hope that we will be able to correct that, and I am disappointed to hear that you would agree with that.

Thank you, Mr. Chairman.

Mr. MICA. Thank you.

Ms. Norton, did you have any questions?

Ms. NORTON. Just to follow up on the question that was just raised about reporting of activities and activities by union members on official time. Does the Federal Government policy in any way parallel the policy of the private sector with respect to such official time?

Ms. LACHANCE. I believe it does, although I can't say that I speak from expertise on that. But that has been the holding of the FLRA, and I believe they probably based it on private sector experience.

Ms. NORTON. Have there been reports of excessive use of time or of abuse of official time by collective bargaining representatives?

Ms. LACHANCE. Not to my knowledge.

Ms. NORTON. Would it be possible for representatives—do collective bargaining representatives represent all employees or only employees in the union?

Ms. LACHANCE. No, ma'am, they have a very, very wide ranging obligation.

Ms. NORTON. I can't hear you, please.

Ms. LACHANCE. I am sorry. They have a very, very broad obligation to represent all of the members in the bargaining unit, not just those who pay dues.

Ms. NORTON. Would it be possible for them to represent all of the employees in the bargaining unit without official time?

Ms. LACHANCE. I don't believe so. I believe that would make their job very difficult.

Ms. NORTON. If there have not been reports of abuse of official time, do any of you have any knowledge of abuse of official time?

Ms. LACHANCE. I do not.

Mr. BROSTEK. We haven't specifically studied that to see if there have been abuses.

Ms. NORTON. Have there been complaints to you from agencies or management?

Mr. BROSTEK. There haven't been complaints to us.

Ms. NORTON. Well, who in the world would they make them to, if not you?

Mr. BROSTEK. Perhaps Members of Congress.

Ms. NORTON. This Member has heard no such complaints. Thank you, Mr. Chairman.

Mr. MICA. Thank you. Mrs. Morella, did you have any additional questions?

Mrs. MORELLA. No. Thank you.

Mr. MICA. Mr. Cummings.

Mrs. MORELLA. I would like to submit them though, Mr. Chairman, if I might.

Mr. MICA. Yes, without objection. I have a number of pages, reams.

Ms. LACHANCE. And if I could also ask permission of the Chair to submit things that we perhaps have not touched on.

Mr. MICA. Without objection, it will be made part of the record.

I recognize Mr. Cummings.

Mr. CUMMINGS. I just have two or three questions. I want to go back to an answer to a question that Mr. Sessions was asking, and

you used the analogy of domestic violence. Can you go back to that, because I think I missed that?

Ms. LACHANCE. Sure. It was probably a little bit of a reach, but what we have learned in the workplace violence arena and the domestic violence arena is that you do not want to state a policy like there will be zero tolerance or that somebody will be immediately dismissed, because the problem is then that people don't report it, because they are so concerned at how severe the penalty is. I think that lesson applies in a number of arenas beyond that.

Mr. CUMMINGS. I am just wondering, what does OPM do, if anything, what kind of guidance is given to these agencies with regard to helping poor performers?

Ms. LACHANCE. We have actually a record that we are very, very proud of, and we are making use of every available technology to make it easier for managers to deal with the issue of performance in the workplace. One of the things we are most proud of is a CD–ROM that we have just developed that has been extensively circulated that literally will just deal with performance issues from soup to nuts and that a manager can keep on their desk and work with whenever there is an issue that comes up. It has sample letters. It is a wonderful tool. We are very excited about it. We have gotten wonderful feedback. We are constantly working with agencies on specific seminars and workshops to bring some of these issues to the forefront and help managers deal with it.

Mr. CUMMINGS. Thank you. That's all.

Mr. MICA. Thank you. I have just one final question. Ms. Lachance, when our subcommittee staff visited the office of OPM's union local, they found 17 phone lines—this is I guess last year, 17 phone lines, 11 computers, and campaign literature of Mrs. Morella's opponent. Does OPM still provide these facilities to the local, and what efforts are being made to ensure that campaign activities are not repeated on Federal property? That was in 1996.

Ms. LACHANCE. We are, in fact, providing office space——

Mr. MICA. The same amount of equipment?

Ms. LACHANCE. Office equipment. I can check on that and get back with you to see what the specifics are, but in fact, we are still providing that. I did not provide the campaign literature, and it is extremely——

Mr. MICA. She didn't ask me to ask that, the staff did.

Ms. LACHANCE. I understand.

Mr. MICA. It does look bad when OPM is distributing literature of one of the opponents of one of the prime members of the panel.

Ms. LACHANCE. OPM was not distributing the literature, Mr. Chairman.

Mr. MICA. Thank you. I feel more reassured today, and I am sure Mrs. Morella does.

Mrs. MORELLA. Thank you for asking that.

Mr. MICA. I didn't mean to embarrass her, but again, it does raise eyebrows, and it isn't proper on Federal property.

Well, I want to thank both Ms. Lachance and Mr. Brostek for their testimony today and for their participation.

I know this draft has a number of controversial proposals from a wide variety of the membership of the House, and we are going to do our best, as I said, to incorporate these recommendations into

an omnibus bill. If not, there are a number of vehicles that will pass the Congress and also receive the signature of the President. There is no telling where these provisions may be tucked in from time to time, so just——

Ms. NORTON. Mr. Chairman, if I could interrupt for a moment.

Mr. MICA. Ms. Norton.

Ms. NORTON. Ms. Lachance, we don't know whether the campaign literature was simply brought in and was to be taken elsewhere, or if it was on the premises to be used. It does seem to me that we would avoid that problem if OPM would simply send a notice reminding collective bargaining agents that the facilities cannot be used in any way for campaign activities so that this does not arise as a problem. Again, we don't know how it was being used, but we certainly don't need to hear about instances like this when all OPM would need to do is to remind people, particularly during campaign season, and particularly now that under the Hatch Act there are certain rights that Government employees have that they didn't have and they have just gotten those rights fairly recently, it seems to me it is an obligation of OPM to remind people about what the rules are.

Thank you, Mr. Chairman.

Mr. MICA. Well, thank you for those comments.

Again, I do thank both of you for your participation here today and I also look forward to your working with us as we try to craft a couple of these changes and incorporate them, as I said, into an omnibus bill, or into legislation that will pass and receive the signature of the President.

So with that, we will leave the record open. I will dismiss this panel and thank you again.

We will call the second panel, if we may. Staff, can we go ahead and change the name plates.

Our next panel consists of Mr. Grover Norquist, president of Americans for Tax Reform; Mr. Robert Moffitt, vice president, Domestic Policy Studies, the Heritage Foundation; Mr. Randel Johnson, vice president for labor policy, U.S. Chamber of Commerce; and Mr. John Just-Buddy, from Bowie, MD.

Some of you are new witnesses to our subcommittee. We do have a policy as an investigations and oversight subcommittee of swearing in our witnesses, and we also have a policy of asking you to try to limit your remarks to the subcommittee to 5 minutes, and we will welcome and include in the record any extraneous or lengthy material.

So if you would all stand and raise your right hands.

[Witnesses sworn.]

Mr. MICA. The witnesses answered in the affirmative.

I want to again welcome our panelists, and I will recognize, first, Mr. Grover Norquist. You are recognized. Welcome, sir.

STATEMENTS OF GROVER NORQUIST, PRESIDENT, AMERICANS FOR TAX REFORM; ROBERT E. MOFFITT, VICE PRESIDENT, DOMESTIC POLICY STUDIES, THE HERITAGE FOUNDATION; RANDEL K. JOHNSON, VICE PRESIDENT FOR LABOR POLICY, U.S. CHAMBER OF COMMERCE; PATRICK KORTEN, CATO INSTITUTE; AND JOHN I. JUST-BUDDY, BOWIE, MD

Mr. NORQUIST. Thank you. I would like to submit my written testimony.

Mr. MICA. Without objection, that will be made part of the record. Thank you. Go ahead.

Mr. NORQUIST. I would just like to briefly do two things. The first is to endorse Congresswoman Connie Morella's proposed H.R. 2566, to make it easier for Federal employees to save more money in their 401(k)'s. I think that is a particularly important innovation.

Second, with respect to the proposal that Pete Sessions and the subcommittee staff have put together to make it possible for people who work for Congress and the White House and political appointees to have the option of a defined benefit plan for their retirement, rather than as an add-on, but as an alternative.

I just point out that this is something that is happening across the country in the States. A number of States have either acted or are in the process of acting to give people that opportunity. It began years ago for people in higher education, particularly at State universities, because people tend not to stay in one place for a long period of time, which the traditional defined benefit plans were structured for. But as many Americans come to Washington to work for Members of Congress or to work for a President as a political appointee or at the White House, they may not be here for 5 years, may not have an opportunity to vest, so I think it is a good idea and one that we are very supportive of to give people the option of a defined contribution or 401(k) equivalent, rather than to go into the defined benefit plan.

Arizona is adopting this statewide. It is being discussed in Florida with bipartisan support. It has actually passed in Michigan and in California for workers, but again, in 48 States it is allowed for higher education, and I would suggest to you that people who work briefly and move from university to university are very similar to people who come to Washington and may work on Capitol Hill for a few years or work for a President for a few years and move on.

Thank you.

[The prepared statement of Mr. Norquist follows:]

Testimony of
Grover Norquist
President, Americans for Tax Reform
on the

Federal Employees Integrity, Performance, and Compensation Act
before the
Civil Service Subcommittee
of the
Committee on Government Reform and Oversight
U.S. House of Representatives

June 24, 1998

Over the past 20 years, the private sector has shifted dramatically toward "defined contribution" pension programs, while the public sector has remained tied to old-fashioned "defined benefit" plans. Recently, some state and local governments have shifted to defined contribution plans, benefiting both workers and taxpayers. The Federal government should allow its employees to choose a full defined contribution plan in place of its defined benefit plan.

The Federal Employee Retirement System

All Federal employees hired after 1983 are automatically covered under the Federal Employee Retirement System (FERS). This is a traditional defined benefit plan, where workers are promised a specific benefit amount for each month in retirement.

Workers pay 0.8% of their wages to FERS, and the Federal government pays all remaining expenses, which run about 11.4% of payroll. In defined benefit plans, these contributions are paid into a common investment pool which is managed by the employer or some investment expert. But the Federal government does not save and invest FERS contributions. It credits the Civil Service Retirement and Disability Fund with the contributions, and then spends the money on general expenses. The Civil Service Fund currently holds about $400 billion in such credited funds, which means only that Congress has already authorized spending up to this amount on civil service retirement benefits. But the benefits will be financed out of current revenues each year as needed.

To receive FERS benefits, the employee must have at least 5 years of Federal service. Workers can start receiving FERS benefits at 55 after 30 years of Federal service, at 60 after 20 years of service, and at 62 after 5 years service. Benefits for those retiring at 62 or above are equal to 1.1% times years of service times the average salary for the three highest years in a row. For those retiring before 62, the 1.1% is reduced to 1%, and benefits are reduced by 5% for each year of retirement before 62. Benefits payable to retirees 62 and older are indexed to inflation, although if inflation equals or exceeds 3%, then the adjustment is the inflation rate minus one percentage point.

Federal employees are eligible as well for a defined contribution retirement plan to supplement their defined benefit plan. Under a standard defined contribution plan, the employer generally just contributes a specified percentage of the worker's salary to an

individual investment account for the worker, along with contributions from the worker. The worker then directs investment of the funds over the years, within certain limits. The worker's retirement benefits then equal the accrued value of the investments.

The supplemental Federal defined contribution plan is called the Thrift Savings Plan(TSP). The Federal employer contributes 1% of wages to the account of each worker, and will match employee contributions up to another 3% of wages. The Federal employer will then pay half of additional employee contributions up to another 5% of wages. Employees can pay up to 10% of their wages into the plan. Workers can then choose to have their funds invested in a stock fund, bond fund or money market fund, which are administered by investment managers under Federal auspices. About 88% of eligible Federal workers in the FERS system contribute to these TSP accounts.

Workers who started Federal employment before 1984 can remain in the older Civil Service Retirement System (CSRS) in effect before that date. CSRS is similar to FERS, with a supplemental TSP option as well.

Annual Federal expenditures for these programs are currently over $40 billion, and are projected to rise to about $250 billion by 2040.

Pension Liberation

Federal employees should have the freedom to choose to invest the enormous amount of funds that are now going into the Federal defined benefit system in their own individual accounts in a defined contribution system. They would then oversee the investment of those funds themselves, generally choosing mutual funds or other investment managers. Those workers who wanted to stay in the current defined benefit system would be free to do so.

Such reform would produce several important benefits for workers and taxpayers.

Benefits for Workers

Portability – Workers would have greater portability with the defined contribution plan, as they can simply take their investment account with full employer contributions with them wherever they go.

Immediate Vesting – In the defined contribution plan, the employer's contributions to the individual account become the full property of the worker upon payment.

Personal Control – In the defined contribution plan, the retirement funds for each worker are under the control of the worker in their own individual accounts. Workers can consequently adopt the investment strategies and benefit plans that best suit their own individual needs and preferences.

Higher Benefits – At standard market investment returns, all shorter term workers staying in Federal employment less than 15 years or so would receive substantially higher retirement benefits from the defined contribution plan, primarily because the defined benefit plan is skewed to favor longer term workers. But even longer term workers may well get more from the defined contribution plan, as workers do not seem to be getting the most for their money in the defined benefit plans.

Fair Benefits – In the defined contribution system, workers would all receive the full market value of their funds, with no opportunity to skew the benefits towards longer term workers, as in the defined benefit plan.

Freedom of Choice – The defined contribution plan maximizes workers' freedom of choice, so that they can choose their own investments, investment strategies, investment managers, and benefit structure. Workers would also be free to choose either the defined contribution or defined benefit plan.

Benefits for Taxpayers

Greater Control Over Costs – With a defined contribution plan, the government is responsible only for a specified contribution each year.

No Unfunded Liability – The defined contribution plan eliminates the danger of any unfunded liability that taxpayers must cover to meet benefit costs. Under this plan, the Federal employer just pays a specified amount into the worker's account each month, and bears no further responsibility or costs for the funds. The Federal system currently has an unfunded liability of about $550 billion that future taxpayers must cover.

Reduced Costs – The greater investment returns through a fully funded defined contribution plan should allow the Federal government to reduce its costs, as well as providing higher benefits for workers. The defined contribution plan also has lower administrative costs for the Federal government, as it would then just pay a specified monthly amount into each worker's account without bearing the costs of benefit and fund administration.

Pension Liberation in the States

A trend is now developing among the states to begin to shift public employee pensions towards defined contribution plans. Michigan adopted a comprehensive defined contribution system for state workers in 1996. California began adopting such a plan for some of its workers that year as well. Ten states have now adopted a defined contribution option as an alternative to a traditional defined benefit plan, for at least a portion of their workers. Legislation providing for such reform is now pending in 6 states, and formal legislative studies regarding possible reform are under way in 12 states.

An Initial Option for Political Appointees and Congressional Staff

Starting Federal pension reform with an option for political appointees and Congressional staff would be highly desirable. These employees would then have the choice of switching the funds now going into the Federal defined benefit (DB) plan to a defined contribution (DC) plan instead. Under the DC plan, the employer and employee contributions would be paid into an individual investment account for each worker. The worker would choose an investment manager to handle the account, and the contributions and investment returns would accumulate tax free until retirement. These funds would then finance retirement benefits for the worker. Current workers who chose the DC plan after years of payments into the DB plan would receive a contribution for their DC accounts equal to past employer and employee contributions on their behalf to the DB plan plus investment returns on those contributions.

This would have important benefits for both workers and taxpayers. Workers would have greater portability with the DC plan, as they would simply take their investment account with them wherever they go. The employer's contribution to the DC account would become the full property of the worker upon payment, providing for immediate vesting. In the DC plan, workers would all receive the full market value and investment returns on their funds, with no opportunity to skew the benefits towards longer term workers as in the DB plan. This will result in much higher benefits under

the DC plan for shorter term workers. Moreover, at full market investment returns, even longer term workers may well receive higher benefits from the DC plan.

For taxpayers, the DC plan provides greater control over costs, as the government is responsible only for a specified contribution for each worker each month. There is no possibility with the DC plan of any unfunded liability that taxpayers must cover to meet benefit costs, as the government is liable only for the specified contribution to each worker's account each month. The taxpayer bears no investment risk that may result in funding shortfalls due to subpar performance by government investment managers or other managers the government may pick. The DC plan would also enable the government to reduce its administrative costs, and possibly its funding costs as well, due to the full market returns of the DC plan.

Since political appointees and Congressional staff tend to have shorter tenure and greater turnover, starting the option for them first would be desirable, as they are losing the most under the current system. Moreover, this would allow these policymakers to see the benefits of the reform first hand, and provide a foundation for eventually expanding the option to all workers.

District of Columbia Pension Assets

We have very timely illustration of the differences between pensions funded through the traditional method of funding defined benefit federal systems and funding them through real assets. Last year, when the Federal Government assumed liability for the pension funds used to pay retirement benefits for the District of Columbia's teachers, police, and fire fighters, the Treasury acquired assets valued at $4.2 billion and an unfunded liability of nearly $5 billion. Because the D.C. Retirement Board had invested more than 60 percent of those assets in equities, during the past year they earned an additional $800 million. According to a recent report from the D.C. Retirement Board's auditor, those assets now exceed $5 billion.

As a result of these real earnings, not only did the assets increase, but the D.C. Retirement Board was able to pay its current obligations, and increase the capital available to pay future pensions. Under the terms of the legislation that authorized the transfer of these assets to the Treasury, however, the trustee who will manage those assets is expected to convert them to nonmarketable Treasury securities. In contrast to the 28 percent that the D.C. Retirement Board earned on these assets last year, or the 10 to 12 percent that the actuaries assume as a standard 10-year rate of return on these investments, the nonmarketable Treasury securities will accumulate " interest" at rates of three to five percent per year – every nickel of that to be paid as obligations on future taxpayers. Where the return on investment earned by the D.C. Retirement Board might have developed sufficient assets to meet the fund's obligations for 15 years, the "interest" that taxpayers pay on Treasury securities will exhaust those funds in less than 10 years. No private sector fund manager would tolerate such a squandering of assets.

As the Congressional Budget Office testified to this Subcommittee last year, the practice of funding future retirement benefits by obligating future generation of taxpayers is unsustainable. The D. C. Retirement Board has provided a fine example of the advantages that can result from effective investment policy. The Subcommittee, by recommending a well-planned shift to investment accounts has recommended a course that will provide for truly independent retirement funding for federal employees while

increasing their flexibility to move between government and private employment. Such a transition deserved swift enactment, and I am pleased to support the measure today.

Mr. MICA. Thank you for your testimony.

We will now recognize Robert E. Moffitt with the Heritage Foundation.

Mr. MOFFITT. Thank you, Mr. Chairman. My name is Robert E. Moffitt. I am the director of domestic policy studies at the Heritage Foundation. Before my service at Heritage, I served in the Reagan administration as Deputy Assistant Secretary for Legislation, and for the Department of Health and Human Services, and also at the U.S. Office of Personnel Management.

The views I express here in this testimony today are my own, and they should not be construed as representing any official position of the Heritage Foundation. However, leading and managing the Federal work force is at the heart of an efficient government. The Civil Service Reform Act of 1978 was a historic attempt by President Carter and the Congress to make Government more directly accountable and more efficient and more effective. The Civil Service Subcommittee today is likewise proposing another ambitious program of legislative initiatives to improve the effectiveness and the efficiency of the Federal Civil Service. These initiatives are comprehensive and range from the use of Federal demonstration programs to changes in the Hatch Act to broader changes in the Federal retirement program.

In the course of my testimony I want to confine my remarks to matters touching upon the relationship between career and noncareer employees and functions, proposals to increase the role of performance, and proposed changes in the Federal benefits program.

The subcommittee is proposing to make sure that Federal employees appointed under political authorities; that is, Presidential appointments and Schedule C, would be prohibited from competing for career positions until a change in administration; would prevent White House staff from careering into civil service positions just after 3 years in the Executive Office of the President, and impose tougher penalties for Federal employees who violate the Hatch Act.

Mr. Chairman, all of these proposals would serve to brighten the line between career and noncareer employees and functions. Together, these proposals would thus ensure the personal accountability of political appointees and protect the integrity of the civil service.

Before commenting on the specifics of these proposals, I would like to offer the subcommittee some perspective on their importance. Maintaining a bright line between career and noncareer functions and employees is a perennial challenge for the executive branch of the Government. At the same time, respecting the prerogatives of the executive has been a continuing challenge for Members of Congress. Members of Congress, regardless of their differences with an administration, must respect the right and the duty of the President to appoint his own men and women. Remarkably, Members of the 104th Congress, perhaps motivated by political hostility to the President, at one point proposed cutting the already tiny number of executive branch political appointees. Such a wrong-headed policy would not only weaken the President's control over the execution of his policy, but also would undermine his overall management of the Government.

The failure to understand or appreciate the distinct functions of career and political appointees is a recurrent source of pain and embarrassment for executive branch officials in both Republican and Democratic administrations. The abuse of the career civil service for partisan political purposes, or the bureaucratic usurpation of sensitive policymaking by career staff is a dual threat to good government and sound management.

In the interest of sound management, President Carter recognized this and moved the responsibility down the management chain to successively lower level political executives and then to career executives and managers, and finally down to the level of where the work is performed.

The subcommittee proposal would authorize civil monetary penalties and employment debarment for former Federal employees convicted under Hatch Act violations during their Federal employment. This would be a welcome change in policy direction. Members of Congress have already weakened the Hatch Act prohibition on political activity by career employees, creating a major breach in the division between career and noncareer status by politicizing the careerists. Career civil servants are today permitted to become more politically active and involved in partisan political campaigns. As they do, they will become subject to increased political pressure from politically active supervisors. This proposal at least raises the costs of a violation.

The committee proposal, consistent with the repeal of the Ramspeck Act, would stop White House staff from careering into competitive service based on 3 years of service in the executive branch of the President. The proposal would also prevent political appointees from competing for career positions until there is a change in the Presidential administration. These proposals prevent even the appearance of impropriety and embody a recognition that the failure to insist on a clear dividing line between political and career functions means that neither will be respected.

While political appointees are attracted to "careering in" for job security or for protection, they do not always leave their political loyalties behind, nor do they lose their ability to act politically in career jobs. This is why career associations like the National Academy of Public Administration have opposed the earlier weakening of the Hatch Act.

The subcommittee is proposing to increase the weight given to performance in reduction in force procedures, to increase agency authorities to give incentive awards to employee groups, to deny automatic within-grade increases in the GS schedule outside of performance, and eliminate the two-tier pass/fail system for employee performance evaluation. All of these proposals would enhance the effectiveness and accountability of the Federal civil service.

The subcommittee proposal would also provide for group awards in those instances where team projects make individual awards impractical. This too advances the pay for performance principle. It should be noted here that this proposal also builds upon a bipartisan tradition. Both President Carter and President Reagan supported the creation of financial incentives to reward individual servants for good work and they supported the idea of allowing Federal agencies to retain the money saved for management im-

provements, the innovation funds as a reward for management efficiencies.

The subcommittee proposals to increase the role of performance as the basis of employee retention in reduction-in-force efforts in Federal agencies would also extend the performance principle throughout the entire work force.

The subcommittee has offered a number of proposals dealing with retirement benefits. The first is to establish, beginning in 2001, a system that would divert a portion of the Federal employee retirement contributions to Thrift Savings Plan in lieu of the Civil Service Retirement and Disability Fund, and gradually increase that portion of retirement contributions.

The subcommittee is also proposing to authorize new employees to participate in the TSP upon hiring and giving new hires the right to roll over private sector furlough and 401(k) plans into the Thrift Savings Plan and also allow all Federal workers to contribute to the Thrift Savings Plan up to the IRS limit of $10,000, regardless of income.

Finally, the subcommittee is talking about creating a fully portable retirement option for political appointees and congressional staff. These are all excellent proposals. A fully portable and individually directed system, based upon 401(k) private plans, much like those found in the private sector, where the employee is fully vested and can move assets as the best option for the next generation of Federal workers. A fully portable plan removes the major impediment to employee mobility. Members of Congress should move toward such a system for the entire work force and dramatize the tangible benefits of a portable new system, including returns on private sector investments for both employees and taxpayers.

In conclusion, Mr. Chairman, the subcommittee has come up with a number of innovative proposals to improve the way in which the Federal Government works. I would just like to add one personal note on all of this, and that is that in dealing with civil service reform issues, they are, within the context of the general Washington environment, not the sexiest issues that Congress have to deal with. In dealing with chapter 89 of Title V, dealing with the arcane rules and regulations that govern the civil service is not something that generally excites many Members of Congress or, for that matter, many taxpayers. However, it is critical to the way in which our Government functions. Unfortunately, historically, it has been the privilege of people whose self-interest in the rules and regulations and guidelines and pay and benefits is obviously and self-evidently self-interested. It is important for Congress to recognize the fact that there is a broad public interest in how indeed we do these things, and too, what is actually best for the Federal workers, to do what is best for the taxpayers they serve.

Mr. Chairman and members of the subcommittee, you have an opportunity to make this work force friendly for a new generation of Federal employees, serving in well compensated jobs with portable benefits, not unlike those available in the best private corporations. The new work force of the 21st century could be a model of performance and accountability and a model of public sector management.

Thank you very much.

[The prepared statement of Mr. Moffitt follows:]

Mr. Chairman and Members of the Subcommittee:

My name is Robert E. Moffit. I am the Director of Domestic Policy Studies at the Heritage Foundation. Before my service at the Heritage Foundation, I served in the Reagan Administration as Deputy Assistant Secretary for Legislation at the United States Department of Health and Human Services(1986-1989) , and also at the United States Office of Personnel Management both as Assistant Director for Compliance and Evaluation Policy and as Assistant Director for Congressional Relations(1981-1986). It is an honor to appear before you today on your broad package of proposals for civil service reform, a subject of abiding importance to both America's taxpayers and members of our federal workforce. The views I express in this testimony are my own,[1] and should not be construed as representing any official position of the Heritage Foundation.

Leading and managing the federal workforce is at the heart of efficient government. The Civil Service Reform Act of 1978 was an historic attempt by President Carter and the Congress to make government more directly accountable and more efficient and more effective. Unfortunately, over the years, efforts to implement both the letter and the spirit of the Civil Service Reform Act have been frustrated by representatives of both political parties and by Republican and Democratic Administrations alike.

The Omnibus Civil Service Reform Act of 1996(HR 3841), adopted by the House of Representatives but failing final passage, would have continued the spirit of reform embodied in the Civil Service Reform Act of 1978. The Civil Service Subcommittee is likewise proposing

[1] Some of the observations presented here are embodied in an essay " Downsizing and Improving the Federal Civil Service," co-authored with Donald J. Devine, in Stuart M. Butler and Kim R. Holmes(eds.),

another ambitious program of legislative initiatives to improve the effectiveness and the efficiency of the federal civil service. These initiatives are comprehensive and range from the use of federal demonstration programs to changes in the Hatch Act to broader changes in the federal retirement program.

In the course of my testimony, I will confine my remarks to matters touching upon the relationship between career and non-career employees and functions, proposals to increase the role of performance, and proposed changes in the federal benefits program. While Members of Congress must call public attention to the weaknesses of the current system and the need to base personnel management decisions on performance, they can also improve the functioning of federal departments and agencies, while building federal employee support for a solid package of portable private sector-style benefits for current and future federal personnel.

Maintaining Clear lines of Demarcation Between Career and Non-Career Employees and Functions. The Subcommittee is proposing to make sure that federal employees appointed under political authorities(including Presidential Appointments and Schedule C's) would be prohibited from competing for career positions until a change in Administration; prevent White House staff from careering into civil service positions after just three years in the Executive Office of the President; and impose tougher penalties for federal employees who violate the Hatch Act. All of these proposals would serve to brighten the line between career and non-career employees and functions. Together, these proposals would thus ensure the personal accountability of political appointees and protect the integrity of the civil service.

Mandate For leadership IV: Turning Ideas Into Actions (Washington, D.C.: The Heritage Foundation, 1997).

Before commenting on the specifics of these proposals, I would like to offer the Subcommittee some perspective on their importance. Maintaining a bright line between career and non-career functions and employees is a perennial challenge for the Executive. At the same time, respecting the prerogatives of the Executive has been a continuing challenge for Members of Congress. Members of Congress, regardless of their differences with an Administration, must respect the right and duty of the President to appoint his own men and women. Remarkably members of the 104th Congress, perhaps motivated by political hostility to the President, at one point proposed cutting the already tiny number of executive branch political appointees. Such a wrongheaded policy would not only weaken the President's control over the execution of his policy agenda, but would also undermine his overall management of the government.

Members of Congress have a duty to recognize and respect the political responsibility of the President for his Administration. It is the President who is responsible for his top political officials, and the President who must hold them and their subordinates personally accountable for achievement of his policy agenda and the management of their agencies and departments. At the same time, Members of Congress must dutifully insist on clear accountability and the crucial distinction between career and non-career employees and functions. The failure to understand or appreciate the distinct functions of career and political appointees is a recurrent source of pain and embarrassment for executive branch officials in both Republican and Democratic Administrations. The abuse of the career civil service for partisan political purposes, or the bureaucratic usurpation of sensitive policy-making, which should be the sole responsibility of political appointees, is a dual threat to good government and sound management.

In the interest of sound management, President Carter recognized this and moved the responsibility down the management chain to successively lower-level political executives, then

to career executives and managers, and finally down to the level where the work was performed. All were bound together by a performance appraisal and performance reward system which rewarded those who successfully enacted the policies set by the President within the laws of Congress. Members of Congress should likewise realize that reducing the number of political appointees weakens that direct managerial accountability. Political appointees are not only in charge of policy, but they are also an integral part of an effective management team.

In the interest of sound policy-making, Members of Congress always should give consideration to the views of senior career officials on technical matters of administration and take advantage of their impressive institutional memory. But on the most politically sensitive questions, political appointees are indispensable, to both the President and the Congress. Even the temporary absence of political appointees who can speak authoritatively for the Administration can be a source of frustration not only for a President, but also for Members of Congress who are trying to hammer out the details of legislation without clear communications on sensitive matters of public policy.

The Subcommittee proposal would authorize civil monetary penalties and employment debarment for former federal employees convicted of Hatch Act violations during their federal employment. This would be a welcome change in policy direction. Members of Congress have already weakened the Hatch Act prohibition on political activity by career employees, creating a major breach in the division between career and non-career status by politicizing careerists. Career civil servants are today permitted to become more politically involved in partisan political campaigns. As they do, they will become subject to increased political pressure from politically active supervisors. This proposal raises the cost of violation.

The subcommittee proposal, consistent with the repeal of the Ramspeck Act, would stop White House staff from careering into the competitive service based on three years service in the Executive Office of the President. The proposal also would prevent political appointees (Schedule C's and others) from competing for career positions until there is a change in Presidential Administration.

These proposals prevent even the " appearance of impropriety" and embody a recognition that the failure to insist on a clear dividing line between political and career functions means that neither will be respected. The President and his team should always realize that once a political appointee gets career protection, he or she is often likely to become a careerist in outlook, with new institutional loyalties to the agency in which he serves and less interest in Presidential policy objectives. This does not, and cannot serve, any President well. Needless to say, it does not serve the interests of the American people who elected the President.

While political appointees are attracted to "careering-in" for their own protection, they do not always leave their political loyalties behind nor do they lose their ability to act politically in career jobs. This is why career associations, like the National Academy of Public Administration, have opposed earlier weakening of the Hatch Act.

Establishing Sound Performance Management. The Subcommittee is proposing to increase the weight given to performance in reduction in force procedures, to increase agency authorities to give incentive awards to employee groups, deny automatic within grade increases in the GS schedule outside of performance, and eliminate the two tier pass fail system for employee performance evaluation. All of these proposals would enhance effectiveness and accountability in the federal civil service.

The Civil Service Reform Act of 1978 (CSRA) applied sound principles of performance management to the daily workings of the federal government. Central to this law is Title 5, U.S. Code 2301(b), which requires that "recruitment, selection, and promotion" are to be determined "solely" on the basis of "relative ability, knowledge and skills"; that "appropriate incentives" are to be provided to encourage "excellence in performance"; and that "employees should be retained on the basis of their performance."

Performance appraisal means nothing if it is not, in the words of David Osborne, celebrated author of *Reinventing Government*, tied directly to "real consequences" for success or failure. Before the enactment of the CSRA, performance appraisal in the federal system used a three-tiered rating system in which almost all federal employees received a "satisfactory" rating at the middle range of performance. The Carter Administration, realizing this was meaningless, created a five-step performance appraisal system, which rated job performance as "outstanding," "exceeds fully successful," "successful," "below successful" (needing improvement), and "unsuccessful." The Reagan Administration enforced this new system, spreading the ratings over at least four of these categories so that performance levels could be distinguished more clearly and rewards distributed accordingly, even if relatively few were actually rated unsuccessful and fired for poor performance.

According to a 1994 survey of major U.S. companies, 90 percent used a system of merit pay for performance.[2] This is not the case in the federal government. In fact, progress toward a real pay for performance system in the federal government has not only been stymied, but it has also been reversed by Republicans and Democrats alike. For example, the pay-for-performance system

created by President Carter in the CSRA in 1978 and implemented by President Reagan for the managerial corps has been effectively eliminated. In 1983, the Reagan Administration reached an agreement with Congress and established a new Performance Management and Recognition System (PMRS) for all GS-13 through GS-15 employees. Meanwhile, the OPM issued regulations to expand the role of performance throughout the entire workforce. But throughout the late 1980s Congressional opponents blocked OPM administrative pay reforms through the congressional appropriations process. Meanwhile, the original merit pay system for federal managers (GM 13-15 grade levels) expired on September 30, 1993. The Bush Administration did nothing. And, to date, nothing has been done by the Clinton Administration to either restore the federal merit pay program for managers or to extend a similar pay for performance system for the federal workforce. But there is no reason why Congress could not do so today.

Performance appraisal is not an easy management task; but it is what managers must do to improve the work product of those they are paid to supervise. Instead of strengthening the established performance appraisal system, the Clinton Administration has aggressively encouraged agencies to adopt a two-level, pass-fail system. Several agencies have done so. This new system is even more " primitive" than the federal employee appraisal system that was scrapped by President Carter, and it effectively ends any serious appraisal of job performance in the federal workforce if it is permitted to become the norm. Pass/ fail systems are weak indicators of actual performance, whether they are applied to academic performance in a university setting or the professional performance of the workforce of the United States. If work is not even appraised with proper care and discrimination, taking into account various strengths and weaknesses that an employee might display on the job, it is not only impossible to recommend discreet improvements in performance, but it is also impossible to reward those who perform it best.

---

[2] Robert J. Samuelson, *The Good Life and Its Discontents: The American Dream in the Age of Entitlement,*

The Subcommittee proposals in the area of performance management build upon the work of the Carter Administration, which created a comprehensive and standardized employee performance appraisal system. And it also builds upon the work of the Reagan Administration, which tightened employee discipline systems, implemented a merit pay system for managers and executives, and increased flexibility in assignments of the Senior Executive Service. The Subcommittee proposal would give managers the ability to limit such with-in-grad increases for General Schedule workers, allowing for administrative review within the agency. This would eliminate the automatic nature of within-grade pay increases, a principle consistent with the pay for performance management.

The Subcommittee proposal would also provide for group awards in those instances where team projects make individual awards impractical. This , too, advances the pay for performance principle. It should be noted here that this proposal also builds upon a bipartisan tradition. Both Presidents Carter and Reagan supported the creation of financial incentives to reward individual civil servants for good work. But they also supported the idea of allowing federal agencies to retain the money saved from management improvements—so-called innovation funds—as a reward for management efficiencies. However, such group awards were not envisioned to exclude individual rewards for productivity gains.

The Subcommittee proposal to increase the role of performance as the basis of employee retention in reduction-in-force efforts in federal agencies would also extend the performance principle throughout the entire work force.

1945-1995 (New York: Random House, 1995), p. 120.

As Members of the Subcommittee know, the reduction-in-force (RIF) procedures are the rules for laying off federal employees. Historically, one of the biggest federal management problems has been the policy of laying off federal workers with little consideration given to how well they perform.

Four factors govern the decision to lay off federal workers: tenure, veterans preference, seniority, and performance. The main goal of Congress should be to upgrade the role of performance relative to seniority, enforcing the legal principle that employees should be retained on the basis of performance. An unfortunate byproduct of the Clinton Administration's guidance supporting a pass-fail system is to further weaken the role of performance relative to seniority in RIF procedures. The result is that it is now even easier for top performers to be laid off during agency consolidations or reductions in force. This result is hardly consistent with improving efficiency or providing positive consequences for good performance in the federal workforce. Giving greater weight to performance would rectify this inequity.

Modernizing the Benefit System. The federal civil service retirement changed in response to the 1984 revision of the Social Security laws. When federal employees were required to pay Social Security taxes, a whole new federal retirement system became mandatory, and Congress created the Federal Employees Retirement System (FERS), including the creation of a new Thrift Savings Plan.. The system was made more portable, allowing participating employees to keep more of their funds if they did not stay in government until retirement. This was a major advantage to the 40 percent of employees who received few or no benefits under the old system because they left before retiring. It is fair to say that with a broadening range of employee choice and significant double digit returns on private investment options in the Thrift Plan, plus the reduced unfunded

liability that has accompanied the adoption of FERS, this is another major policy success of the Congress and the Reagan Administration.

Congress can build on that success. It is paradoxical that the components of the federal benefit system that work best and are most popular among federal workers are driven largely by the free market forces of consumer choice and competition rather than bureaucratic micromanagement. In the Federal Employees Health Benefits Program(FEHBP), for example, federal workers and their families can choose from hundreds of private plans nationwide, offering a fairly wide variety of benefits at competitive premiums. It is not surprising, therefore, that serious health care reformers often point to the success of the FEHBP as empirical proof that individuals and families can and do make rational health care choices. And, of course, the Thrift Savings Fund options have been especially rewarding for federal employees, registering often dramatic gains for employees, especially in the "C" fund. It is equally not surprising that members of Congress, pondering reform of the Social Security system, and contemplating the generation of wealth from private stock options, are not overlooking the achievements of private investment options in the new federal retirement system.

The Subcommittee has a number of proposals dealing with retirement benefits. The first is to establish, beginning in 2001, a system that would divert a portion of the federal employee retirement contributions to the Thrift Savings Plan(TSP) in lieu of the Civil Service Retirement and Disability Fund, and gradually increase that portion of retirement contributions; second, to authorize new employees to participate in the TSP upon hiring; third, giving new hires the right to roll over private sector 401 K plans into the TSP; fourth, allowing all federal workers to contribute to the TSP up to the IRS limit($10,000), regardless of income; and, finally, creating a

fully portable retirement option for political appointees and Congressional staff separate from FERS. These are all excellent proposals.

A fully portable and individually directed system based upon 401(k) private plans, much like those found in the private sector, where the employee is fully vested and can move assets is the best option for the next generation of federal workers. A fully portable plan removes the major impediment to employee mobility. Members of Congress should move toward such a system for the entire federal workforce, and dramatize the tangible benefits of a portable new system, including returns on private-sector investments, for both employees and the taxpayers.

The Subcommittee has also proposed a full disclosure of employee payroll costs, showing the extent to which taxpayers contribute directly to full normal cost of retirement; FICA; unemployment insurance, and health insurance. This is an excellent proposal. It is a wonderful teaching tool. But even more importantly, it has special application for private sector employment. It can thus establish a precedent. This is especially true on the area of health insurance. Far too many employees do not grasp the nature or extent of the employer contribution or misunderstand it as an add on, or a " free good" that automatically comes with the job, rather than as part of their over all compensation. This proposal has a sound educational function.

In conclusion, Mr. Chairman, the Subcommittee has come up with a number of innovative proposals to improve the way Washington works. The key is basing reforms on the twin foundations of political responsibility and performance management, emphasizing managerial accountability and making sure that job performance has consequences.

In the process of reform, Members of Congress must maintain the bright line between career and non-career positions and functions, support the proper roles of each, and avoid blurring the distinctions or confusing these roles, which is always an invitation to scandal or Presidential embarrassment.

Congress has an opportunity to make the workforce friendly for a generation of federal employees, serving in well-compensated jobs with portable benefits not unlike those available in the best private corporations. The new 21st century federal workforce can be a model of performance and accountability in public sector management.

****

The Heritage Foundation is a non-profit, educational, public policy research organization operating under section 501 (c)(3) of the Internal Revenue Service Code. It is privately supported, and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 1996, it had more than 200,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 1996 contributions came from the following sources:

Government	0%
Individuals	52%
Foundation Grants	21%
Corporations	7%
Investment Income	15%
Publication Sales	5%

No corporation provided The Heritage Foundation with more than 2% of its 1996 annual income. The top five corporate givers provided The Heritage Foundation with less than 3% of its 1996 annual income. The Heritage Foundation's books are audited annually by the national accounting firm of Deloitte and Touche. A list of major donors is available from The Heritage Foundation upon request.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

Mr. MICA. Thank you, Mr. Moffitt.

Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. I ask that my written statement be made part of the record.

I have been asked to address the issue of official time in the Government, which is a practice by which agency employees are permitted time away from their job to do certain work for their agency union.

Mr. Chairman, I have seen many issues come and go on Capitol Hill, and in the Federal agencies, both of where I have worked, and usually there are pretty good arguments on both sides of the issues. I believe this is one of those rare times, frankly, where the weight of the arguments seem to line up on one side, regardless of political party, and demonstrate that the status quo is unacceptable and that immediate reform is needed.

Let us review quickly what we have in the record. The GAO studies reveal, which I summarize in my written statement, in no uncertain terms a system out of control which permits agencies to give, with few limitations, employee union representatives paid time off to do union business; that is, some time away from their usual job with full pay and benefits. The GAO figures show that hundreds of these employees are doing this full time, away from their job, I believe it is about 500, and the GAO estimates that the totals overall are in the millions of hours and millions of dollars in cost.

I have said this a couple of times, but it is worth saying again for the record. Remember, this is time away from the job while receiving taxpayer subsidized pay and benefits to do that same job, which is now not being done. I have to say that I thought the GAO downplayed their conclusions in their oral statement this morning. Mr. Chairman, I would just say that the record speaks for itself, and GAO has had various studies on this, and they are very damning to the status quo.

This is all the tip of the iceberg, because frankly, as GAO noted, there are really no reporting requirements considering what—summarizing what the agencies or what the unions are really doing with all of this time. Basically, there is a black hole of uncertainty into which taxpayer dollars are being poured. Again, the GAO reports, if you read them, do not leave any doubt on this issue.

Now, to heighten concern, we have recent interpretations of the law which have clarified that union official time may be used to lobby the Congress on matters of importance to the union. Obviously where Congress is considering or changing agency budgets or realigning agency responsibilities, or considering privatization issues, this is a wide open field subject to very broad interpretation.

Let me read one clause which I just happened to pick up from the Federal Labor Relations reports, it is a 1998 case. The agency was found to engage in unfair labor practice when it said this clause was not negotiable. The Federal Labor Relations Authority said it was based on the fact that it earlier concluded that the same clause in another contract was negotiable. Let me read it for the record. This is what it says in the contract.

Official time will be granted for Association representatives to visit elected officials when representing Federal employees in support or opposition to pending or desired legislation which would impact the working conditions of employees represented by the Association.

If that is not broad, I am not sure what is.

I want to read from the facts in a major case that was decided by the Federal Labor Relations Authority which really opened—which confirmed an earlier case, but really opened the door to lobbying, this whole lobbying issue. The facts in that case were that the grievant's lobbying—and this is during Union Week in Congress, the grievant's lobbying covered the following topics: Protection of Federal pay and benefits, Government downsizing and reorganization, health care reform, civil service reform, protection of temporary employees, and EEO reform.

Now, that leave was initially denied as paid leave. When the grievant returned from the lobbying activities he filed a grievance with the Federal Labor Relations Authority which concluded that at that time he should have been on paid time, and that is again paid time subsidized by the taxpayers.

I just mention this in the case law, which the staff have probably read already, to show that this is not a made up issue; the law is in fact clear on this point, and it is very broad.

So now we have a situation where taxpayers are financing lobbying efforts by Federal employees away from their job, while likely opposing cuts in Federal spending or other initiatives which are often going to be to the benefit of the taxpayers. I think a simple example is, should a Department of Labor employee be really allowed to lobby general cuts in the DOL budget while being paid by the DOL, which is being paid by the taxpayer. Maybe it is a small part of what is going on out there, maybe 10 hours out of the 2.5 million hours, but we just don't really know. That is a part of the problem here, we don't have any records to go on.

I guess the irony of this situation is a little similar to that of frankly the unions using dues from workers to oppose initiatives such as Proposition 226 in California, which would allow those same workers a greater say in how their dues are being spent. It is again, it is money being paid by one party to another party to oppose initiatives that the first party who is paying the money would likely support.

As for the private sector which was raised earlier, it is true that paid time off is allowed in unionized workplaces. These are usually called "no docking" arrangements in the private sector. In the private sector, however—and granted, I did not do a survey of the hundreds of thousands of companies, but I did contact people out in the field, and I think that between them they had about 100 years of labor law experience. In the private sector it is tightly controlled and regulated and all of this is carefully tracked by the employer so that they know when someone is on official time or when they are not on official time. I don't think that is surprising, given that private sector employers have to watch their bottom line and costs. A Federal agency, relatively speaking, and I worked for the Department of Labor for 6 years, is frankly under less constraints when it comes to spending the taxpayers' money. That in turn opens the door to abuse.

Now, there also exist provisions in private sector labor law, which I mention in the written testimony, which limit financial transactions between union representatives, including those who are employees, and the employer, which have been applied to these kinds of official time off situations. That is section 302 of the National Labor Relations Act. I am not going to pretend that law is clear. In fact, there has been some recent case law which sort of throws doubt on exactly what is the test in the third circuit, which I do reference in my written statement. The point here is that there are limitations governing this entire area which employers and unions have to be, would have to be aware of and be careful of when they are engaged in transactions between each other, including official time.

Now, I am not aware frankly of any comparable standard in the public sector. I noticed that AFGE's testimony, and I guess they will be following us, noted that there are many limitations in current law, but they fail to list any. There may very well be some and my research has missed that, so perhaps they could comment on that on the next panel.

I guess my point really is, though, that the private sector and the public sector is the wrong comparison to begin with. In the public sector I would think most taxpayers would believe that in fact there should be a higher bar, there should be more guidelines, more limitations on how taxpayer resources are used simply because they are taxpayer resources. Right now we seem to have a situation where there are less limitations than in the private sector. I discuss that principle of public accountability again in the written statement.

Clearly reform is needed, certainly with full reporting requirements. I was hopeful when I heard the past panel note that the administration did not support additional paperwork burdens on unions. I assume they are going to use that same philosophy when it comes to opposing certain laws which impose greater paperwork on the private sector employers, so perhaps there is some good news there. In any case, I would think the paperwork burden in this case in terms of reporting would be acceptable so that at least the Congress knows what is going on. I would think that reporting requirements are needed. Those reporting requirements should go into how much time is used, what is the nature of the time used, and I believe that lobbying should be expressly prohibited.

Frankly, Mr. Miller I know has introduced a bill, parts of which I gather have been incorporated in the subcommittee bill. The chamber supports the general direction of that bill; we have not taken a specific position on it, but certainly the status quo I would think would be unacceptable, and unless some kind of accountability is put into current law, the whole practice of official time should be eliminated.

Mr. Chairman, I just wanted to conclude by echoing Mr. Moffitt's remarks. My experience on Federal labor relations issues, whether it is EEO or labor, is that it tends to be an inside-the-beltway issue, unfortunately. The private sector does not focus on it because the private sector is simply more focused on private sector labor laws. The taxpayers don't focus on it because they are too busy trying to make a living to pay taxes. Consequently, the status quo

tends to roll along and the interested parties tend to control the debate.

I just bring that up to say that we thank you for holding this hearing and perhaps we can shed some public awareness on this entire issue and go from there.

[The prepared statement of Mr. Johnson follows:]

STATEMENT

on

CIVIL SERVICE REFORM AND THE USE OF OFFICIAL TIME

before the

SUBCOMMITTEE ON CIVIL SERVICE

of the

HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

By

Randel Johnson

June 24, 1998

Good morning. My name is Randel Johnson. I am Vice President of Labor Policy at the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is a business federation representing an underlying membership of more than three million businesses and organizations of every size, sector, and region. I have been asked to share our views on the practice of "official time" under which a federal agency grants time to an employee away from his or her normal job to do certain union activities with continuation of pay or benefits.

Mr. Chairman, we appreciate the opportunity to discuss an issue that is not only very important to the Chamber, but is also one of concern to American taxpayers, both individuals and businesses. The issue is to what extent should taxpayers subsidize "official time" to support federal union activities. A discussion of this issue can be broken down into three sections: (1) What rules exist on the use of official time and are they reasonable; (2) What is the extent of the subsidies by taxpayers to federal employees using official time; and (3) How

does the private sector system compare?

(1) What rules exist with regard to the use of "official time" and are they reasonable.

Mr. Chairman let me briefly describe the law on this issue for the record. Under U.S. Code Title 5 section 7131 (a), "Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes."

There are a few specific limitations on the use of official time found at Title 5 section 7131(b), "Any activities performed by any employee relating to the internal business of a labor organization (including solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status."

However, U.S. Code Title 5 section 7131(d) states, "except as provided in the preceding subsections of this section - (1) any employee representing an exclusive representative, or (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary and in the public interest." Thus, the statute provides two sources of official time, one as a matter of right at subparagraph (a), and one subject to negotiation at

subparagraph (d). Obviously, this latter category is very broad and leaves much open to possible interpretation by both the unions and the agencies. See generally *A Guide to Federal Labor Relations Law and Practice,* Peter Broida, pp. 151-183 (1997). Unfortunately, recent developments at the Federal Labor Relations Authority (FLRA) indicate that there are indeed few limitations on what is negotiable and thus allowable for official time.

For example, in *AFGE National Council of Field Labor Locals and Dept. of Labor, MSHA, Denver*, 39 FLRA 546, 552-54 (1991) the FLRA held that the statute does not preclude parties to a collective bargaining agreement from agreeing to provide official time for other matters, that is, matters other than those relating to labor-management relations activities. The Authority noted, "To the extent that earlier Authority decisions suggest that all collective bargaining agreement provisions dealing with official time must relate solely to labor-management relations activities, they will no longer be followed." Taking this proposition to its logical extreme, the FLRA recently left no doubt that even the direct lobbying of Congress by a union representative on government time is a "permissible" authorization of official time. (See, *Dept. of Army, Corps of Engineers, Memphis and NFFE, Local 259*, 52 FLRA 920 (1997), involving an employee's official time during the Union's annual lobby week in Washington, D.C. The record in the case indicates that the grievant lobbied Congress on issues including pay, downsizing and reorganization, health benefits, civil service reform, protection for temporary employees and EEO reform.) Thus, it now appears that a federal employee union official may, while on taxpayer-supported pay and benefits, lobby on government downsizing, health care, and civil service reform. Conceivably – and still at taxpayer's expense – federal employees also could lobby Congress on tangential issues, such as

welfare reform, tax policy, health care, and balancing the budget, all of which can be said to have an indirect effect on the federal government's 2 million employees.[1]

One leading commentator has noted "One way or another, the Authority is dedicated to the negotiability of official time," Broida, supra, p.155. Phrased another way, the very agency sitting in judgement on these issues appears more than favorably disposed to the broad use of official time by federal unions.

(2) What is the extent of the subsidies by taxpayers to federal employees using official time?

Mr. Chairman, it is worth reviewing in some detail, the startling results of the GAO's studies of "official time." GAO's testimony of September 11, 1996 is dismaying on both the issues of the magnitude of the use of official time and the unreliable/absence of documentation by the federal agencies on how much time is in fact used and for what purpose it is used. At that hearing, GAO noted: (1) The use of official time for union activities is an **established practice** in the federal government; (2) **The total amount** of official time used for union activities, the **cost** of that time, and the **number of people using** that time **are unknown;** and **(3) No reporting requirement** exists for agencies to generate comprehensive data on their support of union activities. GAO also provided a chart outlining what they could determine--that the agency reported hours charged to union activities in FY 1995 was 1,744,000 for the Postal Service, 527,000 for the Internal Revenue Service, 404,000 for the Social Security Administration and an unknown amount for Veterans Affairs. According to GAO, the cost of

[1] In notable contrast to this taxpayer funded union lobbying activity, employers are now prohibited from deducting lobbying as a business expense.

those hours was $29.2 million for the Postal Service and $11.4 million for Social Security Administration but the cost was **unknown** for the other two agencies surveyed.

GAO also gave testimony on June 4, 1996 and issued a report on October 2, 1996 to the Subcommittee on Social Security, for the Committee on Ways and Means to the effect that the Social Security Administration (SSA) has seen a 110% increase in the amount of Social Security Trust Fund money devoted to union activities at SSA from 1993 to 1995- but during the same time frame, the overall size of the SSA work force increased by just 1%. Incredibly by 1995, the SSA had **145 full-time union representatives** on official time, with a total cost of $12.6 million.

We also understand that GAO is prepared to testify today that 34 federal organizations that they surveyed, which included the 30 federal organizations with the greatest number of employees covered by collective bargaining agreements, **were neither routinely collecting nor reporting the kinds of data needed to accurately portray the use of official time across the federal government**. We also understand that, based on the limited information it has, the GAO will estimate that at least 2.5 million hours were used for official time. Mr. Chairman, the bottom line is that millions of taxpayer dollars are being used to further organized labor's interests through federal employee salaries, federal employee benefits, and federal assets and we have grossly incomplete data as to what these millions of dollars are being spent on. Further, this all appears to be the tip of the iceberg.

(3) How does the private sector system compare?

I note that in a review of the transcript of the Sept. 11 hearing there were references to

what happens in the private sector in the area of official time and claims that the federal sector is not all that much different; the implication was that this was all a "much ado about nothing." With all due respect, I believe the comparisons are really apples and oranges. [2] First, there are "fire walls" in current labor law as applicable to the private sector which were created to prevent employers from becoming too close to union leadership through financial transactions, creating collusive "sweetheart" arrangements, which could work to the detriment of the rank and file employees. These provisions, found at Section 302 of the National Labor Relations Act, have their own legislative and litigation history, which is still developing and is admittedly not entirely precise. (See, for example, *Caterpillar v. UAW,* 107 F.3rd 1052 (3rd Cir. 1996) reversing *Caterpillar v. UAW,* 909 F. Supp 254 (1995); *NLRB v BASF Wyandotte Corp.,* 798 F.2d 849, 854-56 (5th Cir. 1986); *Reinforming Iron Workers Local Union 426 v. Bechtel Power Corp.,* 634 F.2d 258 (6th Cir. 1981). However, to my knowledge there are no comparable limitations on federal sector agency employers and unions at all, at least as to official time. As importantly, private sector employers are not spending taxpayer money in wages and benefits when they agree and negotiate with unions to allow a certain amount of

[1] We have to acknowledge that a comparison is difficult because of the incredible (and inexcusable) lack of information as to how exactly millions of dollars of taxpayer funds are being spent when we discuss "official time" in the federal sector. Let's face it - we just don't know much about what is going on out there in federal agencies - other than that a lot of money is being spent to pay federal employees for doing work that is not a part of their job. For a detailed review of "official time" in the private sector, *see Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business, U.S. Dept. of Labor, Oct. 1980.* It is also worth noting that, based on discussions with experienced practitioners, most private sector employers keep careful track of official time, how and why it is used and how much, in contrast to the federal agencies as described in the GAO Reports.

time for union work not directly part of an employee's usual job. They are committing their own assets and this in fact works as a **natural check** on abuse.

In any event, public agencies should be held to a more rigorous standard in this area than the private sector simply because taxpayer funds are directly at risk. In an analogous situation, the Department of Labor concluded that principles of "public accountability" require that public sector employers to be able to "dock" an employee's pay under the Fair Labor Standards Act for not being on the job during absences of less than a day. The DOL rulemaking described the concept as follows:

> Public accountability is a broad concept that forms the foundation for many governmental administrative practices, including most public sector pay systems, and is derived from the desires of taxpayers that their government be accountable to them for expenditures from the public treasuries. Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective and efficient use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain, including the view that public employees should not be paid for time they do not work that is not otherwise guaranteed to them under the pertinent civil service employment agreement (such as personal or sick leave), and the public interest does not tolerate wasteful and abusive excesses such as padded payrolls or "phantom" employee. [emphasis added] See 57 Fed. Reg. 37677 (Aug. 19, 1992).

Conclusion

In conclusion, the current situation is intolerable. There appear to be few legal restrictions of federal "official time" by which federal employees are on full salary and benefits while not doing agency work. The number of hours and money spent is enormous by even federal standards based on what we know, and we actually know very little as to the possible scope of the problem because there is so little data. To heighten our concerns, there

are few legal or practical checks on potential abuse of the system.

With no checks and balances, official time should be simply eliminated. A preferable course would be to quickly enact some form of quality control legislation such as that embodied in the Workplace Integrity Act (H.R. 986, Miller, R-FL) which provides for strict reporting of official time and puts restrictions on what sort of activity qualifies as taxpayer supported "official time." I would add that any reporting requirement should include a description of how the official time was used. Lobbying should be strictly prohibited. Nothing is more offensive on its face than the idea that federal sector unions can be subsidized by the taxpayer as they work in opposition to initiatives which reduce the size of government and which would thus save the taxpayer money. [3]

Thank you.

[3] The irony of this situation is rivaled only perhaps by that of the union leadership using worker dues to oppose legislation, such as Proposition 226 in California, and H.R. 1625, the Worker Paycheck Protection Act, which allow workers to object to the collection of those dues to be used for political purposes or other reasons unrelated to collective bargaining.

Mr. MICA. Thank you. Patrick Korten from the Cato Institute, you are recognized.

Mr. KORTEN. Thank you, Mr. Chairman.

Let me begin by noting for the record that neither I nor the Cato Institute receive any funds from the Federal Government, nor have we ever received such funds, Mr. Chairman. We would probably go out of business before we would take Federal funds.

As a nonprofit educational institute, the Cato Institute does not, of course, endorse or oppose any specific piece of legislation, this one included. And as always is the case, when our policy specialists present testimony, the views that I express here today are my own. I want to reiterate something that Bob Radlin said about the importance of holding a hearing like this. I note no networks are here, unfortunately. You know, you could have invited a Federal employee named Monica Lewinsky to testify about performance appraisals. All of the networks would have shown up. NBC probably would have gone to wall-to-wall coverage and then maybe we would have gotten some large Cato coverage on the issue. She would be reluctant to appear in official form, so I understand the predicament.

But it is important to recognize that you face a difficult balancing act when you try to legislate on these areas, because this room is filled largely with Federal union members, Federal employee association officials, and quite understandably so, but it is important to consider the fact that citizens out there who may have waited several months for their Social Security checks to begin, or someone who just never got that permit to go camping from the Interior Department, aren't here to tell you about their experience with the level of Federal Government performance, and it is important to take that into account.

I want to sharply disagree with something that Ms. Lachance said this morning. I want to encourage you strongly to curb recent trends that undermine the process of assessing performance of the Federal work force. I think the growing popularity of the so-called pass/fail performance appraisal systems in Federal agencies threatens to make appraisals virtually meaningless. I think it is very important for managers to do the work required to make those sometimes tough judgments about the performance of their employees on a regular basis. I was a senior noncareer executive in the Federal Government for some 8 years, and I didn't like it any more than any other manager did. It is hard work. It is tough. To do it right you really have to spend some time on it, but it is critically important for employees to know how their work is being assessed by management on something more than the same basis as we take a look at cars that come into the inspection station. You pass or you fail. It is a heck of a way to treat a Federal employee when you are trying to give them guidance on how you feel about how they are doing.

There is nothing more damaging to the morale of a hard working, high performing employee than to give the same performance rating to him or her as you gave to some unmotivated schlump who is barely getting by. It is even more devastating to see the schlump hang onto his job in a reduction in force, while others who have worked harder and outperformed him get cut. It is also crucial to

tie pay and retention to those performance appraisals. There has got to be a reward that goes beyond a pat on the back. Granting within grades automatically seriously undermines the principle of pay-for-performance. Managers have got to be able to make within grade determinations without facing an arduous appeals process. Any good performance ought to count for more than it does in RIF retention.

On the subject of political appointees, they are, as has been noted here already, transient members of the Federal work force by design. They hold their positions because they share the President's views on public policy. They are willing and able to articulate those views to Congress and to the public on the President's behalf and work like crazy to see that they are implemented. They perform a critical function together with the President. They work to translate the issues the President campaigned on into policy initiatives. When the occupant of the White House changes, they need to change, too.

Civil servants, career civil servants, perform a very different role. They implement policy. They provide continuity, specialized expertise, based on their institutional knowledge, which the political appointees often lack, and experience. Traditionally at least many spend their entire working careers in Government, although that is changing. The public relies on them to be impartial in the administration of the Federal Government, of the services it provides to them, and anything that undermines that impartial administration needs to be curbed and avoided.

Most political appointees understand the temporary nature of their role quite well, but in some ways we seem to go out of our way to encourage them or tempt them to stick around. It is altogether too common for political appointees to career in as an administration is coming to an end, and there is absolutely no reason in my view why we should permit that. Even old political appointments should not be allowed to compete for those political positions until a new administration has taken office. Not prohibiting them from applying, prohibiting them from doing so under circumstances that might be taken unfair advantage of. I think it goes without saying that White House officials ought not to have a grand spec like opportunity for automatic conversion to career jobs.

Briefly, on retirement, a factor that has long reinforced the temptation for some political appointees to stick around is the structure of the Federal retirement system, and I think establishing a portable retirement system for them involving 401(k) type accounts would be a very important step. But frankly, I know this is beyond the scope of what you envision right now, but I would strongly recommend moving to a system of individually owned retirement accounts for all Federal employees, political or career. The golden handcuffs of overly generous Federal employee pay and benefits aren't quite what they once were, of course, but I don't think there is anything worse for civil servants or the public they serve than for them to be trapped in a position they hate by a compensation system that is hard to walk away from.

Of course, I should note in conclusion that the present national discussion on the future of the Social Security System may actually overwhelm this entire debate at some point in the not-too-distant

future. Frankly, there is growing realization nationwide that allowing workers to take that 12.4 percent of payroll and put it into private retirement accounts instead of the Ponzi scheme that the Social Security System really is would allow everyone, government and private sector worker alike, to accumulate personal wealth, it belongs to them, and enjoy retirement incomes that are far higher than Social Security would provide.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Korten follows:]

TESTIMONY OF

PATRICK S. KORTEN
VICE PRESIDENT
THE CATO INSTITUTE

BEFORE THE:
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
SUBCOMMITTEE ON CIVIL SERVICE

UNITED STATES HOUSE OF REPRESENTATIVES

ON:
FACTORS THAT SHOULD BE INCLUDED IN CIVIL SERVICE REFORM LEGISLATION

JUNE 24, 1998

Mr. Chairman, thank you for the opportunity to testify here today on the issue of civil service reform goals. In order to comply with the Truth in Testimony laws, I will note for the record that neither I, nor the Cato Institute, receive any funds from the federal government. Nor have we ever received such funds.

As a non-profit, educational institution, the Cato Institute does not, of course, endorse or oppose any specific piece of legislation. And as is always the case when our policy specialists present testimony, the views that I express here today are my own. But I'm glad to be able to share with you some of the principles that we who are strong believers in limited, constitutional government would find desirable in any overhaul of the federal civil service system.

As a general rule, those of us at Cato believe that the *best* government reform would be a rather dramatic reduction in the size and scope of government. In our *Cato Handbook for the 105th Congress*, we make the case for shutting down the Departments of Education, Commerce, Labor, Energy, Agriculture, Interior, Transportation and Veterans Affairs, and privatizing many other agencies, such as the Tennessee Valley Authority, Amtrak and the FAA.

There are plenty of people here in Washington who are content to try and make the government-owned trains run on time, and of course there's nothing intrinsically wrong with efficiency. But we'd prefer privatizing the railroad, and getting the government out of businesses where it doesn't belong.

Nonetheless, the federal government has legitimate core functions, and ensuring that the civil service bureaucracy carries out those functions effectively is an important public policy goal.

I was a non-career member of the Senior Executive Service for nearly eight years during the Reagan Administration, and believe strongly that political and career civil servants are both very important to the functioning of government in a constitutional republic. And I believe that a

number of the reforms you are considering would highlight their distinct roles in ways that would serve the public well.

Political appointees are, by design, transient members of the federal work force. They hold their positions because they share the President's views on public policy. They are willing and able to articulate those views to Congress and to the public on the President's behalf, and work to see that they are implemented at the agency level insofar as law and regulation permit. Together, the President and his (or her) political appointees perform a critical function: working to translate the issues the President campaigned on into policy initiatives. When the occupant of the White House changes, they must change, too.

Career civil servants perform a very different role. They *implement* policy, rather than *make* it. They provide continuity and specialized expertise based on institutional knowledge and experience. Traditionally, at least, many spend their entire working careers in government, although that is changing.

These roles are separate, and it's important to do all we can to *keep* them separate.

Most political appointees understand the temporary nature of their role quite well. But in some ways, we seem to go out of our way to tempt them to stick around. It's altogether too common for political appointees to "career in" as an Administration is coming to an end, and there's absolutely no reason why we should permit that. People who hold political appointments should not be allowed to compete for career positions until a new Administration has taken office. And I think it goes without saying that White House officials should no longer have a Ramspeck-like opportunity for automatic conversion to career jobs.

A factor that has long reinforced the temptation for some political appointees to stick around is the structure of the federal retirement system, and establishing a portable retirement system for them, involving individual 401K-type accounts, would be an important step.

Frankly, though, I would strongly recommend moving to a system of individually-owned retirement accounts for *all* federal employees, political *or* career. The "golden handcuffs" of overly-generous federal employee pay and benefits aren't quite what they once were. But moving to a system of individual retirement accounts would make the choice to consider employment outside the government easier for employees who find themselves in jobs they no longer find satisfying, or where further opportunities for advancement are few. I don't think here's anything worse for civil servants or the public they serve than for them to be trapped in a position they hate by a compensation system that's hard to walk away from. The American work force has become much more mobile in recent years. Few people regard working for a single employer for an entire career the "default option" any more. Our economy is much the better for it. And there's no reason why the federal work force should be any different.

I should add that the present national discussion on the future of the Social Security system may soon overwhelm the discussion of what sort of retirement system we have for federal employees. Allowing workers to take that 12.4 percent of payroll and put it into private retirement accounts

instead of the Ponzi scheme that the Social Security system really is would allow everyone, government and private sector worker alike, to accumulate personal wealth and enjoy retirement incomes that are far higher than Social Security will provide.

Let me touch briefly on several other reform opportunities worthy of note.

Limiting assignments under the Intergovernmental Personnel Act to other government agencies at the state or local level is long overdue. Allowing career civil servants to accept IPA assignments at non-governmental organizations has led to many situations where they engage in advocacy at the taxpayer's expense. If career employees want to get into the business of policy advocacy, they should be changing employers, not office locations. The IPA was designed to give government employees the opportunity to see how things work at other levels of government, to broaden their perspective. Heavy-handed federal regulation can look quite different when you're on the receiving end at the state or local level, for example. But the IPA should never be used to beef up the resources of a private group that's busy trying to push public policy one way or the other.

Finally, I encourage you to curb recent trends that undermine the process of assessing performance of the federal work force. The growing popularity of so-called "pass/fail" performance appraisal systems in federal agencies threatens to make appraisals virtually meaningless. It's important for managers to make the sometimes tough judgements about the performance of their employees on a regular basis. And it's important for employees to know how their work is being assessed by management. There is nothing more damaging to the morale of a hard-working, high-performing employee than to receive the same performance rating as some unmotivated schlump who's barely getting by. It's even more devastating to see the schlump hang on to his job in a reduction in force while others who've worked harder and outperformed him get cut.

It is crucial that pay and retention be tied to performance appraisals. There's got to be a reward that goes beyond a pat on the back. Granting within-grade raises automatically seriously undermines the principle of pay-for-performance. Managers should be able to make within-grade determinations without facing an arduous appeals process that extends beyond the agency administrative review system. And good performance ought to count for more than it does in RIF retention.

Mr. Chairman, I consider it a truism that we're awfully lucky in America that we don't get all the government we pay for. Paring back the size and scope of the federal government should be a top priority of this Congress. Where the federal establishment is properly within its constitutional bounds, the citizens of the United States deserve a civil service where performance excellence is valued and rewarded, where the compensation system is fair while enabling mobility, and where the roles of political and career federal workers are crisply defined and carefully separated.

Mr. MICA. Now I would like to welcome Mr. John Just-Buddy. He represents one of our Federal employees, and he had heard about the hearing and requested to testify. We are pleased to welcome him. He is an employee with the Department of Agriculture.

Mr. JUST-BUDDY. Thank you so much, sir. Good afternoon. Mr. Chairman, members of this august subcommittee, my name is John Irving Just-Buddy.

Mr. MICA. You don't know them very well. You said "august?"

Mr. JUST-BUDDY. Yes.

Mr. MICA. Just teasing. Thank you again.

Mrs. MORELLA. Speak for yourself, John.

Mr. MICA. Maybe he does know. Thank you, sir.

Mr. JUST-BUDDY. I am a 35-year Federal employee of which 20 years have been as an employee of the U.S. Department of Agriculture. As a career employee whose tenure has intersected 4 decades, I have witnessed and have been a part of many good things that government service has provided to our fellow citizens. I can say honestly to you that I view my opportunity to serve as a Government employee as an absolute privilege. Even as I make this statement, I am acutely aware that there are those who view their opportunity to serve in government as a right rather than a privilege. As a result, there are conflicting attitudes about Government service.

Over the years, I have witnessed many forms of preferential treatment that allowed undeserving employees to be promoted over more deserving employees. Of course, there are various forms of prescribed remedies such as grievances and equal employment opportunity complaints under Title VII of the Civil Rights Act to address wrongdoing. Even this process, which is mandated by law, has to rely on an administrative process which hopefully is not flawed or broken.

In government, from my vantage point, whenever the process was abridged and you could not receive equity through the administrative process, you sought assistance from Federal employees appointed under political authorities. However, this brings me to these rhetorical questions: what do you do when political authorities abandon the traditional role of making sure the bureaucracy functions to the benefit of the American people and instead seek to become career civil servants? What do you do when political appointees who have benefited from a political decision to obtain an opportunity move to circumvent the merit system? What do you do when they parlay their political connections to intimidate the bureaucracy? What do you do when political favoritism rears its ugly head? What do you do when unqualified politicals burrow into career senior executive positions? What do you do when the supreme chair of authority in your agency sanctions favoritism?

I submit to you that the only thing you can do is seek a legal remedy or pray that the political leaders of our Nation enact legislation to protect the bureaucracy from political intrusion. I am here to support section 103, post employment restrictions for political appointees of the Federal Employees Integrity, Performance and Compensation Improvement Act.

Let me acquaint you with my own circumstances, sir. I served as the former Acting Director for Special Programs in the Farm Serv-

ice Agency and as the National Resources Conservation Service Acting Director of USDA Program Outreach Division. My permanent position was the National Program Manager for the Small Farmer Outreach Training and Technical Assistance Program. I managed a staff comprised of two GS–14's, one GS–13, two GS–12's, one GS–11 and one GS–6.

I ran a very successful program that utilized 1890 and 1862 colleges and universities, community-based organizations, Indian tribal colleges and Hispanic serving institutions to provide outreach training and technical assistance to farmers and ranchers across the country. The program employs over 240 agricultural management specialists who are hired by participating entities to provide farmers and ranchers with one-on-one skills in overall farm management practices. The program operates through 28 entities in 23 States and benefits over 10,000 farmers and ranchers across the Nation.

When I took over the program, only 5 entities who employed 15 farm management specialists were involved and served approximately 400 farmers.

I managed the program with very little resources. When the USDA civil rights action team conducted listening sessions around the country, the reports indicated that the small farmers program that I managed was the only program cited by African-American farmers and Hispanic farmers as beneficial to them. The Office of General Counsel affirmed this in their report.

Since the program was becoming highly visible, the powers that be in USDA decided to change the leadership. They determined that the office that I managed and co-wrote the regulation for should be a part of the new departmental outreach office. I recommended establishing an office of outreach 3 years ago and that it be headed by a political appointee with a career deputy for oversight purposes.

For many years, I was acknowledged as the departmental outreach guru. However, once the stakes were raised, outreach gurus came from hither and yon, practically all of them self proclaimed. I had to compete for my own job, one that I loved and was devoted to and spent many hours perfecting.

The vacancy announcement for the position of Director, USDA Program Outreach was announced in April 1997. Included in the announcement were the duties consistent with my job responsibilities.

I even wrote the job description, like I have for my entire former staff. The announcement specifically gave as the main duties management of the 2501 program, and other outreach initiatives, that I had already incorporated into staff job descriptions.

Several political appointees complained that the duties inherent in the announcement was too closely correlated with my position. They complained that the duties of the position restricted their eligibility. As a result, a second announcement was issued canceling out all of the first announcement and they eliminated all of the duties of the first announcement. The requirements were so bland that even the mailman could have been found eligible.

The individual selected for the position was a political appointee who served on Secretary Glickman's staff in the Office of Communications.

The ironic thing is that there was never an interview for this so-called high-profile position, which would have demonstrated my superior qualifications. And to this day, I have only received a telephone call saying I was not selected. The individual who was given the departmental directorship of outreach also was given my job, which had the qualifications of the first announcement. In other words, they changed the rules in order to select him. After being given the job, this individual visited my office and told my staff that I was just another employee and that he was in charge.

At the behest of Congressman Mica's office, GAO conducted an investigation. I was told that the laws did not prohibit Schedule C's from being able to participate for career positions. They also indicated that the selectee was a very weak candidate for senior executive service. I must add that competing against political appointees places the career civil servant at a tremendous disadvantage.

Based upon my knowledge of government, sir, I am certain that if not for political favoritism, the selected individual may have been eligible for a GS–9 or GS–11 position. I was demoted for doing a great job. They politicized my job. Over the last several years I have been rated outstanding by three different supervisors. My last rating was superior by a supervisor who informed me that this was due to rumblings from the top.

Currently, I am on an intergovernmental personnel assignment, or IPA, with the NAACP in Baltimore, MD. I serve as the director of rural development, training and technical assistance. I am allowed there to be creative and productive and still render a service.

I know that my civil rights were violated, but I am more concerned about my citizenship rights. I feel that the action taken by political operatives at USDA have tried to relegate me to second class citizenship status, which I cannot and will not accept. As a result, I have had to seek a legal remedy. This is unfortunate, because I have honorably served my government and my country.

Let me conclude by stating that I am profoundly grateful for this opportunity to address you this morning. I say this with utmost sincerity. All of you should be very proud. You are our country's leaders. You are 1 of 535 people who make the laws for the most blessed country on the face of God's Earth. And even if we were to go back and count up every individual who has ever served in this capacity, given the backdrop of a country of over 200 million people, you are still a part of a very small and special group. You represent the truisms in that old axiom "that never has so many owed so much to so few." I just hope that you will recommend passage for section 103. It won't help me, because I'm in the sunset of my government career, but it will help others and those who are yet to come who will value government service.

Up to this point, I have omitted telling you about myself, and I will very briefly state that I view government as the opportunity to serve. My Judeo-Christian belief affirms in me that to be first amongst you, you must be willing to serve. This is my credo. I can be described simply as a person who loves God, who loves his coun-

try, and who loves and is faithful to his wife and family. Anything else that I am, hope to be, or ever will be pales in significance.

I harbor no rancor or bitterness, just a little disappointment. I am just an old citizen government worker who has tried to do his duty as God has given him the light to see that duty. I came here today to simply ask that this high council right some of the wrongs and, in so doing, help the civil servants of this great Nation.

Thank you.

[The prepared statement of Mr. Just-Buddy follows:]

Good Morning:

Mr. Chairman, members of this August sub-committee, my name is John Irving Just-Buddy. I am a 35-year Federal Government employee of which over 20 years have been as an employee of the United States Department of Agriculture.

As a career employee whose tenure has intersected four decades, I have witnessed, and been a part of many good things, that Government service has provided to our fellow citizens. I can honestly say to you, that I view my opportunity to serve as a Government employee as an absolute privilege.

Even as I make this statement, I am acutely aware that there are those who view their opportunity to serve in Government as a right rather than a privilege. As a result, there are conflicting attitudes about Government service.

Over the years, I have witnessed many forms of preferential treatment that allowed underserving employees to be promoted over more deserving employees. Of course, there are various forms of prescribed remedies such as grievances and equal employment opportunity complaints under Title VII of the Civil Rights Act to address wrong doing. Even this process, which is mandated by law, has to rely on an administrative process which hopefully is not flawed or broken.

In Government, from my advantage point, whenever the process was abridged and you could not receive equity through the administrative process, you sought assistance from Federal employees appointed under political authorities.

However, this brings me to these rhetorical questions:

- What do you do when political authorities abandon the traditional role of making sure the bureaucracy functions to the benefit of the American people and instead seek to become career civil servants?
- What do you do when political appointees who have benefitted from a political decision to obtain an opportunity, move to circumvent the merit system?
- What do you do when they parlay their political connections to intimidate the bureaucracy?
- What do you do when political favoritism rears its ugly head?
- What do you do when unqualified politicals burrow into Career Senior Executive positions?
- What do you do when the supreme chair of authority in your agency sanctions favoritism?

I submit to you that the only thing you can do is seek a legal remedy or pray that the political leaders of our Nation enact legislation to protect the bureaucracy from political intrusion.

I am here to request support for (Section 103) "Post Employment Restrictions for Political Appointees" of the Federal Employees Integrity, Performance, and Compensation Improvement Act.

Let me acquaint you with my own circumstance. I served as the former Acting Director for Special Programs in the Farm Service Agency, and as the National Resources Conservation Service Acting Director of the USDA Program Outreach Division. My permanent position was as the National Program Manager for the Small Farmer Outreach Training and Technical Assistance Program, i.e., "Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers Program (Section 2501). I managed a staff comprised of two GS-14's, one GS-13, two GS-12's, one GS-11 and a GS-6.

I ran a very successful program that utilized 1890, 1862 colleges and universities, community-based organizations, Indian Tribal Colleges, and Hispanic Serving Institutions to provide outreach, training and technical assistance to farmers and ranchers across the country. The program employs over 240 agricultural management specialists who are hired by participating entities to provide farmers and ranchers with one-on-one skills in overall farm management practices. The program operates through 28 entities in 23 states and benefit over 10,000 farmers and ranchers.

When I took over the program only 5 entities who employed 15 farm management specialist were involved and served approximately 400 farmers.

I managed the program with very little resources. When the USDA Civil Rights Action Team conducted listening sessions around the country, the reports indicated that the Small Farmers Program that I managed was the only program cited by African-American farmers and Hispanic farmers as beneficial to them. The Office of General Counsel affirmed this in their report.

Since the program was becoming highly visible, the powers that be in USDA decided to change the leadership. They determined that the office that I managed and co-wrote the regulation for should be a part of the new Departmental Office of Outreach. I recommended establishing an Office of Outreach three years ago and that it be headed by a Political Appointee with a career deputy for oversight purposes only.

For many years, I was acknowledged as the Departmental Outreach "Guru." However, once the stakes were raised Outreach "Guru(s)" came from hither and yon. Practically, all of them self-proclaimed. I had to compete for my own job, one that I loved and was devoted to and spent many hours perfecting.

The vacancy announcement for the position of Director, USDA Program Outreach was announced in April 1997. Included in the announcement were the duties consistent with my job

responsibilities. I even wrote the job description, like I have for my entire former staff. The announcement specifically gave as the main duties, management of the 2501 program and other outreach initiatives that I had already incorporated into staff job descriptions.

Several political appointees complained that the duties inherent in the announcement was too closely correlated with my position. They complained that the duties of the position restricted their eligibility. As a result, a second announcement was issued canceling out the first announcement and eliminating all of the duties of the first announcement. The requirements were so bland that even the mailman could have been eligible.

The individual selected for the position was a political appointee who served on Secretary Glickman's staff in the Office of Communications.

The ironic thing is that there was never an interview for this so-called high profile position which would have demonstrated my superior qualifications and to this day I have only received a telephone call saying I was not selected.

The individual who was given the departmental directorship of Outreach, also was given my job which had the qualifications of the first announcement. In other words, they changed the rules in order to select him. After being given the job, this individual visited my office and told my staff that I was just another employee and that he was in charge.

At the behest of Congressman Mica's office, GAO conducted an investigation. I was told that the laws did not prohibit Schedule "C's) from being able to participate for career positions. They also indicated that the selectee was a very weak candidate for Senior Executive Service. I must add that competing against political appointees places the Career Civil Servant at a tremendous disadvantage.

Based upon my knowledge of Government, I am certain that if not for political favoritism, the selected individual may have been eligible for a GS-9 or GS-11 position. I was demoted for doing a great job. They politicized my job. Over the last several years, I have been rated outstanding by three different supervisors. My last rating was superior by a supervisor who informed me that this was due to rumblings from the top.

Currently, I am on an Intergovernmental Personnel Assignment (IPA) with the NAACP in Baltimore, Maryland. I serve as the Director, of Rural Development Training and Technical Assistance. I am allowed to be creative and productive and still render a service.

I know that my Civil Rights were violated, but I am more concerned about my citizenship rights. I feel that the action taken by political operatives at USDA have tried to relegate me to second class citizenship status, which I cannot and will not accept. As a result, I have had to seek a legal remedy. This is unfortunate because I have honorably served my Government and my country.

Let me conclude by stating that I am profoundly grateful for having this opportunity to address you this morning. I say this with utmost sincerity, all of you should be very proud. You are our Country's leaders. You are one of 535 people who make the laws for the most blessed country on the face of God's earth. And even if we were to go back and count up every individual who has ever served in this capacity, given the backdrop of a country of over 200 million people, you are still a part of a very small and special group.

You represent the truism in that old axiom, "that never has so many owed so much to so few." I just hope that you will recommend passage for Section 103. It won't help me because I am in the sunset of my Government career, but it will help others and those yet to come who will value Government service.

Up to this point, I have omitted telling you about myself and I will be very brief. I view Government as the opportunity to serve. My Judea-Christian belief affirms in me that to be first amongst you--you must be willing to serve. This is my credo.

I can be described simply as a person who loves God, who loves his country and who loves and is faithful to his wife and family. Anything else that I am, hope to be or will ever be pales in significance. I harbor no rancor or bitterness; just a little disappointment. I am just an old citizen-government worker who has tried to do his duty as God has given me the light to see that duty.

I came here today to simply ask of this high council to right some wrongs and in so doing, help the civil servants of this great Nation.

Thank you.

Mr. MICA. Well, thank you, Mr. Just-Buddy, first for coming forward and testifying today voluntarily, and thank you for your many years of service and continued faith in the process. The system does work. People are aggrieved, the system sometimes breaks down, and that is what our panel is here for. Again, we are just so grateful for you coming forward and helping us to correct the laws by which we operate our Government. So we appreciate that.

I have heard a lot of testimony. I think yours is about as frank and open and moving as any I have heard in my years, both in Congress or in chairing this panel, so I do personally thank you.

I do have a question for some of our panelists who served in political capacities in administrations, and I guess some of you have that background, but one of the provisions under consideration in our proposal is to create an optional 401(k) retirement benefit for short-term employees, such as political appointees and congressional staff, instead of paying a defined benefit. I think this might address some of the problems and also give people an incentive to move on to the private sector.

I think Patrick Korten testified that it is the President's right to appoint these folks. Also, I think Mr. Moffitt talked about limitations on political appointees. We really do not want to do that because we want the policy of the President to go forward.

Do you, some of you that have background, think this would be one good measure to help attract folks and then have them move on into the private sector? Mr. Moffitt.

Mr. MOFFITT. Absolutely, Senator. Congressman. Sorry. You will get there, I'm sure.

Mr. MICA. Between you and Mr. Just-Buddy, we are doing real well today.

Mr. MOFFITT. Well, providence will see.

Now, as I said in my testimony, I think it is a terrific proposal. I think what you have to do with political appointees is make it very clear to them that they are the summer help, and one way to do that is to create that kind of a flexible yet generous program. And it seems to me that makes an awful lot of sense, given the nature of the job.

You are talking about a job, if I recall correctly some of the studies done in the 1980's indicated that people served in those jobs usually between 22 and 26 months. So this is an opportunity for them to accumulate retirement savings and then move on to the private sector where they are going to spend the rest of their career.

Mr. MICA. Mr. Korten, did you want to respond?

Mr. KORTEN. Yes, I would simply reiterate what I said about considering extending it beyond political appointees. Frankly, I think that the U.S. work force generally has become much more mobile in recent years, recent decades. It is no longer the case, as I said in my prepared testimony, that spending an entire career with one employer, as Mr. Just-Buddy has done, and proudly and certainly commendably, but it is no longer considered the default option for most people entering the work force today. Nor should it be.

Our economy has benefited greatly from the kind of employee mobility that we have seen. There is a lot of cross pollination, if you will, people moving, for example, among high-tech companies,

bringing the experience and the knowledge they have gained in one spot to another spot where it develops a little bit differently. I see absolutely no reason why that can't be the case, employees moving between the private sector and the government sector and back again. And a kind of 401(k) for everyone would greatly expedite that.

Mr. MICA. Mr. Johnson, you were a bit tough on the official time issue, and I was wondering if there are two parts. One is getting an accurate reading on how much government taxpayer money is used on official time, then maybe putting some limits on that. I mean I think employees have a right to unionize and collectively bargain, public or otherwise. And the other part is, again, some limits, financial limits on expenditure. Who pays for this? Does the union pay for it? Does the public pay for it?

Maybe we should start out with just collecting the data on some basis so we get a handle on this. What do you feel about a proposal like that?

Mr. JOHNSON. Mr. Chairman, I think it is a question of how much, how quickly it can be done. But you are right, right now we are in a situation of where we are all working in the dark because there is no data and there is some paperwork burden to collecting data. But surely we need that, and I would agree that that would be certainly the very first step. On the other hand, if it takes—who would collect the data. If OPM tells you it is going to take 2 years to collect the data or to set up a recordkeeping system to collect the data, that is a long time.

That is obviously your choice to make. I think it is just a question of time and how quickly can the basic data be gathered so you, the committee, can make an informed decision. I think the wide open basis right now is too wide open, and I think the lobbying aspects of the case law and the Federal Labor Relations Authority are troublesome.

Mr. MICA. Mr. Norquist, one of the things that has interested me, well, concerned me, too, is that we have incredible unfunded liabilities in our Federal retirement accounts. Not only do we have unfunded liabilities, the trust funds have, for the most part, been raided and replaced with nonnegotiable certificates of indebtedness to the United States.

One exception to that, and we had interesting testimony about this, was the District of Columbia. They do not do everything right, but some years ago they had an outstanding retirement board. This was 15, 20 years ago. They recognized the unfunded liability was growing out of hand and they made some adjustments. Actually, when we held our hearing on their funds, about 50 percent was unfunded liability and about 50 percent was in hard cash assets. One of the things they did was have the ability to invest some of this money in some options.

I have been trying to get this. If we increase the Federal employee contribution even the small amount of, say 1 percent over 10 years, and fence this money off and invest it, we would take tremendous pressure off the retirement system. Last year we had some $30 plus billion out of the general treasury to fund missing money, and that goes to over $100 million in a short number of years. Not $100 million, $100 billion. I'm sorry.

Do you think that we should be considering, again, something to take some strain to replace this money, and is that going to be wise tax and Federal fiscal policy for the future?

Mr. NORQUIST. Well, most State and local governments do have close to fully funded systems. The District of Columbia has been an exception.

Mr. MICA. In the private sector you go to jail if you do not take proper care and fiduciary responsibility over a retirement fund.

Mr. NORQUIST. And Congress has been and State legislatures have been insistent that the private sector have fully funded systems, because if you are going to have workers working and thinking they are getting compensated both in pay and in money put away for their retirement, you want to make sure that the money put away for their retirement is actually there and is not a promise down the road.

I think moving in the direction to have the Federal system become more fully funded is a move in the right direction, particularly moving to a defined contribution option for people who cycle in and out of government. Make sure that you are not building up any unfunded liabilities in those cases.

And I would point to California, which was worried about attracting quality workers to their university system and just provided a defined contribution option, such as the one that you are looking at for White House employees and congressional employees. They found they couldn't get people to come out and work in California for a couple of years if they were going to, in the middle of their career, in effect, lose the ability to save for their retirement. And California is now, with bipartisan support, looking at doing for their State legislature exactly what you are looking to do here for congressional staff and for White House staff.

Mr. MICA. Thank you. I will yield now to the gentleman from Maryland.

Mr. CUMMINGS. I only have a few questions. I was just wondering, after listening to Mr. Just-Buddy's testimony, I was wondering—is it Mr. Korten?

Mr. KORTEN. Yes.

Mr. CUMMINGS. You realize that the very program he is in now, based on this proposal, would be eliminated, the one where he is giving service to NAACP?

Mr. KORTEN. I do.

Mr. CUMMINGS. I was just wondering, after listening to his testimony, what is your feeling on that?

Mr. KORTEN. Well, the part of the testimony that I did not read here but entered in the record suggests that the IPA ought to be reserved exclusively for circumstances under which Federal Government employees rotate into positions in other governments for some period of time rather than into private groups.

And I certainly have a lot of sympathy for Mr. Just-Buddy. I think the root of that problem is not what this measure would propose to do to the Intergovernmental Personnel Act but rather the abuse of the placement of political appointees in the Department of Agriculture. I think that if we enforce a due respect for the proper position, proper deployment of political appointees, displacing a long-time career employee, such as he, would not be a problem.

I think that that is part and parcel of the much more lax view of the kind of murky waters that now exist between political and career appointments. We have allowed that line to become blurred. I think we need to make it sharper.

Mr. CUMMINGS. Assuming those circumstances did not take place the way he just stated, and just say he took advantage of the program and decided that he wanted to go into this nonprofit private sector. Having spent most of my life in the private sector, the private sector does things a lot differently than the public sector. No doubt about it. I am just wondering, the Federal managers seem to think it is a good idea. It seems as if, and I am going to get to you in a minute, Mr. Just-Buddy, because I'm curious about some things, but it seems to me that because of some of the things that are being done in the private sector that when a person then returns back to the public sector it might be very beneficial.

One of the things that concerns me is how people live their lives in a box and may never go beyond that box. If they never go beyond that box, they stay in that box until they die. There are a lot of people that fall in that category for various reasons. So I am just wondering, Federal managers make a good point that it may enable people to then bring something from one box to another one and, hopefully, perhaps be beneficial to Federal Government.

All of you, just about, have said something about the private sector does it this way, public sector does it this way. You seem to make that contrast, and I just wondered how you felt about that.

Mr. KORTEN. I absolutely share your view about the value of mobility, the value that accrues to the Federal Government when an employee comes in from the private sector and takes up a job for some period of years or vice versa. I think that is a very good thing.

I think that, unfortunately, there is a fundamental principle that I think ought not to be violated. The fundamental principle is that when the taxpayer provides money to the Federal Government to hire someone to do the Government's work, the tax money should not be used to pay that employee to do work for a private advocacy organization.

I agree with your goal. I think that the best way of doing it is, as I said, to encourage, to enable employee mobility by adjusting the compensation system so that people can rotate in and out, if they wish, of Federal employment without the very considerable constraints that come with the way especially the retirement system is set up right now. It truly is the last significant piece of the golden handcuffs, and it is there and it is real.

Try to find a Federal employee who has been around for at least 10 years and has built up a significant balance in the retirement system who is willing to turn his back on that. Doesn't happen. That's why you need individual retirement accounts or some sort of portability.

Mr. CUMMINGS. Well, then that goes back to something else I talked about a little earlier, and that is there is this one life to live concept. It seems like, I was just telling a staff member, one of the things that concerns me about the Federal Government is it takes so long to make change.

Mr. KORTEN. Amen.

Mr. CUMMINGS. So people will be retired and die. Then the change comes about and people will say, oh yeah, remember Joe? He died 10 years ago. He was advocating for this way back when, and wish he was here to see it. But, anyway, let me move on from there.

Mr. Just-Buddy, if you were to come back into the Federal system, do you think there are things that you are learning at the NAACP, under my predecessor Kweisi Mfume, that you could bring back to government, assuming people listened?

Mr. JUST-BUDDY. Congressman, in my particular instance, the reason why I'm at the NAACP is to benefit USDA. In other words, you are all aware of the black farmer issues and the black land laws. The NAACP asked USDA and told them they would help them if they could. So they sent an executive on loan, which is me, to go over there and train NAACP delegates in the field to assist USDA in a decline of black farmer issues.

So in this particular instance, the relationship between the two is most beneficial to USDA. I just happened to be the leading expert in that particular area at USDA, acknowledged by all, except—acknowledgment work is involved except when other things are involved. But it is a wonderful relationship for me there, because I can see the tremendous need there and the enthusiasm over there to make a difference. So I am appreciative of it.

In most IPA's, for example, I think that there is a relationship where you get a lot out of it. Private sector offers an awful lot. Government sort of stays the same a lot and we can pick up on a lot of new techniques in private industry. One thing about the NAACP, I can get things moved quick. I only have to see one person and then I can move forward with dispatch and efficiency and I'm appreciative of it.

Mr. CUMMINGS. Let me ask you something else. I want you all to talk about this drug policy. I was listening to the drug czar and I asked him to give me a profile of who uses drugs in the United States of America. One of the things he said was 85 percent of them are working. They are working every day. You may have some working in your agency, based upon the way he laid it out. He said a lot of these people you would never even suspect. He went on to say that 80 to 85 percent of them are white. He just went and gave us the whole profile.

I am just wondering, with this new proposal, it says persons who have been convicted of use, possession or sale of narcotics would be prohibited from working for the Federal Government. I just wonder how you all feel about that.

Mr. KORTEN. I would be reluctant to endorse something like that.

Mr. CUMMINGS. You would be reluctant.

Mr. KORTEN. I would be reluctant to endorse that.

Mr. CUMMINGS. Why?

Mr. KORTEN. I think it is a bit across the—I think there ought to be more flexibility in judging whether or not somebody is suitable for Federal employment.

Mr. CUMMINGS. Can you elaborate a little? Unless there is somebody else that wants to say something. I'm just curious. Why don't you elaborate while they are trying to figure it out.

Mr. KORTEN. Thank you. I certainly had a certain amount of personal experience with employees who had substance abuse problems in various managerial roles that I have had in and out of Government, and I think that everyone would agree, who has any experience like that, that some of these involve instances where the individual has stepped across the line when he or she was young and foolish. And at one time or another, we were all young and foolish, and I don't know that someone ought to be punished for that for a lifetime. It's a relatively simple principle, I think.

Mr. CUMMINGS. Anybody else?

Mr. MOFFITT. Well, I think that you make—I think it is an excellent question and it is a tough one. I think you're right, there is a lot more substance abuse than we are prepared to admit. It seems to me that one thing that might be worthwhile is some kind of a time limit on this sort of thing. If somebody was convicted years and years ago of a violation of the narcotics laws, that is quite different than somebody who was convicted, let's say, in the last 2 or 3 years. Because I think what you are talking about here is you are talking about behavior.

So it seems to me, Congressman, that as a matter of law, what you want to do is recognize the realities of what we are dealing with and, at the same time, establish a very high standard. And maybe one way to do that is to do the kind of thing that they used to do on background investigations, which is to basically ask the question, have you been involved in the use of drugs in the last 5 years, or something like that.

I do not think, however, that the Government, and I don't think the Congress is—I don't think the Congress is making a mistake by trying to tighten the appointment of people to the Federal civil service. Because, after all, as Mr. Just-Buddy pointed out, working for the people of the United States is an immense privilege and it is an immense privilege that should not be granted without due discretion.

Mr. CUMMINGS. All right. I have plenty more questions, but so that some of my colleagues will have an opportunity, I will just perhaps submit them in writing to you all. Thank you.

Mr. MICA. Thank you, Mr. Cummings.

Mrs. Morella.

Mrs. MORELLA. Thank you. I thank you all for testifying. I just want to point out, in terms of civil service, you know with the emerging democracies there are some things they look for. You need to have, as you approach a democracy, you need to have a constitution, the rule of law, an independent judiciary, a free press, and a good civil service. I mean that is absolutely paramount or you have difficulties. That has been, really, the responsibility of this committee. As somebody has said, it may not be that sexy, but it is critically important to our entire operation of government, whether people are civil servants or not, and we care also about recruiting young people into civil service.

Mr. Norquist, I am amused by your bio here. One of the points in it says P.J. O'Rourke says Grover Norquist is Tom Paine crossed with Lee Atwater, plus just a little soupcon of Madame Defarge. I found that very interesting.

Mr. NORQUIST. P.J. is a funny guy.

Mrs. MORELLA. Mr. Norquist, I want to thank you for your endorsement of my TSP bill, and I wanted to ask all of you, if you feel it is important, what should we be doing to muster up support? I am thinking also, Mr. Johnson, of the chamber of commerce. If you had some business entities and people from think tanks, like you, that really care about this, that maybe you could help to muster up some support so the Treasury says, hey, yeah, with this surplus, we can afford that.

Maybe I will start with you, Mr. Norquist.

Mr. NORQUIST. Well, it was recently brought to my attention. I think it is an excellent idea, and I intend to write on the subject and will encourage others to, both here in Washington and out in the States.

Mrs. MORELLA. Good.

Mr. MOFFITT. Mrs. Morella, I think the attractiveness of your proposal is that it comes at exactly the right time. There was a time not too long ago when only a tiny minority of Americans, really basically the economic elite of this country, invested in things like stocks and bonds and mutual funds, things of that sort. Today, I understand the most recent statistics indicate that 43 percent of all Americans are in the stock market. What is happening is that we are seeing a democratization of investment on a level and really at a rate that would have been shocking, I think, to any of us 10 years ago.

When the Congress, working closely with the Reagan administration, established the Federal Employees Retirement System, that was a major breakthrough in terms of retirement policy for the United States. It was huge. I don't think at the time, when Members of Congress voted for it, they really understood the gravity of, in fact, what it was. I remember. I was involved in those discussions, negotiations, at the time. But when Federal employees start seeing returns on their stock options of 37 and 38 percent, of money that is invested that belongs directly to them, that has a profound effect on how they feel about those kinds of options and the fact that they can take that money with them.

It seems to me that one of the things that we ought to do is to promote the success, at least in terms of the publicity, of what, in fact, Congress and the Reagan administration actually accomplished in 1986, and the fact that the Federal work force today has one of the finest retirement investment options available and make it clear that one of the reasons why it is is because it takes advantage of the power of this remarkable economy.

Mrs. MORELLA. Good point. Good point.

Mr. Johnson, any chance the Chamber will say, hey, this is a good idea?

Mr. JOHNSON. Well, it is not revenue neutral, so it is a rough row to hoe in the Chamber.

Mrs. MORELLA. But, you see, because of the investment, whatever, it churns money into the economy.

Mr. JOHNSON. Right. How did CBO cost it out, I guess would be the question.

Mrs. MORELLA. Yes.

Mr. JOHNSON. Just speaking generally, it has been one of my frustrations when I was on the Hill that the business community

didn't pay more attention to what was going on in the Federal Government, and it continues to be. And just generally speaking, it is one of my goals to try to get more focus on what is going on in this subcommittee. So certainly I would be glad to take this proposal back and run it through the traps.

Mrs. MORELLA. OK, thank you.

Mr. Korten.

Mr. KORTEN. The only observation I would have, Mrs. Morella, is that anything you can do to encourage, enable, advance the ability of individual Federal employees, or anyone else for that matter, to be able to invest their retirement contributions in real assets, stocks, bonds, things that are used in turn to create wealth in the economy, is much to be admired. Investing, quote-unquote, those things in government securities is not an investment of that sort, it is simply setting aside IOUs. The Social Security trust fund, government trust funds generally, are not assets. They are liabilities.

Mrs. MORELLA. I should have thought of that earlier when I put too much into the G fund and not enough into the C fund.

Mr. KORTEN. I would add that those investment decisions ought to be made by individuals rather than Government managers of Government funds. That is a dangerous precedent.

Mrs. MORELLA. Which TSP does give all that choice, and we have added two more even beyond the three that we have had.

Mr. Just-Buddy, you have allowed us to look even closer at that section 103 that you mentioned, and I understand that there has been a GAO study, which I will look into further, having heard your testimony with regard to whether or not you are just an unusual situation or whether there are others that fall into that kind of pattern and that maybe we should be looking at that.

If you had not had that adverse experience, would you still feel that this would be an important section for us to incorporate?

Mr. JUST-BUDDY. Oh, absolutely, Congresswoman. I really came up in the system where the political people were there to make sure the bureaucracy worked, and irregardless of what party was in, we just went about implementing what was decided from the national leadership and did our job.

But this is the first time that I have seen, at tremendous levels, such an intrusion on normally what bureaucracy—well, it is a little different. And I have been around through several administrations, but it's a little different.

Mrs. MORELLA. I guess just one other brief question, again with the opportunity, if I may, of sending any other questions to you, particularly with regard to performance evaluation.

I guess to Mr. Moffitt. As you know, there is a lot of controversy surrounding the bill's performance management provisions. From your experience, are mere performance provisions, are there more performance provisions that you think should be added, especially if those that are in the bill are stripped?

Mr. MOFFITT. I think your problem is how do you ensure the confidence of the American people in the effectiveness of its work force if you do not have serious consequences for performance. That is not a partisan point of view. It is not even a philosophical point of view, strictly speaking, between conservative and liberals. David Osborne, the author of "Reinventing Government", said that the

most important thing you can do to make Government entrepreneurial in the 21st century, really, is to make sure that performance has real consequences. That means you have to tie performance in some sense to pay. You have to make sure that people are rewarded for outstanding work.

I would hope that the committee would not do what Republican and Democratic administrations have done in the past, which is to pass comprehensive legislation which tells the public, as the Civil Service Reform Act of 1978 did, that we are going to stress accountability, we are going to stress performance; we are going to make sure that the Government is, to use Jimmy Carter's famous phrase, the Government works as hard for the people as the people work in order to support the Government, and then backs away from tying real consequences to performance. As I say, this is not a partisan issue.

I think one of the most remarkable things was the failure of the Bush administration to take the merit pay proposals that had been worked out painfully over many months between Congress and the Reagan administration and simply let them die without so much as a by your leave. When you get into this business, and we know it is difficult, and really, very frankly, Mr. Cummings actually earlier on put his finger on it. At the heart of all of this is the ability of managers to be managers, and that means making the very tough decisions about the gradation of people's performance.

If you decide that Government managers are not going to do what every manager in almost every private sector entity does; that is, to make those very, very tough decisions about the performance of the work force, then I'm saying to you, in effect, that what you are doing is you are not—well, put it this way, you are not upgrading the image of the Federal work force, which is something that has to be done. We have got to make sure that the Federal work force is performing at a very, very—at a very strong level but in a way in which those results are manageable.

I'm very, very concerned that if, in fact, the performance management initiatives that you have here are stripped away because, once again, we are really not serious about it, maybe the best thing to do is to go back to the 1978 Civil Service Reform Act and simply repeal it and say that we're really not serious about this.

And let's say if we're not going to have—if we're going to have a pass-fail system, for example, for judging employees, anybody who has been in a university system, as I have, knows that that is not real evaluation. There's a magnificent difference between a student who gets an A and a student who gets a C or a D. And the point is that no more—it does not work in the workplace or the Federal civil service any more than it works in a university setting.

We have to get serious about the performance appraisal and make sure the managers do their job, and we have to give them the tools to do that. And it seems to me that if you take away direct results from performance, you are weakening basically what you are intending to do. As I say, really seriously, if Congress feels it's not worth it, then simply repeal the Civil Service Reform Act of 1978 and forget it.

Mrs. MORELLA. The rest of you, I guess, associate yourself with his comments.

Mr. KORTEN. You all have been in elected politics for a long time, so I don't have to tell you how awkward it would be for a constituent to come up to you and say, hey, how is that Federal work force doing? And you are sitting there in a position having to say, well, 98 percent of them passed. Passed? Passed what? Do you pay them extra for doing a better job? No. I wouldn't want to have to answer that question.

Mrs. MORELLA. OK.

Mr. JOHNSON. I would say in my 6 years with the Department of Labor, I would support those comments. I think you have to have a way to separate out the people who are the workers and the people who aren't, and pass-fail doesn't do that.

It's hard enough, actually, with the five-tiered system now in the Federal Government, between outstanding and fail, because almost everyone—I can't remember the percentages, but almost everybody gets highly satisfactory or satisfactory. Pass-fail even makes that situation worse. And it does depress productivity and depresses motivation among employees. I just say that based upon my 6 years with the bureaucracy.

Mrs. MORELLA. Valuable to have your experiences as Federal employees.

I thank you, Mr. Chairman. In the interest of time, I will submit the rest of my questions.

Mr. MICA. Well, I thank all of our panelists today, especially Mr. Just-Buddy, who stepped forward as the civil servant to relay his particular situation and to help us improve the system, and the others representing various organizations and think tanks.

We may have additional questions that we will submit to you for the record. And with that, we will dismiss this panel and welcome our third panel.

Our third panel today consists of Mr. Albert Schmidt, who is the national president of the National Federation of Federal Employees; Mr. William Pearman, president of the FAA Conference, Federal Managers Association; Mr. Robert Tobias, national president of the National Treasury Employees Union; and Mr. Bobby L. Harnage, Sr., national president of American Federation of Government Employees.

Welcome. We have a couple of new participants here. If we could, we will swear in our witnesses. If you could please stand.

[Witnesses sworn.]

Mr. MICA. I would like to welcome all of our participants today in this third panel, representing primarily Federal employees and managers. We would like to hear your viewpoint on some of these recommendations or other suggestions that you have for our panel.

I will recognize first Mr. Bobby L. Harnage, national president of the American Federation of Government Employees. Welcome, sir, and you are recognized.

STATEMENTS OF BOBBY L. HARNAGE, SR., NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; ROBERT TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; ALBERT SCHMIDT, NATIONAL PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES; AND WILLIAM W. PEARMAN, PRESIDENT, FAA CONFERENCE, FEDERAL MANAGERS ASSOCIATION

Mr. HARNAGE. Thank you, Mr. Chairman and members of the subcommittee. My name is Bobby L. Harnage, Sr., and I'm president of the American Federation of Government Employees. I want to thank you for the opportunity to testify on various proposals being considered as part of the Federal Employees Integrity, Performance, and Compensation Act. No other organization appearing before you today has a greater stake in what you are doing with regard to reform measures as the 600,000 hard working Federal employees that this union represents.

That is why AFGE has been on the frontline for years fighting for sensible, intelligent civil service reform. We believe that the success of any Government reform initiative depends ultimately on the support of the key stakeholders in the enterprise of Government. Reforms will fail unless they are supported by the agencies, the Federal managers, the supervisors, the frontline employees, and their union representatives.

I have submitted my written testimony, and I would like to summarize some of the parts of the draft legislation.

AFGE understands that Federal agency managers need greater flexibility and more discretion to meet mission needs. Every day managers and employees are asked to do more with less. However, with this flexibility must come accountability.

Accountability means new-found discretions over pay and classification, hiring, and performance management is balanced by an expanded substantial role for the exclusive representative in workplace decisions. That is why AFGE has consistently fought against reforms that would deny the legitimate role of labor as both a workplace partner and the employees' workplace representatives. Unfortunately, this bill would place artificial and unnecessary limits on the subjects over which labor and management could negotiate, restricting the parties to bargaining merely over the impact of decisions by agencies. This is totally unacceptable to AFGE.

On the proposal on official time, Mr. Chairman, we might as well shuck it down, as we say where I come from, and tell it like it is. This is nothing more than an attempt to bust Federal employee unions throughout the Government by eliminating all of their use of official time. It would outlaw all official time used to engage in negotiations of any kind. It would outlaw the use of official time to represent employees in proceedings before the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the Federal Labor Relations Authority.

In addition, this provision is an attempt to silence union representatives from communicating with Congress, the body that, as an employer, sets Federal employee pay and benefits. It is Congress, and not Federal managers, that determine many issues of direct concern to employees. In many ways, Congress sits in the seat of the employer at the bargaining table with Federal employees'

unions. And why would Congress want to limit their access to Federal employees when it is more often that is where they get the very source of information that they find most helpful in their deliberation of matters before you concerning Federal agencies?

Official time is authorized by agency grievance procedures. Official time is authorized by statutory appeals procedures. Official time for negotiating with management. All we did is put it in a labor agreement and substituted an agency grievance procedure for a negotiated grievance procedure. We did not expand official time in those areas. However, this law would prohibit a union representative from using official time, but a nonunion representative would still have that entitlement. That is the reason I'm concerned that the legislation is more toward union busting than any other reason, is because it singled out just union representation. We strongly oppose this provision.

I heard a comment by one of the previous panelists a while ago talking about union business. Let's get it clear. Official time is not used for union business. It is prohibited. Union business is signing up members. Union business is collecting dues. Union business is holding membership meetings. Union business is making reports to both Department of Labor and the IRS and to the membership. What official time is used for is labor-management relations.

And we are trying to fix something that is not broke. Where it is working, where we have official time, you can look and see that the number of grievances are considerably reduced, the number of unfair labor practices are considerably reduced. And while we are trying to collect all of the data to determine how much official time and put a dollar value on it, is used, let's also look at what the benefits are that is derived from this use of official time, rather than just try to cloak it as dollars being spent by the taxpayers. It may very well turn out, and I suspect it does, it winds up being a savings to the taxpayers, not a cost to the taxpayers.

On performance management, let me say up front that AFGE members don't want poor performers on the job any more than this committee does. It is our members who must pick up the slack when work isn't done. It is our members who labor in the increasingly competitive environment where the services they perform today are in danger of being contracted out or privatized. Neither AFGE nor its members can afford to coddle the second rate or create safe havens for the incompetent. The provision to give more weight on performance in RIF's is seriously misguided. All of the necessary tools are already in place to deal with poor performers. Federal agencies and managers need to do the difficult work of actually managing employees.

I now have 34 years of service, full-time service in AFGE. I started out as a shop steward on the work floor, became a local officer, a national representative of AFGE, where I negotiated contracts and represented Federal employees in disciplinary actions and adverse actions, then became the national vice president of the largest membership in this federation and supervised 12 national representatives who did the same thing I had previously done. I have never seen where there is a problem firing a poor performer. The problem has been either the manager did not know what to do or would not do what they are supposed to do in order to take the nec-

essary action. You can pass all the legislation you want to; it is not going to correct that particular situation. And the same thing applies to withholding grade increases.

As to the problem with performance evaluations. We have a simple solution to the performance evaluation problem. You give us the broad scope bargaining we need to negotiate at the local level, and we will make it easy to get rid of poor performers and we will see the people doing the job get rewarded. But the problem with all of the systems that you come up with is it leaves it up to the supervisor without some accountability there for making decisions.

The example was given a while ago comparing us to the academia world. It is pretty simple. You have a test, somebody made 85 on it, somebody made 95 on it, somebody made a 70 on it, and, therefore, you got an A, B, and a C student. You don't have those type of numbers when it comes to evaluating employee performance.

The pass-fail provisions we have negotiated are in the Social Security Administration. You may want to take a look at that. Employees are satisfied with it, management is satisfied with it, and it works. But it is not to look at the end results of performance. It requires a constant look at what is happening to the employee, at the beginning of the performance period and all the way through it, there is direct contact and communications between the manager and the employee. It is not a cut pass-fail situation based on a decision that wasn't even thought about 2 weeks ago but now it is time for us to issue the decision and we have a dilemma over pass-fail.

As long as we are given the broad scope bargaining, we will assist you in the area of making sure that poor performers cannot continue to work for the Federal work force. We don't want them, we don't need them.

While this draft proposal contains some provisions that AFGE would support, we believe this bill, on the whole, is far off the mark. Indeed, the bill seems to be a course far away from the sensible proposal aimed at improving the quality of the employee worklife. It is on the path of truly despicable proposals that would devastate Federal employee unions and jeopardize the long-standing right of Federal workers to organize.

We hope that in the days ahead we can work with you and the committee on different approaches to reform, one that respects and values the interests of all the key stakeholders, particularly the rank-and-file workers that do the demanding, often dirty work and sometimes dangerous jobs that make Government work.

I appreciate your interest and this committee's interest in reforming the civil service, and we look forward to working with you. There are some areas, I think, that given the opportunity to have some input, we can come to agreement. We tried to work with the Department of Defense the first part of this year and the latter part of last year on some of the very issues that you are dealing with here. But our problem was they wanted to revert back into their traditional role and not give us the checks and balances we felt like we needed with giving management more flexibilities. We will be more than willing to work with you in that area.

Thank you very much for the opportunity to testify.

[The prepared statement of Mr. Harnage follows:]

Mr. Chairman and Members of the Subcommittee:

My name is Bobby L. Harnage. I am President of the American Federation of Government Employees, AFL-CIO (AFGE). I appreciate this opportunity to testify on the various proposals being considered as part of the Federal Employees Integrity, Performance, and Compensation Act. AFGE is the nation's largest federal employee union, representing some 600,000 employees in over 70 federal agencies. No other organization appearing before you today has as great a stake in government reform measures as the men and women represented by AFGE.

That is why AFGE has been on the front line for years fighting for sensible and intelligent civil service reform. Our members know first-hand how ineffective the government's civil service systems can be, and how often abuse and misuse of the current systems stand in the way of delivering quality service to the American people. In previous testimony before this Committee, AFGE has been a persistent champion for real and fundamental change.

We believe that the success of any government reform initiative depends ultimately on the support of the key stakeholders in the enterprise of government. Reforms will fail unless they are supported by the agencies, federal managers and supervisors, front-line employees and their unions and, of course, the American people. Efforts to restore the public's faith in the effectiveness and performance of government will demand energy, ideas, and a willingness to change on the part of the government's

most important asset, its workers. But these qualities will be in short supply if the reform efforts treat government workers as part of the problem, rather than as the key to success.

AFGE supports many of the reform proposals that the Committee is considering. However, there are a number of other proposals that we oppose so strongly that AFGE could not support the bill as a whole if these proposals remain.

I. SAFEGUARDING THE INTEGRITY OF THE MERIT SYSTEM

Increased Flexibility For Demonstration Projects

As the Committee knows, demonstration projects can be an effective tool for bringing innovation and change to the government's personnel systems. In past projects at China Lake and McClellan Air Force Base (PACER-SHARE), and in current projects planned for the Naval Sea Systems Command and the Department of Veterans Affairs, agencies have experimented with entirely new systems for pay and classification, performance management, staffing and hiring, even reductions in force. It is fair to say that once implemented, a demonstration project has a profound effect on all aspects of an employee's working life.

That is why it is so important that the employees' elected representatives play a key role in designing new personnel systems under a demo. Unfortunately, this bill would place artificial and unnecessary limits on the subjects over which labor and management could negotiate, restricting the parties to bargaining merely over the

"impact" of decisions made by agency management. Indeed, the bill goes even further, proposing to eliminate the long-standing protections afforded collective bargaining agreements under 5 U.S.C §4703(f). Both of these proposals are wholly unacceptable.

AFGE understands that federal agency managers need greater flexibility and more discretion to meet mission needs. Every day both managers and front-line workers are being asked to do more with less. In this environment we can hardly afford to let rigid, inflexible rules get in the way of common sense solutions. However, we do not believe that merely freeing managers from current laws and rules and hoping they do the right thing is the answer. Management flexibility for its own sake -- that is, flexibility without accountability -- is exactly the wrong approach to reform. It will generate distrust and cynicism among the very employees whose commitment and dedication will be needed to make the reforms succeed.

Real accountability comes when new-found management discretion under a demo project is part of a rational system of checks and balances. Accountability means that new-found discretion over pay and classification, hiring, and performance management is balanced by an expanded, substantive role for the exclusive representative in workplace decisions. That is why AFGE has consistently fought against reforms that would deny the legitimate role of labor as both a workplace partner and the employees' workplace representative.

Under the current labor relations system, important workplace decisions are all too often reserved to management's discretion, limiting the parties to the kind of "impact and

implementation" bargaining that this bill advocates. In the past, this limitation has prevented the parties from bargaining over training, the creation of health and safety committees, career development programs, and even the simple requirement that performance evaluations be fair and objective.

Rather than encouraging discussion on the issues of greatest concern to labor and management, the current bargaining framework draws the parties into a pointless debate about whether they are allowed to have the discussion at all. If demonstration projects are to succeed, if they are to have any hope of bringing real innovation and change to a skeptical workforce, bargaining restrictions must ease so that labor and management can work more closely than ever before on important workplace issues.

We do not view this simply as a "union issue." Rather, this is about how the government plans to manage its most precious asset -- its workers -- and whether it is serious about change. We believe that a reinvigoration of the federal civil service necessarily entails a strong partnership with labor, a partnership based on the parties' mutual commitment to high-quality public service. The central issue is whether the government wants to perpetuate the management-knows-best models of the past or whether it embraces the kind of dynamic labor-management partnerships that are leading successful organizations into the 21st century.

AFGE is also concerned about removing the 5,000 employee limit on the size of demonstration projects. AFGE has worked with other agencies on demo projects that received special authority from Congress to cover more than 5,000 employees. The

NAVSEA demo covering over 20,000 employees in the Navy's research and development labs is an example.

But this was a special case. As far as we can tell, this bill contains no restrictions at all and would permit entire agencies to be placed under new personnel systems. The whole purpose of a demo project is to establish limited pilots for discrete groups of employees so that new personnel systems can be studied and evaluated. Simply eliminating the 5,000 employee restriction goes well beyond experimentation. Indeed, it would permit a wholesale replacement of our merit based civil service, something never intended by the laws and rules covering demo projects.

There is nothing special about the number 5,000, but some reasonable limitation on the size and scope of demos is clearly needed. One sensible approach would be to cap demonstration projects to no more than a certain percentage of an agency's workforce, say five percent for a large agency like the Department of Defense or ten percent for smaller agencies.

Require Courts To Review OPM Appeals

AFGE is strongly opposed to revising the longstanding statutory provisions that govern the Office of Personnel Management (OPM) when it seeks to obtain judicial review of arbitration awards and Merit Systems Protection Board (MSPB) decisions. The current statutory scheme carefully limits OPM's right to seek court review of personnel decisions. The statute sets out sensible standards that protect the integrity

of the Civil Service system while discouraging unnecessary and unwanted interference from OPM with ordinary workplace disputes. Under these standards, OPM has the right to petition the MSPB or an arbitrator for review of a decision in cases where the Director of OPM determines that the decision is erroneous and, if allowed to stand, within OPM's jurisdiction. However, petitions are limited to cases that are considered exceptionally important.

With respect to OPM's right to seek judicial review of an arbitrator's award or an MSPB decision, the same reasonable limitation applies. OPM may seek judicial review only in exceptional cases when it finds that the Board or arbitrator committed legal error in interpreting civil service laws and the erroneous decision will have a substantial impact on how aspects of the civil service rules are interpreted in the future. If the court determines that the issues raised will not have a substantial impact on the administration of civil service laws, it may decline to accept the petition for review.

Bear in mind that arbitration decisions do not set legal precedent. An arbitrator reviewing a contract provision or a personnel decision is clearly not bound by a previous arbitrator's award. Viewed in its proper context, therefore, it is disingenuous for OPM to seek an automatic right to court intervention in such cases. OPM is, in effect, asking for an unfettered right to judicial review of cases that: (1) will have an insubstantial impact on civil service laws; or (2) are unexceptional. It is difficult to

see what public interest is served by expanding OPM's rights to seek review of cases such as these.

OPM will surely argue that it has used its authority to seek judicial review wisely and infrequently. We agree. We found that over the past 18 years, OPM has petitioned for review only 57 times, or roughly three times per year. But OPM's reasonable use of a limited grant of discretion does not mean that its discretion should be expanded. To the contrary, what it shows is that the judicious balance struck by Congress twenty years ago has worked exceptionally well for agencies, employees, the judiciary, and the public. Indeed, we can cite no particular case that would justify such an extraordinary expansion of a federal agency's right to intervene in litigation where it has not been a party.

The long-standing system of checks and balances governing OPM review has worked well for two decades and will continue to work if left alone. The changes proposed here are not just unnecessary, but amount to a "where it ain't broke, break it anyway" philosophy of government reform that Congress should eschew.

Official Time

Mr. Chairman, this portion of the bill is nothing more than an attempt to bust federal employee unions throughout the government by all but eliminating the use of official time. The bill would allow federal employee union representatives to use official time only for handling grievances and attending only those labor-management

meetings that are convened or sanctioned by the agency. The bill would outlaw all official time used to engage in negotiations of any kind; to represent employees in proceedings before the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the Federal Labor Relations Authority (although the last agency is permitted to grant the necessary approval); to conduct training on any labor-management issues; and to lobby Congress in its capacity as employer on issues of direct concern to employees.

As you know, Mr. Chairman, official time is used by federal employee union representatives to fulfill their statutory obligations to bargaining unit employees, members and non-members alike. Union representatives can use official time to engage in negotiations and to fulfill other obligations while in duty status.

As part of the Civil Service Reform Act of 1978, Congress required federal employee unions to work on behalf of all employees in a bargaining unit whether they are union members or not. Moreover, Congress prohibited unions from collecting a fair-share payment or fee when they handle grievances for non-members or arbitrate cases on their behalf. In other words, non-members get the proverbial free lunch: they contribute not a dime yet they benefit directly from the hard-fought bargaining gains and skilled representation that federal employee unions are compelled by law to provide equally to members and non-members.

In consideration of these onerous responsibilities, the Congress allowed federal employee unions to *bargain* with agencies over the amount of official time that representatives can use. Bargaining over official time ensures that the union's

interest in securing representational time is balanced by the public's interest in the effective administration of government. Indeed, current law expressly states that federal employee unions can use official time only for those activities which are reasonable, necessary, and in the public interest. Legally permitted representational activities include negotiating collective bargaining agreements, handling employee grievances, conducting and receiving training, and working in partnership with federal agencies to improve the delivery of services to the American people.

Union representatives are prohibited from using official time to conduct or participate in any internal union matters. This means that official time can't be used to organize workers, solicit new members, campaign for office, or conduct elections. Federal employee representatives are also forbidden to use official time for partisan political activities.

As you can see, the 20-year old statutory system for allocating official time fairly balances the interests of federal agencies, federal employee unions, and taxpayers. It also provides numerous safeguards against the abuse or misuse of official time. Is it a perfect system? Of course not. But the Chairman's draft bill does not seek genuine improvements or constructive change. It is apparent to AFGE -- indeed, apparent to anyone who has followed this issue -- that the goal of those who authored this provision is to dismantle official time altogether and to cripple federal employee unions. Here are just some of the devastating consequences we foresee as a result of this provision:

LABOR-MANAGEMENT RELATIONS: Federal employee union representatives, specifically forbidden from using official time to engage in problem-solving negotiations, would have no choice but to advise their rank-and-file members to file grievance after grievance in order to protect their rights -- litigation that would be both costly and completely unnecessary were it not for this provision. The decline in cooperative labor-management relations, while immediately increasing costs to the taxpayers, would also render futile any attempts, through partnership or otherwise, to make government programs more effective, more efficient, and more reliable.

FEDERAL EMPLOYEE UNIONS: Although unions provide their members with many benefits, nothing we do is more important than negotiating with management over working conditions. Prevent unions from negotiating with management over working conditions and you might as well do away with unions altogether. We all know that. And, more importantly, Mr. Chairman, you know that as well.

RANK-AND-FILE FEDERAL EMPLOYEES: This legislation also singles out federal employee unions for punishment. While the bill would prohibit a union representative from using official time to, say, work on behalf of an employee engaged in an MSPB appeal, the legislation would allow an employee who is not a union representative to handle the matter. Unfortunately, that employee representative, no matter how conscientious, would not have the weight and prestige of the union behind her nor would she have the expertise and resources possessed by a real union

representative. The likely result: some federal employees would be deprived of effective representation while others would hire outside lawyers, whose interest in making money and disinterest in resolving disputes amicably would likely lead to prolonged and costly litigation.

FEMALE AND MINORITY RANK-AND-FILE FEDERAL EMPLOYEES IN PARTICULAR: While this legislation would be bad for all of the working and middle class Americans who make up the federal workforce, it would have a disproportionate impact on women and minorities because of its prohibition on the use of official time for representation before the EEOC. At the same time, the bill does not apply to official time used by managers, a majority of whom are white and male, to address their own personnel concerns. While it can't be said conclusively that the legislation's intent is discriminatory, the Chairman must admit that enactment of this provision would have discriminatory consequences.

ALL AMERICANS WHO PAY TAXES AND DEPEND ON AGENCIES FOR SERVICES: For partnership to work well enough to lead to increased efficiencies and better services, both sides must engage in a genuine dialogue. When management is given the exclusive authority to determine when and where meetings should take place and, more importantly, what topics should be discussed, the incentive for agencies to take partnership seriously and to respond to the ideas and concerns of rank-and-file federal employees is all but eliminated.

Mr. Chairman, AFGE simply cannot understand why it is necessary to include these misguided, reprehensible union-busting provisions in what is supposed to be an effort to achieve a consensus civil service reform bill. We will continue to strongly oppose these provisions whether they are included in this measure or considered separately.

Due Process For Federal Managers

The bill proposes to strike the current statutory provision that gives arbitrators the authority to order an agency to initiate disciplinary action against managers in certain cases. At the time the provision was enacted, some managers complained that it wasn't constitutional and that they would be punished without notice and an opportunity to be heard. This "sky is falling" rhetoric was not only unduly alarmist, it was wrong. The U.S. Court of Appeals for the D.C. Circuit had already upheld the language in Department of Justice, Lewisburg v. FLRA, 981 F.2d 1339 (D.C. Cir. 1993).

Under the provision, a disciplinary action can only be proposed by an agency against a manager who is the subject of an adverse finding by an arbitrator. The manager retains all of his or her rights: the right to an impartial investigation, a right to reply, a right to a hearing, and the right to appeal to court. This provision has been in place for five years and those who object to it have yet to cite a single example where a manager's rights have been denied. In addition, the provision was viewed by whistleblower advocacy groups as an essential protection for employees.

The public continues to demand accountability from government agencies, yet the bill would give high-level government law breakers a free ride. There is simply no reason to change the current provision and no excuse to make it even harder to hold federal government managers accountable for illegal or egregious conduct.

II. PERFORMANCE MANAGEMENT

Increase The Weight Of Performance In RIFs

The bill proposes to give more weight to performance appraisals for RIF retention purposes. We believe this proposal is seriously misguided. It would place even greater reliance on a performance management system that is widely viewed as dysfunctional by employees and managers alike.

Let me say up front that AFGE members don't want poor performers on the job any more than this Committee does. It is our members who must pick up the slack when work isn't done at all or isn't done right. And it is our members who labor in an increasingly competitive environment where the services they perform today are in danger of being contracted-out or privatized tomorrow. Neither AFGE nor its members can afford to coddle the second-rate or create safe havens for the incompetent.

But that does not mean that we should give more weight to a system notorious for its inability to make reasonable distinctions about employee performance, a system that managers do not like and employees do not trust. If the goal is merely to score public relations points for being "tough" on poor performers without accomplishing anything of substance, than we suppose this proposal could fool the unaware into

believing that something has been accomplished. If, however, the objective is to force government agencies to confront the weaknesses of the performance management system and to devise more effective evaluation methods, then federal agency managers need to do the difficult work of actually managing employees instead of hoping for a legislative solution that will let them off the hook.

Authorize Denial Of Within Grade Increases And Eliminate MSPB Appeal Rights

This proposal is another example of smoke but no fire when it comes to poor performers. Agency managers already have all the authority they need under the law to deny "within grade increases" (WIGIs) for employees who are not performing at the fully successful level. If a WIGI is denied, an agency need only support its decision by mere substantial evidence, which means no second-guessing by third parties even if a reasonable person might disagree with the agency's decision. Agency managers do not need more authority in this area, they simply need the backbone to exercise the abundant authority they have now.

We have similar concerns about eliminating the right to appeal WIGI denials to the MSPB. The number of MSPB appeals in this area in any given year is so minuscule that this proposal is more than just irrelevant, it's also punitive. Indeed, if the Committee is looking to send a message to poor performers, it has clearly come to the wrong place. Moreover, eliminating appeal rights to the Board may inadvertently eliminate the right to challenge WIGI denials under the negotiated grievance process since the rights are linked under the statute.

Prohibit Two-Tier Evaluation Systems

The idea that performance can't be evaluated meaningfully under a pass-fail system is absurd. Most employees and managers hated the old 5-level system precisely because it emphasized scores and ranking at the expense of a true and honest assessment of employee performance. Managers could avoid confronting real performance problems under the old system simply by handing out "fully successful" or higher performance ratings, something we saw repeatedly across entire organizations.

The pass-fail systems are trying to change that culture. These systems put less emphasis on scores and rankings -- an employee is either acceptable or not -- and more emphasis on continuous feedback to employees about the quality of their performance and the nature of their contributions. Employees like this approach because, for the first time, they are not competing against one another for a particular score but focusing on what is expected and what is needed to get the job done right.

And managers like the system, too, because it eliminates the time once spent rating and ranking and provides more time to actually work with employees on job performance. In effect, our experience has been that pass-fail systems actually help agencies identify and deal with poor performers. They also save resources once spent on defending the obscure and irrelevant distinctions between a "level 2" and "level 3" performance rating under the old multi-level systems.

We urge the Committee not to snatch defeat from the jaws of victory, and to allow agencies to continue moving toward these sensible performance systems.

Limit Performance Improvement Periods

This provision is yet another example of a solution in search of a problem. The proposal is apparently motivated by the rare cases where an employee improves his performance after an opportunity to improve then, after the improvement period has ended, sees a deterioration in performance requiring another improvement period. This "roller coaster" employee is sort of the Bigfoot of performance cases, a hardy myth but difficult to find in the real world.

In any case, agencies are simply not required to offer such an employee endless chances to improve. If an agency can show -- again, by a mere preponderance of evidence -- that the single improvement period constituted a reasonable opportunity to demonstrate acceptable performance, the employee is out the door. There is no evidence that this requirement has interfered in any way with an agency's ability to take action against a poor performer.

III. STREAMLINING APPEALS PROCESSES

Alternative Dispute Resolution In Agencies

We could not support this proposal unless it's clear that, where represented employees are concerned, the design and implementation of new ADR systems in a demonstration project would be subject to collective bargaining.

AFGE has been a frequent critic of the government's costly and inefficient formal dispute resolution procedures. In 1994 we worked with other members of the National Partnership Council on a far-reaching set of recommendations for reform in this area,

including proposals for alternative dispute forums. But the key to those recommendations -- and to our support here -- is the authority of labor and management to design ADR systems together through collective bargaining. There is simply no incentive for AFGE to abandon the old dispute resolution mechanisms -- as troubled as they might be -- if the alternative is completely new systems conceived unilaterally by agencies and imposed on employees without the involvement or agreement of their elected representatives.

Eliminate Mixed Case Appeals Procedures

Any attempt to reform the confusing and overlapping EEO appeals procedures must be carefully planned and comprehensive. AFGE would oppose the "quick fix" that simply picks on anti-discrimination cases.

IV. EMPLOYEE COMPENSATION AND BENEFITS

Full Disclosure Of Government's Payroll Costs

The proposal to require each federal employee's payroll statement to include the "employer's contributions to full normal cost of retirement" would create a false and dangerous impression of the federal government's true costs for its two major retirement systems. The federal government, unlike private employers, does not need to fully fund, prospectively, all retirement benefits accruing to CSRS employees and retirees. There is a good reason for this: Federal pension obligations simply cannot come due all at once because the federal government will never go out of business. The justification for

normal cost accounting in the private sector is to protect employees' retirement benefits from the consequences of their employer's potential inability to generate sufficient cash flow to pay promised benefits. But employees of the federal government do not face this risk, and as such there is no rationale to amortize the so-called "unfunded liability" of the Trust Fund.

It is important to remember that the government's pension liability places no additional costs on the program, the budget, the taxpayer, or the retiree, either now or in the future. We therefore see no rationale for pretending that the federal government uses an accounting system different from the one actually in place. The so-called "full disclosure" proposal creates the illusion of a funding problem that simply does not exist.

Overtime For Managerial Personnel

AFGE supports a legislative fix for the problem of overtime compensation caps but the solution proposed here is too narrow. As far as we can tell, the bill would only address the overtime problem for federal supervisors. If true, this would leave out non-management employees who are also exempt from the FLSA and subject to exactly the same cap on overtime. Supervisors are just one class of employee exempt from the overtime requirements of the FLSA. There are other non-supervisory employees who are also exempt, and who also suffer a loss of pay when working overtime. We urge the Committee to expand the legislation to include non-supervisory employees and to provide the kind of across-the-board funding that will be needed to provide meaningful relief.

Invest Retirement Funds In TSP

AFGE supports the proposal to divert employee contributions from the Civil Service Retirement and Disability Trust Fund into the Thrift Savings Plan (TSP), so long as there is no corresponding reduction in the defined benefits paid by either CSRS or FERS. AFGE has opposed the retirement contribution increases imposed on federal workers over the past two years. The diversion of employee contributions into TSP accounts would constitute a partial refund of these increases, and would thereby provide some compensation for what has amounted to a special income tax on federal workers.

TSP Reforms

AFGE supports the concept of allowing federal employees covered by the Civil Service Retirement System (CSRS) to contribute up to $10,000 into the Thrift Savings Plan (TSP), which Representative Connie Morella (R-MD) has done so much to advance through H.R. 2526.

We have to confess, however, that we are concerned about the realities of pay-as-you-go budgeting. The cost of this benefit would have to be borne elsewhere in the budget and the possibility exists that the offsetting spending cuts could harm more federal employees than would be helped by this provision. However, as always, we are eager to work with Representative Morella, a true friend of federal employees, to make sure that employees are not forced to pay for the budget consequences of tax-deferred private retirement savings.

VI. MISCELLANEOUS PROVISIONS

Right Of First Refusal To Employment Opportunities With Contractors

AFGE does not oppose codifying the right-of-first-refusal in OMB Circular A-76 for federal employees whose jobs are converted to contract. However, there is less to this right than meets the eye since the contractor has unfettered discretion to determine that a contracted-out federal employee is unqualified. Moreover, the right only applies to jobs created as a result of contracts. Since many contractors already have excess capacity and thus no need for more workers, the right of first refusal is not always invoked.

More importantly, since contracting out is essentially a "shell game" by which federal employees are replaced by contractor employees -- usually with no savings or a loss to the taxpayers -- the so-called "right-of-first-refusal" needs to be strengthened if it is to mean anything. One way to do this is to require that a certain percentage of the jobs needed to perform work under the contract -- say 75% -- be given to the very same federal employees who used to perform this work.

Contractors who now prowl the hallways of the Congress in an attempt to peddle their reprehensible government-wide contracting out legislation (a.k.a., "Freedom From Government Competition Act," H.R. 716) often put on a great show about how much they admire and respect the work of federal employees. If they believe what they say, then I'm sure they wouldn't mind seeing such a safeguard become law.

Of course, "right-of-first-refusal" fails to address wages, benefits, and union membership of federal employees whose jobs are contracted out. The Service Contract Act requires that covered federal employees be paid "prevailing" wages and benefits.

Often, however, despite the modest wages and benefits earned by federal employees, covered federal contract workers can experience sharp drops in their compensation packages. Moreover, a significant group of federal employees is exempt from the law's coverage -- and their numbers are growing. According to the General Accounting Office, more than 50% of federal employees reported receiving inferior wages and benefits once their jobs were contracted out. In the ten years since that report was completed, that percentage has likely increased commensurate with the explosion of contracting out.

Contracting-out can make sense when a contractor has devised a more effective, more efficient, and more reliable way of delivering a service. But usually contracting out saves money -- and even then only for a little while -- because it is a way to avoid unions and shortchange workers on their pay and benefits. As The Wall Street Journal reported in 1996, "Just as with corporate outsourcing, 'the big savings' in (public sector) outsourcing are from wages.'"

When the budget's in surplus, the economy's booming, but income distribution grows worse and worse, how can the federal government justify replacing the working and middle class Americans who make up the federal workforce with poorly-paid, poorly-benefitted contingent workers? The answer is, of course, that there is no justification for such a policy. Therefore, any civil service reform legislation should include provisions strengthening right-of-first-refusal and ensuring that contracted out federal employees don't lose wages, benefits, and their rights as union members.

Conclusion

While it contains some provisions that AFGE could support, we believe this bill on the whole is far off the mark. Indeed, the bill seems to veer erratically from sensible proposals aimed at improving the quality of employee work-life to truly despicable proposals that would devastate federal employee unions and jeopardize the long-standing right of federal workers to organize. We hope that in the days ahead we can work with you and the Committee on a different approach to reform, one that respects and values the interests of all the stakeholders whose support you will need.

House Rule XI, Clause 2(g)

AFGE has no grants or contracts to declare.

BOBBY L. HARNAGE, SR.
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

As national president of the American Federation of Government Employees (AFGE), AFL-CIO, Bobby L. Harnage, Sr. leads the nation's largest union for government workers representing 600,000 federal employees in the United States and overseas, as well as employees of the District of Columbia.

Mr. Harnage, an activist with AFGE for over 30 years, was AFGE's national-secretary treasurer for six years, from 1991 to 1997, before filling the vacant position of national president. While secretary-treasurer, Harnage also served as chair of the union's privatization committee -- a watchdog for defense workers and the vital role they serve. Harnage's distinguished military career, which includes stints as an Air Police Investigator at Clark Air Force Base in the Philippines and the Strategic Air Command at Warner Robins Air Force Base in Georgia, makes him a vigilant defender of America's national security.

Subsequent to his election as national secretary-treasurer, Harnage's reputation as a trusted leader earned him a 13-year term as 5th District national vice president, from 1978 to 1991. The 5th District represents federal government employees in Alabama, Florida, Georgia, South Carolina. Tennessee, Puerto Rico and the Virgin Islands. He was a member of the Labor Advisory Board, Center for Labor Education and Research at the University of Alabama and served on the Board of Directors of the Atlanta Metropolitan Area Red Cross.

Harnage is married to the former Sharon G. Turner of Jacksonville, Florida, who was president of her AFGE local for 12 years and also served as a vice president and president of the AFGE National Housing and Urban Development Council.

Mr. MICA. Thank you, sir, for your testimony. We will now turn to Robert Tobias, national president, National Treasury Employees Union.

Welcome back, Bob.

Mr. TOBIAS. It's nice to be back. Good afternoon, Chairman Mica.

The subcommittee's staff has provided NTEU with a general outline of a variety of proposals, some new and some that we have seen before, all of which touch on the way the Federal Government relates to its employees. Unfortunately, we were not provided with the specific legislative language and, therefore, I can't give the subcommittee a real detailed explanation of NTEU's position on some of these matters, but will try to make some observations which I hope the subcommittee will find useful as legislation is crafted.

With respect to demonstration projects, NTEU supports greater flexibility and experimentation that is consistent with agency goals and mission, rather than living with universally mandated rules and regulations. We support lifting the caps on the number of participants and the number of projects allowed under the current law.

However, I think it is a gross misuse of the term to allow management to make unilateral changes in working conditions and call that flexibility. An authentic flexible personnel system means a loosening of overall Federal personnel rules and allowing management and employees, through joint action, to develop new and innovative methods of labor-management relations. NTEU strongly opposes any so-called flexibility proposal that leaves employees out of the determination of the scope, impact, design, and implementation of new work situations. Employees must be part of the creation and implementation or effective change cannot and will not occur.

The previous panel mentioned the 1978 Civil Service Reform Act, and I think that one of the key reasons why that has never been implemented is because the scope of inclusion is so narrow, particularly in the area of defining critical elements and performance standards of Federal employees. Had that system included employee involvement and union involvement in the creation of that system, we might not be here today talking about creating yet again a new performance system. I don't think we should make the same mistake again in the demonstration project authority.

With respect to the review of all OPM appeals, we oppose any change that would eliminate the discretion of the U.S. Court of Appeals to decline to review MSPB appeals and awards. We also oppose extending the time allotted for OPM to file a petition for review, though not altering the time for any other party. Such changes would upset the carefully balanced limitations on the availability of judicial review as well as the assurance of finality of decisionmaking.

I certainly echo the comments President Harnage made about official time. The discussion summary NTEU was provided indicates that a version of Representative Dan Miller's legislation, H.R. 986, is under consideration. And H.R. 986 would strip Federal unions of their ability to negotiate with management for on-the-clock time for those activities that promote labor-management cooperation and the quality and service improvements that result. I think it is wrong headed; I think it is counterproductive; and I think it flies

in the face of what occurs in the non-Federal public sector and certainly in the private sector.

Official time is common, including such leading corporations as General Motors and Ford Motor Co., and General Electric and Harley Davidson. Currently OPM is gathering information on the use of official time in the Federal sector in conjunction with last year's requirement in the Treasury-Postal Service appropriations measure. I think it is premature, at best, to suggest that H.R. 986 in any form should be added to the civil service reform proposal.

With respect to performance management, NTEU is strongly opposed to adopting this system that would rigidly tie performance evaluations to levels of protection during reductions in force for a number of reasons. First, performance evaluations are already a factor in RIF's, and it is unacceptable to us to make them, in essence, the only or dominant factor, ignoring seniority, veterans preference, and other considerations.

Second, it would retain employees who have had only recent high performance evaluations to the disadvantage of ones with long-term and consistently satisfactory performances.

Third, performance evaluations are not objective measures. They are as diverse as the supervisors composing them. In addition to being highly subjective, they have sometimes been found to be racially discriminatory.

Fourth, under this proposal, a manager who unjustifiably inflates his or her subordinate's performance evaluation is protected from staff reductions, while a manager who holds his or her subordinates to a higher standard is punished.

The proposal to invest CSRA retirement funds in the Thrift Savings Program is an extremely complex concept with many potential adverse consequences. For example, does the plan envision individual accounts, discontinuing the concept of defined benefit? Does it envision creating a combination of a defined benefit or a supplemental TSP benefit, or something else? We need concrete language, a period of close study and thorough hearings before any action on this type of a proposal should be considered.

The discussion summary that was provided by the staff contained little, if any, information with respect to the Federal Employees Compensation Act reform. Again, we need specific language before we can provide you with any comments.

Mr. Chairman, I thank you and the members of the subcommittee for your attention to these matters, and your consideration of NTEU's position. I would be very happy to answer any questions you might have.

Mr. MICA. Thank you, Mr. Tobias.

[The prepared statement of Mr. Tobias follows:]

Statement of
Robert M. Tobias
National President
National Treasury Employees Union

to the

Subcommittee on Civil Service
Committee on Government Reform and Oversight
U.S. House of Representatives

June 24, 1998

Good morning Chairman Mica and members of the House Government Reform and Oversight Subcommittee on Civil Service. I am Robert M. Tobias, President of the National Treasury Employees Union (NTEU). Our union represents more than 155,000 federal workers in over 19 different agencies and departments, including the IRS, the US Customs Service, FDIC and the Food and Drug Administration. For sixty years, NTEU has bettered the working lives of virtually every public worker by defending their rights, benefits and workplace protections. I am grateful to the Chairman to have been asked to be here and to present the views of our union.

The Subcommittee staff has provided me with a general outline of a variety of proposals, some new and some that we have seen before, touching on the way the federal government relates to its employees. As I have not been provided specific legislative language, I cannot give the Subcommittee a detailed explanation of NTEU's positions but will try to make some observations that I hope the Subcommittee will find helpful as they begin to craft legislation.

Any legislation put forward by the Subcommittee should take into account both rights and responsibilities of federal workers. The federal workforce is hard-working, paid less than the private sector, restricted in our collective bargaining rights and has already suffered budget cuts, reductions in force, efforts to contract out federal jobs, federal government shutdowns, and physical assaults such as with the Oklahoma City bombing. No one is served by a further degradation of civil service morale or working conditions.

Merit System Protections

Much is said about flexibility and the use of demonstration projects to test new personnel concepts. NTEU supports greater flexibility and experimentation that is consistent with agencies goals and mission, rather than living with universally mandated rules and regulations. We support lifting the caps on the number of participants and the number of projects allowed under current law.

However, it is a gross misuse of the term to allow management to make unilateral changes in working conditions and call that flexibility. An authentic flexible personnel system means a loosening of overall federal personnel rules and allowing management and employees, through joint action, to develop new and innovative methods of labor-management relations. NTEU strongly opposes any so-called flexibility proposal that leaves employees out in the determination of the scope, impact, design and implementation of new work situations. Federal employees already have very limited collective bargaining rights. Congress should be seeking

the inclusion of employees and their representatives in the planning, implementation and testing of a demonstration project. A true evaluation of a new process cannot be scientifically evaluated if it is opposed by the employees or employee leadership of an agency. The American collective bargaining system has worked in the private sector. Congress should not fear experimentation with new forms of labor-management relations in the public sector. Demonstration projects that empower workers with new rights and responsibilities such as bargaining over wages and benefits, we believe, has great potential to improving agency productivity and efficiency. Congress sends the wrong signal by first endorsing bold new experimentation and then tepidly retreating, afraid of innovation.

Also, to implement new benefit plans without any employee bargaining role is highly misguided. Benefits are an extremely sensitive part of federal compensation. Unilateral actions could wreak havoc with employee morale and retention. Under this proposal, coverage under CSRS or FERS pension systems could be waived and a demonstration project imposed with no pension coverage.

Review of OPM Appeals

NTEU opposes any change that would eliminate the discretion of the US Court of Appeals to decline to review certain Merit System Protection Board (MSPB) appeals and awards. We also oppose extending the time allotted for the Office of Personnel Management (OPM) to file a petition for review, though not altering the time for any other party. Such changes would

upset the carefully balanced limitations on the availability of judicial review as well as the assurance of finality of decision-making.

Under current law, Agencies themselves do not have the right of appeal of adverse decisions. Only the Director of OPM may petition for review of final MSPB decisions, and only then in certain limited circumstances, and with the same restrictions applying to arbitration awards. This limited judicial review is consistent with Congress' intent when the Civil Service Reform Act was passed and with the traditional policy of deference to arbitrators' decisions in the private sector. Current law recognizes that in workplace situations, final arbitration offers a faster, cheaper, less formal, and more responsive means of resolution than litigation, and one that is more conductive to the preservation of ongoing employment relations. It also ensures that employees receive the relief mandated promptly, again facilitating a return to normal workplace relations.

Equally troublesome is the proposal to double the time for the Director of OPM to file a petition for review, from thirty days to sixty days, while leaving unchanged the thirty day time frame for other parties. From an institutional standpoint, I might take this as an admission that our union attorneys are twice as efficient as OPM's own lawyers. However, for the employee, this doubles the period of uncertainty for them. If the MSPB has stayed its order, the employee may be unemployed. Even without a stay, the added delay in bringing the matter to a close compounds the harm already incurred. The justification for such an added delay is unclear and the inequity between parties is unfair.

Official Time

The discussion summary NTEU was provided indicates that a version of Representative Dan Miller's legislation, H.R. 986, is under consideration. H.R. 986 would strip federal unions of their ability to negotiate with management for "on the clock" time for those activities that promote labor-management cooperation and the quality and service improvements that result. Official time is common in both the public and private sector including such leading corporations as General Motors and General Electric. Currently, OPM is gathering information on the use of official time in the federal sector in conjunction with last year's requirement in the Treasury Postal Service Appropriations measure. It is premature at best to suggest that H.R. 986, in any form, should be added to a Civil Service Reform proposal.

Performance Management

NTEU is strongly opposed to adopting a system that would rigidly tie performance evaluations to levels of protection during Reductions in Force (RIFs). Performance evaluations are already a factor in RIFs. However, it is unacceptable to us to make them in essence the only or dominant factor, ignoring seniority, veterans' preference and other considerations. It also retains employees who have had only recent high performance evaluations to the disadvantage of one with long term and consistently satisfactory performances. Performance evaluations are not objective measures. They are as diverse as the supervisors composing them. In addition to being highly subjective, they have sometimes been found to be racially discriminatory. Furthermore,

under this proposal, a manager who unjustifiably inflates his/her subordinates performance evaluations is protected from staff reductions while a manager who holds his/her subordinates to a higher standard is punished.

While this point of view is shared by all the major federal sector labor unions, it is not only a union viewpoint. At past congressional hearings the Professional Managers' Association and the Federal Managers' Association have likewise raised objections to such a proposal. Furthermore, Mr. Chairman, I assure you that if any member of this Committee would do as I do and go on the shop floor and walk the halls of federal office buildings asking the employees and managers about their level of confidence in performance evaluations, you would find the individuals most closely involved have no faith in the accuracy of fairness of the current performance evaluation system.

Invest Retirement Funds in TSP

This proposal apparently would shift a portion of the money going into the Civil Service Retirement System (CSRS) into the Thrift Savings Plan (TSP) instead. This would eventually result in no money being left in the CSRS Retirement System to pay benefits. What would occur to beneficiaries who have not even begun to collect yet? Moreover, there have been no hearings on this type of proposal and no one can say with any certainty what the effect of this would be on federal hiring, federal retirement, or the ability of the federal government to meet its retirement obligations to its former employees. NTEU would suggest further study before the

Subcommittee acts on this matter.

Health Benefits

Parents have a duty to see that their dependent children have heath care and employers should assist their employees in this duty by providing family plan health care. NTEU supports mandating dependent coverage for a parent under court order to provide child benefits.

Over a year ago, NTEU negotiated an agreement with the FDIC that moves our members into the FEHBP allowing FDIC to phase out their previous health care plan. This revision will achieve a cost savings to the government. We are still waiting for legislation to allow this non-controversial provision to be implemented. We support action to bring this about along with the employees of the Federal Reserve Board, who are in the same situation.

Federal Employees Compensation Act Reform

The discussion summary NTEU was provided by Subcommittee staff contained little if any information as to the Subcommittee's possible intentions on the nature of these reforms. We can only assume they will resemble some of the proposals raised in recent congressional hearings. NTEU opposes harming spouses and children by cutting family benefits, the replacement of the injured workers' COLA with a less generous formula, or elimination of continuation of pay (COP) for the first three days of disability. The answer to FECA costs lies in

creating a safe and accident-free workplace for federal employees, not cutting benefits they and their families depend on.

Mr. Chairman, I thank you and the members of this Subcommittee for your attention to these matters and your consideration of NTEU's positions. I would be happy to answer any questions you or any other member of the committee may have. Thank you.

NTEU
The National Treasury Employees Union

Biography of

Robert M. Tobias, National President
National Treasury Employees Union

Since August 1983, Robert M. Tobias has served as the chief officer and spokesperson of the National Treasury Employees Union (NTEU), the nation's largest independent federal sector union. He is recognized as the leading authority on issues affecting federal employees.

Tobias, 54, is a 30-year veteran of NTEU. Immediately prior to his election as national president, he was NTEU executive vice president and general counsel, supervising a staff of 45 attorneys and field representatives nationwide, as well as the litigation and negotiations staff and the NTEU training program. He also was chief spokesperson for all of NTEU's national agreements.

As NTEU president, Tobias has broken new ground in the federal sector, instituting the first negotiated alternate work schedules for employees and the first cooperative labor/management programs for on-site child care and employee monetary awards. Tobias is personally responsible for litigating the first federal union lawsuit against a United States president and for winning a case establishing federal employees' right to participate in informational picketing.

As the recognized federal sector union authority on Total Quality Organizations (TQO), Tobias has led implementation of TQO in government through NTEU's partnership with several federal agencies, including the Department of Energy, the U.S. Customs Service and the Internal Revenue Service, which is considered one of the most successful quality improvement efforts in the federal government.

Tobias is a member of President Clinton's National Partnership Council, the Federal Advisory Committee on Occupational Safety and Health and sits on the Executive Committee of the Internal Revenue Service and the Executive Improvement Team at the U.S. Customs Service. He received a presidential appointment in 1996 to the National Commission on Restructuring the IRS.

Tobias is on the board of directors of the American Arbitration Association and is co-founder and treasurer of the Federal Employees Education and Assistance Fund (FEEA). He also advises the president of the United States as a member of the Federal Salary Council.

Tobias, a Michigan native, worked in Detroit as a labor relations specialist for General Motors. He also was a labor relations specialist for the Internal Revenue Service.

Tobias received a bachelor's degree and a master's degree in Business Administration from the University of Michigan, and he graduated from the George Washington University Law School, where he served on the adjunct faculty.

Tobias, who lives in Maryland with his wife Susan, has received the Union Leader Recognition Award from the Society of Federal Labor Relations Professionals and is listed in *Who's Who in America*.

For more information, please contact:
Jim Watkins/Kathy Walsh
Public Relations Department
901 E Street, N.W., Suite 600
Washington, D.C. 20004
(202)783-4444

Mr. MICA. I will now recognize Mr. Albert Schmidt, who is the national president of the National Federation of Federal Employees. Welcome, sir.

Mr. SCHMIDT. Good afternoon. My name is Albert Schmidt. I am the president of the National Federation of Federal Employees. NFFE is the oldest independent Federal union representing employees in 52 agencies across the United States. I truly appreciate this opportunity to speak on various issues presented in the Federal Employees Integrity, Performance, and Compensation Improvement Act.

The principles underlying much of NFFE's testimony today is that Congress should strengthen collective bargaining in tandem with each proposed management flexibility. Collective bargaining is the most effective model of employee relations in both the private and public sectors. It streamlines employee relations and cuts through the redundant and time-consuming statutory appeals. To that end, we would like to see the scope of employee collective bargaining increase.

Many of our locals have negotiated the use of these tools to their and their agencies' benefit. The key is to have options. Federal employees who have an intimate knowledge of their agencies' inner workings may work with management to tailor a system to their specific needs. Agencies that reject this option do so for a reason: Another plan works better for them.

Moving on from the collective bargaining, NFFE strongly opposes the idea of strengthening the Office of Personnel Management's power of appeal. It removes current and important checks on the agency's power. As a result, the proposal jeopardizes the finality of the Federal employment law decisions.

Federal employees will suffer as a result of the unchecked power. Their livelihoods remain at stake while any relief they obtain through the Merit Systems Protection Board is delayed. That means they must wait to receive their back pay, benefits, and future earnings while awaiting the long, drawn-out court process. The delay also affects Federal employees' promotion potential, because a tarnished record affects their ability to compete in the merit promotion process.

Employees may suffer great hardship as a result. One may be the sole and major wage earner in a family. Another may have large medical expenses due to disability or illnesses. Obtaining relief as soon as possible is vital to these employees' economic security.

NFFE opposes strengthening Hatch Act sanctions to authorize penalty for former Federal employees convicted of violations during their employment. If enacted, this proposal would have a chilling effect on all political activities by employees. Employees would fear participation in the political process when participating is one of their most important rights as citizens in this democratic Nation.

On a related point, section 106 confuses us because it would negate the entire Hatch Act. NFFE encourages the subcommittee to take one stance on political activity of Federal employees. We suggest that the position be to preserve the act as is.

NFFE strongly disagrees with other proposals in this section because of their underlying premise that the Government is subsidiz-

ing union activities. Many of the suggestions here would require agencies to report activities they already report, as well as activities the law does not allow. Already prohibited is any conduct of internal union business on Government time. Agencies already report the amount of official time of a union officials use. For these reasons, this section is unnecessary.

Section 203 is unnecessary because agencies already have the authority to deny wage in-grade increases for less than fully satisfactory performance.

NFFE strongly opposes the second prong of this proposal, because providing for administrative review in these cases is meaningless. Agencies would be reviewing their own actions, and agencies typically are not their best watchdogs. MSPB, on the other hand, was created to enforce merit system principles. MSPB should retain the authority to oversee any and all ratings.

NFFE opposes section 205, because managers currently have significant means to remove poor performers. NFFE is not opposed to removing the overtime cap for managerial personnel. Bearing that in mind, we request that the overtime cap be removed for all GS–10's and above. Federal employees who are graded as high as their managers do the same work as those managers; to grant a manager uncapped overtime, but deny the same graded employee the same benefit would be totally unfair.

NFFE opposes section 602, the so-called "protection of privacy" of Federal employees, because that term is a misnomer. It leads one to believe that this proposal will benefit Federal employees, when it actually will hurt them. Section 602 undermines every union's ability to meet the duty of fair representation required by Federal labor relations law. Part of our obligation involves informing and surveying our bargaining unit members about any possible change in their employment. If we are not able to keep in touch, the law will fault us for not having the tools necessary to carry out our responsibilities.

Bringing this information directly to our employees at work is not a viable option because the traditional means of communication are not always available. More Federal employees are utilizing alternate work places and schedules. Some Federal employees utilize "flexiplace," which means they work from their home. Many of our members work at night or third shift. Some work on reservations and other remote locations, which are isolated and sparsely populated. For these reasons, unions must have access to the addresses of our bargaining unit members.

NFFE is not opposed, per se, to the right of first refusal this proposal offers. It confuses us, however, because OMB circular A–76 which sets forth outsourcing guidelines, already contains this right. If this proposal offers to strengthen the ability, NFFE supports it. If not, NFFE does not see any purpose in reinstating what is already required.

That information aside, I would like to point out the often-overlooked reality of a right of first refusal. The term implies that Federal employees will always have the right to turn down a contractor job. That is not the case. Contractors may avoid offering jobs to displaced civil servants by hiring enough private sector employees. Contractors might offer displaced employees jobs located out of

town, and those employees may not have the money to relocate or may have deep ties to their current community.

I also would like to point out that this soft landing is a poor substitute for keeping Government services in-house. NFFE is categorically opposed to the rampant, unbridled contracting of Federal jobs. We have always believed that contracting is the foremost threat to defense readiness and a hindrance to the effective and efficient delivery of goods and services to the American taxpayers. Providing displaced civil servants with the remote possibility of jobs with contractors does not resolve those problems. It does, however, have the potential of adding insult to injury when talented Federal employees are failed once again.

Thank you for this opportunity to express the views of the National Federation of Federal Employees on these issues. I am happy to answer your questions at this time.

[The prepared statement of Mr. Schmidt follows:]

Introduction

Good afternoon, Mr. Chairman and esteemed members of the Subcommittee. My name is Albert Schmidt, and I am President of the National Federation of Federal Employees. NFFE is the oldest independent federal union, representing employees in 52 agencies across the United States. I truly appreciate this opportunity to speak on the various issues presented in the Federal Employees Integrity, Performance, and Compensation Improvement Act.

Discussion

Title I: Safeguarding the Integrity of the Merit System

Collective Bargaining

The principle underlying much of NFFE's testimony today is that Congress should strengthen collective bargaining in tandem with each proposed management flexibility. Collective bargaining is the most effective model of employee relations in both the private and public sectors. It streamlines employee relations and cuts through the redundant and time-consuming statutory appeals process.

To that end, NFFE would like to see the scope of collective bargaining increased in:
Increased Flexibility in the Use of Demonstration Projects (Section 101);
Authority to Conduct Demonstrations Involving Benefits (Section 101);
Increased Weight of Performance in RIFs (Section 201);
Amendments to the Incentive Award Authority (Section 202);
Prohibition of Two-Tier Evaluation Systems (Section 204);
Requiring Alternative Dispute Resolution in Agencies (Section 301); and
Offering Voluntary Reductions in Force (Section 603).

Many of our locals have negotiated the use of these tools to their and their agencies' benefit. The key is to have options. Federal employees, who have intimate knowledge of their agencies inner-workings, may work with management to tailor a system to their specific needs. Agencies that reject these options do so for a reason: another plan works better for them.

Strengthening OPM's Power of Appeal **(Section 102)**

Moving on from collective bargaining, NFFE strongly opposes the idea of strengthening the Office of Personnel Management's power of appeal. It removes current, important checks on the agency's power. As a result, the proposal jeopardizes the finality of federal employment law decisions.

Federal employees will suffer as a result of unchecked power. Their livelihoods remain at stake while any relief they obtain through the Merit Systems Protection Board is delayed. That means they must wait to receive any backpay, benefits and future earnings while awaiting the long, drawn out court process. The delay also affects federal employees' promotion potential because a tarnished record affects their ability to compete in the merit promotion process.

Employees may suffer great hardship as a result: One may be the sole or major wage earner in the family. Another may have large medical expenses due to disability or illness. Obtaining relief as soon as possible is vital to these employees' economic security.

Hatch Act Sanctions **(Section 105)**

NFFE opposes strengthening Hatch Act sanctions to authorize penalties for former federal employees convicted of violations during their employment. If enacted, this proposal would have a chilling effect on all political activity by employees. Employees would fear participation in the political process when participating is one of their most important rights as citizens in this democratic nation.

"Subsidizing" Union Activities **(Section 106)**

On a related point, Section 106 confuses us because it would negate the Hatch Act entirely. NFFE encourages the Subcommittee to take one stance on political activity by federal employees. We suggest that position be to preserve the Act as is.

NFFE strongly disagrees with other proposals in this section because of their underlying premise: that the government is "subsidizing" union activities. Many of the suggestions here would require agencies to report activities they already report as well as activities the law does not allow. Already prohibited is any conduct of internal union business on government time. Agencies already report the amount of official time union officials use. For these reasons, this section is unnecessary.

Title II: Performance Management

Authorizing Denial of WIGIs for Less Than Fully Successful Performance and Prohibiting MSPB Appeal **(Section 203)**

Section 203 is unnecessary because agencies already have the authority to deny wage-in-grade increases for less than fully successful performance.

NFFE strongly opposes the second prong of this proposal because providing for administrative review in these cases is meaningless. Agencies would be reviewing their own actions, and agencies typically are not their own best watchdogs. MSPB, on the other hand, was created to enforce merit system principles. MSPB should retain the authority to oversee all ratings.

Limiting the Number of PIPs Before Removing Poor Performers **(Section 205)**

NFFE opposes Section 205 because managers currently have sufficient means to remove poor performers.

Title IV: Employee Compensation and Benefits

Overtime for Managerial Personnel **(Section 401(e))**

NFFE is not opposed to removing the overtime cap for managerial personnel.

Bearing that in mind, we request that the overtime cap be removed for all GS-10s and above. Federal employees who are graded as high as their managers do the same work as those managers. To grant a manager uncapped overtime but deny a same-graded employee the same benefit would be patently unfair.

Title VI: Miscellaneous Provisions

"Protection of Privacy" of Federal Employees **(Section 602)**

NFFE opposes Section 602, the so-called "protection of privacy" of federal employees, because that term is a misnomer. It leads one to believe that the proposal will benefit federal employees, when it actually will hurt them. Section 602 undermines every union's ability to meet the duty of fair representation required by federal labor relations law. Part of our obligation involves informing and surveying our bargaining unit members about any possible change in their employment. If we are not able to keep in touch, the law will fault us for not having the tools necessary to carry out our responsibilities.

Bringing this information directly to our employees at work is not a viable option because the traditional means of communication are not always available. More federal employees are utilizing alternative work places and schedules. Some federal employees utilize "flexiplace," which means they work from home. Many of our members work a night or third shift. Some work on reservations and other remote locations, which are isolated and sparsely populated.

For these reasons, unions must have access to the addresses of our bargaining unit members.

Employment Rights Following Conversion to Contract **(Section 604)**

NFFE is not opposed per se to the right of first refusal this proposal offers. It confuses us, however, because OMB Circular A-76, which sets forth outsourcing guidelines, already contains this right. If this proposal offers to strengthen the ability, NFFE supports it. If not, NFFE does not see any purpose in restating what is already required.

That information aside, I would like to point out the often-overlooked reality of a "right of first refusal." That term implies that federal employees will always have a right to turn down a contractor job. That is not the case. Contractors may avoid offering jobs to displaced civil servants by hiring enough private sector employees. Contractors might offer displaced employees jobs located out-of-town, and those employees may not have the money to relocate, or may have deep ties to their current home they do not wish to sever.

I also point out that this soft landing is a poor substitute for keeping government services in-house. NFFE is categorically opposed to the rampant, unbridled contracting of federal jobs. We have always believed that contracting is the foremost threat to defense readiness and a hindrance to the effective and efficient delivery of goods and services to American taxpayers. Providing displaced civil servants with the remote possibility of jobs in with contractors does not resolve those problems. It does, however, have the potential of adding insult to injury when talented federal employees are failed once again.

Conclusion

Thank you for this opportunity to express the views of the National Federation of Federal Employees on these issues. I am now happy to answer any of your questions.

Mr. MICA. Our last witness today is Mr. William Pearman, president of the FAA Conference of the Federal Managers Association. Welcome, and you are recognized, sir.

Mr. PEARMAN. Thank you, Mr. Chairman. Good afternoon. We recognize the members of the subcommittee.

As the chairman said, my name is Bill Pearman, and I am president of the FAA Conference of the Federal Managers Association. I have served as an air traffic controller with the FAA for the past 30 years, and I am currently a first line supervisor at the Washington Air Route Traffic Control Center in Leesburg, VA. My remarks today are exclusively those of FMA and do not necessarily reflect the official position of the Federal Aviation Administration. I might also add that I am here on my own time today.

Mr. Chairman, I would like to start by thanking you for including Congressman Davis' overtime legislation in your reform package. I also want to thank you for allowing us to work with you and your staff to bring the need of the Federal Employees Compensation Act reform to the attention of Congress.

Congresswoman Morella, I would like to thank you for your outstanding leadership on civil service issues. We greatly appreciate your legislation to increase the amount of money Federal employees can invest in their thrift savings plan accounts.

Congressman Cummings and Delegate Norton, in their absence, we would still like to recognize them for their leadership on contracting out, and Congressman Cummings for his improved rules in governing the leave for the organ donation and the court-ordered health care coverage for children.

I would like to briefly comment on some of the proposals in the reform package that FMA generally supports, first, the demonstration projects.

While FMA generally favors demonstration projects, they are not without their problems. One common complaint about the managers at China Lake is that their system ties performance ratings to budget. Another concern is the ability for the agency to waive RIF rules. FMA encourages the subcommittee to hold hearings on existing projects before moving to eliminate restrictions on the number of participants.

Second, FMA supports limiting the availability of performance improvement periods. However, the proposal under consideration is too harsh. The availability of performance improvement periods should be limited to one in a 3-year period unless the job has changed substantially.

I would like to now comment briefly on some of the proposals in the reform package that FMA opposes. First, we urge you to drop the retirement overhaul portion of the reform bill. Second, FMA believes that there are more effective ways of promoting effective management performance management that increases the weight of performance appraisals during RIF's. We urge you to drop this proposal.

Third, FMA opposes the ADR proposal that would give all departments and agencies the ability to cutoff impartial third-party review of personnel actions by the Merit Systems Protection Board. From our experience at the FAA, FMA believes that this would be a tragic mistake and urges you to drop this proposal.

Speaking of the FAA, I would like to highlight two aspects of the FAA personnel system: first, the absence of the MSPB appeal rights, and second is the absence of RIF rules. Forty-seven thousand employees of the Federal Aviation Administration have been exempt from the governmentwide personnel rules since April 1, 1996. While FMA supported extension of the personnel flexibility, we are now concerned about the degree to which the civil service rules no longer apply to the FAA.

The FAA has replaced the MSPB appeal rights with a guaranteed fair treatment program, outlined in FAA Personnel Reform Implementation Bulletin No. 17. In our view, this represents a significant reduction in the due process rights of a nonbargaining unit of FAA employees. FMA recommends that Congress restore the right of FAA employees to submit appeals to the Merit Systems Protection Board.

Under the 1996 FAA reauthorization, the administration was required to bargain with its unions and consult with other employees of the administration over the development of its new personnel system. On June 15, 1998, Transportation Secretary Rodney Slater announced that the FAA had completed its negotiations with the administration's largest union, the National Air Traffic Controllers Association.

There are currently 15,000 air traffic controllers and 2,180 air traffic controller supervisors. This agreement calls for the elimination of one-third, or 700, of the FAA air traffic supervisors in order to finance a 3-year, $200 million pay package for the air traffic controllers. In 1994, the FAA ordered a reduction in the number of supervisors to meet the National Performance Review's arbitrary target of increasing the ratio of employees to supervisors from 7 to 1 to 15 to 1. The FAA halted this initiative due to concerns about its negative impact on safety.

In the case of the labor agreement, it appears that politics have triumphed over operational concerns. The FAA managers are now extremely concerned about the FAA's exemption from the governmentwide RIF rules. It would take the FAA 3 months to negotiate new RIF rules for the bargaining unit employees; it could rewrite the RIF rules for managers overnight. FMA urges you to reapply the governmentwide RIF rules to the FAA.

In conclusion, Mr. Chairman and Ranking Minority Member Cummings, as you and your subcommittee continue to work on civil service reform, I urge you to view the FAA as a cautionary tale. Civil service reform involves a delicate balance between empowering managers, while at the same time not tossing out so much of the centralized rules that the employees' rights begin to depend on the size of their organization's political action committees as opposed to the notions of fairness and justice.

This concludes my prepared remarks, and I would be happy to answer any questions you may have.

[The prepared statement of Mr. Pearman follows:]

FMA
Federal Managers Association

BIOGRAPHY OF WILLIAM W. PEARMAN

William W. (Bill) Pearman is the President of the FAA Conference of the Federal Managers Association (FMA). He has served as President of the FAA Conference, which represents over 1,600 managers and supervisors within the FAA, since 1994. He is a past member of FMA's General Executive Board. Bill has served as an air traffic controller with the FAA for the past 30 years. For the last twelve, he has been an area manager, traffic management supervisor, and is currently a first line supervisor at the Washington Air Route Traffic Control Center (ARTCC), in Leesburg, Virginia.

1641 Prince Street • Alexandria VA 22314-2818 • (703) 683-8700 • FAX (703) 683-8707

INTRODUCTION

Mr. Chairman, Ranking Member Cummings, and Members of the Subcommittee:

I am William W. Pearman, President of the FAA Conference of the Federal Managers Association. I have served as an air traffic controller with the FAA for the past 30 years. For the past 12 years, I have been an area manager, traffic management supervisor, and I am currently a first line supervisor at the Washington Air Route Traffic Control Center (ARTCC), in Leesburg, Virginia. My remarks today are exclusively those of FMA and do not necessarily reflect the official position of the Federal Aviation Administration.

FMA is the largest and oldest association of managers and supervisors in the federal government. On behalf of our 15,000 members in 25 government departments and agencies I would like to thank you for holding this important hearing and for inviting us to present our views to the Civil Service Subcommittee on the Federal Employees Integrity, Performance, and Compensation Improvement Act (FEIPCIA). Mr. Chairman, FMA greatly appreciates your leadership and your willingness to work with stakeholder groups in assembling this package of reforms to improve our nation's civil service laws. As those closest to the process of managing and supervising the entire Federal workforce, we share your goals of improving integrity, performance and compensation.

Today I would like to briefly comment on a number of the draft proposals contained in the June 16th FEIPCIA outline and share with the Subcommittee my experience as a manager under the FAA's new personnel system.

TITLE 1. SAFEGUARDING THE INTEGRITY OF THE MERIT SYSTEM

DEMONSTRATION PROJECTS – FMA generally supports demonstration projects under Chapter 47 of Title 5 U.S.C. and similar authorities. Demonstration projects under the Civil Service Reform Act of 1978 (P.L. 95-454) are designed to provide managers, at the lowest level practicable, the authority, control, and flexibility they need to ensure that their agency's mission is carried out in the most efficient and effective manner possible. The original concept was to test out new personnel practices for possible application to the rest of the federal government. In practice it has turned into alternative personnel authority for agencies that are adept at lobbying Congress for increased human resource management flexibility.

The classification and pay system at the China Lake Naval Air Warfare Center in California, one of the oldest and best known demonstration projects, gives managers flexibility to reward performance by granting anywhere from no pay increase beyond comparability adjustments to a 6% increase in pay for exceptionally outstanding employees. In addition, managers at China Lake are required to sit down with their employees three times a year to conduct a performance review session. This gives employees an opportunity to receive input on how they can improve their performance toward the goal of receiving a higher pay increase.

While FMA favors loosening the current restrictions, we are opposed to abandoning all controls. The FEIPCIA outline appears to suggest that 5 U.S.C. 4703 would be amended to allow for 15 projects with more than 5,000 participants. While current law generally provides for only 10 projects limited to 5,000 or fewer employees a few agencies have obtained or are seeking authority to exceed the current cap on

participants. The Department of Defense is preparing to implement a demonstration project covering up to 75,000 employees in its acquisition workforce. (3/24/98 – 63 FR 14253) In addition, the House and Senate are currently in conference on H.R. 2676, the Internal Revenue Service Restructuring and Reform Act of 1998, that would allow all 102,000 employees of IRS to be covered under a demonstration project.

Demonstration projects are not without their problems. One common complaint from managers at China Lake is that it ties performance ratings to budget. The bottom line is that if the manager has a better than normal or outstanding performer working for them, they cannot tell them so unless they have the money. Another concern managers at China Lake have about their demonstration project is the ability for the agency to waive governmentwide reduction-in-force rules, contained in Chapter 35 of Title 5 U.S.C. Under China Lake's RIF rules employees can only "bump" within their current job series. This could unfairly disadvantage experienced managers who have been promoted from job series with numerous employees to single position job series.

FMA is concerned about the balkanization of the civil service and the ability of downsized Congressional and OPM staffs to oversee and ensure agency adherence to merit system principles. We would encourage the Subcommittee to hold hearings on extension of alternative personnel system authority to the entire federal government before eliminating the restrictions placed on participants contained in chapter 47 of Title 5 U.S.C. These hearings should focus on the successes and failures of currently authorized demonstration projects and take testimony from agencies seeking alternative personnel system authority on how they intend to utilize their flexibility. After such hearings if

Congress decides to proceed it should loosen the reigns on demonstration projects but not let them go entirely.

CAFETERIA BENEFITS – Under current law, 5 U.S.C. 4703(c)(3) agencies with demonstration project authority may not waive Subpart G of Title 5 U.S.C. dealing with insurance and annuities. Absent hearings, legislative language, and analysis from the Congressional Budget Office, the Congressional Research Service, and the Office of Personnel Management, FMA cannot support this proposal. Retirement and health benefits are a central part of the civil service compensation package that attracts and retains qualified employees. Serious consideration should be given before agencies are allowed to alter these basic benefits.

SUBSIDIZATION OF UNION ACTIVITIES – FMA would like to repeat the objections we raised in our March 20, 1997 letter to Chairman Thompson and Chairman Burton regarding the negative impact H.R. 986 would have on partnership. This letter is attached to our testimony. We urge the Subcommittee to drop this proposal from FEIPCIA.

DUE PROCESS RIGHTS OF MANAGERS UNDER NEGOTIATED GRIEVANCE PROCEDURE – FMA supports the requirement of formal procedures for disciplinary actions imposed on federal managers as a result of appeals agency decisions.

TITLE II. PERFORMANCE MANAGEMENT

INCREASING THE WEIGHT GIVEN TO PERFORMANCE DURING REDUCTIONS IN FORCE

FMA opposes increasing the weight of performance ratings in reductions-in-force. This was the most controversial provision contained in the Omnibus Civil Service Reform Act, H.R. 3841, from the 104th Congress. It was deleted after the bill failed to gather the two-thirds vote needed for passage on the floor of the House. FMA urges the Subcommittee to drop this provision from the proposed FEIPCIA.

Under current law, Federal workers in RIFs are retained based on: 1) length of service, 2) tenure, 3) veterans' preference and 4) performance. In competing for retention in a RIF, employees are credited with 20 years of service for a performance rating of "outstanding", 16 for "exceeds" and 12 for "fully successful." The employee's last 3 annual performance ratings are averaged and added to their total retention score. For example, an employee with two "outstandings" and an "exceeds" would receive credit for an extra (20+20+16)/3 = 19 years of service. The proposal under consideration would statutorily increase the weight of performance ratings in a RIF by awarding 10 years of service for an "outstanding", 7 for an "exceeds" and 5 for "fully successful." These ratings would then be added together. For example, the same employee with two "outstandings" and an "exceeds" would, under the new system, receive credit for an extra 10+10+7=27 years of service.

Between January 1993 and March 1998 the size of the Federal workforce (excluding USPS) has gone from 2,188,647 FTE to 1,847,279 full time equivalents (FTE). This is a reduction of 341,368 FTE that amounts to a 15.6% reduction in the size of the Federal workforce. (Source – U.S. OPM Office of Workforce Information Monthly Report of Federal Civilian Employment (SF 113-A) 05/15/98). While

effective performance management is a central concern of all managers and supervisors and further government downsizing is inevitable, FMA believes that the current law adequately accounts for performance. We suggest that after thorough congressional consideration adequately funded demonstration projects and limiting the availability of performance improvement plans may hold more promise as effective management tools for rewarding high performers and removing poor performers.

ELIMINATE MSPB APPEAL RIGHT FOR DENIAL OF WITHIN GRADE INCREASES - Within grade pay increases are not automatic, however, 98% of employees get them when they are eligible. The provision under consideration would repeal the statutory right of employees to appeal WIGIs to the MSPB. Few appeals are advanced each year. However, FMA objects to this provision because the ability of bargaining unit employees to grieve denial of WIGIs would remain unchanged. At the same time, employees outside of the bargaining unit would be left without any means to appeal a WIGI denial taken against them. FMA recommends the provision should be dropped.

PROHIBITION OF TWO-TIER EVALUATION SYSTEMS – FMA members who work at the Social Security Administration have not been pleased with their agency's implementation of its pass/fail rating system. Out of the agency's more than 60,000, employees only 6 failed in 1996 and only 12 failed in 1997. One of the reasons that SSA managers are reluctant to give failing grades to employees is that they believe that their actions will not be supported by upper management. According to the MSPB's March 1998 study *The Changing Federal Workplace: Employee Perspectives*, 56 percent of supervisors report having had to deal with at least one problem employee within the last two years. However, 62%

reported that they did not take action against the employee because they were concerned that upper-level management would not support their actions.

Managers in other agencies, however, think that pass/fail ratings systems are appropriate. FMA would like to commend OPM for its guide for supervisors entitled *Addressing and Resolving Poor Performance* issued in January of this year. In an environment of downsized agency personnel support offices, OPM's efforts are greatly appreciated. FMA recommends that Congress let agencies retain flexibility in designing their ratings systems but encourage them to involve managers in the process of designing these systems.

PERFORMANCE APPRAISALS

FMA supports limiting the availability of performance improvement periods under Chapter 43 of Title 5 U.S.C. However, we feel that the proposal under consideration is too harsh. Allowing only one performance improvement period throughout an employee's career does not adequately take into consideration the fact that the employee may change jobs several times. FMA recommends that the availability of performance improvement periods should be limited to one in a three-year period unless the job has changed substantially.

TITLE III. STREAMLINING THE APPEALS PROCESSES

ADR IN AGENCIES – FMA opposes the provision of Section 111 of the House passed version of H.R. 2676 that would eliminate MSPB appeal rights for IRS employees. Section 301 of the proposed FEIPCIA would give all Departments and agencies the ability to cut-off impartial third party review of

personnel actions. FMA believes this would be a tragic mistake and urges the Subcommittee to drop this proposal.

On November 15, 1995 the President signed into law the FY '96 Department of Transportation Appropriations (P.L. 104-50). Under this law, the FAA has been exempt from governmentwide personnel rules contained in Title 5 U.S.C. since April 1, 1996 with the exception of the following provisions:

(1) section 2302(b), relating to whistleblower protection;
(2) sections 3308–3320, relating to veterans' preference;
(3) chapter 71, relating to labor-management relations;*
(4) section 7204, relating to antidiscrimination;
(5) chapter 73, relating to suitability, security, and conduct;
(6) chapter 81, relating to compensation for work injury; and
(7) chapters 83–85, 87, and 89, relating to retirement, unemployment compensation, and insurance coverage.

*P.L. 104-122 3/29/96 Continuing Resolution (Temporary Stop-Gap Funding Measure)

On February 15, 1995 I testified before the House Aviation Subcommittee that the FAA was "*hampered by governmentwide personnel regulations*" and that "*any legislative effort to restructure should provide relief from governmentwide procurement and personnel regulations.*" On balance, the 1,500 FMA members who work for the FAA, view the extension of personnel flexibility to their agency as a positive development. Our experience with this personnel flexibility, however, has brought into focus a tension in several areas between adherence to merit system principles (5 U.S.C. 2301) and freedom from governmentwide personnel rules. (The FAA is no longer statutorily required to adhere to merit system principles.)

In addition to our concern over the absence of a statutory requirement for the FAA to adhere to governmentwide reduction-in-force rules, FAA managers are particularly concerned about the absence of impartial third party review of agency actions against employees. Replacement of MSPB appeal rights with the "Guaranteed Fair Treatment" program outlined in FAA Personnel Reform Implementation Bulletin #17, 7/26/96, represents a significant reduction in the due process rights of non-bargaining unit FAA employees.

In FMA's view, restoring the right of FAA employees to submit appeals to the MSPB under Chapter 77 of Title 5 U.S.C., would not diminish the personnel flexibility extended to the FAA under P.L. 104-50. It would go a long way, however, toward promoting efficient service to the flying public and ensuring fair and equitable treatment for FAA employees by providing important protection for employees who do not have access to the negotiated grievance process under Chapter 71 of Title 5.

The provisions in P.L. 104-50 exempting the 47,000 employees of the FAA from governmentwide personnel rules contained in Title 5 U.S.C. are intended to make the agency work better and cost less.

> *FAA personnel and procurement reform. –Sections 350 and 351 of the Committee bill provide that funds provided for FAA operations and capital improvements are exempt from various Federal personnel and procurement requirements. This will result in the more efficient modernization of the ATC system, and in a more efficient and cost-effective deployment of the air traffic control workforce.*
>
> Senate Report 104-126 accompanying H.R. 2002 (P.L. 104-50). p. 20.

Mr. Chairman, in your opening statement for the Subcommittee's first hearing on civil service reform in October of 1995, you said:

> *We must ensure that any civil service reforms are responsive to real problems and provide real solutions.*

In retrospect, the elimination of MSPB appeal rights by P.L. 104-50: 1) does not promote efficient service (i.e., it did not respond to a real problem); and, 2) it recreates a system of adjudication of appeals of disciplinary actions against employees that was discredited and corrected 20 years ago (i.e., it does not provide a real solution).

The Merit Systems Protection Board is the adjudicatory body created by the Civil Service Reform Act of 1978 (P.L. 95-454) to provide an impartial administrative review of employee appeals of personnel actions taken against them.

> *Employee rights and the availability of due process are important factors in building a stable and high quality Federal workforce. They are among the incentives for recruiting and retaining the best employees. They help to maintain an impartial civil service and protect employees from arbitrary actions.*
>
> *Office of Management and Budget, Deputy Director for Management* - Improving the Process for Resolving Workplace Disputes: A Report to the U.S. House of Representatives Committee on Appropriations Subcommittee on Treasury Postal Service and General Government *April 23, 1996. p. 6,7.*

The availability of impartial third-party administrative review of personnel actions such as suspensions, downgrades, or removal, is one of the greatest strengths of the civil service system. FAA employees are

the exception among most of their civil service colleagues in other agencies in that they are not afforded the due process rights associated with access to MSPB.

> *"I can't imagine or visualize any right of any employee which could not be met or honored in the milieu of efficient service. I don't see any necessary conflict in those two concepts."* The Honorable Howard **Thomas Markey**, then Chief Judge, U.S. Court of Appeals, Federal Circuit, on access to due process for Federal employees.

> *"I, too, agree that there isn't really a conflict. There shouldn't be a conflict between efficiency and fairness."* The Honorable **Clarence Thomas**, then Chairman of the Equal Employment Opportunity Commission, on access to due process for Federal employees.

> *The Civil Service Reform Act of 1978: Tenth Anniversary Review and Assessment – Proceedings from a two-day program devoted to evaluating the promise and reality of a decade under the CSRA as seen by the officials responsible for its creation and implementation, May 18 and 19, 1988.*

Not only was the elimination of MSPB appeal rights not necessary to promote efficient service it reestablished a system of adjudication that was discredited and eliminated 20 years ago.

The rights of Federal employees have evolved for more than 100 years. Milestones include the Civil Service Act of 1883, which began to replace the spoils system with a merit system of hiring – by competitive examinations – and

created the Civil Service Commission (CSC) to oversee it; the Veterans Preference Act of 1944, which gave employees who were military veterans appeal rights beyond those of other workers; and President Kennedy's 1962 Executive Order that extended those rights to all workers and recognized employees' unions.

By the 1970s, the Civil Service Commission faced increasing criticism for a perceived conflict of interest: it was responsible for regulating employees conduct and performance, and it also judged appeals from disciplinary actions against employees. These concerns led to passage of the Civil Service Reform Act of 1978 (CSRA). After much study, Congress and the White House agreed to terminate the CSC and divide its adjudicatory responsibilities among five agencies, four of them newly created:

The Merit Systems Protection Board

The Equal Employment Opportunity Commission

The Federal Labor Relations Authority

The Office of Special Counsel

The Office of Personnel Management

Office of Management and Budget, Deputy Director for Management - Improving the Process for Resolving Workplace Disputes: A Report to the U.S. House of Representatives Committee on Appropriations Subcommittee on Treasury Postal Service and General Government *April 23, 1996. p. 1,2.*

There is nothing fair or guaranteed about the FAA's "Guaranteed Fair Treatment" program. Under this program final administrative review of personnel actions is conducted by a three-person panel inside the

agency. One panel member is chosen by the employee, another is chosen by the agency and the third panel member is chosen by the employee and the agency from a list *generated by the agency*. In addition, unlike MSPB decisions, "Guaranteed Fair Treatment" decisions have no precedential value. "Guaranteed Fair Treatment" represents a return to the bad old days before CSRA.

> As the Supreme Court noted, the CSRA was intended to replace the "haphazard arrangements for administrative . . . review of personnel action" with "an integrated system" to balance employee interests "with the needs of sound and efficient administration." United States v. Fausto, 484 U.S. 439, 444-45 (1988).
>
> *Testimony of Ben L. Erdreich Chairman U.S. Merit Systems Protection Board before the Subcommittee on Civil Service Committee on Government Reform and Oversight United States House of Representatives, November 29, 1995. p. 3.*

FMA recommends that Congress restore the right of FAA employees to submit appeals to the Merit Systems Protection Board under Chapter 77 of Title 5 U.S.C.

MIXED CASES - FMA supports streamlining the cumbersome and confusing procedures for handling "mixed cases", ones that involve both a personnel action appealable to the Merit Systems Protection Board and an allegation of discrimination. Under the current procedure, a mixed case can be heard by the Board, the EEOC, and the Special Counsel. In addition, the employee retains the right to begin adjudication all over again in a United States district court after all of these administrative bodies have heard and ruled on the case. FMA recommends the consolidation of all mixed cases through appeal only to the Merit Systems Protection Board, with judicial review by the Federal Circuit. This will provide

greater clarity of appeal rights to appellants, preserve administrative and adjudicative resources, yield more uniform law, and render speedier justice.

TITLE IV. EMPLOYEE COMPENSATION AND BENEFITS

OVERTIME FOR MANAGERIAL PERSONNEL – FMA strongly supports inclusion of H.R. 3956 in the proposed FEIPCIA. We would like to thank Congresswoman Morella for her cosponsorship of this important legislation.

Many downsizing agencies are increasingly relying on overtime to get the work done. Managers and supervisors at these agencies, however, face an outdated restriction placed on the payment of overtime that is encouraging some to leave the ranks of management and return to the bargaining unit so they can earn a higher paycheck. Under current law (5 U.S.C. 5542), overtime pay for Federal managers and supervisors (one and a half times the normal rate for work in excess of 40 hours per week) is limited to that given to a General Schedule level 10 step 1 employee. Certain non-managers/supervisors above GS 10 step 1 may be exempt from the cap if they satisfy criteria issued by OPM.

The overtime cap causes two problems for managers and supervisors. First, managers and supervisors above GS 12 step 6 actually earn less on overtime than they do for work performed during the regular work week. Second, managers and supervisors may earn substantially less for overtime work than the employees they supervise.

The first grade-based overtime cap, enacted in 1954, set the base at GS 9 step 1 (P.L. 83-763). Twelve years later in 1966, it was increased to GS 10 step 1 (P.L. 89-504). In the thirty-two years since that time, however, nothing has been done to keep pace with changing workforce realities. In 1966 the average GS grade was 7.3. In 1996 the average GS grade was 9.5. H.R. 3956, introduced by Representative Tom Davis would amend 5 U.S.C. 5542 to increase the GS 10 step 1 overtime cap to GS 15 step 1. FMA urges the Subcommittee to act on this legislation to remove significant financial disincentives to promotion within the federal government.

INVEST RETIREMENT FUNDS IN TSP – FMA is aware of the Chairman's concern about the Civil Service Retirement and Disability Fund and his interest in replacing the current Federal retirement plans with one that relies solely on a defined contribution system. FMA respectfully disagrees with the Chairman on his assessment of the health of the CSRDF and the desirability of moving all active employees covered under the Civil Service Retirement System (CSRS) and FERS into a new system.

The CSRDF is in good health. According to the Congressional Research Service, "Under the financing arrangements set out in current law, the system is not now and never will be 'insolvent' or without adequate budget authority for payment of benefits." (CRS Memorandum 3/18/95 *Federal Civil Service Retirement: Is There a Financing or Funding Problem?*) In a May 17, 1995 letter to the editor of the *Wall Street Journal*, former Office of Personnel Management Director, James B. King, agreed that the Federal retirement system is financially sound. King said, "The $540 billion unfunded liability is not an impending shortfall in the system's financing. It is a statement of payments that would come due if the government ceased to exist. However pessimistic -- or optimistic -- one may be, the government is not

going to shut its doors and the unfunded liability therefore does not present a crisis or suggest that the retirement system is unsustainable. It is, in fact, on a very sound footing."

After two years of thorough consideration, Congress created FERS in 1986. When FERS was created it was applied *prospectively* to all those who entered the Federal workforce after 1984. Workers hired under the older CSRS were given the option to remain in the old system or switch to the new system. The old system relies on a defined benefit pension and the defined contribution Thrift Savings Plan. The new system relies on Social Security, TSP, and a defined benefit pension.

The proposal under consideration, however, appears to suggest that the U.S. Government would *retroactively* renege on the promise it made to FERS and CSRS employees when they were hired that they would receive a defined benefit pension. This would result in a substantial reduction in benefits. FMA urges the Subcommittee to drop section 402(a) from the proposed FEIPCIA.

TSP REFORMS, CHILD BENEFITS UNDER COURT ORDER, ORGAN DONOR LEAVE – FMA supports the efforts of Congresswoman Morella and Congressman Cummings to: increase the amount of money Federal workers can invest in the Thrift Savings Plan; enable the federal government to enroll an employee and his or her family in the FEHB Program when a State court orders the employee to provide health insurance coverage for a child of the employee but the employee fails to provide the coverage; and to increase the amount of leave federal employees may use to serve as organ donors.

TITLE V. FEDERAL EMPLOYEES COMPENSATION ACT REFORM

Federal Employee Compensation Act costs are a significant concern to Federal agencies. The program's annual cost is $1.85 billion. Although FECA is administered by the Department of Labor's Office of Worker's Compensation (OWCP), disbursements for an injured or disabled employee are charged back to the agency's salary and expense account. This charge back provision, instituted to make agencies accountable for safety, has led many managers to see their rapidly downsizing budgets tapped in order to pay for long-term disability cases.

Particularly troubling is the number of retirement age recipients of FECA benefits. "Sixty percent of the approximately 44,000 long-term beneficiaries receiving compensation benefits in June 1995 were 55 years of age or older, 37 percent were age 65 or older." (Federal Employees' Compensation Act: Issues Associated with Changing Benefits for Older Beneficiaries GAO/GGD-96-138BR, 8/14/96.)

Mr. Chairman, FMA first raised this issue before your Subcommittee in 1995. We appreciate the work of your staff in bringing this issue to the attention of the House Education and Workforce Subcommittee on Workforce Protections. FMA testified before this Subcommittee in March of this year in favor of the following FECA reforms:

- Reduce the FECA benefit from 75% to 66 2/3% of income;
- Establish a FECA retirement program;
- Base benefit increases on employee pay adjustments, not the Consumer Price Index (CPI);
- Extend the right to resume employment from one to three years;
- Eliminate disparity in payments received by different pay grades for identical anatomical losses.

THE FEDERAL AVIATION ADMINISTRATION

Mr. Chairman as I noted earlier, the FAA has been largely exempt from governmentwide personnel rules contained in Title 5 U.S.C. since April 1, 1996. On October 9, 1996 the President signed into law the Air Traffic Management System Performance Improvement Act (P.L. 104-264). Under this law, the FAA was required to bargain with its unions and consult with other employees of the Administration over the development of the Administration's new personnel management system.

On June 15, 1998 Transportation Secretary Rodney Slater announced that the FAA had completed its negotiations with the Administration's largest union, the National Association of Air Traffic Controllers. There are currently 15,000 Air Traffic Controllers and 2,180 ATC supervisors. This agreement calls for eliminating 1/3rd or 700 of the FAA's Air Traffic supervisors in order to finance a 3-year $200 million pay raise for Air Traffic Controllers.

In 1994 the FAA ordered a reduction in the number of supervisors to meet the National Performance Review's arbitrary target of increasing the ratio of employees to supervisors from 7:1 to 15:1. The FAA halted this initiative due to concerns about its negative impact on safety. In the case of the labor agreement, it appears that politics have triumphed over operational concerns.

FAA managers are now extremely concerned about the FAA's exemption from governmentwide RIF rules contained in Chapter 35 of Title 5 U.S.C. The FAA is currently voluntarily adhering to governmentwide RIF rules. Given the current situation, FAA managers find themselves vulnerable in

the absence of RIF rules. While it would take the FAA three months to renegotiate RIF rules for bargaining unit employees it could rewrite RIF rules for managers overnight.

The greatest potential for the abuses the merit system principles are designed to prevent occur in hiring and in layoffs. FMA urges you to reapply governmentwide RIF rules to the FAA.

CONCLUSION

Mr. Chairman and Ranking Minority Member Cummings, as you and the Subcommittee continue your work on Civil Service reform I would urge you to view the FAA as a cautionary tale. Civil Service reform involves a delicate balance between empowering managers while at the same time not tossing out so much of the centralized rules that employees' rights begin to depend on the size of their organizations' Political Action Committees as opposed to notions of fairness and justice.

Again, I want to thank the Subcommittee for holding this important hearing on the proposed Federal Employees Integrity, Performance and Compensation Improvement Act. FMA looks forward to working with you and the Subcommittee to improve human resource management in the civil service. This concludes my prepared remarks, I would be happy to answer any questions you may have.

###

FMA
Federal Managers Association

March, 20 1997

The Honorable Fred Thompson
Chairman
Senate Governmental Affairs Committee
340 Senate Dirksen Office Building
Washington, DC 20510
Attention: Hannah Sistare

The Honorable Dan Burton
Chairman
House Government Reform & Oversight Committee
2157 Rayburn House Office Building
Washington, DC 20515
Attention: Kevin Binger

Dear Chairman Thompson and Chairman Burton:

On behalf of the 200,000 managers and supervisors in the Federal Government whose interests are represented by the Federal Managers Association, I am writing to express our concerns about S. 139, legislation introduced by Senator Lauch Faircloth to prohibit the use of Social Security and Medicare trust funds for official time for employees of the Social Security Administration to perform labor organization work. In addition, FMA is concerned about legislation introduced by Representative Dan Miller, H.R. 986, to substantially limit and restrict the use of official time. The enactment of S. 139 would effectively end SSA's ability to engage in the labor-management partnership process established by Executive Order 12871. Enactment of H.R. 986 would certainly have a chilling effect on the partnership process. In our professional opinion, a cessation of partnership at SSA and other Federal agencies would not be in the best interest of the agencies, the employees or the American public.

The issue of official time at SSA and other agencies was addressed in the 104th Congress in hearings before the Ways and Means Social Security Subcommittee and the Government Reform and Oversight Civil Service Subcommittee. In addition, last October GAO issued a report on use of official time at SSA (GAO/HEHS-97-3). Those hearings and the GAO report raised some significant issues relating to use of official time at SSA. GAO estimates that SSA's costs for official time have doubled from $6 million in 1993 to $12.6 million in 1995. However, GAO also reports that during the same period the number of unfair labor practice charges decreased from 391 to 209 resulting in a savings of $14 million. The increased cost for official time at SSA can largely be attributed to increased employee involvement in the partnership process. So far, this investment has produced dividends at SSA and throughout the Federal Government. These dividends have accrued not only from reduced unfair labor practice charges but also from documented improvements in operational capabilities and improved services.

The NPC's October 1996 report, *A New Vision for Labor-Management Relations*, details the progress and success of the partnership process. The number of bargaining unit employees in partnership councils is up from 764,000 (55%) in 1994 to 858,931 (70%) today. Survey information in the report reveals that 74% of management respondents wanted to continue their efforts. The survey also reveals that partnerships are starting to tackle more difficult issues and produce dramatic savings while providing higher quality service to the American public.

1641 Prince Street • Alexandria VA 22314-2818 • (703) 683-8700 • FAX (703) 683-8707

President Clinton issued Executive Order 12983 on December 21, 1995 placing the Federal Managers Association and the Senior Executives Association on the National Partnership Council. Since that time, FMA has been working with the other members of the NPC to create an atmosphere of mutual respect throughout every agency and at every level of government. Such an atmosphere will be conducive to creating labor-management partnerships that truly empower America's workforce. Success stories to date have been impressive, but this is only the beginning of a truly remarkable cultural change in the way we do business throughout America.

As tax-paying citizens first and civil servants second, FMA members are very concerned about our nation's $5.4 trillion debt. America's income and expenditures must be brought into balance, and in this era of shrinking budgets the Federal workforce is the key to turning our current fiscal situation around. Today's environment demands new and innovative approaches that will insure the highest quality of service to the American people. FMA believes that the partnership process, and ultimately the empowerment of the Federal employee, will unleash the creative energies of our workforce and enable us to work smarter and produce better results.

We urge you to support the partnership effort by rejecting S. 139. America's workforce is on the right track. The support of the Congress of the United States for the partnership process is imperative if we are going to succeed in providing our Nation that element of fiscal responsibility that will insure our position of world leadership throughout the 21st century.

Thank you for consideration of our views and with kindest regards, I am

With kindest regards, I am

Sincerely yours,

Michael B. Styles

Michael B. Styles
National President

Mr. MICA. Thank you. I think I will start with you. Your folks didn't like being out of the MSPB, the appeals process, and you have had experience now for what, a year-and-a-half, 2 years with a different system?

What is the problem with it?

Mr. PEARMAN. I get phone calls from all over the entire country from people that are having problems within the management ranks or the supervisor ranks, and problems with the managers of their respective facilities. It boils down to—a lot of times, a personality conflict maybe between the two parties. But before this could ever reach the three-party fairness appeal process that is in the FAA personnel reform, the manager would probably be the oversight before that ever got out of the building. So it is only a two-panel process, as we have seen many times that this process took place within the FAA.

So therefore we are seeing that a manager has the final say-so over the objection of, say, a first-line supervisor, and then it is not carried any further than that.

Mr. MICA. Now, don't you have the ability to come up with some changes to that current system, and why hasn't that been done?

Mr. PEARMAN. If we have the ability to do that, I am unaware of it, Mr. Chairman, but I certainly will explore that possibility.

Mr. MICA. But that is your internal system that you put in place; I thought you had the discretion to change that.

Mr. PEARMAN. Well, I think the FAA has the discretion to change that.

Mr. MICA. Yes, that is what I am talking about.

Mr. PEARMAN. But I am a very, very small voice in that process.

Mr. MICA. See, the problem I have is that I am hearing now that we are giving discretion to an agency to try this and develop their own system. On the other hand, I am deluged with complaints from the other side that the appeals process takes too long and that we need flexibility to institute our own system. So you have been given that flexibility, granted, not a long time, and you are telling me it doesn't work because it is missing some elements.

Is FAA not responding to, say, addressing those needed changes that you are talking about?

Mr. PEARMAN. I am not indicating that they are not responding to that. I am saying at this point in time, I am seeing right from my level that it is not working.

Mr. MICA. But you are telling me that most of those are personality conflicts, so they should go back to the MSPB and get in that system. And you think they would be resolved more quickly in that fashion?

Mr. PEARMAN. Well, I think the element of fairness and equity here is the important element that we need to address and be concerned with, and I don't see that happening from where I am sitting. And maybe we have the ability to go in the FAA personnel reform system and change and correct that, and if we have the ability to do that, by all means we should utilize it.

Mr. MICA. Well, I think that we are here trying to make the systems all work, and we gave the agency a couple of years ago the flexibility to institute some changes and, again, to come up with something that would work. We need to set up a meeting with FAA

and see what is going wrong there. If we have given this flexibility and it is not working, and they are coming here and telling us now that it is not being changed, we need to get it changed.

So I appreciate your testimony and your remarks. We will see what we can do on that.

Mr. Tobias, I don't have the specifics of the language, but I think it was you that said that any types of changes in performance evaluation and rating you would support, as long as there was employee involvement. Do you have any specific language or proposal that you would like to provide us with, or any——

Mr. TOBIAS. Well, I think that—I have long taken the approach that the appropriate way of devising performance management systems is in the context of collective bargaining. I think that is where the Civil Service Reform Act of 1978 went wrong, not including employees, not including their unions, in defining critical elements in performance standards. And as a result, since we were on the outside, we have litigated those.

I guess my second point is that notwithstanding the prior panelist who said that the public is concerned with how people are evaluated, I don't think that is true at all. I don't think the public gives a darn how employees are evaluated. I think what the public is concerned about is whether or not the service is provided. Is the service provided to the public, that is what the public is concerned about.

I think that the current system gets in the way oftentimes of providing that service. There is no distinction between a 3 and a 4 such that the amount of time that is spent making that distinction makes any sense. The real issue is, is the supervisor working with the employee to provide the service that the agency is supposed to be providing to the public. That is the real issue. It is agency mission. And all of this preoccupation with whether it is a 3 or a 4, I think is very, very misplaced.

And on the bottom end of the line, when people aren't performing, you know, the system—and I have said this before to this subcommittee—the criteria for dismissal of a Federal employee is less onerous to reach than almost all private sector employers in every State in the country, so it is easier to fire a Federal employee. So I think this preoccupation with performance in poor performers is misplaced.

Mr. MICA. I would have to disagree with you about the part about the appeals process and the private sector, coming from the private sector. You don't perform and you are out. Not in every instance, but in the majority of instances in the private sector—I don't have any problems; I think the Federal employees know who the poor performers are. I would love to give them the ability and the authority, again, to get rid of those folks. I would have no problem with that.

Because I think if they are given a mission, they can perform their mission; if they are given a budget to work within, I think they can do very well; and I would have no qualms about giving them any type of a reward system and giving them the ability to make decisions on who stays and who goes.

And the same thing in a RIF, both folks who are there. The problem is, we have created this box and we have put everybody in it, and we don't have the ability to be flexible.

Now I am concerned about where we are flexible on the appeals process in trying to speed that up and give them the ability to deal with that themselves, and they are coming back and saying, it ain't working. So we are between a rock and a hard place.

Well, as we develop some language—I am not tied to any language; I am not tied to any concept. I am just trying to see where we can reward those who perform well, and where we can expedite the departure or removal of those who don't perform, and give employees as much say as possible in the process.

Mr. TOBIAS. Is an evaluation—I guess I am caught with the word "reward." I think an evaluation isn't necessarily a reward.

Mr. MICA. No, I agree. I am talking about hard cash.

Mr. TOBIAS. That is a different question.

Mr. MICA. In my office, folks who perform well get compensation increased. I find a way of having the others exit, and I have full discretion and am given a budget, a mission to accomplish, and I have no problem.

In the private sector I did the same thing with folks, and it is difficult because we are trying to build a structure and a system that applies across the board; we are trying to give flexibility that we can try different things and see how they work. But it is a difficult task.

Mr. Harnage, if I may, Mr. Miller has a proposal that—I don't think you endorsed today the official time. I am slow to catch on to people's viewpoints, but possibly as a compromise to those that are trying to get a handle on this—and I think the Congress has already attempted to do that through some disclosure—would you support some disclosure of official time and some standardization as far as reporting?

We heard GAO; we even heard OPM say that the data is not available and it is also not comparable in the current form that it is collected or available. Could you support the collection of this information and data, since we are dealing with public money here, as a compromise?

Mr. HARNAGE. Well, I guess my first question would be, why are we singling out this one aspect of official time? We have people that use official time in various ways, attending the Kiwanis Club meeting, Lion's Club meeting, doing PR in the community. There are a lot of other areas that official time is used. Do we keep up with the official time an employee representative uses in an EEO procedure if it is a nonunion representative? No, we don't. We don't even keep up with that anywhere.

Now, in some places, most places, that is kept up if it is a union representative. So why are we singling out just the union representatives for collecting this data? As I said, one of the important aspects for this to be meaningful is, you have to look also at the benefits derived from that official time. Otherwise, you are just looking at a dollar value which is going to distort the picture.

If the purpose is just simply to say, these are taxpayers' dollars being used on union activities, that is a false statement. As I point-

ed out, none of it is used for union activities, it is all in the area of employee representation.

So it is going to be cumbersome, it is going to be burdensome to the agencies, but I know in the beginning of official time usage, back when we first started negotiating it, some agencies were required to keep official time, and when we go into contract negotiations on renewal, they would say, well, we have to restrict this official time. Too much of it is being used, but they didn't even have the records, they themselves, that they would keep. They couldn't support their argument that it was being abused. And I suspect that it has been expanded to today's debate.

Mr. MICA. Well, you are citing, though, justification for doing this for even the unions, because you can document the amount of time that is used and the manner in which it is used. You also testified, I think, that Congress is the boss here, and this is a different situation; that it is taxpayer money and we have to be accountable for it. So Members of Congress are asking for some accounting.

We have had the two agencies that are responsible for getting us the information telling us they can't get us the information because there isn't any standard out there; there is no collection. In fact, you could even use this in your negotiation and bargaining if you had valid information—your unions, whether it is this group or some other employee group, is not able to provide adequate or standardized information in their negotiations.

So as a compromise, I should think that some standard collection information would be helpful to both sides. And you can't support that?

Mr. HARNAGE. Well, let me make sure I understand what you are saying.

You are talking about—I thought this was a two-pronged problem. One is you want to collect the data and the other one is you wanted to put a restriction on how much could be used, and if you are dropping that restriction——

Mr. MICA. Well, what I am trying to do is find a compromise. I have Mr. Miller who wants to basically shut you down, and I am just trying to find out what is going on, OK? You are telling me that in your negotiations you have had the same problem trying to find out what your folks are doing, are involved in, and use that data as part in giving some accurate information for your negotiations.

I have Mr. Miller over here on the other side and he wants something else. I am just saying, as a compromise, maybe we could benefit both parties. The employer, the U.S. Congress, would know what is going on. The employee groups would be able to go to the bargaining table and say, well, this is what we are doing; this is good, valid information. It isn't out of the ordinary what we are requesting for employee participation. There are many good benefits to some of what you are doing on what is official time. So I am just saying as a compromise, how about that?

Mr. HARNAGE. Well, I would say, Mr. Chairman, I certainly would look forward to working with you.

Mr. MICA. Good. I look forward to your language on that and your specific proposal.

Mr. HARNAGE. Let me point out one observation, though. We are talking about the taxpayers, and there not being a comparison in the private sector. There is. I suspect none of the previous panel could tell you how many stockholders the corporations have got in touch with about official time being used in the private sector. It is something that is worked out between the union and management and nobody else cares; it is their business. They don't report that to the stockholder because it is insignificant. And my concern in putting a limit on it would be, even where it is successful, where it is working, it would be limited. But if that is somewhat minimized now, I would be more than willing to work with you.

Mr. MICA. I said nothing about limit. Did anyone hear me say that? Could the clerk call back my words? I did not say anything about limit.

But we are willing to work with you. I am willing to take some language. I am just a referee. I just don't have the suit on.

Let me see, Mr. Schmidt, last question: You told me you were opposed to, I believe it is section 602, I am—again, I believe that is the section that dealt with the list availability and privacy. You were opposed to that.

Mr. SCHMIDT. Right.

Mr. MICA. One of the concerns we have is about giving the lists out or you acquiring the lists. Is there some compromise that could be reached to ensure that these lists of Federal employees' names are kept private, confidential, not used?

Mr. SCHMIDT. Well, we would have to follow the Privacy Act just like the Federal Government has to follow the Privacy Act on issuing lists of names to contractors for surveys. There are some surveys that are taking place right now where lists of Social Security numbers and dates of birth and job titles and everything are given to a private contractor in one of the agencies.

Now, what we are saying is that in order for us to do our job as a union to represent our bargaining unit and fulfill our obligation to represent everybody in that bargaining unit, we need to get input from everybody in that bargaining unit, not just our members, our dues-paying members but our bargaining members. We need to have input so that we can make the decisions that are best for the whole bargaining unit. We can't fulfill our obligations to those people, those members, without having a list to be able to contact them.

It is actually more and more harder to be able to contact them at work—like I stated, with the flex time, the schedules have been changed for Federal workers; the inability to contact people on third shift and second shift, trying to get people at remote sites—to be able to send information or questionnaires to those people to get input so that the union can represent them.

Mr. MICA. Again, as a compromise, Mr. Schmidt, would you support some restrictions on what can be done with the list when you get it?

Mr. SCHMIDT. Well, again I state that there is the Privacy Act and we would have to follow the Privacy Act, just like any other agency would have to.

Mr. MICA. But you would not support any further restrictions than what is required under the Privacy Act?

Mr. SCHMIDT. Again, we are willing to work with you on this issue.

Mr. MICA. We look forward to your language, Mr. Schmidt.

I yield to the distinguished ranking member, Mr. Cummings from Maryland.

Mr. CUMMINGS. Just a few questions, but first of all, a statement.

Mr. Harnage, I wouldn't be that willing to compromise. I think you are absolutely right. I think there has been an effort to almost destroy unions, and I think unions play a very, very important role in our—in this country, and I think that they—for the people that I represent, they are very important; and so I don't know whether I will be a part of that compromise discussion.

Two, you all have to explain to me—somebody explain to me what this evaluation process thing is. I don't understand why—I don't understand why unions like it, and I know I missed some of the discussion, and I assume you may have discussed it.

The thing about pass-fail, and I guess having evaluated people and worked in the private sector—and I ran a small business, and if people didn't work, they didn't get paid; coming from that kind of background, pass-fail for me just wouldn't have worked. I had to be able to let people know, where they were and how they were coming along, and if they failed to meet the standard, whatever that was, whatever was the standard at the time, they didn't have a job, because it went right back to the bottom line.

The bottom line is, were we able to produce what we were supposed to be producing, and if we weren't able to produce, then none of us would have a job.

So I am kind of trying to figure out where this is. How does pass-fail, as opposed to levels of—maybe four or five levels of how you are doing; I don't understand how it computes.

Then I want to go back to something that you said, Mr. Tobias, when you said that we have a situation where the public really doesn't care about pass-fail, and I agree with you. All they want to know is that the Government is working effectively and efficiently. They want to know that their tax dollars are being spent effectively and efficiently.

But for the employees, I think it does—it is significant with regard to morale, with regard to how they are doing. If I sit beside one person—in fact, with Mr. Mica, I feel the same way about coming from the private sector; I try to pretty much run my office the way I would run a private sector office. That is, we have certain standards. Those standards are expected to be met. If people can't meet the standards, they have to go, period.

And so—and but yet, still, it is good for them to kind of let them know where they are on that scale so that they can improve and get better, and if they don't get better, then "see ya." But just help me with that, somebody.

Mr. TOBIAS. I think we are talking about two issues. One, we are talking about the ability to get rid of the poor performer. If they don't perform, out the door.

And the second thing we are talking about is, how do we stimulate people to perform better? That is really what we are talking about here.

Mr. CUMMINGS. OK.

Mr. TOBIAS. Now, in the Federal sector, the test for dismissal for performance is the failure to perform one standard, there might be several standards, in one critical element, there may be several critical elements. All the agency has to do is support that by substantial evidence, and the person is out the door. That is it; they are out.

So on the poor performer issue or someone who is failing, the Federal Government has all the tools, and as President Harnage said, what we see is a failure of managerial will, not a failure of the process itself.

Now, on the other hand, the issue is, how do you stimulate people to do more, and what we are finding is that the issue of gradation in the Federal Government, when we have this gradation, managers were doing an evaluation once a year, issuing the grades, and never talking to people in between. So what we have evolved to in some places, not in all places, but in some places, is a pass-fail system, with the obligation that is enforced that managers are talking to employees on a monthly basis, or more frequently, but what they are doing right, what they are doing wrong, and how can they do it better.

What we are trying to do is stimulate the conversation that is critical to infusing energy into the workplace and encouraging people to perform better, as opposed to this ritual of a 1, 2, 3, 4, 5. That is how we have evolved to what we have in some locations. And what this bill would do would be to stop that experiment and stop the evolution, and I think it is unwise.

Mr. CUMMINGS. Well, then certainly that leads to the next question. Why can't you have the mandatory discussions with the other system? Do you follow what I am saying?

Mr. TOBIAS. Yes, and that is what was supposed to happen starting in 1978, and it didn't happen. It just—it didn't happen. And so instead of trying to issue more mandates after 20 years of failure, we have tried something else, or are trying something else. It is an experiment; it is not in many locations.

Mr. CUMMINGS. It just seems like it would be—I mean, pass-fail is just so either you did or you didn't, and I guess the panel that talked about it a little bit earlier, talked about the honesty and integrity of the system, that is, giving everybody either excellent, or whatever the top two are, and not going too far below that.

But I also wonder whether you maintain the integrity when you talk about pass-fail, too, because maybe someone is not that anxious to say to a person they failed.

Mr. TOBIAS. Well, in the contracts that we have negotiated, when someone is applying for a promotion, they get the gradations. They get 1, 2, 3, 4, 5, because they are competing with their colleagues and there has to be some basis for comparison when a supervisor doesn't know them, so we provide for those kinds of gradations in the contracts that we have negotiated. So the pass-fail system is a substitute for the required annual evaluation that the Federal rules require.

Mr. CUMMINGS. Mr. Harnage, I asked Ms. LaChance about this whole issue of OPM and their contribution to the agencies with regard to helping poor performers perform better. What has your ex-

perience been with regard to OPM and their input into the system for employees that you represent? Just curious.

Mr. HARNAGE. Well, first let me clear up a point for you. I really appreciate the work that you do on behalf of Federal employees. You are a strong supporter and you look after the Federal work force and your constituency very well, and I appreciate that. I don't want anybody to leave here with the wrong impression.

There is a value to the chairman of this committee continuing a dialog to get a better understanding of what we need to do, but don't fret, I am not going to compromise any principles. I didn't get here doing that, and I plan to be here for a while.

Mr. CUMMINGS. I wasn't trying to put you on the spot, either. I guess things that I have seen since I have been in this Congress for 2½ years, and I see—and I guess the only thing I have to compare it to is really the State system. It is just that I—it just concerns me what is happening; the attacks that the unions are undergoing; and it is a tough attack; it really is, and it bothers me.

As you said, I mean, I fight tooth and nail to try to maintain it, because one of the things I do believe is that once you lose something, it may never come back in my lifetime. I understand that. I have lived long enough now to see that. So what I try to do is hold on to everything that I can and try to, as long as I have it, I still have it, I can still work with it, but if it is gone, it is gone, and then it becomes a part of the history books.

Mr. HARNAGE. Right.

Mr. CUMMINGS. I just wanted to make sure you understand it wasn't a personal attack.

Mr. HARNAGE. And on the poor performers, I don't think you were here at the time I was saying that there is nobody in this organization, or at this table for that matter, that supports keeping poor performers. It requires other employees to pick up the slack that poor performers are not doing.

So we are not here about protecting poor performers, but I think you misunderstand the pass-fail as if, all of a sudden, today, we decide you pass or fail, and that is it. The pass-fail that we have, and I mentioned with the Social Security Administration where we helped negotiate that, it is a continuing dialog between the supervisor and the employee through the whole period of time, so at the time the pass-fail is due, it is well-known of what the situation is, and the person is deserving of what they get. And that is something that the employees like and the managers like, and it is working. But as President Tobias said, that is a test; we are experimenting with it, because the present system doesn't work.

One of the problems with the five-tier system and the present system is the fact that you have ways of rewarding a Federal employee, and I know there was a lot of comment about being able to reward the good performers. You have cash awards that are available, outstanding performance evaluations, superior performance evaluations, within-grade increases that you can reward Federal employees with.

The problem is very often, most often, there is a quota put on that. You tell this unit you can only have one outstanding, you can only have one sustained superior, and so the other employees that perform just as well don't get rewarded, but that one employee, I

pick you this year, I may pick you 3 years in a row—because I like you, not necessarily that you are performing any better than anybody else.

Those are some of the problems that we have with the present system and the system that is being proposed. Unless there is bargaining, unless there is an opportunity for the employees who are complaining about the poor performers who have an opportunity to fix that situation, there is going to be a continuation of the current problem.

Let us bargain what needs to be done in order to give the employees a proper performance evaluation and there won't be any poor performers, except where management just simply does not have the will to take the necessary action that they must take.

Mr. CUMMINGS. This is the last question. This thing about drugs, I tell you, I mean, I spend a lot of my time on drugs, because I live in a community——

Mr. HARNAGE. Be careful how you say that now.

Mr. CUMMINGS. That's a good one. You got me that time.

No, fighting this whole drug problem—thank you, and I could see it in the Washington Post tomorrow morning. But fighting this whole drug problem, and drugs in the workplace is a major, major issue. I dealt with it in the Maryland legislature because I had the Workman's Compensation Committee, and we just passed a piece of legislation under the House with regard to workplace drug treatment and that kind of thing, and it got an almost unanimous vote from the House. The whole issue of saying to a person, you will not have a job if you are convicted of possession—and I am sure you all are familiar with the provision. You know, on the one hand, you want to make sure that you don't have people on drugs working in the workplace, because it makes it bad for everybody. I don't care how you look at it, you have got dangerous situations. But on the other hand, this is the issue of whether you are treating it as a disease or even treating it as something that needs some kind of medical attention. I was just wondering how you all felt about this whole thing of saying to a person, conviction, no job.

Mr. HARNAGE. Well, this is one area, concerning the drugs, that I would agree with the previous panel, with the representative from the Cato Institute. I think it goes too far. First, understand, I have absolutely no use for or patience for anybody using drugs and, particularly, selling drugs. I think it is a horrendous offense and should not be tolerated.

But it goes a little bit too far when it says, even where a person has been rehabilitated and this occurred 20 years ago, they are barred for life, even though they are an outstanding citizen now and may very well be the No. 1 person that promotes not to abuse drugs, not to use drugs.

Very often one of the best teachers with alcohol abuse is a reformed alcoholic, and so just because somebody 20 years ago was convicted of a minor offense, it doesn't say major, but a minor offense in drug activity, I think is a little bit harsh.

I will give you an example of why I consider that. We also have a provision—not in this bill, but in other legislation that has already been enacted—dealing with domestic abuse, spousal abuse, where a person cannot carry a gun who has been convicted, and

that law was retroactive. So we have a particular individual who some 12 years ago in a domestic dispute pleaded nolo contendere. Immediately following that, they had a divorce and parted ways long ago, and he has been an outstanding employee for 12 years now with the Federal Government, but because he pleaded nolo contendere on that, he is going to be fired; it has nothing to do with his job performance. And I can see that happening in the area of drugs.

But understand, as I said, I have absolutely no use for those that use drugs or for those particularly that sell drugs, and the reason I was so quick to correct you on your comment just now is, I can remember a time when Nancy Reagan was visiting a McDonald's and part of it was reaching out to the young people about, you know, "Say no to drugs," and on the television when they started interviewing, she said, "I am here for the drugs." And I have never forgotten that.

Mr. CUMMINGS. Well, thank you very much. I really appreciate that, I really do. You were quick, too.

Does anybody else have any comments?

Mr. TOBIAS. Well, I think that the language that is under consideration is really more symbol than substance in the sense that there was much made of drug testing of Federal employees, and so Federal employees were drug tested and the incidence of drug use in the Federal Government, either from those who were applying for jobs or those who were on the jobs, was minuscule. And several GAO reports have shown that the amount of dollars spent—I can't remember the numbers, but it is huge in terms of the number of people who were identified as using drugs in the Federal Government.

So this is my view: among the Federal work force, which is an older work force, for the most part, it is not the prime group of people who are, you know, candidates for drug use. And all of the other evidence that has accumulated since we have had this drug testing, I think this is an issue that really doesn't apply to the Federal work force and ought not be enacted, because there is no substantive reason for having it in the first instance.

Mr. CUMMINGS. Thank you.

Mr. PEARMAN. In the FAA, this is a safety-related job; we do test extensively, and we do random drug testing in order to be able to secure and reassure the flying public that we have no drug abuse in the system. But it does provide for, if a person has—shows up on a positive, then they are given one chance for rehabilitation. And we do alcohol testing as well as drug testing, separate and apart from, and if one has been found to be an abuser of either drugs or alcohol, they are given that opportunity for rehabilitation.

So I think that is the accountability that we are looking for in order to make sure that we don't go in and adversely affect our employees with something that is a correctable problem. But by the same token, if they are caught on the second time around, there are no questions asked. They are out the door.

Mr. CUMMINGS. I agree with Mr. Harnage. I mean, drugs are a major problem. I see the devastation. I see it every day, every day when I go home to the area that I live in. And I also know about the workplace problems.

I mean, when you talk about FAA—I just think that we have to—I like that kind of an approach and that is pretty much what we tried to do in Maryland, to give people an opportunity to get themselves together; and then if they didn't do what was necessary to do that, then they had major, major problems.

I guess the sad part about it is that, although in the Federal Government, it may be minuscule, I think drugs—they are having their impact on a lot of people and a lot of families, and a lot of workplaces.

I just want you to know, I am going to have to go to another meeting, but I wanted to thank you all for your testimony; and all the other witnesses that might still be here, I want to thank you.

Mr. MICA. Thank you. Mrs. Morella.

Mrs. MORELLA. I think I am the wind-up, having been here the entire time. I must be, Mr. Chairman, and I wanted to be, because it is a very important bill that we have before us in draft form. I also particularly wanted to hear this panel because, quite frankly, you represent the people who will be affected by this legislation, and you represent a majority of them.

Also, you have had the opportunity to listen to the other panelists, so now coming at the end, you can do some summation.

In the draft, I recognize there are some parts you like, some parts you don't like. But I am going to ask you if you will prioritize, prioritize in terms of what is the most important element or elements in this bill that you feel must be passed, should be passed?

Following that, I am going to ask you obviously the most egregious—and I think I have an idea already what that is going to be, the most egregious. Much of this is reflected in your testimony, but again, in trying to single out what we must make sure we grasp as we go through this draft and decide what to reject, what absolutely must be part of it, just sort of what is important to your people.

Do you want to start off, Mr. Harnage?

Mr. HARNAGE. Well, I am sitting here thinking; and since we weren't the ones that are moving this legislation, I am not too sure any of it is something I would say that is needed. But the part that I probably have the least problem with is the part on the TSP which, as with Mr. Cummings, I really appreciate the work that you do for Federal employees, and you are a champion for Federal employees.

My concern on the TSP, of course, we expressed in our testimony is that it not take away from the CSRA benefits. We wouldn't be having this discussion—I was thinking about that a while ago when I was hearing the other panel testify about the TSP and all and how we ought to be doing that 100 percent, we wouldn't be having that conversation if this was the late 1970's or early 1980's.

The fact that we have got a very good economy going right now and the stock market is doing fine, the TSP Program is doing outstanding that they all participate in is the reason we are having most of that discussion. If it was a bad market, I don't think it would even be happening. And that would be one of our fears, if you take the money out of the CSRA trust fund and put it in the TSP and the market goes sour, people that are still in the program shouldn't lose from that standpoint.

Other than that, though, some little minor tweak in that, we would be glad to work with you on, but that would be the one I guess would be the least problem in the package.

Mrs. MORELLA. The greatest problem?

Mr. HARNAGE. Well, please understand that the objections that I raised on all the issues that we opposed are very strong objections, and I in no way would be willing to say if the official time problem goes away, then the rest is not—that wouldn't be the case, because the next one would just move up, and it would become the most egregious.

But of course that is the one that I least understand. And I did have the benefit of listening to the second panel—I didn't listen to the first panel—and I am glad to hear that you recognize, and I am sure the whole panel does, but I heard the previous panel talk about what is good for the Federal employee, what is wanted by the Federal employee and what is needed by the Federal employee; and I just want to make sure that everybody understands our roles here.

The previous panel represented corporate America; we represent the workers, this panel. They tell us what they want and what they need, and we seek to find what is best for them.

So the official time is something I don't understand, and that is one of the reasons I want to continue the dialog with this committee, and in particular, with the chairman. It just seems to be nothing but, as I said in my testimony, union busting, it is not necessarily doing anything for the taxpayer. But you can wave that price tag out there certainly and get the taxpayer interested in it; just as with anything you put before them, if it is not the whole truth, they can draw the wrong conclusions.

Mrs. MORELLA. It would seem to me it was recently that we had a hearing on this, and then I checked with staff and they said it was back in 1996, but I do remember that we did have a hearing and not everybody had the benefit of listening to the testimony. But it was very informative.

Mr. Tobias? I know you haven't seen the specific draft.

Mr. TOBIAS. Well, I guess I echo what President Harnage said with respect to the TSP. I am most concerned actually, I think, with the unexplained CSRS change that is mentioned in this—mentioned in the material that we received, because it is so unclear, but if the CSRS changes were to lead to a combination of, or actually the elimination of a defined benefit or a combination of defined benefit in a thrift savings program, it would eliminate the reason for the CSRS being in existence at all. And employees who want to get out of the CSRS are going to have that option. Congress provided them that option beginning on July 1.

I am also very concerned about the administrative time usage, because as Chairman Mica mentioned, Congress has an interest in knowing the amount of time that is used, and I can understand that. But the issue isn't the amount of time, at least in my view; the issue is, how is that time utilized?

That is really the issue. Gathering the data on the amount really tells you nothing. It tells you nothing. It is just like, so what? I mean, you know how many FTE's are out there because you appro-

priate the money to hire the FTE's; you know there are 1.9 million Federal employees.

So the issue of how much time is union time has to be connected to the contribution that time makes to achieving the mission of the agency. I don't notice anybody who has focused on that issue, and it seems to me that that is the critical issue, not just the amount of time used.

Mrs. MORELLA. Performance-benefit kind of ratio which is what came out in that hearing, and maybe we need to do it again.

Mr. SCHMIDT. Well, I think the toughest effort for NFFE is the collective bargaining in tandem with the increased management flexibility. As President Harnage stated, we were not involved in the draft of these proposals, and we can only sit here and respond by helping to shape what our ideas are. We must strongly oppose, though, the Hatch Act sanctions and also any limit on official time.

Again, I have sat here the whole morning and part of this afternoon and heard responses about what the taxpayers want. I would like to remind you all that we are taxpayers, too; and we are concerned about how taxes are being spent, and we feel official time is a proper way to spend our tax money. So I thank you very much.

Mrs. MORELLA. We are also. We are Federal employees, and we are taxpayers too.

No, I understand. I wonder about the Hatch Act sanction. I questioned it at first when I saw it, but I mean, what is wrong with it? Incidentally, I was one of the sponsors when I was first elected, consistently until I went to the White House to sign the Hatch Act reform, so I believe very much that Federal employees should be able to engage in the political arena away from the job.

But the Hatch Act sanctions, what is wrong with that? If somebody had committed a violation and then just immediately left and went into the private sector?

Mr. SCHMIDT. But to penalize somebody for something that has occurred prior to it being—well, prior to coming out and coming after them after they leave Federal employment is like saying if you have done something wrong elsewhere, the employer can come after you and charge you with wrongdoings after you leave that facility.

Mrs. MORELLA. Except you have a responsibility to obey the law.

Well, I will keep an open mind. It is something I really hadn't dwelt on, but when I heard about it, it just seemed to have a kind of logic to it. And I would be happy to listen to what all of you have to say, or you can submit it to us, section by section, as you go through the draft proposal.

Mr. Pearman.

Mr. PEARMAN. We would like to thank you for offering that TSP as a part of this package, because we fully support that. The overtime that is offered, and has been included from Congressman Davis' legislation, we are very happy about that. And the RIF and the MSPB appeal back to the FAA, they are the three most important things we would like to see reimplemented.

At this point, no to the retirement. And that, of course, supports what we have reiterated in our testimony: the demo on benefits, eliminating the MSPB for other agencies, and the position to eliminate the official time.

On official time, we have seen in the FAA that has gone a long way in order to promote the partnership between management and the union, and that has been quality time that has been, I think, very beneficial to both the union and management. And to eliminate the official time, I think, would dilute that relationship. It has been very, very successful, in our opinion, in this implementation. So I would hate at all costs to see that done away with.

Mrs. MORELLA. I tend to agree with you on it. I want to thank you also for your specific suggestions with regard to FAA and its exemption from MSPB and RIFs.

You raised some very important points, so I do hope that you will all make sure you are involved in this process, because we would like to see some good legislation come out of this subcommittee and committee and House and Senate. I thank you.

Thank you, Mr. Chairman.

Mr. MICA. Thank you, Mrs. Morella. Now, is someone opposed to the 401(d) for political appointees?

Mrs. MORELLA. The Sessions bill.

Mr. HARNAGE. I don't strongly oppose it.

Mr. TOBIAS. I could live with that.

Mr. MICA. Well, we heard Mr. Just-Buddy and what has happened. These people get in and then they want to convert and sometimes do convert into career. We view them as a necessary arm of the Presidency; to implement his policy. But we are finding more and more instances where I am getting requests from folks for some option out into different portable retirement programs.

Again, we had a meeting with the President's new IRS Commissioner, trying to work through—and this affects you, Mr. Tobias, to a large degree—how many folks they bring in under these new terms. And one of the items under discussion is, we can't get these folks to come out of the private sector to help us, even for a short period of time, without some additional flexibility.

So we are seeing more and more of this. And, as chairman, I mean almost every appropriations bill, or some agency is coming to me almost every day saying, well, I can't get these folks because we are locked in to this. So I think we are going to face that and contend with it.

As I said, I feel a little bit like a referee in a match here, and I have many Members who are not on this panel who have proposals that deal with civil service. We have the members on the panel who have their priority items. Nobody is here to do anything to hurt Federal employees. I think there is a common bond among all the proposals to actually enhance the standing, benefits, and the opportunities for Federal employment and Federal employees and to make the system work, but we have a short window.

There will be items that will pass and will get the President's signature; some of them may be contained in an omnibus bill; some may be riders on other must-pass legislation. But I do welcome all of the employees' groups. It is true that you, as opposed to the other panels, do represent our Federal work force and employees and managers, and we value your input. In fact, I solicit your language and specific recommendations of remedies for the problems that have been discussed or outlined here. I am not concerned with

any pride of authorship or language, so you can be as much a part of the process or outside the process as you would like.

But, in fact, some things will move forward here by virtue of powers much greater than my lowly standing as chairman and station in life as chair of this Civil Service Subcommittee.

Mr. TOBIAS. We are never going to accept that, Chairman Mica. We will never accept that kind of a statement.

Mr. MICA. As Mr. Just-Buddy said, I don't consider myself august in any respect.

But I also want you to know, gentlemen—Mr. Pearman, Mr. Schmidt, Mr. Harnage—this is your first time testifying. You will find very few chairs in the House of Representatives that can time their committee meeting to coincide with a bell for a number of votes that will proceed.

I do want to thank you, welcome the new participants, and hope you will consider yourself as full participants. Fortunately we have also had Mr. Tobias return.

Mr. TOBIAS. And it is always a pleasure.

Mr. MICA. He is certainly a veteran and does a great job representing his folks.

Mr. HARNAGE. Mr. Chairman, if I might just make——

Mr. MICA. Remember, I get the last word.

Mr. HARNAGE. Right, but I wanted to make an observation for you.

I was really moved by Mr. Just-Buddy's testimony, and I'm sure everybody that heard it was, and I really appreciate you giving him that opportunity. I did not know who he was until today. But the fix he is looking for is not necessarily the fix he is going to get.

I have met with the Department of Agriculture twice this year, one time with the Secretary concerning the politicization of that department, where people are being moved from non-Federal jobs into Federal jobs and then their seniority counting from their previous job in a RIF, reduction in force, which could have just as severely affected him.

But we have a problem in the Federal sector where the OPM has given the agencies the authority to go to an outside list on any position that they are advertising for employment. The fact that they went out and selected a political appointee could very well be happenstance. They could have gone to a State employee, they could have gone to a county employee, who are also political appointees, and selected them over him as well, or somebody totally unrelated.

So the fix he is looking for is not going necessarily to take care of every problem that can be faced.

Mr. MICA. Well, I thank you for your comment, and he does represent the Federal work force. He had contacted us. As most of you who have dealt with me in the last 40 months know, someone requests and wants to appear and be a part of this, I do keep a very open process. We probably should have more Federal independent employees come forward to cite their case; maybe they do not have the exact solution, but it is your responsibility as representatives of the employees and our responsibility as representatives of the people to find real solutions to their problems, whether it be on his specific issues or others that have been brought before us. I think we all can work together in the future to meet that obligation.

So there being no further business before the Civil Service Subcommittee, I again thank our witnesses, both those who are empaneled and remaining, and the others who have been before us today.

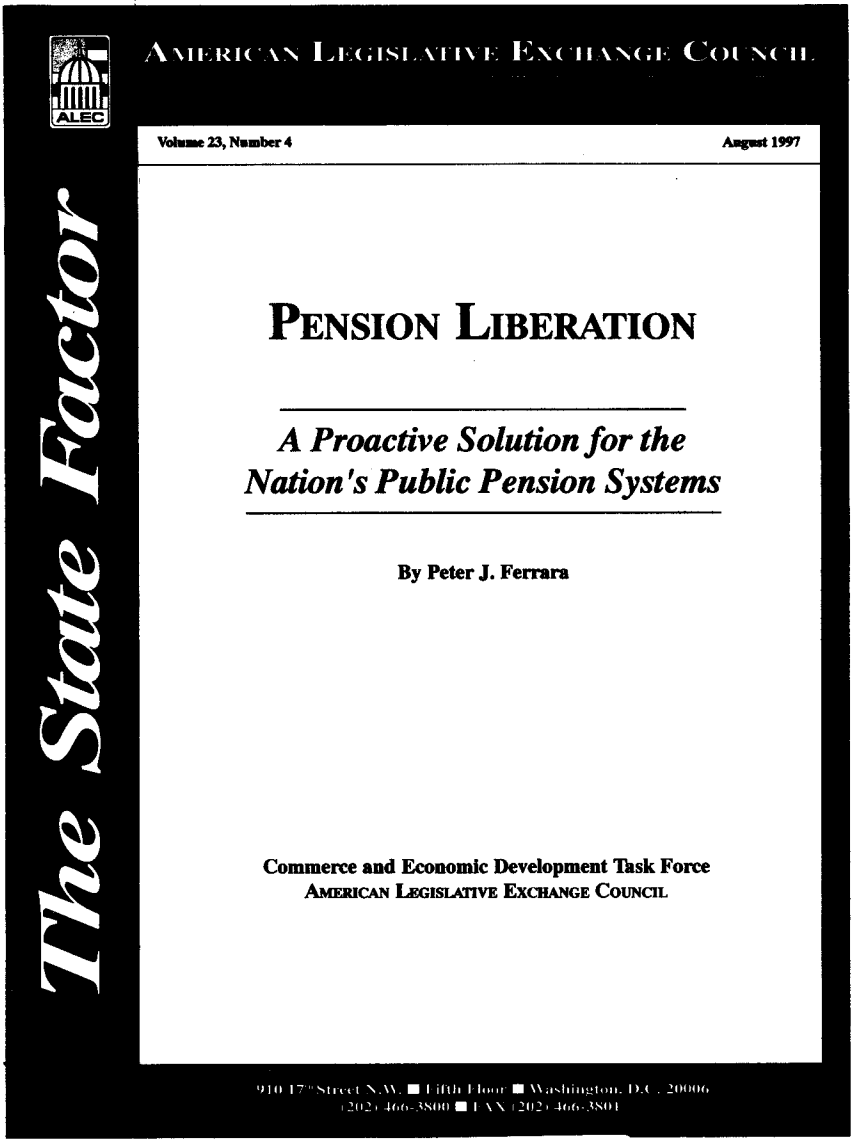
I will announce, too, that we will have a meeting in July, and it will probably not be a public meeting, but advise the minority that one of the issues that I did not mention at the beginning, that we have tried to address in hearings, is discrimination in the Federal work force and Federal workplace. We have held a number of sessions with some of the agencies, both in public and in private, and we will have another meeting at a mutually agreeable time to get a report from those agencies that have not met what we consider acceptable standards for dealing with discrimination in their various agencies.

So we will put you on notice for that, and we will also continue to address the problem of discrimination in the Federal work force both publicly and also privately with the agencies.

There being no further business before the subcommittee, this meeting is adjourned.

[Whereupon, at 2:36 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]



AMERICAN LEGISLATIVE EXCHANGE COUNCIL

The State Factor

Volume 23, Number 4 August 1997

PENSION LIBERATION

A Proactive Solution for the Nation's Public Pension Systems

By Peter J. Ferrara

Commerce and Economic Development Task Force
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

910 17th Street N.W. ■ Fifth Floor ■ Washington, D.C. 20006
(202) 466-3800 ■ FAX (202) 466-3801

About the Author

Peter J. Ferrara *is general counsel and chief economist at Americans for Tax Reform. He has also been a senior fellow at the National Center for Policy Analysis, the Heritage Foundation and the Cato Institute. Ferrara served in the Justice Department from 1992-93 as a policy advisor to the attorney general and was counsel at the Washington, D.C., law firm of Shaw, Pittman, Potts & Trowbridge from 1983-1992. He has also taught law, worked in the Reagan White House and in the Department of Housing and Urban Development. Ferrara is a graduate of Harvard College and Harvard Law School.*

American Legislative Exchange Council
Bringing the States and the Nation Together

The American Legislative Exchange Council (ALEC) was founded in 1973 by a small group of Democratic and Republican state legislators who shared a common commitment to the Jeffersonian principles of individual liberty, limited government and free markets.

Today, ALEC has grown to become the nation's largest bipartisan, individual membership organization of state legislators, with nearly 3,000 members throughout the 50 states, Puerto Rico and Guam. Nearly one-third of ALEC's members hold leadership positions in their legislatures.

ALEC brings the states and the nation together through conferences, seminars, publications and its nine National Task Forces. Each provides a unique vehicle for legislators to communicate across state lines, share experiences and ideas, and work in unison with the private sector to create effective public policies.

ALEC's goal is to ensure that our legislative members are fully armed with the information, research and ideas they need to win in the legislative arena. Our publications keep members up to date on emerging trends and provide in-depth analyses of issues at the state level. Our conferences and meetings promote colleague-to-colleague communication by linking like-minded legislators together. Our National Task Forces provide a forum in which legislators and the private sector discuss issues, develop policies and write model legislation.

Unlike other state legislative organizations, ALEC's credo is that business should be an ally, not an adversary, of state legislators. ALEC provides the private sector with an unparalleled opportunity to have their voices heard, their perspectives appreciated, and their interests put before the nearly 3,000 pro-free enterprise state legislators of ALEC. Through ALEC, legislators and the private sector work in a dynamic partnership to develop public policies that harness the immense power of free markets and free enterprise to encourage economic growth, increase the nation's competitiveness, and improve the quality of life for all Americans.

The State Factor: Pension Liberation: A Proactive Solution for the Nation's Public Pension Systems
Volume 23, Number 4
© August 1997

American Legislative Exchange Council
910 17th Street, N.W.
Fifth Floor
Washington, D.C. 20006

(202) 466-3800

Publications Order Code: 9705 Cost to non-members: $10.00 plus shipping and handling

The State Factor: Pension Liberation: A Proactive Solution for the Nation's Public Pension Systems, has been published by the American Legislative Exchange Council's (ALEC) Commerce and Economic Development Task Force as part of its mission to discuss, develop and disseminate public policies which expand free-markets, promote economic growth, limit government and preserve individual liberty. ALEC is the nation's largest bipartisan, voluntary membership organization of state legislators, with nearly 3,000 members across the nation. ALEC is governed by a 21-member Board of Directors of state legislators, which is advised by a 23-member Private Enterprise Board representing major corporate and foundation sponsors.

ALEC is classified by the Internal Revenue Service as a 501(c)(3) non-profit public policy and educational organization. Individuals, philanthropic foundations, corporations, companies, or associations are eligible to support ALEC's work through tax-deductible gifts. Nothing written herein is to be construed as necessarily reflecting the view of the American Legislative Exchange Council, its Board of Directors, or its membership, or as an attempt to aid or hinder the passage of any bill before the Congress or in state legislatures.

PENSION LIBERATION

A Proactive Solution for the Nation's Public Pension Systems

EXECUTIVE SUMMARY

Over the past 20 years, the private sector has shifted dramatically toward "defined contribution" pension programs, while the public sector has remained tied to old-fashion "defined benefit" plans.

TWO RETIREMENT PLAN MODELS

Under a traditional defined benefit plan, workers are promised a specific benefit amount for each month in retirement. In contrast, under a defined contribution plan, the employer simply contributes a specified percentage of the worker's salary to an individual investment account for the worker. The worker is permitted to direct the investment of the funds, with the resulting retirement benefit being the accrued value of the investments.

ADVANTAGES OF DEFINED CONTRIBUTION PLANS

Public defined contribution plans offer valuable advantages for both workers and taxpayers.

ADVANTAGES TO WORKERS

Portability — Workers can simply take their accumulated funds with them when they change jobs.

Immediate Vesting — In a pure defined contribution plan, the employer's contributions to the individual account become the full property of the worker upon payment.

Personal Control — In the defined contribution plan, the retirement funds for each worker are under the control of the worker in their own individual accounts. Workers can consequently adopt the investment strategies and benefit plans that best suit their own individual needs and preferences.

Fair Benefits — Under a traditional defined benefit plan, the benefits are skewed to favor the longer-term and oldest workers. However, a defined contribution plan provides fair, undistorted benefits to each worker, granting each the full value of the contributions made for them.

Higher Benefits — The defined contribution plan includes no limit on the benefits workers can receive. Those who achieve strong investment performance in their individual accounts will receive much higher benefits than offered under a standard defined benefit plan.

Freedom of Choice — The defined contribution plan maximizes workers' freedom of choice so that they can choose their own investments, investment strategies, investment managers, and benefit structure. In addition, under the proposed reform, current workers can also choose whether they want to be in the defined contribution plans or stay in the defined benefit plans.

ADVANTAGES FOR TAXPAYERS

No Investment Risk — With the government managing a common pool of investments under a defined benefit plan, the taxpayers bear the complete risk of poor investment performance.

No Political Risk — With the government specifying benefits far into the future, as under defined benefit plans, there is always a strong danger of political giveaways by short-sighted politicians. Moreover, a large government investment pool, as under a defined benefit plan, is always subject to the danger of political interference that could raise costs, including political favoritism that may influence investment policy and take the focus off simply maximizing investment returns.

No Unfunded Liability — The defined contribution plan eliminates the danger of any unfunded liability that taxpayers must cover.

Greater Control Over Costs — With a defined contribution plan, the government is responsible only for a specified contribution each year.

Reduced Costs — Defined benefit plans have large administrative costs for the government employer. The government must maintain and pay for the management of the large common pool of assets. With a defined contribution plan, by contrast, administrative costs are negligible. The government simply pays an amount into each employee's own account as part of payroll processing. The worker takes over administration of the account after that, much like an IRA or basic account.

Improved Employee Recruitment — Highly talented workers may not be willing to commit to long-term government employment. However, they may be willing to work for a state or local government for a few years. The defined contribution plan would make it easier to recruit such workers because it is fully portable, and the workers can take the saved contributions with them when they leave.

CRITICISMS OF DEFINED CONTRIBUTION PLANS

Unsophisticated Workers — Some believe that most workers are too unsophisticated about financial matters to handle the responsibility of directing their own retirement investments. This underestimates the capabilities of working people. Nevertheless, the plan can be easily structured to avoid this problem.

Investment Risk — Defined contribution plans shift investment risk from the employer to the worker so that a worker's benefits depend entirely on the investment performance of his or her retirement account. What is not widely recognized is that while defined contribution plans leave workers subject to investment risk, defined benefit plans without inflation adjustments leave workers fully subject to an unavoidable inflation risk that would be devastating when inflation is high. Also, market-based mechanisms allow workers to reduce this risk to easily manageable levels.

Survivors and Disability Benefits — Some argue that defined contribution plans do not include survivors and disability benefits. However, defined contribution plans can be structured to match any benefits offered by defined benefit plans.

Transition Issues — Some argue that the transition to a defined contribution plan will be costly. However, if the defined benefit plan is fully funded, then it will have the money to pay the departing workers saved in its common trust fund. Moreover, experience shows that those who leave defined benefit plans to take a defined contribution option are primarily the shorter term and younger workers with little in accumulated funds in the defined benefit plan.

REFORM PLANS

Michigan — Governor John Engler proposed a defined contribution reform plan for state workers on November 7, 1996. The legislature passed it by the end of the year. It is now considered one of the Governor's major accomplishments.

California — The reform process in California began with legislation proposed in 1996. The proposal passed the Assembly by a 43 to 29 margin, but was killed by special interests in the Senate. Current legislation seeks to fully implement the reform at a slower pace.

Other States — Defined contribution plans for local government workers have proliferated in Colorado, Florida, Michigan and Texas. Studies are under way in nine other states and legislation to expand defined contribution plans is under consideration in 20 states.

INTRODUCTION

Over the past 20 years, the private sector has shifted dramatically toward "defined contribution" pension programs, where the employer pays a specified amount into a personal investment account for the worker and the benefits equal those accumulated funds plus any returns on the investment. The number of private sector employees in such plans soared from 11 million in 1975 to 43 million in 1995, an increase of about 300 percent. Contrast that with the stagnation of private defined benefit plans, where the employer promises a specified retirement benefit and saves and invests the funds in a common investment pool to finance those benefits. From 1975 to 1995, the number of private sector employees in

such plans grew by less than 10 percent, from 33 million to 36 million. Most private sector employees with pensions are in fact now in defined contribution plans. Yet, in the public sector, government employees remain overwhelmingly tied to old-fashion defined benefit plans. In 1994, 91 percent of public sector employees were in such plans, which was little change from the 93 percent that were in defined benefit plans in 1987. The proportion of public employees in defined contribution plans has remained stable at 9 percent over the years.[1]

The time has come for the public sector to join the private sector in reaping the advantages of defined contribution plans. This would benefit both public employees and taxpayers.

For workers, the defined contribution plan is fully portable, as they can take the funds paid into their accounts wherever they go. Those who work for a few years in the public sector and then move on, as most now do, would not lose all of their employer pension contributions, as with typical defined benefit plans. Moreover, the funds are under the control of each worker. They do not have to worry about politicians mishandling the funds, charging taxpayers for unfunded liabilities, or cutting their benefits. Indeed, through mutual funds, annuities and the like, even the longer-term workers would likely earn higher benefits than promised in defined benefit plans. Overall, such reform gives workers broad freedom of choice and control.

For taxpayers, the defined contribution plan avoids the risks of having government bureaucrats invest huge pools of retirement funds. Instead, the government's expenses are fixed as a percentage of the payroll each year, with no investment risk or danger of unfunded liabilities. This promotes certainty and stability in budgeting. In addition, the simple defined contribution plan saves large amounts in administrative costs, and possibly funding costs as well. At the same time, because of the many benefits of defined contribution plans for workers, such plans will help public employers recruit the best employees.

Because of these overwhelming advantages, a legislative trend is developing in the states in favor of defined contribution plans for public employees. Michigan has recently adopted a plan creating a defined contribution option for all of its workers. California has adopted legislation for such an option for some of its workers, with more bills pending. Additional legislation is pending in at least 20 states.

This report will analyze these proposals and assorted issues. It will first describe the typical structure and features of defined benefit and defined contribution plans. It will then describe the benefits of defined contribution plans and the criticisms. It will next discuss the recent reform efforts in Michigan and California, and briefly note developments in other states.

TWO RETIREMENT PLAN MODELS

Under a traditional defined benefit plan, workers are promised a specific benefit amount for each month in retirement. The government employer pays retirement contributions into a common investment pool for all covered workers. The workers may be required to make some contribution as well. The government employer then invests the funds in the common pool, which are used to pay promised benefits in retirement.

The benefits are usually subject to a "vesting" requirement, which provides that the employee must work a minimum number of years to receive benefits. Typically, the minimum is 10 years. If the worker leaves for another employer before satisfying the minimum vesting requirement, then the worker loses any claim to the employer's contributions to a retirement pension payout. The worker typically gets back only contributions personally made to the common pool, plus a nominal amount of interest.

A formula usually determines the benefit amount at retirement by multiplying some percentage, such as 1 to 2 percent, times the number of years of service for the employer, times the worker's final salary, or average of three highest years of salary. For example, suppose an employee works 30 years for a government employer and then retires with a final salary of $50,000. If the percentage factor is 1 percent, then the annual retirement benefit is 1 percent times 30 times $50,000, or $15,000. Investment performance, contribution rates and overhead expenses have no impact on the pension payout in a defined benefit plan.

While the employee's benefit is specified in advance under the defined benefit plan, the employer's cost of funding the plan is highly uncertain. The employer must contribute enough each year so that, with investment returns, the saved funds will be suf-

ficient to finance the promised benefits. But whether the contributions will be sufficient depends on a wide range of factors that vary over time. These include life expectancy, the growth in future earnings, investment performance, inflation and other factors. If the amount saved in the common investment pool falls below the level necessary to fund future promised benefits, the shortfall is called an "unfunded liability." This unfunded liability then has to be covered by taxpayers through higher contributions from the general fund.

Under a defined contribution plan, the employer simply contributes a specified percentage of the worker's salary, typically 7 to 10 percent, to an individual investment account for the worker. The worker may be required to make a contribution as well, perhaps 3 percent of his or her salary. The worker then directs investment of the funds over the years, within certain limits. The worker's retirement benefit is then the accrued value of the investments.

The employer's contributions under this plan are typically not subject to vesting requirements. The contributions become the property of the worker when paid into the account. Because the worker's benefits equal the accrued value of the invested funds, there is no possibility of an unfunded liability. The employer's costs under these plans are fixed and certain, providing predictable budgeting to the government employer. Yet the employee's ultimate benefit is not fixed in advance.

As previously noted, defined benefit plans cover 91 percent of state and local public workers, compared with 9 percent covered by defined contribution plans. Retirement funds held by public sector defined benefit plans total about $1.6 trillion, compared with $20 to 25 billion held by public sector defined contribution plans.

ADVANTAGES OF DEFINED CONTRIBUTION PLANS

As compared to public defined benefit plans, defined contribution plans offer valuable advantages for both workers and taxpayers.

ADVANTAGES TO WORKERS

Portability — The most obvious advantage of defined contribution plans for workers is portability. Since contributions are paid directly into individual accounts for each worker, like separate bank accounts, workers can simply take their accumulated funds with them when they change jobs. As a result, workers get to keep the full past contributions made on their behalf and their full accrued benefits. In a defined benefit plan, by contrast, the contributions for each worker are in a common pool where each worker's share is not separately identified. If a worker leaves before satisfying the extensive vesting requirement of 10 years or so, the worker loses all past employer contributions and may take only his or her own contribution plus minimal interest. But even after vesting, the worker still does not have portability in a defined benefit plan. Workers cannot take accumulated employer contributions with them to their next job. Workers can only receive future retirement benefits, calculated under formulas designed to benefit longer-term workers at the expense of shorter-term workers. Moreover, even to receive these benefits, departing workers cannot take their own past contributions to the retirement plan either. If the worker withdraws his or her own contributions even after vesting, the worker will lose all retirement benefits and consequently all claims to the past contributions from the employer.

Immediate Vesting — In a pure defined contribution plan, the employer's contributions to the individual account become the full property of the worker upon payment. As a result, the worker enjoys immediate vesting of employer retirement contributions. This greatly benefits the majority of state and local government workers who are not going to stay with one employer for the rest of their careers.

In a typical defined benefit plan, by contrast, the employer contributions are again kept by the government in a common pool, and the worker's rights to them typically vest only after long periods of time, typically 10 years. As a result, most workers lose out, since most remain with one state or local employer for less than 10 years. For example, in California 70 percent of state and local workers lose all employer retirement contributions because they stay with one employer for less than 10 years, and consequently fail to meet the 10-year vesting requirement. Moreover, even workers who stay longer never get to take employer contributions with them when they leave, and their ultimate retirement benefits

only reflect the full benefit of the employer contributions when they have worked well beyond 10 years.

Personal Control — In the defined contribution plan, the retirement funds for each worker are under the control of the worker in their own individual accounts. Workers can consequently adopt the investment strategies and benefit plans that best suit their own individual needs and preferences. As a result, they may well end up with higher benefits than under a traditional defined benefit plan. Moreover, under the defined contribution plan they don't have to worry about politicians taking away benefits or bureaucrats mishandling funds and losing or squandering their retirement assets.

Fair Benefits — Under a traditional defined benefit plan, the benefits are skewed to favor the longer-term and oldest workers over others in at least three ways. First, the vesting requirements eliminate benefits for those working less than 10 years, with the funds then devoted to the longest-term workers. Second, the benefits are a percentage of final salary, which tends to be much higher for those who have worked for the employer the longest, or for older workers.

Third, granting the same percentage of final salary for each year worked (1 to 2 percent) does not grant the full benefit of the contributions for younger workers who remain employed for several years, then leave. For example, take a worker who enters government employment at age 22, works for 15 years, and then leaves for a private sector job. Under a traditional defined benefit plan, the worker will qualify for benefits at retirement. But the worker will only receive the same 1 to 2 percent of final salary for each year worked as other workers under the benefit formula. Yet, the contributions made for the worker during employment continued to earn investment returns for many years after employment was terminated. The worker, however, receives no benefit from these additional investment returns.

Indeed, contrast this younger worker with an older worker who enters government employment at age 50 and continues to work there for 15 years, retiring at age 65. The contributions for this worker earned investment returns for far fewer years than those for the younger worker. Yet, this worker will get the same 1 to 2 percent of final salary for each year worked as the younger worker. If the older worker's salary was higher, as is likely, he or she will actually get more benefits in retirement than the younger worker, even though the contributions for the younger worker earning returns for many more years would have accumulated to much more by retirement. The younger workers are consequently denied the full benefit of their contributions, which are redistributed in large measure to others.

None of these distortions occur in a standard defined contribution plan. The contributions to the worker's account immediately vest as the property of the worker, so the worker gets to keep those full contributions in any event. The worker also gets to keep the full returns earned by those contributions over the years, rather than leaving them to others based on a calculated percentage of final salary. The defined contribution plan consequently provides fair, undistorted benefits to each worker, granting each the full value of the contributions made for them.

Higher Benefits — The defined contribution plan includes no limit on the benefits workers can receive. Those who achieve strong investment performance in their individual accounts will receive substantially higher benefits than offered under a standard defined benefit plan. In fact, there is good reason to believe that on average workers in defined contribution plans will receive substantially higher benefits than offered by defined benefit plans, to the same or lower contribution rate.

Those managing the common investment pool for a defined benefit plan are investing only to finance the targeted benefit levels. For career workers, these will range from 30 to 80 percent of final salary and cluster around 45 to 65 percent.[2] The managers will not invest more aggressively to achieve higher benefits, even when that can be done safely. If they do attain higher investment returns where legally permissible, the employer will likely reduce contributions or withdraw the excess assets. Otherwise, the government employer will likely use the funds to extend benefit coverage to new politically influential interest groups, adding to the long-term costs of the program. With benefit levels for existing workers set by law, better investment performance in a defined benefit plan generally cannot be used to pay higher benefits to current workers.

Contributing a standard 10 percent of salary each

year to a defined contribution plan that earns the full standard investment returns available in the market will produce higher benefits than those targeted under a typical defined benefit plan. And those who would benefit the most are the longest-term workers who thought they were getting the most out of the skewed benefits of defined benefit plans.

The average real rate of return earned in the stock market going back over the last 70 plus years, all the way back to 1926, is 8 percent.[3] The average real rate of return on corporate bonds over that period is 3 percent or more.[4] A conservative portfolio with half of each would earn 5.5 percent.

Assume a worker earns around $30,000 per year over his or her career in constant inflation adjusted dollars. If 10 percent of that salary is contributed to a personal investment account for the worker earning a real return of 5.5 percent each year, then after 40 years that investment account would total $432,357, again in constant, inflation adjusted dollars. (See Table I.) That amount would finance an annuity paying about $60,000 per year each year for the rest of the worker's career. A defined benefit plan paying 1.5 percent of final salary for each year of work would pay only $18,000 per year. A defined benefit plan paying 2 percent of final salary for each year of work would pay only $24,000 per year. So the defined contribution plan would pay 2½ to 3½ times the benefits of the defined benefit plan. (See Table I.) And the pool of money is available upon the employee's death for his or her children or other heirs.

A worker earning $40,000 each year would reach retirement after 40 years of work with a retirement account total of $576,476, again in constant dollars. That amount would finance an annuity of $80,000 per year, compared to $24,000 to 32,000 for a defined benefit plan. A worker earning $50,000 each year would retire with a fund of $720,595, paying about $100,000 per year, compared to $30,000 to 40,000 for a defined benefit plan. Again, the defined contribution benefits are 2½ to 3½ times the defined benefit plan payments. (See Table I.)

Now suppose the worker retires after only 30 years of work. At a salary of $30,000 per year, the worker would retire with a fund of $313,457, which would pay about $43,000 per year in benefits compared to $13,500 to 18,000 for a defined benefit plan. The defined contribution benefits are still 2.4 to 3.2 times the defined benefit plan payments (See Table I.) The $40,000 per year worker would retire after 30 years with a fund of $417,942, paying about $58,000 per year in benefits, compared to $18,000 to 24,000 for the defined benefit plan. The $50,000 per year worker would retire after 30 years with a fund of $522,428, which would pay about $73,000 per year, compared to $22,500 to 30,000 in the defined benefit plan. (See Table I.) Again, the defined contribution plan pays 2.4 to 3.2 times the defined benefit plan.

Now suppose the worker's retirement account doesn't perform as well as others for some reason and earns only a 4 percent real return, which is just half the average return in the stock market over the last 70 years. A $30,000 per year worker would retire after 40 years of work with a trust fund of almost $300,000. That fund would pay almost $37,000 per year for the rest of the worker's life, again all in constant, inflation adjusted dollars. The defined benefit plan would pay $18,000 to 24,000 per year. (See Table II.) So the defined contribution plan would still pay 50 to 100 percent more.

A $40,000 per year worker would retire after 40 years with a trust fund of almost $400,000, which would pay almost $50,000 per year, compared to $24,000 to 32,000 for the defined benefit plan. A $50,000 per year worker would retire with a trust fund of almost $500,000 paying over $61,000 per year, compared to $30,000 to 40,000 for the defined benefit plan. (See Table II.) In these cases, the defined contribution plan again pays 50 to 100 percent more than the defined benefit plan.

Now suppose the worker retires after only 30 years. The $30,000 per year worker would retire with a trust fund of about $175,000, paying about $21,000 per year, compared to $13,500 to 18,000 for the defined benefit plan. The $40,000 per year worker would retire with a trust fund of $233,000 paying about $28,000 per year, compared to $18,000 to 24,000 for the defined benefit plan. The $50,000 per year worker would retire with a trust fund of almost $300,000, paying about $36,000 per year compared to $22,500 to 30,000 for the defined benefit plan. (See Table II.) The defined contribution benefits are still substantially more than the defined benefit plan payments.

These calculations all assume retirement at the standard Social Security retirement age, which is

65 today and will rise to 67 over the next 25 years. To the extent workers can receive retirement benefits under the defined benefit plans at earlier ages, those plans would do much better compared to the defined contribution plans. But such defined benefit plans also require much higher contribution rates than 10 percent of salary, which was used as the basis for the defined contribution benefits alone. At a minimum, however, these calculations show that the longer-term workers would do quite well under defined contribution plans, and would quite possibly receive significantly higher benefits than under a typical defined benefit plan.

Freedom of Choice — Finally, the defined contribution reform proposals maximize workers' freedom of choice. Under the defined contribution plans, workers can choose their own investments, investment strategies and investment managers. They can also choose their own benefit structure and vary their benefits over time, perhaps leaving more in the accounts to accumulate further earnings. Current workers can also choose whether they want to be in the defined contribution plans or stay in the defined benefit plans, and under most proposals this is true for future workers as well. The bottom line is that the defined contribution reform proposals give workers maximum freedom of choice and control over their own money.

ADVANTAGES FOR TAXPAYERS

No Investment Risk — The most obvious advantage for taxpayers of a defined contribution plan is that it eliminates investment risk for them. With the government managing a common pool of investment funds under a defined benefit plan, the taxpayers bear the complete risk of poor investment performance. If such poor performance leaves the pool unable to pay the promised defined benefits, then the taxpayers will have to make up the difference from the general fund.

Under the defined contribution plan, however, the taxpayers simply make a specific contribution to the accounts of the workers each month. The government is then not liable for the investment performance of the funds. Workers' benefits equal the accumulated value of the funds plus interest. Taxpayers, consequently, are not subject to any risk of investment performance.

No Political Risk — Defined contribution plans eliminate another set of risks that are usually overlooked — political risks. With the government specifying benefits far into the future, as under defined benefit plans, there is always a strong danger of political giveaways by short-sighted politicians. These politicians can promise higher retirement benefits, while leaving future officials and taxpayers to pay for them. Under a defined contribution plan, where the government does not specify future benefits but only makes regular investment contributions, this risk is eliminated.

Moreover, a large government investment pool, as under a defined benefit plan, is always subject to the danger of political interference that could raise costs. Political favoritism may influence investment policy, prohibiting some investments and forcing the fund into others. By taking the focus off of simply maximizing investment returns, such political favoritism will reduce investment returns and increase the cost of funding the specified defined benefits.

Politicians may seek to raid the large, tempting investment pool in other ways as well. They may seek to withdraw funds for other uses, claiming an excess of funds which may be temporary or chimerical. Or they may try to use the funds for short-term added benefits. These actions would again raise costs for taxpayers.

Government management of the funds also creates the risk of mishandling of the funds by bureaucrats who lack the incentives, competitive pressures and expertise of private investment managers. Attempts to insulate the funds from bureaucratic control by contracting out to private investment managers may not be entirely successful.

Finally, a large government investment pool creates the risk for taxpayers of greater government control of the private economy. Through such a pool, the government ends up owning large shares of private companies. The government also holds a large share of investment capital that it can use to impose mandates on the private sector. Even where there has been a good record of avoiding such abuse in the past, the danger is always present.

None of these risks arising from a large government investment pool exist in a defined contribution plan where the government does not maintain such a pool.

No Unfunded Liability — The defined contribution plan also eliminates the danger of any unfunded liability that must be covered by taxpayers. Under a defined benefit plan, any shortfall in the common investment pool that leaves the pool unable to pay the promised benefits must be covered by the taxpayers, regardless of the cause of the shortfall. In the defined contribution plan, where the government does not maintain a common investment pool but only pays a specified amount to each worker's individual account each month, there is no possibility of an unfunded liability.

Greater Control Over Costs — The defined contribution plan also provides the government and taxpayers greater control over costs. Costs under a defined benefit plan, where the government has pledged to provide a certain benefit regardless of cost, can vary greatly, depending on a wide range of factors outside of the government's control. Retirees can live longer, greatly increasing costs. More workers may stay with the government employer long term, increasing costs. Interest rates or the stock market may decline, requiring increased contributions to make up the difference. With a defined contribution plan, by contrast, the government is responsible only for a specified contribution each year, which the government agrees to in negotiations with employees. This means in turn greater certainty and predictability in budgeting. There is no possibility that taxpayers will be surprised with a large, unexpected cost that will require increased taxes.

Reduced Costs — A defined contribution plan can also significantly reduce costs. Defined benefit plans have large administrative costs for the government employer. The government must maintain and pay for the management of the large common pool of assets. Moreover, federal law imposes many regulatory requirements on such plans regarding distribution of benefits, eligibility, actuarial calculations, investment policies, etc. Complying with and reporting on these requirements significantly adds to costs.

With a defined contribution plan, by contrast, administrative costs are negligible. The government simply pays an amount into each employee's own account as part of payroll processing. The worker takes over administration of the account after that, much like an IRA or basic account.

A defined contribution plan may save the government on funding costs as well. The discussion above showed that workers can get high benefits, paying even more than their final salaries, with only 10 percent of their salary paid into the individual defined contribution accounts. Indeed, these benefits can be substantially higher than under typical defined benefit plans. Yet, defined benefit plans typically cost more than 10 percent of payroll. With a defined contribution plan, government employers may be able to get a better deal for their workers while paying less into the plan.

In California, the state Department of Finance estimated that the defined contribution plan offered by Assemblyman Howard Kaloogian would save the state's taxpayers $1,642 per employee each year, due to these factors. With well over a million public employees, this adds up to a very large benefit for taxpayers.

Improved Employee Recruitment — Finally, because of the advantages to employees, defined contribution plans can help employers attract better employees. Highly talented workers may not be willing to commit to state government employment long-term. But they may be willing to work for a state or local government for a few years. The defined contribution plan would make it easier to recruit such workers because it is fully portable, and the workers can take the saved contributions with them when they leave. Moreover, these and other workers would favor the freedom of choice, personal control, and possibly higher benefits that they could get through defined contribution plans.

CRITICISMS OF DEFINED CONTRIBUTION PLANS

UNSOPHISTICATED WORKERS

One of the major criticisms of defined contribution plans is that most workers are too unsophisticated about financial matters to handle the responsibility of directing their own retirement investments. This underestimates the capabilities of working people. Nevertheless, the plan can be easily structured to avoid this problem.

As part of the plan, the employer can offer work-

ers a preselected list of the major, highly reliable mutual funds, complete with their performance records. The list can include only highly diversified funds likely to achieve the average market returns discussed above over the long run. There are hundreds of such plans in the United States. By picking these funds, workers would effectively be picking only the investment managers for their accounts. These highly sophisticated investment managers would then be picking the individual stocks, bonds and other investments, not the workers.

The plan can also offer the workers a list of investment managers who have agreed to follow certain guidelines in investing the workers' accounts, again calculated to produce a diversified portfolio that would likely follow average market returns over the long run. Here as well, the worker would be picking only the investment manager and that sophisticated manager would be picking the individual investments.

Workers need not be limited to these options. But the availability of these options obviates the problem of the unsophisticated worker.

INVESTMENT RISK

Probably the main criticism of defined contribution plans is that they shift investment risk from the employer to the worker. In a defined benefit plan, the worker receives the specified benefits regardless of investment performance, so the worker bears no investment risk. In a defined contribution plan, the worker's benefits depend entirely on the investment performance of his or her retirement account, so the worker bears the full investment risk. Poor investment performance leads directly to lower benefits.

What is not widely recognized is that while defined contribution plans leave workers subject to investment risk, defined benefit plans without inflation adjustments leave workers fully subject to an unavoidable inflation risk that would be devastating when inflation is high. As inflation rises, the specified benefit in an unadjusted defined benefit plan is worth less and less, and there is nothing the worker can do to avoid this. Under a defined contribution plan, by contrast, the worker's investments would rise along with inflation over the long run, providing a real, above-inflation, market rate of return. This would tend to keep prospective long-run benefits rising with inflation.

Also not sufficiently appreciated is that workers can fully handle the investment risk posed by defined contribution plans for several reasons. First, retirement investments are very long term. Workers are not only investing for their entire career, but, indeed, for their entire life, as the remaining retirement fund will continue to be invested to support benefits throughout retirement. With such a long-term investment horizon, perhaps 60 years or more, workers can weather many ups and downs in investment performance, with the average return on a diversified portfolio very likely over the long run to close in on the average long-term market return.

Second, workers can easily invest in simple, widely available, highly diversified pools of stocks, bonds and other investments, through mutual funds and other vehicles. Such diversified pools will track the general market investment returns discussed above over the long run. Indeed, with a sufficiently broad-based investment pool, the worker would basically own a piece of the economy as a whole. If the entire economy collapses, state and local governments will not be able to support defined benefit plan promises either.

Third, market investment returns leave a wide margin for error. The calculations above showed that at even half the average return earned in the stock market even the longest-term workers would receive much higher benefits through a defined contribution investment account than through a typical defined benefit plan. So a worker's investments can perform well below market averages and still maintain adequate retirement support.

Workers, indeed, may be able to handle this investment risk better than state and local governments. For they can do so without all of the political risks discussed above. Finally, where the defined contribution plan is offered as an option, workers have the free choice of whether or not to accept this investment performance risk. Moreover, along with the risk, workers receive the greater reward of likely higher benefits and the many other benefits already discussed.

SURVIVORS AND DISABILITY BENEFITS

Some argue that defined contribution plans do not include survivors and disability benefits while defined benefit plans do. But defined contribution plans

can be structured to match any benefits offered by defined benefit plans. Funds in the defined contribution plan can be devoted to purchasing life and disability insurance that will fully cover survivors and disability benefits.

TRANSITION ISSUES

Another argument is that the transition to a defined contribution plan will be costly because the government will have to pay the workers leaving the defined benefit plan their share of accumulated funds to take to the new plan. But if the defined benefit plan is fully funded, then it will have the money to pay the departing workers saved in its common trust fund. If the defined benefit plan is not fully funded, then it needs to be in any event, and the government will have to bear that cost anyway.

Moreover, experience shows that those who leave defined benefit plans to take a defined contribution option are primarily the shorter term and younger workers with little in accumulated funds in the defined benefit plan. As a result, while 63 percent of the government workers in West Palm Beach, Florida, chose the newly offered defined contribution plan, they took with them only 14 percent of the assets of the old defined benefit plan. The assets of that plan actually continued to increase throughout the transition, climbing from $80.7 million before the conversion to $86.4 million after the conversion. Similarly, while 42 percent of the government workers in Oakland County, Michigan, chose the new defined contribution plan, they took with them only 13 percent of the assets of the old defined benefit plan. That plan's assets continued to increase throughout the transition as well, climbing from $440.4 million before the conversion to $513.6 million after the conversion.

REFORM PLANS

Michigan — Michigan Governor John Engler proposed a defined contribution reform plan for state workers on November 7, 1996. The legislature passed it by the end of the year. It is now considered one of the Governor's major accomplishments.

The reform provides that all new state employees hired after March 31, 1997, and all new public school employees hired after July 31, 1997, will be in the new defined contribution plan. Current state and public school employees will have an option to join the new defined contribution plan, or they can stay in the current defined benefit plan.

Under the defined contribution plan, the state contributes a minimum of 4 percent of the worker's salary to an individual investment account for each worker. The employer will then match voluntary employee contributions up to an additional 3 percent of salary, making a total contribution of 10 percent. The worker can contribute up to an additional 13 percent of salary without employer match at the worker's choice.

The plan includes a vesting feature added to the traditional defined contribution model. The employer contributions are vested 50 percent after two years, 75 percent after three years and 100 percent after four years. Before such vesting, the employer contribution to a worker's individual account must be returned if the worker leaves to work for another employer.

Current employees may choose to switch to the new defined contribution plan only during an open window in the first four months of 1998. If they make the switch, all past employee contributions to the defined benefit plan will be transferred to the defined contribution plan. In addition, for workers who are vested in the defined benefit plan, an amount equal to the present value of their accumulated retirement benefits will be transferred to their defined contribution account as well. Once a worker switches to the defined contribution plan, he or she cannot later choose to go back to the defined benefit plan. On the other hand, after the four-month window in early 1998, workers in the defined benefit plan can no longer choose to switch to the defined contribution plan. For current workers who do switch, their prior service in the old defined benefit plan is counted toward the four-year vesting requirement of the defined contribution plan.

Investment options are structured for workers to make investing easy for them. First, they can choose from three core investment funds with set percentages of asset allocations in different investment areas, reflecting a range of risk and return variations. State Street Global Advisors, the third party administrator for the plan and one of the largest pension investment firms in the world, will maintain these three funds, choosing the particular investments and

holding to the preset asset allocation requirements.

Second, the worker can choose from among 12 preselected mutual funds considered the best in their primary investment areas, whether stocks, or bonds, or other private investments. Finally, the worker can choose a self-directed option which includes the choice of hundreds of mutual funds determined to be sound and suitable for retirement investment.

Workers who leave state employment under the defined contribution plan can leave their assets in the same structured investment system, or roll them over into an individual retirement account (IRA) or a retirement plan maintained by their next employer.

Current workers who switch to the defined contribution plan will receive the same retiree health benefits as under the old defined benefit plan. For new workers in the defined contribution plan, the state will pay 3 percent of the cost of the health benefits for each year of service, up to a maximum of 90 percent. The retiree pays the rest. These benefits vest after 10 years of service. Retirees can choose any alternative private health plan and direct the state premium contribution towards payment of that plan. This includes private medical savings account (MSA) plans.

The state's reform plan provides for no change in the benefits of current retirees. Moreover, there will be no change in benefits for employees who choose to stay in the old defined benefit plan.

The state Department of Management and Budget estimates that Michigan will save almost $100 million in the first year alone because of the new defined contribution plan. Yet, the 45 percent of state employees and 65 percent of public school employees who effectively received no benefits under the old plan because they left public employment too early will now be able to benefit under the new system after only two years, with fully vested benefits after only four years.

In addition to the state, four major counties in Michigan have switched to defined contribution plans for their workers. These include Oakland County, Saginaw County, Washtenaw County and Wayne County. The state capital, Lansing, has switched as well, and the city of Kalamazoo has a partial defined contribution plan.

California — The reform process in California began with legislation proposed in 1996 by Assemblyman Howard Kaloogian. His bill would authorize, but not require, state and local employers throughout the state to offer defined contribution plans as an alternative to their defined benefit plans. The defined benefit option would have to be maintained as well. Non-school employers could choose to have the defined contribution plan administered by the California Public Employees Retirement System (CalPERS) and school employers could choose the State Teacher's Retirement System (STRS). Alternatively, the employer could choose any qualified private company, or could administer the plan itself.

The bill required employers to transfer accrued benefits from the defined benefit plan to the worker's defined contribution account for those who chose the new plan option. Otherwise, remaining details of the defined contribution plan, such as employer and employee contributions, would be left to negotiations between employers and workers. The bill in particular allows immediate vesting of all employer contributions to the defined contribution accounts. It would also allow a structured investment system as under the Michigan reforms discussed above.

The bill would expand benefits to 75 percent of public employees who receive no benefits under the state's existing defined benefit plan because they leave the system before taking a retirement benefit. At the same time, because of savings on administration and funding costs, the state Department of Finance estimated that the bill would save a whopping $1,642 each year for each new employee who chooses the new system. The bill would affect 1.2 million workers in the CalPERS and STRS plans, which hold $165 billion in combined assets.

Kaloogian's proposal passed the Assembly by a 43 to 29 margin in a vote on May 31, 1996. In the Senate, however, the bill ran into strong opposition from public employee unions. Since the bill would expand benefits to the 75 percent of workers now excluded, and so many workers choose the defined contribution plan wherever it is offered, the unions' opposition is plainly motivated by its own institutional interest, rather than the interests of workers. The unions just want workers dependent on explicitly union-negotiated benefits, not the workers own portable assets. The unions and the current CalPERs system do not view all government employees as

their constituents, but rather only those government employees who remain in the union and CalPERS system until retirement.

Similarly motivated opposition arose from CalPERS and STRS, the established retirement plans. They did not want workers departing from their plans, thereby reducing their size and clout. They also did not want competition from alternative administrators. They suggested that they would develop a modified defined contribution plan that they would administer. But as Kaloogian rightly told *Pensions and Investments* newspaper, "Competition is necessary and the current systems monopoly on management and administration of pensions must end."[5]

This opposition, however, was successful in stopping Kaloogian's broad bill in the Senate. But the legislature settled on a narrower compromise. The California State University system lobbied heavily for the Kaloogian option because, it argued, it would help them greatly in recruiting top academic talent. Top professors would be more willing to move to California schools knowing that if they stayed only a few years, they would still receive pension benefits they could take with them. As a result, a final bill passing both houses by unanimous consent and signed into law on August 9, 1996, provided the Kaloogian option for employees of the state's colleges and universities.

In 1997, Kaloogian is offering a new proposal. His new bill would provide the option to all employees of the state legislature. Kaloogian argues that these are the shortest-term workers in the state on average and most need the new option. The bill is co-sponsored by Assemblyman Dick Floyd, the legislature's most pro-labor proponent, and Senator Steve Peace.

Other States — Defined contribution plans for local government workers have proliferated in Colorado, Florida, Michigan and Texas. Options for such plans have been recently adopted for teachers in West Virginia and Washington state, and other public employees in Colorado.

In December 1996, Ohio passed legislation providing a defined contribution option for all higher education employees. A similar option exists for higher education employees in South Dakota, Missouri, Alabama, and now California. Ohio also passed legislation last year requiring a study of expanding the option to all state employees. Similar studies are under way in nine other states, including Vermont, Massachusetts, Connecticut, Virginia, West Virginia, Iowa, Missouri, Oklahoma and Montana. Legislation to expand defined contribution plans is under consideration in 20 states.

CONCLUSION

Proposals to provide a defined contribution retirement option for state and local government workers involves a unique opportunity to benefit these workers and state and local taxpayers at the same time. State and local governments should consequently consider adopting such an option for their workers.

ENDNOTES

1 Some employers can have both plans, using the defined contribution plan as a voluntary supplement to the defined benefit plan. As a result, in the past the proportion of public employees participating in each type of plan added up to over 100 percent.

2 At 1 percent of final salary for each year worked, a 30-year worker will receive 30 percent of final salary. At 2 percent of final salary for each year, a 40-year worker will receive 80 percent of final salary.

3 *Stocks, Bonds, Bills, and Inflation, 1996 Yearbook* (Chicago, Ill., Ibbottson Associates, 1996); William G. Shipman, "Retiring with Dignity: Social Security vs. Private Markets," The Cato Institute's Project on Social Security Privatization, SSP#2 (Aug. 14, 1995); Marshall N. Carter and William G. Shipman, *Promises to Keep: Saving Social Security's Dream* (Wash., D.C., Regnery Publishing, 1996).

4 Peter J. Ferrara, Social Security Rates of Return for Today's Young Workers (Wash., D.C., National Chamber Foundation, 1986), p. 16.

5 Christina Williamson, "California Funds Fear Asset Drain," Pensions and Investments, June 24, 1996. p. 2.

6 Assumes retirement at the normal Social Security age.

7 Range assumes defined benefit plan provides 1.5 to 2 percent of final salary for each year of work.

8 Assumes retirement at the normal Social Security age.

9 Range assumes defined benefit plan provides 1.5 to 2 percent of final salary for each year of work.

TABLE I

RETIREMENT BENEFITS[4] UNDER DEFINED CONTRIBUTION PLANS AND DEFINED BENEFIT PLANS

Assumes 5.5 Percent Real Return on Investments
All figures in Constant 1997 Dollars

		40 Years of Work Defined Contribution Plan		Defined Benefit Plan	
Annual Salary	Total Investment Fund Accumulated By Retirement	Annual Annuity Benefit	Replacement Rate	Annual Benefit	Replacement Rate
$30,000	$432,357	$60,278	201%	$18,000-$24,000	60%-80%
$40,000	$576,476	$80,481	201%	$24,000-32,000	60%-80%
$50,000	$720,595	$101,540	203%	$30,000-40,000	60%-80%

		30 Years of Work Defined Contribution Plan		Defined Benefit Plan	
Annual Salary	Total Investment Fund Accumulated By Retirement	Annual Annuity Benefit	Replacement Rate	Annual Benefit	Replacement Rate
$30,000	$313,457	$43,011	143%	$13,500-$18,000	45%-60%
$40,000	$417,942	$58,268	146%	$18,000-24,000	45%-60%
$50,000	$522,428	$72,934	146%	$22,500-30,000	45%-60%

TABLE II

RETIREMENT BENEFITS[5] UNDER DEFINED CONTRIBUTION PLANS AND DEFINED BENEFIT PLANS

Assumes 4.0 Percent Real Return on Investments
All figures in Constant 1997 Dollars

		40 Years of Work Defined Contribution Plan		Defined Benefit Plan	
Annual Salary	Total Investment Fund Accumulated By Retirement	Annual Annuity Benefit	Replacement Rate	Annual Benefit	Replacement Rate
$30,000	$296,480	$36,882	123%	$18,000-$24,000	60%-80%
$40,000	$395,306	$49,199	123%	$24,000-32,000	60%-80%
$50,000	$494,133	$61,655	123%	$30,000-40,000	60%-80%

		30 Years of Work Defined Contribution Plan		Defined Benefit Plan	
Annual Salary	Total Investment Fund Accumulated By Retirement	Annual Annuity Benefit	Replacement Rate	Annual Benefit	Replacement Rate
$30,000	$174,985	$20,981	70%	$13,500-$18,000	45%-60%
$40,000	$233,313	$27,975	70%	$18,000-24,000	45%-60%
$50,000	$291,642	$36,280	73%	$22,500-30,000	45%-60%

Portable Retirement Option (PRO) Act

Summary

This Portable Retirement Option (PRO) Act would authorize state and local public sector employers to provide optional portable retirement plans for state and local public sector employees. The plans would be administered by the employers or by service providers and would allow employees to participate in the optional plan in lieu of continued membership in their existing retirement system. The existing retirement system would be required to transfer the actuarial present value, as defined, to the plan administrator. The bill would establish the Portable Retirement Option Fund in the State Treasury and provide that all moneys would be continuously appropriated for payments of the plan.

Model Legislation

Section 1. {Short Title.} This Act shall be known as the Public Employees' Portable Retirement Option (PRO) Act.

Section 2. {Legislative Declarations.}

Section 3. {Definitions.} As used in this chapter, unless the context clearly requires a different meaning:

(A.) "Retirement" means a member's withdrawal from the active employment of an employer and completion of all conditions precedent to retirement.

(B.) "Portable retirement option or "plan" means the portable retirement option authorized by this Act as those plans may be established by the state or individual local public agencies.

(C.) "Existing retirement system" means any state or local public retirement system.

(D.) "Existing employer" means any public employer of a member of the existing retirement system.

(E.) "Member" or "employee" means any person employed by the state or any local public agency that elects to be included in the plan.

(F.) "Employer" means the state or local public agency, including , but not limited to, school districts, that employs a member.

(G.) "Compensation" means the remuneration paid by the employer in payment for the employee's services during normal working hours, but does not include the monetary value of any other advantages furnished to the employee.

(H.) "Member contribution" means an amount reduced from the employee's regular pay, and deposited into the member's individual account within a defined contribution plan.

(I.) "Employer contribution" means an amount deposited into the member's individual account on a periodic basis coinciding with the employee's regular pay period by an employer from its own funds.

(J.) "Individual account" or "account" means an account in an portable retirement option established for each member to record the deposit of member and employer contributions and earnings thereon on behalf of the member.

(K.) "Fund" means the Public Employees' Portable Retirement Option Fund.

(L.) "Administrator" means an employee of an employer who has been designated by the employer as plan administrator of the plan, or the service provider hired by the employer to provide plan administration services to the plan.

(M.) "Accrued service benefit" means the amount, determined by the actuary of the existing retirement system, that represents the present value of an employee's accrued retirement benefit earned through the date on which a payment is made to a portable retirement option by an existing retirement system for the benefit of an individual account. In order to determine the present value of the accrued benefit, the discount

rate for investment earnings and the assumptions for current final average compensation shall be approved by the employer. At the employer's written election, the accrued services benefit shall also include an employee's pro rata share of any actuarially determined excess of plan assets compared to accrued liabilities in the existing retirement system on the reporting date prior to the employer's election to make an portable retirement option available to a specific group of employees.

Section 4. {Creation of Public Employees' Portable Retirement Option.} Portable retirement options may provide a framework under which the state and each local public agency are authorized to create retirement plans for their respective employees that are tailored to each employer's individual needs and that provide the opportunity for retirement savings and for the orderly administration of the plans.

Section 5. {Purpose.}
(A.) This chapter shall be liberally construed to authorize alternative retirement plans for state and local public agency employees. The purpose of this chapter is to authorize state and local public agencies to provide portable retirement options that are fully funded on a current basis from employer or employee contributions, or both.
(B.) In no event may the state or any local public agency fail to continue to offer membership in any retirement system in existence at the time of enactment of this Act, to current employees, new employees, or retirees.
(C.) Portable retirement options shall be established and administered in accordance with the requirements for qualified retirement or eligible deferred compensation plans respectively under the Internal Revenue Code of 1986, as amended.

Section 6. {Administration of Plan.}
(A.) The employer has all powers necessary to effectuate the purposes of this Act. The employer shall determine and charge reasonable costs of administering the system. The employer may contract with existing public retirement systems or may contract with a private pension, insurance, annuity, mutual fund, bank, savings association, or other qualified company or companies, or any combination of these entities, to administer the day-to-day operations of the plan.
(B.) The Public Employees' Portable Retirement Option Fund is hereby created for the portable retirement option and is a trust fund in the State Treasury administered by the employer in accordance with this Act and applicable state laws. All moneys in the fund are continuously appropriated, without regard to fiscal years, for administrative costs and payments which shall be made upon warrants drawn by the Controller upon demands made by the employer.

Section 7. {Eligibility for the Plan.} Any state or other public agency employee who is a member of any existing retirement system on the effective date specified in an agreement between the employee and the employer may, in lieu of continued or exclusive participation in an existing retirement system and upon written election, voluntarily elect membership in an portable retirement option offered by the employer. The administrator of the portable retirement option shall notify the existing retirement system of the employee's election and of the employee's service record and compensation history within [insert time limit, i.e., 45 days] of that election, and the existing retirement system, within [insert time limit, i.e., 45 days], shall transfer to the plan administrator a payment equal to the actuarial present value of the employee's accrued service benefit on the date of the transfer. The amount so transferred shall be credited to the employee's individual account.

Section 8. {Readmission to the Plan.}
(A.) Any employee whose employment terminates and is later reemployed by an employer shall be eligible for membership in either the existing retirement system or the portable retirement option.

(B.) An employee whose employment with a former employer or an existing employer is suspended as a result of an approved leave of absence, approved maternity or paternity break in service, or any other approved break in service authorized by the employer, is eligible for
readmission to the plan in which he or she was a member at the time the break in service began.
(C.) In all cases where a question exists as to the readmission to membership in a plan, the employer shall decide the question.

Section 9. {Management of the Plan.} The employer, or the entity or entities with which it has contracted, in conjunction with this plan, may purchase group annuity contracts, individual retirement annuities, disability insurance investment contracts, securities, mutual funds, interest in trusts and other financial instruments, health care benefit plans, and group insurance as necessary or appropriate for the plan to provide retirement and related benefits comparable to those provided under an existing retirement system. Selections of plan administrators, annuities, and insurance products shall be conducted through a competitive selection process. If requested by a participating employer, an existing retirement system shall provide an actuarially determined optional disability benefit option and employer contribution rate for employees who elect to participate in a portable retirement option.

Section 10. {Reporting Requirements.} The plan administrator shall prepare, or cause to be prepared, [insert time period, i.e., at least quarterly] a statement for each member's individual account. The statement shall include the current market value of the account, including self-directed investment options, an itemization of changes in the account, the amount vested, and other information as may be required by the plan administrator or the employer. The plan administrator or the employer shall arrange for an independent audit of the plan's assets unless the audit is provided for by a third party organization.

Section 11. {Severability Clause.}

Section 12. {Repealer Clause.}

Section 13. {Effective Date.}

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
AFFILIATED WITH THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL/CIO
317 South Patrick Street
Alexandria, VA 22314
Telephone 703/519-0300
Fax 703/519-0311
E-mail nage @ erols.com

WRITTEN STATEMENT BY

KENNETH T. LYONS
NATIONAL PRESIDENT

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

BEFORE

THE SUBCOMMITTEE ON CIVIL SERVICE
HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

ON

CIVIL SERVICE REFORM ISSUES

JUNE 24, 1998
2203 RAYBURN OFFICE BUILDING

The National Association of Government Employees (NAGE) is an affiliate of the Service Employees International Union, the third largest union in the AFL-CIO. NAGE represents more than 140,000 federal employees in various agencies, from civilians in the Defense Department, to employees at the Department of Veterans Affairs, the Forest Service and the Department of Transportation. Mr. Chairman, on behalf of the entire membership of NAGE, I am pleased to submit written testimony regarding proposed changes to the current federal employment system.

NAGE is proud of its employees working in the Federal government. They are some of the most hardworking, competent and loyal workers in this country. NAGE once again states its belief that employees should be retained on the basis of the adequacy of their performance, that inadequate performance should be corrected and employees should be separated who cannot or will not improve their performance to meet required standards.

Today, we are here to discuss legislation that will greatly

affect all employees in the federal sector. While to date no specific legislation has been made public, we appreciate the opportunity to discuss the overall aspects of proposed legislation.

I SAFEGUARDING THE INTEGRITY OF THE MERIT SYSTEM

NAGE has serious reservations to the section that deals with demonstration projects. Our organization could support legislation for demonstration projects if they were bargained for before implementation. We do not feel that bargaining after impact is in any way conducive to good labor-management relations. For a demonstration project to be successful, the employees must "buy into" the concept. Employees' views, comments and suggestions should be recognized and appreciated. We would support employees and management coming together to develop plans for demonstration projects that include the purpose of the project, the methodology and the duration. NAGE will continue to oppose any demonstration projects that are converted to any alternative personnel system.

NAGE believes that eliminating the restriction of 5,000 employees per demonstration is unwarranted. NAGE believes that the current provisions which require the identification of the employees included in the demonstration projects must be retained.

NAGE has concerns allowing OPM an extra thirty days to appeal MSPB erroneous actions. It is ironic that many critics of the federal employee appeal system complain about over-worked courts regarding employees, then see fit to propose extending appeal time limitations and mandating court action when the "grand overseer," OPM, seeks review in cases it loses.

Another provision in section I that concerns NAGE deals with official time. As you know, the Civil Service Reform Act of 1978 allows federal employee unions official time for those activities which are reasonable, necessary and in the public interest. Union representatives may not use official time to conduct internal union business. This has resulted in better labor-management relations, improved services and reduced costs. We are opposed to any attempt to eliminate, alter or change official time. I must note that non-members who pay no dues to unions also receive the benefit of allowing federal employees official time.

II PERFORMANCE MANAGEMENT

As you know, Mr. Chairman, unions have fought hard to protect its members during RIFs. Increasing the amount of points based on subjective standards of performance provides federal managers an

opportunity to support favoritism over seniority. Therefore, we have serious reservation over the proposal to provide for additional retention credit for employees based on performance.

NAGE supports legislation that provide for group awards in instances where team projects make individual awards impractical. We believe this will go far towards boosting morale and supporting the efforts made by entire organizational units.

NAGE will not support any provision that takes away rights of employees to grieve the results of performance appraisal to MSPB appeal. NAGE is unaware of any statistical analysis indicating that WIGI appeals are frivolously filed.

The last provision in Section II deals with limiting to one the number of performance improvement programs (PIPs) before removal of poor performers. NAGE believes you should perform your job to the best of your ability: If you do not perform satisfactorily and, after notice and a reasonable time to improve, your work performance is still unsatisfactorily, you should be removed. NAGE believes that many of these problems could be corrected with better trained managers who can identify poor performers. Many managers sweep the problem employee under the rug thinking the problem will go away.

III STREAMLINING THE APPEALS PROCESS

NAGE was founded on the belief that federal employees must be provided with due process when any governmental action is being taken against them, including federal employee appeals of adverse actions or disciplinary actions, in both conduct and performance cases.

NAGE will continue to support measures that encourage Alternative Dispute Resolutions. While we support these measures, we believe that any language added to this legislation that would require employees to submit to ADR techniques in lieu of other administrative of judicial remedies would waive employees rights.

Our union has concerns over changes in streamlining the appeal process. We all understand there is some overlap in the system. We also believe in regards to a discrimination suit there should be adequate protections for that individual. Accordingly, changes in the appeal system should be discussed by all relevant parties including unions, prior to introduction of future legislation.

While NAGE supports legislation that extends MSPB appeal

rights to FBI agents, we seek support for federal employees who have lost or never had these rights. Recently due to a change in the personnel system at the Federal Aviation Administration, employees have lost their MSPB rights. NAGE also wants to recognize Title 32 employees especially Civilian National Guard Technicians, who have never had MSPB rights. NAGE looks forward to the day when the Federal government affords these employees the same rights enjoyed by other federal employees.

IV EMPLOYEE COMPENSATION AND BENEFITS

Federal fire fighters have long worked under a confusing and inequitable pay system which results in them earnings of about half as much per hour as other federal employees at the same grade and step. Organizations such as ours have been working to resolve this issue for more than 20 years.

In 1996, Chairman Mica held a hearing on fire fighter pay. At the conclusion of the hearing, Chairman Mica encouraged the agencies employing federal fire fighters to work together with the organizations representing federal fire fighters and the Office of Personnel Management to reach a consensus proposal.

Earlier this year, a compromise proposal endorsed by all affected parties was unveiled. The parties agreed to ask Congress to approve the proposal in the most expeditious manner possible.

The Appropriations Committee acceded to this request and included the provision in the Treasury, Postal Appropriation. We believe that this is the best available option for passage.

Sections that deal with retirement benefits and the Thrift Savings Plan (TSP) contain many provisions which NAGE support. NAGE stonily supports elimination of the waiting period which can require new federal employees to wait as long as a year before they are eligible to begin making retirement contributions to the TSP. Federal employees will benefit from the provisions that allow new hires to roll over private sector 401(k) accounts into TSP and allows them to contribute to the TSP up to the IRS limit (currently $10,000 per year) regardless of income. All federal employees know how important it is to save for retirement and these provisions will help make retirement that much easier for federal employees. NAGE thanks Representative Connie Morella for her help on this part of the legislation.

Mr. Chairman, I would like to thank you again for this opportunity to provide a written statement for this hearing. While NAGE has many concerns regarding this proposed legislation, we are eager to work with you and your staff on providing the best service to the American people. Thank you.

606 North Washington Street
Alexandria, Virginia 22314-1914
(703) 838-7760 • FAX (703) 838-7785
http://www.narfe.org

June 24, 1998

The Honorable John Mica
Chairman, Subcommittee on Civil Service
Committee on Government Reform and Oversight
B-371-C Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Mica:

I am writing to comment on certain provisions in the draft outline of the Federal Employees Integrity, Performance and Compensation Improvement Act of 1998. We appreciate the opportunity to express our views on this omnibus proposal before it is introduced in the House. I request that this letter be included in today's Civil Service Subcommittee hearing record.

According to a June 16 discussion summary, Section 402 (a) of the draft bill would "establish a system, beginning in 2001, directing a portion of federal employees' retirement contributions to the Thrift Savings Plan (TSP) in lieu of Civil Service Retirement and Disability Fund (CSRDF). Gradually increase portion of retirement contributions invested over a period of years."

NARFE vigorously opposes any legislation that attempts to phase out or eliminate the defined benefit portion of federal workers' retirement income. We are particularly concerned that a proposal, which seems designed to do just that, is considered simply part of a plan addressing a wide variety of federal salary, performance, and administrative practices.

NARFE believes that eventual enactment of such a proposal would have grave consequences for future retirement income security of the federal workforce. Consideration of a change of this magnitude must be focused and deliberate.

While many federal employees and retirees can anticipate a more secure retirement with their TSP accounts, their investments – except for the Government securities fund -- are not risk free. That is why a defined benefit is a critical part of the economic security of federal workers and annuitants. It serves as a "safety net" in the event that TSP funds perform poorly. Eliminating the defined benefit would be a mistake.

Moreover, NARFE has historically raised concerns about any proposal that would divert contributions presently made to CSRDF. Current federal law ensures the long-term viability of CSRDF by requiring agencies and present and future employees to make CSRDF contributions.

National Association of Retired Federal Employees

Charles R. Jackson, PRESIDENT
Al James Golato, VICE PRESIDENT
Bess T. Jensen, SECRETARY
Frank G. Atwater, TREASURER

There are also potential budgetary implications to this proposal. Present agency and employee contributions to CSRDF are respectively considered intergovernmental transfers and revenue to the government. Such funds are not outlays because they remain within the federal government's coffers when they are contributed to CSRDF. Under the draft legislation, however, any funds diverted from CSRDF to TSP will become outlays because they leave the federal government. This diversion could create the perception that outlays for federal civilian retirement had substantially increased despite the fact that employee and agency contributions had remained the same.

I understand that it is your intention to act on this legislation before Congress adjourns in October. Given the magnitude and variety of the changes you are proposing and the shrinking legislative calendar, we urge you instead to concentrate on conducting more analysis of long range fiscal and actuarial assumptions before moving forward. To that end, NARFE urges that you allow the Congressional Budget Office, the Congressional Research Service, the General Accounting Office, the Office of Personnel Management and the Federal Thrift Savings Board ample time to review and comment on the actual legislation.

Beyond changes to the retirement system, NARFE shares some of the concerns voiced by federal and postal employee organizations regarding the omnibus proposal. We believe many areas cited need separate committee consideration. To that end, we urge you to postpone further action until legislative language is available and until more thoughtful hearings and analysis can be conducted.

Sincerely,

Charles R. Jackson

CHARLES R. JACKSON
President

A STATEMENT SUBMITTED TO THE HOUSE GOVERNMENT REFORM AND OVERSIGHT CIVIL SERVICE SUBCOMMITTEE TO BE INCLUDED IN THE REMARKS CONCERNING THE PENDING LEGISLATION KNOWN AS 'THE FEDERAL EMPLOYEES INTEGRITY, PERFORMANCE AND COMPENSATION IMPROVEMENT ACT'

OPENING STATEMENT

Chairman Mica and Members of the Committee we are grateful for this opportunity to give a statement in support of legislation to make right recent wrongs by agencies that have had a profound effect on the lives of employees and retirees. Our statement is limited to the Department of State and the wrongful interpretation of the Foreign Service Act of 1980 (FSA'80) as it applied to the conversion of Senior Foreign Service Reserve Officers (SFS) to the Civil Service (CS).

We are Kenneth R. Strawberry and George J. Mattis. We are now retired from the Department of State. We are two of seven former Senior Foreign Service Reserve Officers involuntarily converted to Civil Service status as a result o f the FSA'80 who challenged the Department of State's failure to uphold the edict of the Congress as emphatically expressed in the FSA'80.

The FSA'80 Section 2106 (2), now codified at 22 U. S. C. 4156 (a) (2), as it refers to us former SFS Reserve Officers says, to wit: An individual who is converted under section 4154 of this title to a position in the competitive service shall be entitled to have that position, or any other position to which the individual is subsequently assigned (other than at the request of the individual), be considered for all purposes as at the grade which corresponds to the class in which the individual served immediately before conversion so long as the individual continues to hold that position.

Further, The Committee on Post Office and Civil Service, in its report on the FSA'80, emphasized this point by stating. " Employees converted are provided with permanent saved grade and tenure rights comparable to what they had." (Quote from page 34 of the report on the Foreign Service Act of 1980, H. R. 6790.)

We would like to give the Members of the Committee some sense of the officers who made up the group that is seeking your help. Mr. Strawberry holds a graduate degree. He entered military service in June 1956, and became a Public Health Service (Civil Service) officer assigned to the Federal Bureau of Prisons in 1958 and entered on duty as a Psychologist at the Department of State in December of 1962 and remained there until he was forced to retire, due to age in July, 1995.

Mr. Mattis is a graduate of the Federal Executive Institute. He served in the U. S. Army from 1945 to 1947. After graduation from college, he joined the Federal Government. In September of 1962 he came to the Department of State as a management analyst. In December of 1992 he was involuntarily retired from State because of his age.

Other persons in this group include an attorney, scientists, educators, intelligence officers and an administrative officer.

WHAT WAS YOUR RANK AT TIME OF CONVERSION ?

As a result of the FSA'80 we former FSR Class 2 officers were classified as Senior Foreign Service 4 officers (SFS-4), with salary and benefits accorded that rank. We were advised by the Department that we were not eligible for overseas assignment and further in order to continue

our former Foreign Service rank we were required to accept only assignments given us by the Department, regardless of the level of that position. (Since we had rank in person status, the Department could assign us to non-management positions.) The Department converted us to GS-16 officers, instead of converting us to SES (Senior Executive Service), the Civil Service rank corresponding to our SFS rank.

DID THESE CHANGES IN RANK DESIGNATIONS AFFECT YOUR SALARY OR BENEFITS ?

At the time these new regulations were taking place there was in effect a salary cap. The salary cap held the actual salary of the upper grades to a salary less than the scheduled salary for those grades. This salary cap on upper level civil service pay was instituted during the Eisenhower Administration. Over the years the Congress had to adjust the pay cap upward to provide a more reasonable salary range between the mid and upper GS grades.

We former senior FSR officers continued to have a scheduled pay and benefits as SFS-4, though our actual salary was limited by the imposed pay cap.

In 1990 when Executive Order # 12698 raised the salary of SFS-4, the Department failed to make the required adjustment to our pay.

Informal discussions with staff members of the Director General seemed to have fallen on deaf ears. Reminders of the clear and concise language of the FSA'80 Section 2106 (2) seemed to have fallen on dumb minds.

From that time on our salary and benefits moved further from that of the SFS-4 , the rank we held just prior to the involuntary conversion to Civil Service.

WHEN DID IT BECOME EVIDENT THAT THE DEPARTMENT HAD INTERPRETED THE PROVISIONS OF THE FSA'80 AS IT APPLIED TO THE FORMER SENIOR FOREIGN SERVICE OFFICERS ?

When FEPCA, the Federal Employees Pay Comparability Act became law in 1991 the Department determined once again to change our rank designation, salary and benefits. At that time the remaining former senior FSR officers again met with staff members of the Director General in an effort to resolve the growing problems. We were no longer referred to as officers with rank in the person. We were told that henceforth we would be referred to as Senior Level Civil Service Officers, no longer accumulating annual leave as senior officers. Recommendations for performance bonus were either ignored or paid at a pittance of that paid to SES/SFS officers.

Based on FEPCA a rank/salary scale was prepared and presented to us by the staff of the Director General that would have placed us at Senior Level 8 at a salary of the rank we held just prior to conversion. However, without notice the Department classified us as Senior Level 00, at the lowest pay allowed under the new pay scale.

From that time on our salary was approximately $10,000 less per year than those officers holding the rank that was equivalent to what we held just prior to conversion. That loss of salary also affected our contribution to the Thrift Savings Plan, our Life Insurance, our retirement and our surviving spouse annuity.

WERE THERE OTHER FORMER FSR OFFICERS AFFECTED BY THE ACTION OF THE DEPARTMENT ?

Yes. There were at the time twelve former Senior FRS officers affected by the Departments' decision to classify us as Senior Level 00 (SL-00). We were the remaining officers from a group of thirty one senior officers converted from the Foreign Service to the Civil Service as a result of the FSA'80. Over the years retirement, changed careers, and death reduced the group to the final seven.

IN ADDITION TO THE SEVEN OFFICERS WE ARE DISCUSSING TODAY COULD THIS PROBLEM OCCUR AGAIN ?

No. We are the last of the Senior Foreign Service Officers converted to Civil Service status under the provisions of the FSA'80 to be affected by the Departments' action.

IS THERE ANY EVIDENCE THAT THE DEPARTMENT OF STATE OR OFFICERS OF THE DEPARTMENT OF STATE MADE DECISIONS CONTRARY TO THE MANDATES OF THE FSA'80 ?

Yes. The one that comes to mind immediately is a June 25, 1991, Memorandum to Director Theresa A. Manley PER/CSP (Personnel / Civil Service Personnel) from Michael S. Cessna L / EP (Legal / Ethics & Personnel). The subject of that document is, " Establishing Pay for Former Super Grade Positions." It appears that document resulted from a prompt from Ms. Manley. That document did not come to our attention until late 1995 . Attorney Cessna in his last paragraph states; " We note in your memorandum you make reference to these employees rights under the Foreign Service Act. Owing to their conversion to Civil Service, their rights are governed by the Civil Service statutes and regulations."

We now believe that document provided persons in the Director Generals' office the justification to ignore those provisions of the FSA'80 intended to protect our earned rank, salary and benefits.

Keeping this information from us allowed the Department to keep us in non-managerial assignments and to continue to require us to retire at age sixty five, contrary to Civil Service rules.

WHAT STEPS DID YOU TAKE TO CORRECT WHAT APPEARS TO BE A VIOLATION OF THE LAW THAT GOVERNED YOUR CONVERSION FROM SENIOR FOREIGN SERVICE TO CIVIL SERVICE?

With the assistance of an attorney, we filed a complaint with the Foreign Service Grievance Board. The Board correctly stated that they were not empowered to interpret the law (FSA'80) nevertheless, without granting a hearing on the issues, they rendered an opinion in favor of the Department's position.

We then filed a complaint in the Federal Court for the District of Columbia. The Judge assigned to the case urged the Department to settle the matter out of court. The government attorney rejected the suggestion. After nearly three years, and without a hearing on the issues, the Judge affirmed the Department's position. Our attorney was appalled by the decision of the Court.

Individually, and at various times, the Director(s) General of the Foreign Service were asked to intercede, requests for help from the Office of the Inspector General received no interest and a personal request to Assistant Secretary Patrick Kennedy of the Bureau of Administration went unanswered. We appealed to the Under Secretary for Management Dick Moose to no avail.

Members of our group have contacted their Congressional representatives in the past. We hoped that they would be able to influence the Department to abide by FSA'80 and correct the wrongs done to us. However, the Department has steadfastly refused to change its position. More recently, Congressman Mike McIntyre of North Carolina, having reviewed pertinent material, has encouraged us to come before your Committee and has offered his support, seeking an amendment that would make whole our rights and benefits under the law.

MR. STRAWBERRY, YOU SUGGEST THAT YOU WERE FORCED TO RETIRE DUE TO AGE. AS A CIVIL SERVICE OFFICER EXPLAIN HOW THAT HAPPENED.

Mr. Chairman, I would describe my departure from the Department of State at age sixty five as being fired from my job. It was a traumatic experience.

I am disabled with joint problems, however I performed my duties and earned outstanding ratings and awards with recommendations for performance bonus and promotion. In July 1995 the Department notified me that I would be retired on July 31, 1995. It was at that time that I learned about the June 25, 1991 Memorandum stating that we former FSR officers were subject to Civil Service statutes and regulations. As a result our Attorney sought a Court order delaying my separation from duty. The Attorney representing the Department of State assured the Court in the event it was later determined that I should not be retired due to age the Department would pay the back salary. On July 31, the date of the hearing we did not have a copy of the June 25, 1991 Memorandum.

Since that time the Department has insisted that I was required to retire at age sixty five because I contributed to the Foreign Service Pension System. When converted and based on the stipulations of the FSA'80, I agreed to remain in the Foreign Service Retirement System. However, the Department changed the rules as evidenced by the June 25, 1991 Memorandum. Had the Department advised us, as they should have, I would have asked to be converted to the Civil Service Retirement System. The Department's refusal to reveal the June 25 Memorandum may have been arbitrary. The Department was able to impose those Civil Service rules that were favorable to management, such as holding us to positions of their choosing, limit our leave and performance bonus. On the other hand the Department could force us to retire at age sixty five. Remember that we were advised that we were not eligible for overseas assignment. I believe as does my attorney that the Department has acted in bad faith in this matter.

HOW CAN THIS COMMITTEE HELP YOU ?

We respectfully request that the Committee include in the pending legislation language that directs the Department of State to honor the provisions of Section 2106 (2) of the FSA'80 and other pertinent sections of that law and to retroactively adjust the pay and benefits of us former Senior Foreign Service Reserve Officers.

AFFIDAVIT

We the undersigned hereby affirm that the information we provided above is, to the best of our knowledge, true.

Kenneth R. Strawberry — June 22, 1998

George J. Mattis — June 22, 1998

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

June 23, 1998

Honorable John L. Mica
Chairman, Subcommittee on Civil Service
United States House of Representatives
B-371C Rayburn House Office Building
Washington, D.C. 20515-3951

Dear Mr. Chairman:

I am writing, as Secretary to the Judicial Conference of the United States, to request that you include the enclosed statutory language (enclosure 1) which would authorize the judiciary to establish a flexible benefits plan for federal judges and judicial employees, on an experimental basis, in the forthcoming "Federal Employee Integrity, Performance, and Compensation Improvement Act." I have also enclosed, for your assistance, a detailed sectional analysis of the bill (enclosure 2).

If enacted, the proposed legislation would authorize the Administrative Office of the United States Courts to establish a flexible benefits plan, including a cafeteria plan, for a period of five years for federal judicial officers and employees. As you may know, flexible benefits plans and cafeteria plans are almost universal in the large employee private sector and are also very common within state governments. A flexible benefits plan allows employees to choose among various levels of supplemental benefits coverage, so that they can choose the level of benefits that fit their needs.

While the judiciary would continue to offer its officers and employees the current federal benefits package, this statutory change would authorize the Director of the Administrative Office to make new supplement benefits available, including dental benefits, short- and long- term disability benefits, long-term care insurance, and vision care. Empowering the judiciary with the flexibility to offer these benefits will allow it to respond to the changing needs and demographics of its work force. I should note that the average age of a federal judge is 56 -- 11 years higher than the average age of rank-and-file federal employees.

Presently, certain agencies which have their own statutory pay authority (e.g. the Federal Deposit Insurance Corporation and the Comptroller of the Currency) allow employees to participate in flexible benefits plans. *See, e.g.*, 12 U.S.C. § 1833b.

In 1996, the House of Representatives proposed establishing a similar plan for the benefit of its Members and employees. *See* H.R. 2739, 104th Cong. 2d Sess., § 107. While H.R. 2739 was enacted, the provision on the cafeteria plan was stripped from the bill as a result of an amendment offered by Senator John Glenn. *See* "House of Representatives Administrative Reform Technical Corrections Act," Pub. L. 104-186, 110 Stat. 1718.

It is my sense that the authorization of such an experimental program would be beneficial not only for the judiciary, but for Congress and the executive branch as well.

The Judicial Conference asks for your assistance on this legislation to help ensure that the federal judiciary can continue to attract and retain the best and brightest candidates. Should you or your staff have any questions or concerns, please do not hesitate to contact Art White, of our Office of Legislative Affairs, at 202/273-1120.

Sincerely,

Leonidas Ralph Mecham
Secretary

2 Enclosures

cc: Edward J. Lynch

An Act

To establish a flexible benefits plan, as an experimental program, in the federal judicial branch and for other purposes.

Section ___. Flexible Benefits Provision

(a) The Administrative Office of the United States Courts may establish, as an experimental program, a flexible benefits plan, including a cafeteria plan under section 125 of the Internal Revenue Code of 1986 for the benefit of officers and employees of the judicial branch, including justices and judges.

(b) There is established in the Treasury an account which shall be available for the payment of benefits and other expenses of the operation of the plan referred to in subsection (a). The account shall consist of--

(1) amounts withheld from the pay of participants in the plan; and

(2) such other amounts as may be received with respect to the plan.

(c) The Director of the Administrative Office of the United States Courts (hereinafter in this Act referred to as the "Director") shall have the authority, subject to the approval of the Judicial Conference of the United States, to define the nature and extent of benefits under the plan.

(d) The program shall terminate five years from the effective date of this Act, except that the Director may continue the program for a maximum of two additional years in order to validate the results of the experiment.

(e) The Director shall, no later than seven years from the effective date of this Act, report the results of the program to Congress, evaluating the results of the program and its impact on improving public management.

(f) This section shall take effect on the 180th day after the date of enactment of this Act.

Enclosure 2

Sectional Analysis

This section authorizes the Administrative Office of the United States Courts to establish a flexible benefits plan, including a cafeteria plan, on an experimental basis, for federal judicial officers and employees, including justices and judges. Flexible benefits plans and cafeteria plans are almost universal in the large employee private sector and are also very common within state governments. A flexible benefits plan allows employees to choose among various levels of supplemental benefits coverage, so that they can choose the level of benefits that fit their needs.

While the judiciary would continue to offer its officers and employees the current federal benefits package, this statutory change would authorize the Director of the Administrative Office to make new supplement benefits available, including dental benefits, short- and long-term disability benefits, long-term care insurance, and vision care. Empowering the judiciary with the flexibility to offer these benefits will allow it to respond to the changing needs and demographics of its work-force, as well as continue to attract and retain the best and brightest employees.

An account is established in the Treasury which shall be available for the payment of benefits and other expenses of the plan. The Director of the Administrative Office is also authorized to define the nature and extent of benefits under the plan, with the approval of the Judicial Conference of the United States.

The cafeteria plan is authorized for five years, but may be extended an additional two years in order to allow the Director to evaluate it. The Director shall provide Congress with an evaluation of the program and its impact on improving public management.

National Weather Service
Employees Organization
AFFILIATED WITH MEBA AFL-CIO

June 30, 1998

Hon. John L. Mica
Chairman, Civil Service Subcommittee of the
Committee on Government Reform and Oversight
Room B371C
Rayburn House Office Building
Washington DC 20515

RE: **Omnibus Civil Service Reform Bill of 1998**

Dear Chairman Mica:

Thank you for inviting me to testify before your Subcommittee on the Omnibus Civil Service Reform legislation that the Subcommittee is preparing. I regret that I was unable to attend but I appreciate the opportunity to submit posthearing comments for the record which I hope may be of some assistance to the Subcommittee.

As you are aware, the National Weather Service Employees Organization believes that it is essential to work with you and the Subcommittee to explore common ground to find ways in which the human resources of the Federal government can be managed better. NWSEO believes that the interests of its members coincide, rather than conflict with, the interests of the agency's customers. (The use of the term "customers" is particularly appropriate in the case of the National Weather Service because the agency's nomenclature for that which it issues to the public is a "forecast product.")

We understand that the Subcommittee is considering whether it should include in the omnibus legislation it is drafting the provisions of H.R. 3956 introduced earlier this year by Representative Davis. This legislation will ensure that Federal managers and supervisors will receive overtime compensation at one and one-half times the hourly rate of a GS-15, step 1. Presently, managers, supervisors and other Federal employees at higher grades receive no premium for working overtime. If fact, those employees above the rate of GS 12, step 5 actually earn less during each hour they work overtime than their usual hourly rate.

601 PENNSYLVANIA AVENUE, NW, SUITE 900, WASHINGTON, DC 20004 (703) 293-9651

NWSEO believes that enactment of such legislation would be highly equitable. However, valid questions have been raised, such as in the testimony of OPM Director LaChance, about the appropriateness of paying time and one-half overtime to Federal managers when their private sector counterparts do not receive comparable premium compensation.

If the Subcommittee ultimately determines that premium compensation for Federal managers is inappropriate at this time, we urge the Subcommittee to include in the omnibus package the terms of another bill introduced by Representative Davis, H.R. 2987, which would provide overtime premium pay for *non-managerial* forecasters at the National Weather Service who work unscheduled overtime during severe weather.

The National Weather Service ("NWS") staffs and operates 118 forecast offices 24 hours a day, seven days a week, as well as several additional national weather centers, such as the National Hurricane Center in Miami, Florida, the Storm Prediction Center in Norman, Oklahoma, the Marine Prediction Center in Camps Springs, Maryland and the Aviation Weather Center in Kansas City, Missouri. The meteorologists, hydrologists and hydrometeorological technicians at these offices are responsible for issuing forecasts and warnings of severe weather, including thunderstorms, tornadoes, floods and hurricanes in order to protect the American public and aviation. NWS forecasters are paid at a rate lower than their normal hourly rate when they work unscheduled overtime during severe weather episodes and, in some cases, are not paid at all.

NWS forecasters are exempt from coverage of the Fair Labor Standards Act. However, the Federal Employees Pay Act entitles them to overtime payment at one and one-half times the hourly rate of a GS-10, step 1, or $25.32 an hour (1.5 x $16.88). Because of this anomaly, many NWS forecasters are paid *less* per hour when they work overtime. For example, a GS-13, step 5 lead forecaster is paid $ 29.96 an hour for his regular tour of duty, but is only paid $25.32 an hour while working overtime. This overtime is worked during periods of severe weather when the work is at its most fatiguing and demanding and the responsibilities to the public are the greatest.

In fact, there are some occasions when NWS forecasters are not paid for their overtime work at all. Under existing pay laws, most Federal employees are prohibited from receiving during any one pay period basic and premium pay which, in the aggregate, exceeds the base pay of a GS-15, step 10. As a result, NWS forecasters are denied any premium pay for extended hours of mandatory overtime service during protracted severe weather events. In order to correct this inequity, NWS employees who work overtime should be paid at one and one-half times their normal hourly rate instead of one and one-half times the hourly rate of a GS-10, step 1 and be exempt from the GS-15 biweekly pay cap.

This legislation is needed to ensure the availability of NWS forecasters during severe weather events. NWS forecasters are routinely asked or required to stay past the end of their normal shifts during severe weather in order to assist the incoming forecasters with severe weather warnings and related media and emergency services inquiries. Frequently, other forecasters are called to work early or on their days off when severe weather is anticipated. It is common for NWS forecasters to remain at their forecast offices for a day or more at a time during hurricanes, flooding and blizzards while their families are at home being threatened by the same inclement weather.

It is official policy to staff NWS forecast offices for "fair weather" and then rely on calling additional forecasters in on overtime during severe weather. For example, there are routinely two forecasters on duty at the Los Angeles Forecast Office at any given time. However, when there is a high probability of severe weather, three additional forecasters are called into the office on an overtime basis. The Station Duty Manual of the forecast office serving metropolitan Washington, D.C. states:

> *During actual or expected hazardous weather (heavy snow, freezing rain, high winds, heavy rain, flood, flash flood, dam breaks, severe thunderstorms, hurricanes, or tornadoes), extraordinary demands are placed on us. Sufficient staffing, at least one or two extra, is essential to meet these operational demands. In most cases, overtime is used to provide the extra personnel. . .*
>
> *At times, due to severe or adverse weather occurring or expected, or due to personal circumstances, an individual is asked to stay over (or come in early). The lead forecaster has full authority to hold shift forecasters beyond their normal scheduled shift time, or to call the next shift in early to maintain adequate staffing levels to continue the office mission of protecting life and property.*

Similar corrections to title 5 have already been made for air traffic controllers, who, like NWS forecasters, also work rotating shifts. See (Pub. L. No. 90-557). The reasons why true time and one-half overtime was granted to air traffic controllers are equally applicable to National Weather Service forecasters, whose work is equally essential to public and aviation safety. As the legislative history of Pub. L. No. 90-557 noted:

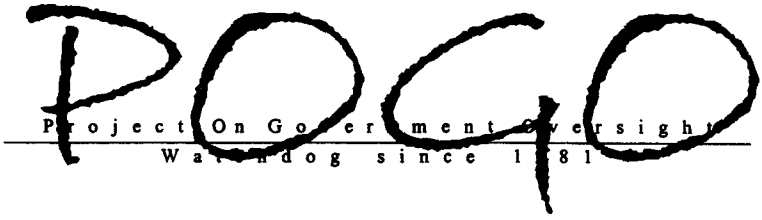
> *. . . [T]he employee actually draws less hourly pay for overtime work than he does for regular non-overtime work. This situation creates gross inequities and inevitably generates employee morale problems, as well as reluctance by employees to remain available for frequent callback or overtime work.*

It is important to eliminate the inequities in overtime compensation to ensure the continued availability of NWS forecasters during this and other severe weather events. The alternative, fully staffing NWS offices to handle severe weather during each shift, would require the NWS to hire over a thousand additional forecasters, *if they were available.* The current practice jeopardizes the nation's safety because there is actually a financial disincentive for forecasters to answer a call to come to the office at odd hours, in inclement conditions, on short notice. *If the national policy is to have a "stand by" Weather Service as we do now, we must ensure that there is someone standing by to work during severe weather.*

Respectfully submitted,

Richard J. Hirn
General Counsel

cc: Rep. E. Cummings
Chairman D. Burton
Rep. H. Waxman
Full Committee Members



Written Testimony of

Danielle Brian

Executive Director

Project On Government Oversight

before the

The Civil Service Subcommittee

of the

Committee on Government Reform and Oversight

U. S. House of Representatives

June 24, 1998

1900 L Street, N.W., Suite 314 • Washington, DC 20036-5027 • (202) 466-5539
Fax: (202) 466-5596 • E-mail: pogo@pogo.org • http://www.pogo.org
POGO is a 501(c)3 organization • Printed on Recycled Paper

Project on Government Oversight (POGO) is a non-partisan, non-profit government watchdog. Our mission is to investigate, expose, and remedy abuses of power, mismanagement, and government subservience to special interests.

Introduction

The Equal Employment Opportunity Commission (EEOC) is an organization that is both necessary and potentially effective in the ongoing fight against discrimination in the workplace. Its purpose is to provide recourse and protection to employees who are victims of discrimination. The sheer number of complaints received from federal and private sector employees in Fiscal Year (FY) 1996 alone, totalling approximately 104,400,[1] clearly demonstrates the necessity of the EEOC. Although the need for this agency is unquestionable, we are not arguing in favor of the status quo. In POGO's inquiry into EEOC practices, initiated by whistleblowers' complaints, we have found that there are serious issues that need to be addressed before the EEOC can become an effective, efficient organization that best serves the purpose for which it was created.

There are a combination of factors that account for the EEOC's ineffectiveness. One of these factors is the lack of funding necessary to hire and adequately train enough personnel to investigate and process the vast number of complaints received by the EEOC every year. According to studies done by the Government Accounting Office (GAO), the EEOC, and employment attorneys, two of the main causes of the EEOC's problems are too much work and too few resources. While this may be true, it does not excuse negligent or irresponsible findings in the work that does get done. Other factors include the complaint intake process; the authority agencies have to reject the EEOC's findings in federal sector cases; cases being dismissed or classified as individual rather than class in order to decrease workload; and a general bias in favor of respondents.

Some telling figures are those provided by the EEOC itself (see Tables I - III, attached). For instance, in FY 1996 64,298 federal sector counseling contacts were made with only 26,410

[1] The data included in this report do not include the number of complaints received or processed by the Fair Employment Practice Agencies (FEPAs). The data is derived from Federal Sector Report on EEO Complaints Processing and Appeals, FY 1991 - FY 1996 from the EEOC; Federal Complaint Statistics, FY 1987 - FY 1997 from the Office of Federal Operations; and EEOC All Statutes Fy 1991- FY 1997 from the Office of Communications and Legislative Affairs.

resulting in filed charges. While some of these complaints were truly without merit or were misunderstandings between parties rather than discrimination, still more did not get any further than the counseling stage because the complainants were discouraged from filing a charge by the agency's intake personnel.[2] Also in FY 1996, there were 3,083 agency actions in response to EEOC's recommended decisions. Of these, 98% of the 2,799 "no discrimination" findings were accepted by the agencies, 56 were modified and 4 were rejected. On the other hand, only 101 or 36% of the 284 reasonable cause findings -- where allegations of discrimination are confirmed by the EEOC -- were accepted by the agencies, 5 decisions were modified, and an astounding 178 or 63% were rejected. These figures clearly paint a picture of an agency whose findings are accepted only if they exonerate the federal agency. If the EEOC finds the agency at fault, the EEOC is simply overruled the overwhelming majority of the time.

Authority of Agencies to Reject EEOC Findings

The federal sector appeals process for the EEOC is somewhat different from that of the private sector. The complaint process begins and ends with the agency. The agencies that the CP is filing charges against have the authority to reject the findings of the EEOC's Administrative Judges (AJs). As mentioned above, 63% of the findings of discrimination (which only totalled approximately 10% of the recommended decisions to begin with) were rejected by the agencies. This is a blatant conflict of interest, tantamount to putting the fox in charge of the henhouse. Table II illustrates the difference between the actions taken on no cause findings and those taken on cause findings for FY 1991 - FY 1996.

Making Investigations Easier: Narrow Charges and Lack of Class Action

In Representing Plaintiffs in Title VII Actions: Volume 1, Kent Spriggs[3] states that the EEOC is hostile to class action charges. Although they have no authority to do so, the EEOC has

---

[2] C. Victor Lander of Lander and Associates, P.C. before the US House of Representatives Committee on Education and the Workforce, (October 21, 1997).

[3] Kent Spriggs is a lawyer with the Spriggs Law Firm out of Tallahassee, Florida. They specialize in employment discrimination litigation. He is currently a member of the Florida Bar, the American Bar Association, the National Bar Association, and the Association of Trial Lawyers of America.

repeatedly returned charges to Spriggs rewritten to exclude the pattern and practice allegations that he and his clients made in the charge of discrimination. Also criticizing the lack of class actions, Richard Seymour[4] pointed out that many employers are regional or national. This results in a situation where several charges on the same discrimination issue may be pending in more than one EEOC office, forming a pattern of discrimination. This pattern of discrimination, not obvious on an individual basis, may become apparent upon investigation. Because the discrimination may not be obvious in the individual charge, however, the level of investigation necessary to bring the pattern to light may never be initiated, and the charge stands a good chance of being dismissed or not resolved correctly. The EEOC itself states in its Notice of Proposed Rulemaking in the Federal Register on February 20, 1998 that "only a very small number of cases are brought as class actions and those that are filed generally result in a denial of class certification."[5] This is one of the issues addressed by the EEOC's recommendations for change.

A similar issue is that of narrowly drafted charges. Complainants do not have the full benefit of knowing what was in their employers' minds, and it may only be after investigation that the full extent of the discrimination is known. In addition, charging parties (CPs) are rarely represented by counsel. As a result, they rely on the EEOC to draft their charges properly. Unfortunately, the EEOC intake personnel have a history of refusing charges that may have class implications or of drafting the charges too narrowly.[6] Although this makes the charges easier to investigate, it otherwise severely limits the CPs' ability to further pursue their claim in court.

General Bias in Favor of Respondents

A third issue is the general bias the EEOC shows in favor of the respondents. The system seems to be geared toward making the process of getting relief from discrimination as difficult as

---

[4] Richard T. Seymour, Testimony on behalf of the Lawyers' Committee for Civil Rights Under Law before the U.S. House of Representatives Committee on Education and the Workforce, Oversight Hearing on the U.S. Equal Employment Opportunity Commission, (October 21,1997) [hereinafter LCCRUL].

[5] EEOC, "Federal Sector Equal Employment Opportunity Notice of Proposed Rulemaking," Federal Register online via GPO Access, February 20, 1998 (Volume 63, Number 34, pages 8594-8606), 8600 [hereinafter EEOC Notice of Proposed Rulemaking].

[6] LCCRUL, 8.

possible for the complainant. This is demonstrated in a number of different ways, only some of which are mentioned here.

Some offices and intake personnel still discourage complainants from filing charges, as is supported in Table I by the relatively small percentage of contacts that result in charges filed. On the occasions where a charge is filed and the EEOC initiates an investigation, that investigation is usually one that only scratches the surface of the allegations. Often, relevant witnesses are often not interviewed at all, the respondent's word is taken over that of the complainant, documentary evidence supplied by the respondent is not verified, and investigators apply the standard of "beyond a reasonable doubt" rather than "reasonable cause."[7] Not every office is guilty of these practices. Those that are, however, put the burden of proof on the complainant rather than on the respondent and makes showing that a charge has merit (an already difficult task in the best of circumstances) that much more difficult. In FY 1996, for instance, administrative closures totaled 30, 821 and no cause findings totaled 63,216 in the private sector alone. Together, these were 91% of all private sector resolutions in FY 1996.

Corrective Actions

Former Chairman Gilbert F. Casellas established a Federal Sector Workgroup which evaluated and developed recommendations to improve the federal sector complaint process. The recommendations based on the evaluation and on the comments from the agencies were announced in the Federal Register on February 20, 1998. One proposal is to give the AJs the authority to issue final decisions. This proposal would eliminate the conflict of interest inherent in the present system which allows the agencies to accept, modify, or reject the AJs' findings. While the agency would now be allowed to appeal a decision, they would no longer be allowed to simply overrule it.

Another proposal is to require agencies to make alternative dispute resolution (ADR) programs available. The option of ADR provides agencies a means of dealing with the vast number of complaints, many of which are misunderstandings between the parties rather than discrimination, in a manner that is fair to complainants and respondents. Making ADR an option

---

[7] Kent Spriggs, Representing Plaintiffs in Title VII Actions: Volume 1 (New York: John Wiley &Sons, Inc., 1994), 151, and anecdotal evidence provided by whistleblowers.

rather than a requirement ensures that it does not become just another administrative hurdle to be overcome rather than an effective and fair means of decreasing the EEOC's workload. It allows fair treatment of all complaints, enables the charges that have real merit to move along more quickly in the system, and does not disqualify complainants from further EEOC proceedings or litigation should they choose not to participate in ADR.

A third proposal expands the ability of complainants to gain class certification on their charges, if appropriate. The regulatory change would allow the complainant to move for class certification at any reasonable point in the process, meaning at any point when the complainant "knows, or should know, that the complaint ... involves questions of fact common to a class and is typical of the claims of a class."[8] This proposal would also make it the responsibility of the agency or the AJ to ensure that the class agent is aware of his or her obligations at that time. These changes would make it possible for complainants, who would otherwise have no way of knowing that the employer's discriminatory actions were practice or pattern, to get class certification upon discovery.

These are just a few of the many changes to the federal sector complaint process proposed by the EEOC. If implemented, the proposed changes would address and correct a significant portion of the inefficiencies and negligent practices in the federal sector. Those issues that can not be corrected through regulatory change can be corrected through increased funding and personnel resources, improved training of EEOC personnel, and enforcement of set performance (not quota) standards.

[8] EEOC Notice of Proposed Rulemaking, 8601.

Table I

Federal Sector Complaints Statistics FY 1991 - FY 1996

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
Counseling Contacts	83,604	81,530	67,654	68,654	68,936	64,298
Total Complaints Receipts, Total	17,696	19,106	22,327	24,592	27,472	26,410
Resolutions, Total	**16,813**	**17,389**	**19,500**	**21,565**	**22,947**	**25,150**
Dismissals	4,888	5,290	4,351	6,241	7,373	8,904
Withdrawals	2,198	2,120	2,266	2,296	2,516	2,653
Settlements	5,114	5,237	4,628	5,948	5,477	5,830
Agency Decisions	**4,613**	**4,742**	**8,255**	**7,080**	**7,131**	**7,763**
Hearings Receipts, Total	5,773	6,907	8,882	10,712	10,515	10,677
Resolutions, Total	**5,051**	**6,100**	**8,906**	**9,507**	**9,324**	**8,760**
Recommended Decisions	1,800	2,125	3,008	3,185	3,001	2,962
Cause	**266**	**313**	**390**	**363**	**353**	**321**
No Cause	**1,534**	**1,812**	**2,618**	**2,822**	**2,649**	**2,641**
Settlements	1,584	1,939	3,182	3,112	2,952	2,725
Withdrawals	701	798	1,231	1,399	1,474	1,345
Remands	896	1,138	1,260	1,573	1,667	1,562
Class	70	100	110	92	77	47
Administrative	N/A	N/A	115	146	153	118

Source: EEOC Federal Sector Reports on EEO Complaints Processing and Appeals FY 91 - FY 96;
Office of Federal Operations' Federal Complaint Statistics FY 87 - FY 97.

POGO July 8, 1998

Table II
Agency Actions on EEOC Findings

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
Agency Actions on EEOC Findings	1,897	2,215	2,500	3,121	2,033	3,083
No. of Discrimination Findings	**244**	**294**	**317**	**289**	**230**	**284**
Accept Findings	106	105	115	119	107	101
Modify Findings	14	30	23	33	31	5
Reject Findings	**124**	**159**	**179**	**137**	**92**	**178**
No. of No Discrimination Findings	**1,653**	**1,920**	**2,183**	**2,832**	**1,803**	**2,799**
Accept Findings	**1,591**	**1,858**	**2,082**	**2,352**	**1,748**	**2,739**
Modify Findings	61	53	93	461	46	56
Reject Findings	1	9	8	19	9	4

Source: EEOC Federal Sector Report on EEO Complaints Processing and Appeals FY 91 - FY 96, Table V.
POGO July 8, 1998.

Table III

Private Sector Complaints Statistics FY 1991 - FY 1996

All Statutes

	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
Receipts, Total	63,898	72,302	87,942	91,189	87,529	77,990
Resolutions, Total	**64,342**	**68,386**	**71,716**	**71,563**	**91,774**	**103,467**
Administrative Closures	14,941	16,003	20,285	26,012	34,153	30,821
No Cause Findings	38,369	41,736	40,183	34,451	46,700	63,216
No Merit Resolutions, Total*	**53,310**	**57,739**	**60,468**	**60,463**	**80,853**	**94,037**
Merit Resolutions						
Settlements	5,047	4,348	4,138	3,938	3,811	3,163
Withdrawals w/Benefits	4,250	4,673	5,145	5,236	5,035	4,009
Cause Findings						
Unsuccessful Conciliations	1,189	1,061	1,376	1,319	1,575	1,509
Successful Conciliations	546	545	589	607	500	749
Merit Resolutions, Total**	**11,032**	**10,627**	**11,248**	**11,100**	**10,921**	**9,430**

* No Merit Resolutions, Total is the sum of Administrative Closures and No Cause Findings.

** Merit Resolutions, Total is the sum of Settlements, Withdrawals, and Cause Findings.

These figures do not include those from the Fair Employment Practice Agencies.

Source: EEOC Office of Communications and Legislative Affairs.

POGO July 8, 1998

DEFINITIONS OF TERMS

Administrative Closure – Charge closed for administrative reasons, which include: failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

FEPAs – Fair Employment Practices Agencies are state and local agencies with which EEOC has contractual worksharing agreements to process employment discrimination charges.

Merit Resolutions – Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.

No Reasonable Cause – EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may request a review of a no-cause finding by EEOC Headquarters officials and may exercise the right to bring private court action.

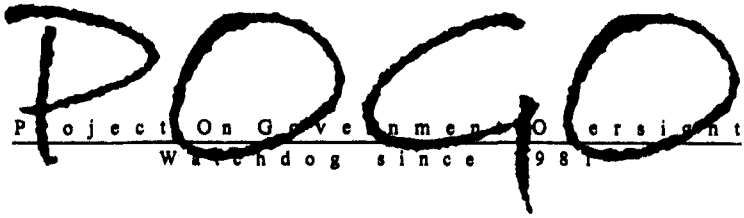
Reasonable Cause – EEOC's determination of reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. Reasonable cause determinations are generally followed by efforts to conciliate the discriminatory issues which gave rise to the initial charge.
NOTE: Some reasonable cause findings are resolved through negotiated settlements, withdrawals with benefits, and other types of resolutions, which are not characterized as either successful or unsuccessful conciliations.

Settlements (Negotiated) – Charges settled with benefits to the charging party as warranted by evidence of record. In such cases, EEOC and/or a FEPA is a party to the settlement agreement between the charging party and the respondent (an employer, union, or other entity covered by EEOC-enforced statutes).

Successful Conciliation – Charge with reasonable cause determination closed after successful conciliation. Successful conciliations result in substantial relief to the charging party and all others adversely affected by the discrimination.

Unsuccessful Conciliation – Charge with reasonable cause determination closed after efforts to conciliate the charge are unsuccessful. Pursuant to Commission policy, the field office will close the charge and review it for litigation consideration. NOTE: Because "reasonable cause" has been found, this is considered a merit resolution.

Withdrawal with Benefits – Charge is withdrawn by charging party upon receipt of desired benefits. The withdrawal may take place after a settlement or after the respondent grants the appropriate benefit to the charging party.



Danielle Brian–*Executive Director*

Ms. Brian, has been the Executive Director of the Project On Government Oversight (POGO) since 1993. She has testified before Congress numerous times, and is often quoted in national media as an expert on government accountability. She often speaks to groups, ranging from foreign government officials, policy analysts and continuing education classes on the role of public interest groups in government oversight.

Before becoming Executive Director, she worked with POGO for over four years as a Senior Research Associate. Ms. Brian has a Masters degree from the School of Advanced International Studies at Johns Hopkins and a Bachelors degree from Smith College.

Ms. Brian has also consulted on False Claims lawsuits and investigated the Iraqgate scandal. She has worked as an Associate Producer for television documentaries, and as a Senior Policy Analyst at the Arms Control and Foreign Policy Congressional Caucus, where she primarily focused on weapons proliferation. Ms. Brian has also served on the Board of Trustees of Smith College.

1900 L Street, N.W., Suite 314 • Washington, DC 20036-5027 • (202) 466-5539
Fax: (202) 466-5596 • E-mail: pogo@pogo.org • http://www.pogo.org
POGO is a 501(c)3 organization • Printed on Recycled Paper

SENIOR EXECUTIVES ASSOCIATION

P.O. BOX 44906 • WASHINGTON, D.C. 20026
PHONE: 202-927-7000 • FAX: 202-927-5192

June 22, 1998

The Honorable John L. Mica
Chairman
Civil Service Subcommittee
Government Reform and Oversight Committee
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: Federal Employee Integrity, Performance, and Compensation Improvement Act

Dear Mr. Mica:

The Senior Executives Association represents the interests of career members of the SES and other career executives in equivalent positions. We appreciate the opportunity to provide comments on your proposed legislation and we request that these comments be included in the record of the hearing to be held on these proposals scheduled for June 24, 1998.

We commend you and your Subcommittee staff for the leadership in developing such a comprehensive bill. It contains many issues that need to be dealt with legislatively. As you know, we are commenting on an outline summary of the bill, and do not have the specific legislative text, which we understand will be drafted after the hearing. Therefore, our comments will be general in nature.

Title I. *Safeguarding the Integrity of the Merit System*

In this Title, you propose to increase the flexibility in the use of demonstration projects by increasing the number of such projects from 10 to 15, and eliminating the restriction of 5,000 employees per demonstration. We support your proposal to expand the number of demonstration projects, however we have concerns that an entire agency might be made a demonstration project, with changes for all employees in the agency without the opportunity for consideration by the employees and managers. Therefore, we propose that the number of employees permitted in one demonstration project not exceed 25,000, but in no event be permitted to include an entire agency.

This would allow the inclusion of some smaller agencies in demonstration projects where new ideas could be "test driven" before implemented government-wide.

You also propose to provide authority to conduct demos about benefit changes including "cafeteria" plans. We believe cafeteria plans and other demo projects could be important options, with the special exception of the CSRS and FERS systems, and with restrictions on what could be changed in the FEHBP program. For example, while we would support the test of an MSA program as part of the FEHBP, we would be concerned about a test which might inadvertently lure employees or retirees into an HMO which has not been thoroughly examined by the Office of Personnel Management.

We support your proposal for limits on "Impact and Implementation" bargaining and a restriction on bargaining over wages and benefits in demonstration projects. We believe that the current labor/management system with its balance between labor and management, and its new reliance on partnership efforts, has served the public interest. We believe it should be retained in its present form.

Title I. B *Review of OPM Appeals of Erroneous Decisions*

We support OPM's request that it be granted authority to appeal decisions of the Merit Systems Protection Board ("MSPB") which they believe are erroneous. We also support the extra 30 days which the statute would authorize to appeal such actions.

Title I.C *Post Employment Restrictions for Political Appointees*

We firmly support the restrictions on political appointees being allowed to convert to career positions during the term of a particular Administration. We believe that doing away with "burrowing in " accomplishes a number of purposes: a) it will ensure that employees who accept political appointments recognize that they serve at the pleasure of the Administration which appointed them, and therefore, their loyalty is owed to that Administration; b) it will restrict political appointees from being able to compete for higher-level positions in the career service which can block promotion opportunities for career employees; c) it will go far to protect the distinction between career and political appointees and, in doing so, will ensure that appointments to career positions are being made based on merit, not only in reality but also in appearance. We believe this change will help to ensure the integrity of the merit system in government. We also support the repeal of the White House "Ramspeck" type conversion opportunity.

We support your proposed changes to the Hatch Act sanctions, which would provide for fines and debarment of former federal employees convicted of Hatch Act violations while federal employees. We believe this is an additional step which would strengthen the merit system and keep

partisan politics out of the administration and enforcement of the laws passed by Congress.

We support your drug conviction debarment proposal. This, too, would ensure the integrity of the federal service, and protect the taxpayers' dollars which could not be subjected to improper use by individuals committing narcotics violations.

We support due process rights for managers. While this has not been an overwhelming problem, managers have sometimes been branded as guilty of discrimination, or of having violated an employee's rights, in an arbitration decision under a collective bargaining agreement, without the opportunity to defend themselves or to participate in the proceeding. We believe that any decision which taints a manager's reputation and can impact his or her career or promotion opportunities should not take place in a proceeding where the manager is not given notice of the charges, the support for the charges, and an opportunity to defend himself/herself. We believe any other course of action violates the manager's constitutional due process rights.

We disagree with your proposal to repeal the Intergovernmental Personnel Act. While in some cases this provision may have been misused by agencies, we believe that overall it has benefitted the federal government by allowing employees to secure experience with state and non-profit organizations. We believe that the experiences employees have gained in such assignments have overall benefitted the employees and their agencies upon their return from these assignments.

Title II. *Performance Management*

We support an effort to provide additional weight being given to performance for RIF retention purposes. We would like to reserve further comment until after specific language is drafted.

We support the concept of group awards in your Incentive Awards Authority, and would like to ensure that they include the authority to provide awards by "gain-sharing."

We support doing away with MSPB appeal rights for denial of within-grades. We support your proposed prohibition on "pass-fail" evaluation systems. We think these become easy outs for managers who do not wish to confront employees with performance problems, and become convenient ways for employees to be able to slide by, since there is no benefit to gain by working harder and getting a higher rating. The "pass-fail" system also threatens the validity of reduction-in-force rules, which allow employees with higher performance ratings to get additional credit in a RIF.

We support limiting the ability of employees to overuse Performance Improvement Plans. We suggest that no employee in the same position be allowed more than one PIP period in a 3-year period.

Title III. *Streamlining Appeals Processes*

We strongly support providing agencies the authority to establish ADR programs. We think any program which minimizes adversarial conflict is a step forward in employee/management relations.

We also support your elimination of the mixed-case appeals procedures. We believe that each employee should be granted one appeal on any action, and that a single appellate body should be responsible for making final decisions.

We support the extension of MSPB appeal rights to FBI agents. Now that the decision by the MSPB on the "exculpatory no" doctrine was reversed by the Federal Circuit Court of Appeals, we know of no reason why FBI agents should not have appeal rights.

We have no position on GAO using the Congressional Compliance for appeals, nor do we know enough about the proposal to place the Postal Service under the non-federal EEO procedure to be able to take a position.

Title IV. *Employee Compensation and Benefits*

Under the pay adjustment section, we support each of the proposals for firefighters pay adjustment, administrative law judges pay adjustment, Social Security Administration Appeals Judges pay adjustment, full disclosure of payroll costs, and "overtime" for managerial personnel. We believe all these proposals are justified and will benefit government operations.

On retirement benefits, we must at this time remain neutral on the investment of retirement fund in the TSP. We have not seen the figures on this nor do we understand the potential impact and, therefore, are unable to comment.

We do not understand the OPM miscellaneous error corrections, and consequently, we cannot comment. On the remaining proposals under retirement benefits, we support the proposals, reserving further comment pending review of the legislative language.

Under health benefits, again, we are unable to comment. We support added leave for organ donation, and the reauthorization of the Family Friendly Leave Act.

Title V. *Federal Employees Compensation Act Reform*

We understand this provision has been deferred to a later time. In general, we agree that the FECA program needs to be better managed by federal agencies in order to reduce their costs, and that

he Honorable John L. Mica
hairman
ne 22, 1998
age 5

centives should be devised and efforts aimed at bringing the employee back to work, rather than aving them on FECA for the remainder of their careers and into retirement.

tle VI. Miscellaneous Provisions

We support all of the proposals, i.e., centralized training oversight, protecting the privacy of deral employees, voluntary RIFs, and employment rights following conversion to contract.

We again commend your Committee and the Committee staff for pulling together this nnibus bill. We look forward to working with the Committee to ensure the enactment of a bill hich all can support. Thank you for the opportunity to provide our comments.

incerely,

arol A. Bonosaro
resident

G. Jerry Shaw
General Counsel

○