NSPS: THE NEW DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL SYSTEM—REACHING READINESS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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CONTENTS

	Page
Hearing held on April 12, 2005	1
Statement of:	
Abell, Charles S., Principal Deputy Under Secretary, Personnel and Readiness, Department of Defense; George Nesterczuk, Senior Policy Advisor on the Department of Defense, U.S. Office of Personnel Management; and Neil A.G. McPhie, chairman, U.S. Merit Systems Protection Board	51
Abell, Charles S.	51
McPhie, Neil A.G.	80
Nesterczuk, George	70
Heiser, Karen, organizational development program manager, Federal Managers Association; John Gage, national president, American Federation of Government Employees; and Ron Ault, president, Metal Trades Department	94
Ault, Ron	153
Gage, John	117
Heiser, Karen	94
Walker, David M., Comptroller General of the United States, U.S. Government Accountability Office	6
Letters, statements, etc., submitted for the record by:	
Abell, Charles S., Principal Deputy Under Secretary, Personnel and Readiness, Department of Defense, prepared statement of	53
Ault, Ron, president, Metal Trades Department, prepared statement of	156
Davis, Hon. Danny K., a Representative in Congress from the State of Illinois, prepared statement of	4
Gage, John, national president, American Federation of Government Employees, prepared statement of	120
Heiser, Karen, organizational development program manager, Federal Managers Association	97
McPhie, Neil A.G., chairman, U.S. Merit Systems Protection Board, prepared statement of	82
Nesterczuk, George, Senior Policy Advisor on the Department of Defense, U.S. Office of Personnel Management, prepared statement of	72
Walker, David M., Comptroller General of the United States, U.S. Government Accountability Office, prepared statement of	9

NSPS: THE NEW DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL SYSTEM—REACHING READINESS

TUESDAY, APRIL 12, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERAL WORKFORCE AND AGENCY ORGANIZATION,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:03 p.m., in room 2154, Rayburn House Office Building, Hon. Jon C. Porter (chairman of the subcommittee) presiding.

Present: Representatives Porter, Davis of Illinois, Norton, and Van Hollen.

Staff present: Ron Martinson, staff director; B. Chad Bungard, deputy staff director/chief counsel; Chris Barkley and Shannon Meade, professional staff members; Reid Voss, legislative assistant/clerk; Patrick Jennnings, detail from OPM serving as senior counsel; Mark Stephenson and Tania Shand, minority professional staff members; and Teresa Coufal, minority assistant clerk.

Mr. PORTER. Welcome, everyone. Thank you for joining me today. The hearing will come to order. The Subcommittee on the Federal Workforce and Agency Organization is having a hearing entitled, "NSPS: The New Department of Defense Civilian Personnel System—Reaching Readiness."

But I thought that for the benefit of those who have traveled for some distance to be here that I would start the meeting. As I said in my opening a moment ago, welcome. Thank you for being here.

Today's testimony focuses on another significant milestone in the transformation of the Federal work force. On February 14, 2005, the Department of Defense and the Office of Personnel Management issued proposed regulations for the new National Security Personnel System at the Department of Defense. The NSPS will be the second major new personnel system for Federal employees; the other being the DHS personnel system.

According to the Department of Defense, when the NSPS is fully implemented, approximately 700,000 civilian DOD employees will be eligible for coverage under the new system. When the new NSPS and the new DHS human resources system are fully implemented, over half of the Federal Government will be under the pay for performance and other aspects of the new systems.

As I pointed out in our previous hearing on the DHS system, the new human resource systems at DOD and DHS are the first major

reforms to our Civil Service process in 50 years. It is critical that we get this right. And it took many months of hard work by the DOD, the OPM and the DOD labor organizations to create the proposed regulations for the NSPS, and there are still a lot of details to be worked out, which is why we are here today.

We are charged with implementing a large-scale change and having to deal with a number of personnel and cultural issues. DOD faces nothing short of a major task. This is our chance to use the oversight power of the subcommittee to highlight the aspects of the regulation efforts that represent steps in the right direction and aspects that raise concern or need additional work.

As I have said before, change can be difficult, and I know that this is a nerve-wracking experience for the Department's work force. However, I can assure everyone here that this subcommittee will closely monitor the progress of DOD and OPM toward a publication of final reglations and implementation of this new system over the next several years. I am confident that if the NSPS is implemented in a fair, credible, and transparent manner, DOD employees will thrive. Under this new system—again, DOD employees will thrive under the new system.

I would like to express my thanks to the witnesses who have agreed to join us today. We have brought together a broad and knowledgeable array of voices as we continue our oversight of the new system and look forward to hearing all of your perspectives, if not today, then in the future.

I would now like to recognize the ranking member of the subcommittee, Mr. Danny Davis. Welcome, and we now have a quorum.

Mr. DAVIS. Thank you very much, Mr. Chairman, and I want to thank you for calling this hearing. I also want to thank the witnesses for agreeing to appear and for coming.

At the Deparment of Homeland Security's hearing our subcommittee held last month, I said that DHS's personnel regulations and implemented directives were not fair, credible, or transparent.

Today the Defense Department offers us the same kind of changes to its personnel system. The difference between DHS and the Defense Department is that DOD already has shown us that they have no intention of being fair, credible, or transparent. There is a saying that actions speak louder than words. And of course, my mother used to tell us that "What you do speaks so loudly until I can't hear what you are saying."

DOD's actions have given us a good idea of what to expect when NSPS is implemented. I will give you two examples of actions that demonstrate what we can expect from DOD. First, early last year, DOD released a proposal for its new labor relations systems to congressional staff. House and Senate Democrats expressed concerns about the proposal in the February 25, 2004 letter to Secretary Rumsfeld. The letter stated that the National Defense Authorization Act of 2003 specifically stated three things. One, that DOD could not waive Chapter 71 of Title 5 of the U.S. Code which sets forth the right of employees to join unions; that the new personnel system must be prescribed jointly with the Director of the Office of Personnel Management; and that DOD must provide for an independent third-party review of agency decisions.

House and Senate Democrats were not the only congressional members who expressed concern. So did many Republicans. Their concern was so great that DOD was compelled to go back to the drawing board and to start the proposal process all over again. Yet DOD presents us with more of the same kind of draft regulations and implementation directives that were the source of initial concerns. Chapter 71 of Title 5 continues to be replaced with provisions that essentially gut collective bargaining on most matters that are important to Federal employees. Instead of jointly prescribing and implementing the proposed regulations, OPM has been reduced to reviewing and commenting on DOD regulations that may have governmentwide implications.

Finally, instead of an independent third-party review of agency decisions, DOD continues to propose a new Defense Labor Relations Board that would be located within the DOD and whose members would be selected solely by the Secretary.

The second example of DOD's it's-our-way-or-the-highway attitude has to do with the administration's much-touted and well-publicized call for performance-based pay. If we have heard nothing else from the administration, we have heard that Federal employees should be compensated based on their individual performance and that managers should have the flexibility to award their best performances with bonuses and higher salaries. Concerns about patriotism and politicization of the process were dismissed.

Earlier this year the pay-for-performance debate raged on. It came to light that DOD gave political and noncareer employees higher pay raises than career employees. These were across-the-board pay raises for political appointees, and they were not based on merit or on individual performance. The irony of DOD's actions is that these political appointees are responsible for our national security, but they are not held to the same standards to which rank-and-file Federal employees are held.

The second example demonstrates the kind of unfairness that makes me concerned that the regulations do not state that employee performance expectations must be in writing. These expectations will determine whether or not an employee receives a pay raise, but not one word of these expectations must be put in writing. DOD has shown us that they have no intention of being fair or credible. DOD's intentions, however, are transparent to anyone paying attention.

It is no surprise to me that the Comptroller General will testify that he has three primary concerns about the proposed regulations. These concerns have to do with the fact that the proposed regulations lack adequate safeguards to ensure fairness and to guard against abuse. Do not specify that employee expectations should be communicated to employees in writing and do not specify a process to involve employees in the planning and development of the new system.

Mr. Chairman, I share these concerns, and based on DOD's actions, the members of this subcommittee and Congress should share them as well. I look forward to the testimony of our witnesses, and, again, thank you very much for calling the hearing.

[The prepared statement of Hon. Danny K. Davis follows:]

**STATEMENT OF THE HONORABLE DANNY K. DAVIS
AT THE SUBCOMMITTEE ON FEDERAL WORKFORCE
AND AGENCY ORGANIZATION
HEARING ON**

NSPS: THE NEW DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL SYSTEM – REACHING READINESS

April 12, 2005

Chairman Porter, at the Department of Homeland Security hearing our Subcommittee held last month, I said that DHS's personnel regulations and implementing directives were not fair, credible, or transparent. Today, the Defense Department offers us the same kind of changes to its personnel system. The difference between DHS and DOD is that DOD already has shown us that they have no intention of being fair, credible, or transparent. There is a saying that "actions speak louder than words," and to anyone who is paying attention, DOD's actions have given us a good idea of what to expect when NSPS is implemented.

I'll give you two examples of actions that demonstrate what we can expect from DOD. First, early last year, DOD released a proposal for its new labor relations system to congressional staff. House and Senate Democrats expressed concerns about the proposal in a February 25, 2004, letter to Secretary Rumsfeld. The letter stated that the National Defense Authorization Act of 2003 specifically stated three things: that DOD could not waive Chapter 71 of Title 5 of the U.S. Code, which sets forth the right of employees to join unions; that the new personnel system must be "prescribed jointly with the Director" of the Office of Personnel Management; and that DOD must provide for an "independent third party review of agency decisions."

House and Senate Democrats were not the only Congressional members who expressed concern. So did many Republicans. Their concern was so great that DOD was compelled to go back to the drawing board and to start the proposal process all over again -- yet DOD presents us with more of the same kind of draft regulations and implementation directives that were the source of initial concerns. Chapter 71 of Title 5 continues to be replaced with provisions that essentially gut collective bargaining on most matters that are important to federal employees. Instead of "jointly" prescribing and implementing the proposed regulations, OPM has been reduced to "reviewing and commenting" on DOD regulations that may have governmentwide implications. And finally, instead of an "independent third party" review of agency decisions, DOD continues to propose a new Defense Labor Relations Board that would be located within DOD and whose members would be selected solely by the Secretary.

The second example of DOD's "its our way or the highway" attitude has to do with the Administration's much touted and well publicized call for performance based pay. If we have heard nothing else from the Administration, we have heard that federal employees should be compensated based on their individual performance and that managers should have the flexibility to award their best performers with bonuses and higher salaries. Concerns about patriotism and politicization of the process were dismissed. Earlier this year, as the pay for performance debate raged on, it came to light that DOD gave political and noncareer employees higher pay raises

than career employees. These were across the board pay raises for political appointees, and they were not based on merit or individual performance. The irony of DOD's actions is that these political appointees are responsible for our national security, but they are not held to the same standards to which rank-in-file federal employees are held.

The second example demonstrates the kind of unfairness that makes me concerned that the regulations do not state that employee performance expectations must be in writing. These expectations will determine whether or not an employee receives a pay raise, but not one word of these expectations must be put into writing. DOD has shown us that they have no intention of being fair or credible. DOD's intentions, however, are "transparent" to anyone who is paying attention.

It is no surprise to me that the Comptroller General will testify that he has three primary concerns about the proposed regulations. These concerns have to do with the fact that the proposed regulations lack adequate safeguards to ensure fairness and to guard against abuse; do not specify that employee expectations should be communicated to employees in writing; and do not specify a process to involve employees in the planning and development of the new system.

I share those concerns, and based on DOD's actions, members of this Subcommittee and Congress should share them as well.

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Mr. PORTER. Thank you. I would like to ask unanimous consent that all Members have 5 legislative days to submit written statements and questions for the hearing record. Any answers to written questions provided by the witnesses will also be included in the record. Without objection, so ordered.

Also ask unanimous consent that all exhibits, documents, and other materials referred to by the Members and their witnesses may be included in the hearing record and that all Members be permitted to revise and extend their remarks. Without objection, so ordered.

It is also the practice of this committee to administer the oath to all witnesses. If you could all please stand, those that will be testifying, and I will administer the oath.

[Witnesses sworn.]

Mr. PORTER. Let the record reflect that all witnesses have answered in the affirmative. Please be seated. Thank you.

On our first panel today, we will hear from Mr. David Walker, the U.S. Comptroller General for the Government Accountability Office. Mr. Walker, it is a pleasure. I know that you have a number of other testimonies you have to make in the next few days, so we appreciate you being a part of our hearing once again. So if you would please—you have 5 minutes.

STATEMENT OF DAVID M. WALKER, COMPTROLLER GENERAL OF THE UNITED STATES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. WALKER. Thank you, Mr. Chairman and Ranking Member Davis. It is a pleasure to be back before you. I would ask your consent that my entire statement be included in the record so I can move to summarize it now, if you can, Mr. Chairman.

Mr. PORTER. Yes.

Mr. WALKER. Thank you very much.

Mr. WALKER. It feels like deja vu all over again, because it wasn't that long ago that I was here before this subcommittee testifying about the Department of Homeland Security's proposed regulations; and obviously they are both matters of significant importance, not only with regard to the departments and agencies involved, and their employees, but also with regard to our overall effort to try to modernize our human capital policies and practices in the Federal Government.

As I did at that hearing, I would respectfully request that—just provide you a few examples of positives, areas of concerns and the issues going forward. My testimony has many more that has now been provided as a part of the record.

As you both know, the National Security Personnel System did not get off to a good start on Capitol Hill and, frankly, didn't get off to a good start initially within the Department of Defense.

As you probably recall, the Defense Department came up to Congress 1 day before a recess. I had a very thick bill, with no business case and very little justification. The Congress held a number of hearings, including this full committee, and made a number of improvements to that bill that I think represented the progress.

The Defense Department, after that legislation was enacted, initially stated its intention to move quickly to maximize this new

flexibility as quickly as possible. I am pleased to say that since Gordon England has been involved as Secretary Rumsfeld's point person on this project, I have noticed a significant change; namely, the commitment to so-called "spiral development," to a more phased approach, and the commitment toward more consultation and communication with regard to this important initiative. And I think that's important. But as Mr. Davis said, you know, it's important that continue, and actions do speak louder than words.

I would give one positive comment, one area of concern and one important point as we move forward.

First, the overall conceptual framework with regard to regulations has considerable merit because it proposes to move to a more modern, flexible, and market-based and performance-oriented classification compensation system. So the conceptual framework clearly has merit.

However, with regard to the areas of concern, the details do matter very greatly, and there are very many important details that have yet to be defined.

For example, how will performance expectations be set and how will that be documented? How will the new pay for performance-based compensation system actually be designed and implemented? Furthermore, how will the appeals processes actually work, and what will be the rights and the limitations to those rights, and will they have adequate independence not only to be effective but also credible in the eyes of the affected parties?

These details very much do matter, and I think it makes it critically important that the meet-and-confer period which is about to be undertaken be engaged in by both parties on a—in a constructive manner and using a good-faith approach, because it's pretty clear that these new authorities are going to be implemented. But it's very important that both parties come to the table in a good faith manner and with a constructive approach to try to make the best out of these regulations and to fill in some of these details, because I am a strong believer, Mr. Chairman and Mr. Davis, that there clearly is a need for additional flexibility in this area. But there must be adequate safeguards to provide reasonable assurance and consistency and to prevent abuse when that flexibility is granted.

The last point that I would make on going forward is it's critically important that there be adequate systems and safeguards in place before any additional pay-for-performance or other major flexibilities are implemented. It's very, very important that they be in place; and that means, among other things, a modern, effective, credible, and hopefully validated performance appraisal system that results in meaningful distinctions of performance and, furthermore, that there be adequate internal safeguards as well as external safeguards, and that there be an appropriate degree of transparency with regard to the degree of results of any related decisions. Transparency is a powerful force, and I think that it can play an important role here.

I think it's important that we get this right, rather than getting it fast. On the other hand, I think we need to move as soon as prudently possible to make these reforms, because it's going to take a

number of years to effectively do what all needs to be done to roll this out departmentwide.

We at GAO will continue to do our best to lead by example and to share our considerable experience and expertise in this area. As you know, we went to broad-banding in 1989. We went to pay for performance in 1989, and we have continued to try to improve to modernize that over the years, and we think that some of our both process and policy approaches may have conceptual merit for consideration by both the Department of Defense as well as Department of Homeland Security.

And last, but certainly not least, as both of you know, the Department of Defense has 14 of 25 high-risk areas on GAO's latest high-risk list. It is critically important that DOD place additional time, attention, and focus on the much-needed business transformation effort. And this National Security Personnel System is a critical element of that overall transformation effort.

And we believe and continue to believe, as I will testify over the next couple of days before the Armed Services Committee, that the Department of Defense needs a chief management official, a Chief Operating Officer, if you will, the person at the right level within the Department, a level 2, reporting to the Secretary, who is dedicated full time to addressing the many business transformation challenges, including NSPS; because, in the past, the track record is not very good and, quite frankly, the stakes are way too high, both from the standpoint of money and people, not to do this right.

Thank you.

[The prepared statement of Mr. Walker follows:]

United States Government Accountability Office

GAO

Testimony

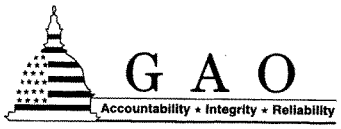
Before the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, House of Representatives

For Release on Delivery
Expected at 2:00 p.m., EDT
Tuesday, April 12, 2005

HUMAN CAPITAL

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

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



GAO-05-517T

April 12, 2005

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Highlights

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

HUMAN CAPITAL

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

Why GAO Did This Study

The Department of Defense's (DOD) new human resources management system—the National Security Personnel System (NSPS)—will have far-reaching implications for civil service reform across the federal government. The 2004 National Defense Authorization Act gave DOD significant flexibilities for managing more than 700,000 defense civilian employees. Given DOD's massive size, NSPS represents a huge undertaking for DOD. DOD's initial process to design NSPS was problematic; however, DOD adjusted its approach to a more deliberative process that involved more stakeholders. NSPS could, if designed and implemented properly, serve as a model for governmentwide transformation in human capital management. However, if not properly designed and implemented, it could severely impede progress toward a more performance- and results-based system for the federal government as a whole.

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

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

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

What GAO Found

Many of the principles underlying the proposed NSPS regulations are generally consistent with proven approaches to strategic human capital management. For instance, the proposed regulations provide for (1) elements of a flexible and contemporary human resources management system—such as pay bands and pay for performance; (2) DOD to rightsize its workforce when implementing reduction-in-force orders by giving greater priority to employee performance in its retention decisions; and (3) continuing collaboration with employee representatives. The 30-day public comment period on the proposed regulations ended March 16, 2005. DOD and OPM have notified the Congress that they are preparing to begin the meet and confer process with employee representatives who provided comments on the proposed regulations. The meet and confer process is critically important because there are many details of the proposed regulations that have not been defined. (It should be noted that 10 federal labor unions have filed suit alleging that DOD failed to abide by the statutory requirements to include employee representatives in the development of DOD's new labor relations system authorized as part of NSPS.)

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

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

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

Chairman Porter and Members of the Subcommittee:

I appreciate the opportunity to be here today to provide our preliminary observations on the Department of Defense's (DOD) proposed National Security Personnel System (NSPS) regulations, which the Secretary of Defense and the Acting Director of the Office of Personnel Management (OPM) jointly released for public comment on February 14, 2005.[1] The National Defense Authorization Act for Fiscal Year 2004[2] gave DOD significant authorities to redesign the rules, regulations, and processes that govern the way that defense civilian employees are hired, compensated, promoted, and disciplined. The proposed regulations, which according to DOD will ultimately affect more than 700,000 defense civilian employees, are especially critical because of their implications for governmentwide reform. In March 2005, I testified on the NSPS proposed regulations before the Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia.[3] Also, during my recent speech before the Merit Systems Protection Board (MSPB) on the challenges that the federal government faces in the 21st century, I highlighted a range of trends and challenges, including DOD's human capital reform effort and a governmentwide framework to advance human capital reform.[4]

As suggested by the title of this hearing—"NSPS: The New Department of Defense Civilian Personnel System Reaching Readiness," NSPS represents a huge undertaking for DOD, given its massive size and geographically and culturally diverse workforce. In addition, DOD's new human resources management system will have far-reaching implications for the management of the department and for civil service reform across the federal government. NSPS could, if designed and implemented properly, serve as a model for governmentwide transformation in human capital management. However, if not properly designed and implemented, NSPS

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

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

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

[4] The Honorable David M. Walker, "21st Century Challenges: Reexamining the Base of the Federal Government" (paper presented to the Merit Systems Protection Board, New Orleans, La., April 5, 2005).

could impede progress toward a more performance- and results-based system for the federal government as a whole.

We raised several issues regarding DOD's civilian workforce in a recently released report on the fiscal challenges the federal government faces in the 21st century, including whether DOD is pursuing the design and implementation of NSPS in a manner that maximizes the chance of success.[5] In recent testimony on DOD's business transformation efforts, we indicated that DOD is challenged in its efforts to effect fundamental business management reform, such as NSPS, and indicated that our ongoing work continues to raise questions about DOD's chances of success.[6] There is general recognition that the government needs a framework to guide the kind of large-scale human capital reform occurring at DOD and the Department of Homeland Security (DHS), a framework that Congress and the administration can implement to enhance performance, ensure accountability, and position the nation for the future. Implementing large-scale change management initiatives is a complex endeavor, and failure to address a wide variety of personnel and cultural issues, in particular, has been at the heart of unsuccessful organizational transformations. Strategic human capital management, which we continue to designate as a high-risk area governmentwide,[7] can help agencies marshal, manage, and maintain the workforce they need to accomplish their missions.

Summary

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

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

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

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

take more factors into consideration when defining the areas in which employees will compete for retention. The third positive feature is that DOD has pledged to engage in a continuing collaboration with employee representatives. On March 16, 2005, the 30-day public comment period on the proposed regulations ended. On March 28, 2005, DOD and OPM notified the Congress that they are about to begin the meet and confer process with employee representatives who provided comments on the proposed regulations. (It should be noted that 10 federal labor unions have filed suit alleging that DOD failed to abide by the statutory requirements to include employee representatives in the development of DOD's new labor relations system authorized as part of NSPS.)

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

Regarding the way forward, development of the position of Deputy Secretary of Defense for Management, who would act as DOD's Chief Management Officer, will be essential to provide leadership that can elevate, integrate, and institutionalize responsibility for the success of DOD's overall business transformation effort, including its new human resources management system. In fact, in my previous testimony on DOD's business transformation efforts, we identified the lack of clear and sustained leadership for overall business transformations as one of the underlying causes that has impeded prior DOD reform efforts.[8] Additionally, DOD would benefit if it develops a comprehensive communications strategy that provides for ongoing, meaningful two-way communication that creates shared expectations among employees, employee representatives, managers, customers, and stakeholders. Finally, DOD must ensure that it has the institutional infrastructure in place to

[8] GAO-05-140T.

make effective use of its new authorities. At a minimum, this infrastructure includes a human capital planning process that integrates DOD's human capital policies, strategies, and programs with its program goals and mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and, importantly, a set of adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to help ensure the fair, effective, and credible implementation and application of a new system.

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

Preliminary Observations on the Proposed DOD National Security Personnel System Regulations

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

Pay and Performance Management

In January 2004, we released a report on pay for performance for selected OPM personnel demonstration projects that shows the variety of approaches taken in these projects to design and implement pay-for-performance systems.[9] Many of these personnel demonstration projects

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

were conducted within DOD. The experiences of these demonstration projects provide insights into how some organizations in the federal government are implementing pay for performance, and thus can guide DOD as it develops and implements its own approach. These demonstration projects illustrate that understanding how to link pay to performance is very much a work in progress in the federal government and that additional work is needed to ensure that performance management systems are tools to help agencies manage on a day-to-day basis and achieve external results.

When DOD first proposed its new civilian personnel reform, we strongly supported the need to expand pay for performance in the federal government.[10] Establishing a clear link between individual pay and performance is essential for maximizing performance and ensuring the accountability of the federal government to the American people. As I have stated before, how pay for performance is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful.[11] DOD's proposed regulations reflect a growing understanding that the federal government needs to fundamentally rethink its current approach to pay and better link pay to individual and organizational performance. To this end, the DOD proposal takes another valuable step toward a modern performance management system as well as a market-based, results-oriented compensation system. My comments on specific provisions of pay and performance management follow.

Aligning Individual Performance to Organizational Goals

Under the proposed regulations, the DOD performance management system would, among other things, align individual performance expectations with the department's overall mission and strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. However, the proposed regulations do not detail how to achieve such an alignment, which is a vital issue that will need to be addressed as DOD's efforts in designing and implementing a new personnel system move forward. Our work on public sector performance management efforts in the United States and abroad has underscored the importance of aligning daily operations and activities with organizational

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

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

results.[12] We have found that organizations often struggle with clearly understanding how what they do on a day-to-day basis contributes to overall organizational results, while high-performing organizations demonstrate their understanding of how the products and services they deliver contribute to results by aligning the performance expectations of top leadership with the organization's goals and then cascading those expectations to lower levels.

A performance management system is critical to successful organizational transformation. As an organization undergoing transformation, DOD can use its proposed performance management system as a vital tool for aligning the organization with desired results and creating a "line of sight" to show how team, unit, and individual performance can contribute to overall organizational results. To help federal agencies transform their culture to be more results oriented, customer focused, and collaborative in nature, we have reported on how a performance management system that defines responsibility and ensures accountability for change can be key to a successful merger and transformation.[13]

Establishing Pay Bands

Under the proposed regulations, DOD would create pay bands for most of its civilian workforce that would replace the 15-grade General Schedule (GS) system now in place for most civil service employees. Specifically, DOD (in coordination with OPM) would establish broad occupational career groups by grouping occupations and positions that are similar in type of work, mission, developmental or career paths, and competencies. Within career groups, DOD would establish pay bands. The proposed regulations do not provide details on the number of career groups or the number of pay bands per career group. The regulations also do not provide details on the criteria that DOD will use to promote individuals from one band to another. These important issues will need to be addressed as DOD moves forward. Pay banding and movement to broader occupational career groups can both facilitate DOD's movement to a pay-for-performance system and help DOD better define career groups, which in turn can improve the hiring process. In our prior work, we have reported that the current GS system, as defined in the Classification Act of 1949,[14] is a key

[12] GAO-04-479T.

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

[14] 5 U.S. Code §§ 5101-5115.

barrier to comprehensive human capital reform and that the creation of broader occupational job clusters and pay bands would aid other agencies as they seek to modernize their personnel systems.[15] The standards and process of the current classification system are key problems in federal hiring efforts because they are outdated and thus not applicable to today's occupations and work.

Under the proposed regulations, DOD could not reduce employees' basic rates of pay when converting to pay bands. In addition, the proposed regulations would allow DOD to establish a "control point" within a band that limits increases in the rate of basic pay and may require certain criteria to be met for increases above the control point.[16] The use of control points to manage employees' progression through the bands can help to ensure that their performance coincides with their salaries and that only the highest performers move into the upper half of the pay band, thereby controlling salary costs. The OPM personnel demonstration projects at China Lake and the Naval Sea Systems Command Warfare Center's Dahlgren Division have incorporated checkpoints or "speed bumps" in their pay bands. For example, when an employee's salary at China Lake reaches the midpoint of the pay band, the employee must receive a performance rating that is equivalent to exceeding expectations before he or she can receive additional salary increases.

Setting and Communicating Employee Performance Expectations

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

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

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

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

The range of expectations that DOD would consider in setting individual employee performance expectations are generally consistent with those used by high-performing organizations. DOD appropriately recognizes that given the vast diversity of work done in the department, managers and employees need flexibility in crafting specific expectations. However, the experiences of high-performing organizations suggest that DOD should require the use of core competencies as a central feature of its performance management effort.[17] Based on our review of other agency efforts and our own experience at GAO, we have found that core competencies can help reinforce employee behaviors and actions that support the department's mission, goals, and values, and can provide a consistent message to employees about how they are expected to achieve results. By including such competencies as change management, cultural sensitivity, teamwork and collaboration, and information sharing, DOD would create a shared responsibility for organizational success and help ensure accountability for the transformation process.

Making Meaningful Distinctions in Employee Performance

High-performing organizations seek to create pay, incentive, and reward systems that clearly link employee knowledge, skills, and contributions to organizational results. These organizations make meaningful distinctions between acceptable and outstanding performance of individuals and appropriately reward those who perform at the highest level. DOD's proposed regulations state that supervisors and managers would be held accountable for making meaningful distinctions among employees based

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

on performance and contribution, fostering and rewarding excellent performance, and addressing poor performance.

Under the proposed regulations, DOD is expected to have at least three rating levels for evaluating employee performance. We urge DOD to consider using at least four summary rating levels to allow for greater performance-rating and pay differentiation. This approach is in the spirit of the new governmentwide performance-based pay system for the Senior Executive Service (SES), which requires at least four rating levels to provide a clear and direct link between SES performance and pay as well as to make meaningful distinctions based on relative performance. Cascading this approach to other levels of employees can help DOD recognize and reward employee contributions and achieve the highest levels of individual performance.[18]

Providing Adequate Safeguards to Ensure Fairness and Guard Against Abuse

Although DOD's proposed regulations provide for some safeguards to ensure fairness and guard against abuse, additional safeguards should be developed. For example, as required by the authorizing legislation, the proposed regulations indicate that DOD's performance management system must comply with merit system principles and avoid prohibited personnel practices; provide a means for employee involvement in the design and implementation of the system; and, overall, be fair, credible, and transparent. However, the proposed regulations do not offer details on how DOD would (1) promote consistency and provide general oversight of the performance management system to help ensure it is administered in a fair, credible, and transparent manner, and (2) incorporate predecisional internal safeguards that are implemented to help achieve consistency and equity, and ensure nondiscrimination and nonpoliticization of the performance management process. Last month, during testimony, we stated that additional flexibility should have adequate safeguards, including a reasonable degree of transparency with regard to the results of key decisions, whether it be pay, promotions, or other types of actions, while protecting personal privacy. We also suggested that there should be both informal and formal appeal mechanisms within and outside of the organization if individuals feel that there has been abuse or a violation of the policies, procedures, and protected rights of the individual. Internal mechanisms could include independent Human Capital Office and Office of Opportunity and Inclusiveness reviews that provide reasonable assurances

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

that there would be consistency and nondiscrimination. Furthermore, it is of critical importance that the external appeal process be independent, efficient, effective, and credible.

In April 2003, when commenting on DOD civilian personnel reforms, we testified that Congress should consider establishing statutory standards that an agency must have in place before it can implement a more performance-based pay program, and we developed an initial list of possible safeguards to help ensure that pay-for-performance systems in the government are fair, effective, and credible.[19] For example, we have noted that agencies need to ensure reasonable transparency and provide appropriate accountability mechanisms in connection with the results of the performance management process.[20] This can be done by publishing the overall results of performance management and individual pay decisions while protecting individual confidentiality and by reporting periodically on internal assessments and employee survey results relating to the performance management system. DOD needs to commit itself to publishing the results of performance management decisions. By publishing the results in a manner that protects individual confidentiality, DOD could provide employees with the information they need to better understand their performance and the performance management system. Several of the demonstration projects have been publishing information about performance appraisal and pay decisions, such as the average performance rating, the average pay increase, and the average award for the organization and for each individual unit, on internal Web sites for use by employees. As DOD's human resources management system design efforts move forward, DOD will need to define, in more detail than is currently provided, how it plans to review such matters as the establishment and implementation of the performance appraisal system—and, subsequently, performance rating decisions, pay determinations, and promotion actions—before these actions are finalized, to ensure they are merit based.

Staffing and Employment

The authorizing legislation allows DOD to implement additional hiring flexibilities that would allow it to (1) determine that there is a severe shortage of candidates or a critical hiring need and (2) use direct-hire

[19] GAO-03-717T.

[20] GAO-04-479T.

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

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

Workforce Shaping

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

employee's performance.[21] Although we support greater consideration of an employee's performance in RIF procedures, agencies must have modern, effective, and credible performance management systems in place to properly implement such authorities.

An agency's approach to reductions should be oriented toward strategically shaping the makeup of its workforce if it is to ensure the orderly transfer of institutional knowledge and achieve mission results. DOD's proposed regulations include some changes that would allow the department to rightsize the workforce more carefully through greater precision in defining competitive areas, and by reducing the disruption associated with RIF orders as their impact ripples through an organization. For example, under the current regulations, the minimum RIF competitive area is broadly defined as an organization under separate administration in a local commuting area. Under the proposed regulations, DOD would be able to establish a minimum RIF competitive area on a more targeted basis, using one or more of the following factors: geographical location, line of business, product line, organizational unit, and funding line. The proposed regulations also provide DOD with the flexibility to develop additional competitive groupings on the basis of career group, occupational series or specialty, and pay band. At present, DOD can use competitive groups based on employees (1) in the excepted and competitive service, (2) under different excepted service appointment authorities, (3) with different work schedules,[22] (4) pay schedule, or (5) trainee status. These reforms could help DOD approach rightsizing more carefully; however, as I have stated, agencies first need to identify the critical skills and competencies needed in their workforce if they are to effectively implement their new human capital flexibilities.

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

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

Adverse Actions and Appeals

As with DHS's final regulations,[23] DOD's proposed regulations are intended to streamline the rules and procedures for taking adverse actions, while ensuring that employees receive due process and fair treatment. The proposed regulations establish a single process for both performance-based and conduct-based actions, and shorten the adverse action process by removing the requirement for a performance improvement plan. In addition, the proposed regulations streamline the appeals process at the MSPB by shortening the time for filing and processing appeals.

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

DOD's proposed regulations generally preserve the employee's basic right to appeal decisions to an independent body—the MSPB. However, in contrast to DHS's final regulations, DOD's proposed regulations permit an internal DOD review of the initial decisions issued by MSPB adjudicating officials. Under this internal review, DOD can modify or reverse an initial decision or remand the matter back to the adjudicating official for further consideration. Unlike other criteria for review of initial decisions, DOD can modify or reverse an initial MSPB adjudicating official's decision where the department determines that the decision has a direct and substantial adverse impact on the department's national security mission.[24] According to DOD, the department needs the authority to review initial MSPB decisions and correct such decisions as appropriate, to ensure that the MSPB interprets NSPS and the proposed regulations in a way that recognizes the critical mission of the department and to ensure that MSPB gives proper deference to such interpretation. However, the proposed

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

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

regulations do not offer additional details on the department's internal review process, such as how the review will be conducted and who will conduct them. An internal agency review process this important should be addressed in the regulations rather than in an implementing directive to ensure adequate transparency and employee confidence in the process.

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

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

implementation of its mandatory removal provisions.[25] (IRS employees feared that they would be falsely accused by taxpayers and investigated, and had little confidence that they would not be disciplined for making an honest mistake.) We reported that IRS officials believed this provision had a negative impact on employee morale and effectiveness and had a "chilling" effect on IRS frontline enforcement employees, who were afraid to take certain appropriate enforcement actions.[26] Careful drafting of each removable offense is critical to ensure that the provision does not have unintended consequences.

DOD's proposed regulations also would encourage the use of alternative dispute resolution and provide that this approach be subject to collective bargaining to the extent permitted by the proposed labor relations regulations. To resolve disputes in a more efficient, timely, and less adversarial manner, federal agencies have been expanding their human capital programs to include alternative dispute resolution approaches. These approaches include mediation, dispute resolution boards, and ombudsmen. Ombudsmen typically are used to provide an informal alternative to addressing conflicts. We previously reported on common approaches used in ombudsmen offices, including (1) broad responsibility and authority to address almost any workplace issue, (2) their ability to bring systemic issues to management's attention, and (3) the manner in which they work with other agency offices in providing assistance to employees.[27]

Labor-Management Relations

The DOD proposed regulations recognize the right of employees to organize and bargain collectively.[28] However, similar to DHS's final regulations, the proposed regulations would reduce the scope of bargaining by (1) removing the requirement to bargain on matters traditionally referred to as "impact and implementation" (which include the processes used to deploy personnel, assign work, and use technology) and

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

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

[27] GAO-01-479T.

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

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

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

Our previous work on individual agencies' human capital systems has not directly addressed the scope of specific issues that should or should not be subject to collective bargaining and negotiations. At a forum we co-hosted in April 2004 exploring the concept of a governmentwide framework for human capital reform, which I will discuss later, participants generally agreed that the ability to organize, bargain collectively, and participate in labor organizations is an important principle to be retained in any framework for reform. It also was suggested at the forum that unions must be both willing and able to actively collaborate and coordinate with management if unions are to be effective representatives of their members and real participants in any human capital reform.

DOD Faces Multiple Implementation Challenges

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

Ensuring Sustained and Committed Leadership

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

- elevate attention to overcome an organization's natural resistance to change, marshal the resources needed to implement change, and build and maintain the organizationwide commitment to new ways of doing business;
- integrate various management responsibilities into the new system so they are no longer "stove-piped" and fit into other organizational transformation efforts in a comprehensive, ongoing, and integrated manner; and

- institutionalize accountability for the system so that the implementation of this critical human capital initiative can be sustained.[29]

In 2004, we testified that while the Secretary of Defense and other key DOD leaders have demonstrated their commitment to the business transformation efforts, in our view, the complexity and long-term nature of these efforts requires the development of an executive position capable of providing strong and sustained executive leadership—over a number of years and various administrations.[30] The day-to-day demands placed on the Secretary, the Deputy Secretary, and others make it difficult for these leaders to maintain the oversight, focus, and momentum needed to resolve the weaknesses in DOD's overall business operations. While sound strategic planning is the foundation upon which to build, sustained and focused leadership is needed for reform to succeed. One way to ensure sustained leadership over DOD's business transformation efforts would be to create a full-time executive level position for a chief management official who would serve as the Deputy Secretary of Defense for Management.[31] This position would provide the attention essential for addressing key stewardship responsibilities, such as strategic planning, human capital management, performance and financial management, acquisition and contract management, and business systems modernization, while facilitating the overall business transformation operations within DOD.

Establishing an Overall Communications Strategy

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

[29] On September 9, 2002, GAO convened a roundtable of government leaders and management experts to discuss the chief operating concept. For more information, see GAO, *Highlights of a GAO Roundtable: The Chief Operating Officer Concept: A Potential Strategy to Address Federal Governance Challenges*, GAO-03-192SP (Washington, D.C.: Oct. 4, 2002), and *The Chief Operating Officer Concept and Its Potential Use as a Strategy to Improve Management at the Department of Homeland Security*, GAO-04-876R (Washington, D.C.: June 28, 2004).

[30] GAO-05-140T.

[31] GAO-05-140T.

management initiative.[32] This communications strategy must involve a number of key players, including the Secretary of Defense, and a variety of communication means and mediums. DOD acknowledges that a comprehensive outreach and communications strategy is essential for designing and implementing its new human resources management system, but the proposed regulations do not identify a process for the continuing involvement of employees in the planning, development, and implementation of NSPS.

Because the NSPS design process and proposed regulations have received considerable attention,[33] we believe one of the most relevant implementation steps is for DOD to enhance two-way communication between employees, employee representatives, and management. Communication is not only about "pushing the message out," but also using two-way communication to build effective internal and external partnerships that are vital to the success of any organization. By providing employees with opportunities to communicate concerns and experiences about any change management initiative, management allows employees to feel that their input is acknowledged and important. As it makes plans for implementing NSPS, DOD should facilitate a two-way honest exchange with, and allow for feedback from, employees and other stakeholders. Once it receives this feedback, management needs to consider and use this solicited employee feedback to make any appropriate changes to its implementation. In addition, management needs to close the loop by providing employees with information on why key recommendations were not adopted.

Providing Adequate Resources for Implementing the New System

Experience has shown that additional resources are necessary to ensure sufficient planning, implementation, training, and evaluation for human capital reform. According to DOD, the implementation of NSPS will result in costs for, among other things, developing and delivering training, modifying automated human resources information systems, and starting up and sustaining the National Security Labor Relations Board. We have

[32] GAO-03-669.

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

found that, based on the data provided by selected OPM personnel demonstration projects, the major cost drivers in implementing pay-for-performance systems are the direct costs associated with salaries and training.

DOD estimates that the overall cost associated with implementing NSPS will be approximately $158 million through fiscal year 2008. According to DOD, it has not completed an implementation plan for NSPS, including an information technology plan and a training plan; thus, the full extent of the resources needed to implement NSPS may not be well understood at this time. According to OPM, the increased costs of implementing alternative personnel systems should be acknowledged and budgeted up front.[34] Certain costs, such as those for initial training on the new system, are one-time in nature and should not be built into the base of DOD's budget. Other costs, such as employees' salaries, are recurring and thus would be built into the base of DOD's budget for future years. Therefore, funding for NSPS will warrant close scrutiny by Congress as DOD's implementation plan evolves.

Involving Employees and Other Stakeholders in Implementing the System

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

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

regulations also will give designated employee representatives an opportunity to be briefed and to comment on the design and results of the new system's implementation. DHS's final regulations, however, provide for more extensive involvement of employee representatives. For example, DHS's final regulations provide for the involvement of employee representatives in identifying the scope, objectives, and methodology to be used in evaluating the new DHS system.

The active involvement of employees and employee representatives will be critical to the success of NSPS. We have reported that the involvement of employees and employee representatives both directly and indirectly is crucial to the success of new initiatives, including implementing a pay-for-performance system. High-performing organizations have found that actively involving employees and stakeholders, such as unions or other employee associations, when developing results-oriented performance management systems helps improve employees' confidence and belief in the fairness of the system and increases their understanding and ownership of organizational goals and objectives. This involvement must be early, active, and continuing if employees are to gain a sense of understanding and ownership of the changes that are being made. The 30-day public comment period on the proposed regulations ended March 16, 2005. DOD and OPM notified the Congress that they are preparing to begin the meet and confer process with employee representatives who provided comments on the proposed regulations. Last month, during testimony, we stated that DOD is at the beginning of a long road, and the meet and confer process has to be meaningful and is critically important because there are many details of the proposed regulations that have not been defined. These details do matter, and how they are defined can have a direct bearing on whether or not the ultimate new human resources management system is both reasoned and reasonable.

Evaluating DOD's New Human Resources Management System

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

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

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

Framework for Governmentwide Human Capital Reform

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

To help advance the discussion concerning how governmentwide human capital reform should proceed, we and the National Commission on the Public Service Implementation Initiative hosted a forum in April 2004 on whether there should be a governmentwide framework for human capital reform and, if so, what this framework should include.[35] To start the discussion, we suggested, in advance of the forum, a framework of

[35] GAO and the National Commission on the Public Service Implementation Initiative, *Highlights of a Forum: Human Capital: Principles, Criteria, and Processes for Governmentwide Federal Human Capital Reform*, GAO-05-69SP (Washington, D.C.: Dec. 1, 2004).

principles, criteria, and processes based on congressional and executive branch decision making and prior work.

While there was widespread recognition among the forum participants that a one-size-fits-all approach to human capital management is not appropriate for the challenges and demands faced by government, there was equally broad agreement that there should be a governmentwide framework to guide human capital reform. Furthermore, a governmentwide framework should balance the need for consistency across the federal government with the desire for flexibility, so that individual agencies can tailor human capital systems to best meet their needs. Striking this balance would not be easy, but such a balance is necessary to maintain a governmentwide system that is responsive enough to adapt to agencies' diverse missions, cultures, and workforces.

While there were divergent views among the forum participants, there was general agreement on a set of principles, criteria, and processes that would serve as a starting point for further discussion in developing a governmentwide framework in advancing human capital reform, as shown in figure 1.

Figure 1: Principles, Criteria, and Processes

Principles that the government should retain in a framework for reform because of their inherent, enduring qualities:

- merit principles that balance organizational mission, goals, and performance objectives with individual rights and responsibilities;
- ability to organize, bargain collectively, and participate through labor organizations;
- continued prohibition of certain personnel practices; and
- guaranteed due process that is fair, fast, and final.

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

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

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

- prescribing regulations in consultation or jointly with the Office of Personnel Management;
- establishing appeals processes in consultation with the Merit Systems Protection Board;
- involving employees and stakeholders in the design and implementation of new human capital systems;
- phasing in implementation of new human capital systems;
- committing to transparency, reporting, and evaluation;
- establishing a communications strategy; and
- assuring adequate training.

Source: GAO.

Concluding Observations

As we testified previously on the DOD and DHS civilian personnel reforms, an agency should have to demonstrate that it has a modern, effective, credible, and, as appropriate, validated performance management system in place with adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to ensure fairness and prevent politicization of the system and abuse of employees before any related flexibilities are operationalized. DOD's proposed NSPS regulations take a valuable step toward a modern performance management system as well as a more market-based, results-oriented compensation system. DOD's proposed performance management system is intended to align individual

performance and pay with the department's critical mission requirements; hold employees responsible for accomplishing performance expectations; and provide meaningful distinctions in performance. However, the experiences of high-performing organizations suggest that DOD should require core competencies in its performance management system. The core competencies can serve to reinforce employee behaviors and actions that support the DOD mission, goals, and values and to set expectations for individuals' roles in DOD's transformation, creating a shared responsibility for organizational success and ensuring accountability for change.

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

Mr. Chairman and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

Contacts and Acknowledgments

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Appendix I

"Highlights" from Selected GAO Human Capital Reports

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Highlights

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

June 2004

DOD CIVILIAN PERSONNEL

Comprehensive Strategic Workforce Plans Needed

Why GAO Did This Study

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

What GAO Recommends

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

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

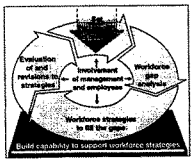
To view the full product, including the scope and methodology, click on the link above. For more information, contact Derek Stewart at (202) 512-5559 or stewartd@gao.gov.

What GAO Found

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

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

Strategic Workforce Planning Process



Source: GAO.

United States General Accounting Office

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Highlights

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

June 4, 2003

HUMAN CAPITAL

Building on DOD's Reform Effort to Foster Governmentwide Improvements

Why GAO Did This Study

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

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

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

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

What GAO Found

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

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

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

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Highlights

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

May 2003

HUMAN CAPITAL

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

Why GAO Did This Study

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

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

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

What GAO Found

DOD's lack of attention to force shaping during its downsizing in the early 1990s has resulted in a workforce that is not balanced by age or experience and that puts at risk the orderly transfer of institutional knowledge. Human capital challenges are severe in certain areas. For example, DOD has downsized its acquisition workforce by almost half. More than 50 percent of the workforce will be eligible to retire by 2005. In addition, DOD faces major succession planning challenges at various levels within the department. Also, since 1987, the industrial workforce, such as depot maintenance, has been reduced by about 56 percent, with many of the remaining employees nearing retirement, calling into question the longer-term viability of the workforce. DOD is one of the agencies that has begun to address human capital challenges through strategic human capital planning. For example, in April 2002, DOD published a department wide strategic plan for civilians. Although a positive step toward fostering a more strategic approach toward human capital management, the plan is not fully aligned with the overall mission of the department or results oriented. In addition, it was not integrated with the military and contractor personnel planning.

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

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

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

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Highlights

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

May 1, 2003

DEFENSE TRANSFORMATION

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

Why GAO Did This Study

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

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

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

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

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

What GAO Found

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

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

The critical questions to consider are: should DOD and/or other agencies be granted broad-based exemptions from existing law, and if so, on what basis? Do DOD and other agencies have the institutional infrastructure in place to make effective use of any new authorities? This institutional infrastructure includes, at a minimum, a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program goals and mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and, importantly, a set of adequate safeguards, including reasonable transparency and appropriate accountability mechanisms to ensure the fair, effective, and credible implementation of a new system.

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

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Highlights

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

April 2003

DOD CIVILIAN PERSONNEL

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

Why GAO Did This Study

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

What GAO Recommends

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

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

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

What GAO Found

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

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

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

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

Service	FY 2002 civilian staffing levels	Average age	Percent eligible to retire by 2007	Percent eligible to retire by 2009
Navy	35,563	46	28	39
Army	14,234	49	41	52
Marine Corps	1,323	48	45	60
Air Force	21,152	47	35	44
Total	72,272	47	33	43

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

United States General Accounting Office

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Highlights

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

April 29, 2003

DEFENSE TRANSFORMATION

Preliminary Observations on DOD's Proposed Civilian Personnel Reforms

Why GAO Did This Study

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

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

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

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

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

What GAO Found

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

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

The critical questions to consider are: should DOD and/or other agencies be granted broad-based exemptions from existing law, and if so, on what basis; and whether they have the institutional infrastructure in place to make effective use of the new authorities. This institutional infrastructure includes, at a minimum, a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program goals and mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and, importantly, a set of adequate safeguards, including reasonable transparency and appropriate accountability mechanisms to ensure the fair, effective, and credible implementation of a new system.

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

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Highlights

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

March 2003

DOD PERSONNEL

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

Why GAO Did This Study

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

What GAO Recommends

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

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

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

What GAO Found

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

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

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

United States General Accounting Office

GAO's Mission

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Mr. PORTER. Thank you, Mr. Walker. I appreciate you mentioning those three key areas that I know that my friend and colleague from Illinois pointed out in his opening statement. And I expect you will probably have some more questions with regard to those, and I will wait for some of those questions.

But I have had an opportunity, since we last had a hearing and since we chatted, to look at some of the information that you provided regarding the Deputy Secretary of Defense for Management, and I know you touched upon it in your closing comments. Even beyond today's hearing, I look forward to looking closer at that. I think it's critical in some shape or form that a person of this capacity become a part of the process. My concern is that at what point does that happen, and what would be optimum as we are looking at, you know, the pay-for-performance change; first change, as I said, in 50 years.

At what point should we be spending more time on that Deputy Secretary of Defense? Should that be parallel to what we are doing today?

Mr. WALKER. Well, I have mixed emotions about this, Mr. Chairman, because on the one hand the President, as you know, has announced his intention to nominate Gordon England, who is the individual I referred to before, as Deputy Secretary of Defense. And let me say for the record that in my own actions with Secretary England, I believe he is a first-rate professional, and I believe that's an excellent nomination.

At the same point in time, I also believe that the existing Deputy Secretary job is a full-time job, and that there is—continues to be a need for a Deputy Secretary for Management, this chief management official if you will, to focus on the business transformation. I doubt that there's a human being on the planet that can basically deal with both of those jobs. Each of them are full-time jobs. The stakes are too high for us not to get NSPS right. The stakes are too high for us not to make, you know, progress with regard to the other major business transformation challenges within the Department of Defense, such as financial management, information technology, supply chain management, etc. And I think it's going to take somebody like this chief management official at the right level for—enough time with a proven track record of success in order to be successful.

Mr. PORTER. Yes.

Mr. WALKER. So now is what I would say, Mr. Chairman.

Mr. PORTER. Now is the time.

How would you envision this position being different from the newly created Chief Human Capital Officer?

Mr. WALKER. My view is that the new Chief Human Capital Officer would report to this position, that a number of key players who are involved in the business side of the Department of Defense which should inherently not be political. I mean, there might be political appointees, but you need to make sure that you have the right type of business infrastructure in place no matter who the President is, no matter who the Secretary of Defense is, and no matter which party controls the White House or Capitol Hill.

And so my view is that the Chief Human Capital Officer would report to this person and would work in partnership with this per-

son as well as other key players, not just the under secretaries, but also the service secretaries and other key players in the Department in order to take a more strategic, a more integrated, and a more, you know, departmentwide approach to this and other key initiatives within the Pentagon.

Mr. PORTER. Do you think that CHCO, or the Chief Human Capital Officer, is going to have the tools and the ability to manage the change to NSPS?

Mr. WALKER. I think first we have to recognize that, you know, that modernizing your human capital policies and practices is absolutely key to the overall transformation effort within the Department, and that while the Chief Human Capital Officer will play a critically important role, this is so important to the mission of the Department of Defense that even the Secretary of Defense needs to allocate some time to this effort.

And the communications strategy, while it might end up, you know, involving the Deputy Secretary or Deputy Secretary of Management as playing a key role along with the CHCO, you have to involve a number of different line and functional heads, as well as the Secretary, in this effort.

I mean, you know, the stakes here are key, not just for the Department of Defense, but also for our overall Civil Service reform effort. I mean, we are dealing with a huge part of the Federal work force, and it's really critically important that we get this right.

Mr. PORTER. I had an opportunity to meet with some of the managers yesterday and had kind of a question-and-answer session. I think I touched upon it at our last hearing. I know there are a lot of folks that are concerned. And now we are talking close to 600,000, 700,000 people in DOD and certainly those in Homeland Security.

But I want to reiterate what you mention in your summary, that we have to have these safeguards in place to prevent abuse. We have to. It's our responsibility, and it's critical that it be highlighted in your report.

Also the process for continuing involvement by the employees, I think that, again as you pointed out in your report, it's an area of weakness.

And as my colleague said from Illinois, we have to make sure that some of these things are done in writing so that people understand.

I know this isn't a question, it's more of a comment. In my short tenure as chairman, I am learning that in many departments, agencies, I question who is in charge. And I think the system has allowed itself to evolve into a lot of this, a lot of finger-pointing. And at least I believe in the watch of this subcommittee, we don't want to create more finger-pointing; we want to have somebody in charge so they are held accountable, so that they can respond to these employees that need help, to those managers that want to train and make sure there is ample training material.

Again not a question, more a comment. I appreciate what you have had to say today.

Mr. WALKER. If I can followup real quickly on that. With regard to the overall business transformation effort within the Department of Defense, of which NSPS is a subset, a very important sub-

set but only in a piece, the answer is nobody is in charge. That's the honest answer right now at the Department. I am talking about the overall business transformation process.

And you talk about concerns. It is very understandable that there would be broad-based and serious concerns about the type of changes that are being proposed here. Quite frankly, there were broad-based and serious concerns when these same type of changes were proposed at the GAO. I mean, these are fundamental philosophical changes. But just because they are complex, just because they are controversial, just because they are a concern, doesn't mean that we shouldn't proceed. We must proceed. But how do we proceed? You know, what basis we proceed, and to make sure that it is based upon a constructive and interactive approach that we have these actual—these principles and safeguards in place, and that we have reasonable transparency; that's critically important. But we must proceed. But how we do it matters.

Mr. PORTER. Thank you. Mr. Davis.

Mr. DAVIS OF ILLINOIS. Thank you, Mr. Chairman.

Mr. Walker, let me thank you. As always, I look forward to your insight into your testimony, and I agree with you totally that the conceptual framework, I think, is excellent. I also agree with your assessment of Mr. England.

But I think that some of these things have to be codified in such a way that it doesn't matter, to some degree, who the individuals might be relative to the implementation, but that the codification is there. You have consistently testified that human resource systems must be transparent and credible. I mean—and I have certainly appreciated that position.

And you have also indicated that you believe that employees must have confidence in the system if you are going to have the kind of work force, the kind of morale, and the kind of productivity that you are expecting.

Would you say that verbal communications could be good enough to create that kind of environment and those kinds of confidences in the employees?

Mr. WALKER. Well, verbal communications need to occur, and they should occur on a frequent basis throughout the year, but I believe that you have to have some written expectations.

And part of that has to do with seriously considering a competency-based approach as a means to move forward with regard to any new performance appraisal system.

I know that we at GAO adopted that, and I know others have followed a similar approach, including most recently the Defense Intelligence Agency, which ended up adopting a number of our competencies. And what we found is a competency-based approach is a way that can help to set expectations and help to assure a reasonable degree of consistency, you know, not only within units but also across units in a given department.

So I think you need to have written expectations, but that should be supplemented with frequent oral communications.

Mr. DAVIS OF ILLINOIS. And you indicated, so—to answer another question that I sort of had in mind—and so that you would suggest that DOD look seriously at some of the policies and practices that your agency has established and been making use of and encourage

them to follow suit or to certainly look at what you have done more as a model than what they have perhaps recommended?

Mr. WALKER. Well, Mr. Davis, we are not perfect, and we never will be. Nobody is. I think that, you know, we have had a considerable amount of experience here, both as it relates to the policy framework as well as it relates to the process that should be employed to try to get to a positive outcome.

And in fairness, the DOD and DHS are talking with our people, and they are trying to be informed by that. And I hope that when they end up engaging in the meet-and-confer process, and I hope that when they end up filling in a number of the important details, some of which I mentioned, some of which you mentioned, some of which the chairman mentioned, I hope that in doing that, it will be informed in part by what they learn from us and others, because there are a number of important details that have to be filled out.

And if I can come back to your comment about institutional versus individual, that's a critically important point. The fact of the matter is we are talking about doing something here that will span beyond any individual and beyond any administration.

And just as I think it's important that we keep that concept in mind for the National Security Personnel System, I also think it's important that we keep that concept in mind with regard to the chief management official, because we need to institutionalize that as well, because we don't know who the next set of players might be.

Mr. DAVIS OF ILLINOIS. Can you think of anything that agencies would have to fear by doing that? I am saying sometimes, you know, people see demons and things if they open them up a bit. Can you think of anything that they would have to fear from employees?

Mr. WALKER. Well, obviously anytime you provide more discretion, people are concerned about how that discretion is going to be used, and want to make sure that discretion is not going to be abused.

There is little doubt in my mind that the DOD and that—you know, in this particular case, are wanting to get reasonable flexibility, but they are not wanting to abuse employees. It would be totally counterproductive to do that. But in order to be able to heighten the degree of confidence that that won't be done, it just reinforces the needs for the safeguards. It reinforces the needs for more specificity. It reinforces the need for, you know, more written documentation and adequate checks and balances; that that not be based upon a promise but it actually be written and codified, if you will.

Look, no matter what the final rules are, there will be a significant percentage of the work force that will remain concerned. And part of that is because we are moving from a system whereby, under current law, 85 percent-plus of all pay increases have nothing to do with skills, knowledge, and performance. It's on autopilot. And we are moving from a system where, even if you perform at an unacceptable level—where we don't have that many people who do—but even if they perform at an unacceptable level, they are entitled by law to that 85 percent of the annual increase. And so that by itself is going to cause a great degree of concern.

But as I said, that doesn't mean we shouldn't move forward.

Mr. DAVIS OF ILLINOIS. Thank you very much. And I think I have some of that 85 percent who work for me who—and we want to change it.

Mr. PORTER. I don't think I will comment on that, Mr. Davis. We will leave that for you.

Mr. Walker, on page 20—and you don't need to turn to page 20, but it has to do with resources for implementing the new system and training and helping change this culture—you said 85 percent has nothing to do with performance.

Could you spend a little more time this afternoon talking about the training aspect and where you see the strengths and weaknesses are of the plan regarding the training, making sure the managers are trained and employees are trained so they can understand how they can achieve these higher levels of performance?

Mr. WALKER. Well, first, we haven't done an in-depth study of their training plan. Frankly, I don't know that they have an in-depth training plan for us to study yet. I will say this: that based upon our own experience, which I know best, it takes a considerable amount of time and it takes a considerable amount of resources to be able to not only help explain what you are doing and why you are doing it, but how to do it.

Again, they have to come up with a modern, effective, credible, and hopefully validated performance appraisal system; that, after you do that, you have to train not just the managers who will rate employees, but also the reviewers who will review the ratings, and also the employees who will be rated based upon these standards, and also the other key players who will have some role to play with regard to the checks and balances.

We spent a considerable amount of time and money after we ended up designing the system and training all those different key players in what their role was and what we were trying to accomplish out of this system and what type of, you know, safeguards and means that we had in place to try to achieve all of our objectives.

My understanding is, just through a note that's been passed to me by one of our very capable staff, is that the plan hasn't been developed yet, which doesn't surprise me, because it's hard to develop the plan when you don't have the system yet, you know. But no doubt it's—you know, the Department contemplates that there will be extensive, you know, training efforts.

Mr. PORTER. And with your assistance as this unfolds, I would like to put a microscope under that so we watch as that unfolds, so that there is proper training and the funding of that training. But I would appreciate your assistance in that area.

Mr. PORTER. Another question. You know, when I go back to the district, I am asked frequently about homeland security, international security, because its still in the hearts and minds of individuals as they are going to work every day; they go to the airport, and there's extra security.

How do you see the NSPS fulfilling the mission of DOD; and that's, of course, the security of the Nation and of the world? Is, in fact, this system being put in place going to make our Nation a safer place to live and to work and to raise our families?

Mr. WALKER. I think it can if it is designed and implemented properly. Let me tell you why I say that. Because any agency, company, or not-for-profit entity is only as good as the people who comprise it. And I think it's important to recognize that we do need to move to more modern or flexible, more market-based and performance-oriented human capital systems. That's critically important. We need to do a better job of linking the strategic plan and the desired outcomes of the Department of Defense with the measures of success for the different units that make up the Department of Defense and the individuals who contribute to the mission of the Department of Defense.

And I think that to the extent that we can link those and integrate those and move to a more modern set of human capital policies and practices where we are making more decisions based upon skills, knowledge, and performance, then there's no doubt in my mind that we will end up resulting in more positive outcomes that will enhance value and will mitigate risk. That has clearly been the case at GAO, and I think it can be the case in many departments and agencies. But it's, as has been said, not just what you do but how you do it that matters.

Mr. PORTER. Thank you. Mr. Davis.

Mr. DAVIS OF ILLINOIS. Just actually one question, though. I was thinking, when I was a kid growing up, my mother and I used to have a lot of serious conversations about her assessment of my performance. And I remember her telling me one time that I hadn't done much. And I asked her, how much is much?

And that leads me to the question of how much detail. How detailed do we need to have things in order to create this transparent environment that we are talking about? And I know it's difficult to assess and measure what sometimes you can't see before you see it, but how much detail is necessary?

Mr. WALKER. What I would say, Mr. Davis, is I have found that a competency-based approach, where you end up working in partnership with employees to define the competencies that are necessary for them to be successful and maximize their potential in various roles and responsibilities; so you work in partnership with the employees to define those competencies, and then you have the employees validate what has been come up with such that A, you get better buy-in with regard to that and, frankly, you mitigate litigation risk as well by doing it that way.

If you do that, and then you couple that with fairly clearly defined, you know, performance standards—in other words, here is what we want you to do and here is what we define as meets expectations, and here is how we define as "outstanding," "role model," call it what you want. That if you do that, you have a very, very solid framework for moving forward. And then some of those competencies might end up involving competencies like achieving results.

Then, as a supplement to doing this, you must then define what do you mean by that? What do the results mean from the standpoint of the unit involved, the individual involved? You know, we do that at GAO, and the definition of results will vary, based upon the department, based upon the unit, based upon the individual, as to how can they contribute to overall organizational results.

But the competencies and the performance standards provide the foundation that can be supplemented with additional information where there would be a degree of transparency associated as well. But the level of detail, obviously, would vary based upon the individual facts and circumstances.

Mr. DAVIS OF ILLINOIS. Thank you very much.

Mr. WALKER. Thank you.

Mr. DAVIS OF ILLINOIS. I really appreciate your testimony.

Mr. PORTER. I just have one additional question, and it's come up a couple of times. It has to do with the Labor Relations Board. The question is whether or not having three members appointed by the Secretary of Defense really provides an independent review. Do you feel that the Department can establish an independent committee to review the employee problems?

Mr. WALKER. I think if they are all going to be appointed by the Secretary of Defense, there has to be a process for determining who the candidates are from which the Secretary will select. There has to be a participatory process there where you are providing reasonable assurance that there's going to be some degree of balance on that Board, where employees and/or their representatives have input to that process. I also think it's important to have term appointments and very stringent standards for removal once the person is appointed.

We have at the GAO something called the Personnel Appeals Board. That is something that was established late in the 1980's to provide credible, reliable, independent and external review body for our employees. In the interest of full and fair disclosure since day one, the Comptroller General has appointed the members of that board.

However, how we go about it is very important. We do have a consultative process. We do try to achieve balance. There are fixed terms, and people cannot be removed, you know, once they have been appointed. In fact, I can't remove them. They can only remove themselves, their colleagues can remove them, if they are—if there is a dereliction of duty or some other aspect.

So I think, you know, it's possible for it to work if you address the issues that I talked about. But I don't think they have been adequately addressed yet.

Mr. PORTER. Thank you. Again, we appreciate you being here and providing your insights, we look forward to continued communications on these topics. We appreciate it.

Mr. WALKER. Thanks. I will stay for a little while, but I won't be able to stay for the whole time.

Mr. PORTER. I understand. Thank you. Thank you.

I would now like to invite our second panel of witnesses to please come forward to the table.

I will first have opening statements by the Honorable Charles S. Abell, Principal Under Secretary of Defense, Personnel and Readiness. Following Mr. Abell will be Mr. George Nesterczuk, the Senior Policy Advisor on the Department of Defense, U.S. Office of Personnel Management. And finally we will hear from the Honorable Neil McPhie, the chairman of the U.S. Merit Systems Protection Board.

I would like to begin today by recognizing Mr. Abell. Mr. Abell, thank you very much, and you will have 5 minutes.

STATEMENTS OF CHARLES S. ABELL, PRINCIPAL DEPUTY UNDER SECRETARY, PERSONNEL AND READINESS, DEPARTMENT OF DEFENSE; GEORGE NESTERCZUK, SENIOR POLICY ADVISOR ON THE DEPARTMENT OF DEFENSE, U.S. OFFICE OF PERSONNEL MANAGEMENT; AND NEIL A.G. McPHIE, CHAIRMAN, U.S. MERIT SYSTEMS PROTECTION BOARD

STATEMENT OF CHARLES S. ABELL

Mr. ABELL. I thank you, Mr. Chairman and Mr. Davis.

The National Personnel System is a key part of DOD transformation. We will create a total force, uniformed military and civilian employees who share a common vision, who recognize common strategic and organizational objectives, and who operate as one cohesive unit. DOD civilians are unique in government in that they are an integral part of an organization that has a military mission, a national security mission.

DOD civilians are at work side by side with our uniformed military personnel around the world in every time zone, every day. NSPS will bring 21st century human resource management to these dedicated public servants.

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

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

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

The proposed regulations published in the Federal Register on February 14 reflect the result of this adjusted process. The Federal Register notice is the formal notice required by the statute, followed by the 30-day comment period, after which we reviewed the comments, and beginning on April 18th, will meet in a meet-and-confer process for a minimum of 30 days.

Mr. Chairman, I stress the word "minimum." We will devote the time necessary to adequately discuss and confer on every issue raised during the comment period, and this is where the details that so many long for will begin to emerge. We have asked the Fed-

eral Mediation and Conciliation Service to assist us in this meet-and-confer process. And at the conclusion of the meet-and-confer period we will report the results to our congressional oversight committees.

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

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

Although we plan to implement the labor relations system DOD-wide, we intend to phase in the HR system beginning in late summer of this year, as we expect full implementation by late 2007 or perhaps early into 2008. We recognize that the National Security Personnel System is a significant change, but these are necessary changes.

We will meet the challenge of change and change management willingly. We are committed to training employees, managers, and supervisors. We are committed to the collaborative approach that we have used to get to this point. We understand the concern and the anxiety of our employees. It would be unnatural if they were not concerned or anxious, and we will address their concerns.

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

Mr. Chairman, before I close, I would like to recognize the great contributions of my partner, Mr. George Nesterczuk, Dr. Ron Sanders of OPM, and Ms. Mary Lacy of our personnel—of our program executive office. They have been invaluable to getting us to where they are, and they are going to be part of the team that takes us all the way home.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Abell follows:]

Statement of

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

Before the
Subcommittee on the Federal Workforce and Agency Organization

Committee on Government Reform
U. S. House of Representatives

On
National Security Personnel System
Proposed Regulations

April 12, 2005

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

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

The Collaborative Process

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

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

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

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

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

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

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

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

were facilitated by the Federal Mediation and Conciliation Service in order to ensure open and robust communication.

Since April 2004, DoD and OPM have conducted 10 meetings with officials of the unions that represent DoD employees, including the nine largest unions that currently have national consultation rights. These union officials represent 1,500 separate bargaining units covering about 445,000 employees. These meetings involved as many as 80 union leaders from the national and local level at any one time, and addressed a variety of topics, including: the reasons change is needed and the Department's interests; the results of Department-wide focus group sessions held with a broad cross-section of DoD employees; the proposed NSPS implementation schedule; employee communications; and proposed design options in the areas of labor relations and collective bargaining, adverse actions and appeals, and pay and performance management.

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

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

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

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

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

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

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

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

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

Details of the Proposed Regulations

The Secretary of Defense and the Director of OPM jointly issued the proposed regulations and they were published in the Federal Register on February 14, 2005. This initiated a 30-day comment period and provided another opportunity for input on the design of the system. The public comment period closed on March 16, 2005 and we are currently reviewing the thousands of comments we received from individual employees, interested citizens, professional organizations, employee unions, members of Congress, and advocacy groups. Most of the comments are thoughtful, genuine, and raise legitimate concerns. We will give consideration to these public comments as we move forward in revising and finalizing the NSPS regulations.

The Federal Register Notice also served as the formal written proposal of the system for review and comment by our employee unions, as required by the NSPS

statute. We encouraged them to participate in the public comment period as well. We received comments from the United DoD Workers Coalition as well as 12 national labor organizations representing DoD employees. DoD and OPM have analyzed these recommendations and have given them serious consideration and are about to begin discussions with the unions about these recommendations. In recognition of the union's special status as our employee representatives, the NSPS statute provides for a "meet and confer" process with them for a minimum of 30 days. As required by the statute, we formally notified Congress on March 28, 2005 that we will begin the meet and confer process with employee representatives on April 18, 2005. We look forward to continuing our dialogue with our unions and, with the help of the Federal Mediation and Conciliation Service (FMCS), we hope to find common ground. Upon completion of the meet and confer process, we will report the results and outcomes to Congress.

We will not put into effect any portion of the proposed new systems until after we complete the meet and confer process, provide the 30-day Congressional notification of the Department's intent to implement these systems, and publish the final regulations in the Federal Register.

Before I go in to what the proposed design is, I would like to emphasize what will not change. As you know, the system will not change merit system principles that form the foundation for the federal civil service. Rules against prohibited personnel practices won't change. Protections for whistleblowers won't change nor will anti-discrimination laws. Veterans' preference is preserved under NSPS. Employee benefits – health and

life insurance, retirement, leave – NSPS does not affect the laws covering these programs. Employees facing adverse actions will still be entitled to due process. And, employees will continue to have the same, if not more, opportunities for training.

The new system will provide for:

- A simplified pay banding structure, allowing flexibility in assigning work and a move toward market sensitive pay
- A performance management system that requires supervisors to set clear expectations (linked to DoD's strategic plan) and employees to be accountable
- Pay increases based on performance, rather than longevity
- Streamlined and more responsive hiring processes
- More efficient, faster procedures for addressing disciplinary and performance problems, while protecting employee due process rights
- A labor relations system that recognizes our national security mission and the need to act swiftly to execute that mission, while preserving collective bargaining rights of employees as provided for in the NSPS statute.

The proposals for performance management are designed to foster high levels of performance and to ensure excellent performance is recognized, rewarded, and reinforced. The system is designed to make meaningful distinctions in levels of performance and to hold employees accountable at all levels. We will ensure employees

are under the performance management system for an adequate period of time before making any performance-based adjustments to pay.

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

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

The proposed regulations were developed in consultation with staff of the Merit Systems Protection Board, with extensive discussions relative to appellate options and alternatives. MSPB officials were particularly constructive and many of their numerous suggestions are reflected in our proposed appellate procedures, including the retention of MSPB administrative judges (AJs) as the initial adjudicators of employee appeals of

adverse actions. Although the NSPS law allowed DoD to establish an internal appeals process, we concluded the potential advantages of creating a new infrastructure – greater efficiency of decision-making and deference to agency mission and operations, among them – could be achieved if MSPB administrative judges were retained but with procedural modifications. The modifications we propose will streamline the process without sacrificing employee protections.

Among those changes is a proposal to allow the Department to review initial decisions of the Administrative Judges to ensure that MSPB interprets NSPS and these regulations in a way that recognizes the critical mission of the Department and to ensure that MSPB gives proper deference to such interpretation. After review, the Department may affirm the decision, remand the case to the AJ for further adjudication, modify or reverse the decision, but only based on stringent criteria. Final Department decisions may be appealed to the MSPB, which retains limited review authority established in the NSPS statute. Ultimately, an employee or the Secretary may seek judicial review if still not satisfied with the appeal decision.

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

for AJs to substitute their judgment in mitigating penalties; however, the Department will ensure that managers consider a variety of important factors in each situation before determining an appropriate penalty.

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

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

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

Implementation – a Phased Approach

Although DoD will implement the labor relations system DoD-wide, we intend to implement the human resources system in phases, or spirals, to start as early as July 2005. In the first spiral, up to 300,000 General Schedule (GS and GM), Acquisition Demonstration Project, and certain alternative personnel system employees will be brought into the system through incremental deployments over 18 months, with the first increment covering 60,000 employees. After an assessment cycle and the certification of

the performance management system required by the NSPS statute are completed, the second spiral will be deployed. Spiral two, consisting of Federal Wage System employees, overseas employees, and all other eligible employees, will be phased in over a three-year period, with full implementation to occur by 2007/2008.

Training is one of the most critical elements for a smooth and successful transition to NSPS. The Department is fully committed to a comprehensive training program for our managers, supervisors and employees. We will make sure all employees get the training needed to understand the system, how it works, and how it will affect them. The Department has a robust training infrastructure in place to train and educate its personnel and we will leverage that infrastructure as we implement NSPS specific training. We have a dual training strategy to provide functional training on all elements of the NSPS system, as well as behavioral training, with the focus on the skills, attitudes and behaviors necessary to successfully adapt to NSPS. Some of the Component behavior-based training has already begun. Other courses are in development and will be available to train all affected employees in advance of NSPS implementation.

Summary

We recognize NSPS involve significant changes. They are necessary for the Department to carry out its mission and to create a 21st century system that is flexible and contemporary while protecting fundamental employee rights. We have developed these proposals with extensive input from our employees and their representatives. We look

forward to reviewing and analyzing the comments on the proposed regulations and to the meet and confer process with our employee representatives. We remain committed to the collaborative approach we have taken in the development of NSPS and we will continue to encourage a dialogue as we proceed through the writing and development of the implementing issuances.

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

Mr. PORTER. Thank you very much.

George, that was quite an opening right there from Mr. Abell. Maybe I don't need to say much more. He said great things about you.

STATEMENT OF GEORGE NESTERCZUK

Mr. NESTERCZUK. I will see if I can reciprocate toward the end of my testimony as well. He has been a great partner.

Thank you, Mr. Chairman, for holding this hearing and for giving us the opportunity to clarify a number of issues surrounding the NSPS. I have provided a longer statement for the record. I would just like to, orally, briefly summarize some of the key points.

It's my privilege to represent the Office of Personnel Management today to discuss the proposed implementation of the NSPS. The proposed regulations will establish a new human resources management system that we believe is as flexible, contemporary, and responsive as the President and the Congress originally envisioned. The regulations are still in a proposed stage. We still have much left to do. Right now we are assessing the thousands of comments that came in during the public comment period, and we are about to enter into the meet-and-confer process with DOD's unions, during which we expect to get into a great deal of detail concerning the regulations.

Subsequently, we expect a great deal of additional work in the continued collaboration with the unions over implementing issuances within the Department. We have stipulated a continuing collaboration process in the regulations and expect to refine it during the meet-and-confer period beginning next week.

As to the content of the regulations, I think we will probably get into details during the question-and-answer period, but I would like to summarize a few key points. On pay and performance, we took a very employee-oriented approach. We are proposing a simplified classification system that will actually enhance career growth for employees. We are simplifying the pay structure using broad pay bands that will allow greater employee growth within each band, and we are making clearer distinctions on entry into supervisory and managerial tracts.

On staffing flexibilities, we believe that the regulations will better support the Department in matching its work force to its mission requirements. There are provisions for expedited hiring and targeted recruitment. Performance-based retention is built into the system with less organizational disruption whenever they need to be enforced. We have also guaranteed full veterans preference as veterans enjoy today in the work force.

On due process of accountability, we have assured due process safeguards for employees, while balancing the greater deference to DOD's mission requirements that the current system—where the current system has been lacking.

Finally, in the labor relations arena, we are proposing a system that provides the Department with more predictability and greater uniformity in the issuance of internal management directives.

Let me conclude with the following, Mr. Chairman. If DOD is to be held accountable for national security, it must have the authority and flexibility essential to that mission. That's why Congress

gave the Department and OPM the authority to waive and modify the laws governing staffing, classification, pay, performance management, labor relations, adverse actions and appeals, a broad array of flexibilities.

In developing the proposed regulations, we believe that we have succeeded in striking a better balance between union and employee interests, on the one hand, and the Department's mission imperatives on the other. At the same time, we made sure the core principles of the Civil Service were preserved.

Mr. Chairman, that concludes my statement. Thanks for the opportunity to appear before the subcommittee, and I will be pleased to respond to any questions you might have.

Mr. PORTER. Thank you, anything nice you might want to say about Charles while you are here?

Mr. NESTERCZUK. He has been terrific, a very understanding fellow. Thank you.

[The prepared statement of Mr. Nesterczuk follows:]

Statement of
George Nesterczuk
Senior Advisor to the Director on Department of Defense
U.S. Office of Personnel Management

Before the

Subcommittee on the Federal Workforce and Agency Organization
Committee on Government Reform
U. S. House of Representatives

On

"NSPS: The New Department of Defense Civilian Personnel System – Reaching Readiness"

April 12, 2005

I. Introduction

Mr. Chairman, it is my privilege to represent the Office of Personnel Management before you today to discuss the proposed regulations implementing NSPS in the Department of Defense (DOD). The proposed regulations will establish a new human resources (HR) management system that we believe is as flexible, contemporary, and responsive as the President and the Congress envisioned.

The proposed regulations are the result of an intense collaborative process that has taken over a year. There is still much to do before the NSPS proposal can be finalized, beginning with the review of all the comments we received and beyond that the formal meet and confer period with DOD unions that begins next week. It has been a privilege for me and the team at OPM to work with the dedicated men and women of DOD, its employees and senior leadership in the development of this system. This monumental task has been challenging and rewarding and I appreciate your continued interest and support as we work through the development and implementation process.

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

Mr. Chairman, in discussing the proposed regulations, it is important that we also address the process employed to gather employee input and how OPM will work with DOD to ensure employees have meaningful input in the remaining design and implementation. I will address these two procedural points first and then summarize the major highlights of each of the key components of the proposed regulations.

Before that discussion, let me say that we are well aware of the intense interest in the proposed regulations. We very much appreciate the comments we have received from employees, employee representatives, and the advice we have received from Members of Congress. We would like to acknowledge the continuing interest from Chairman Davis and the special concerns raised by Ranking member Waxman together with other Members of the committee. We are reviewing their recommendations very carefully and they will be most helpful during this meet and confer process. While we believe that we have developed a balanced proposal that is faithful to the fundamental principles of the civil service, we do not view our proposals as necessarily the last word and look forward to addressing each of the issues raised by these Members.

II. Collaboration: Outreach and Employee Involvement

The NSPS development process has been a broad based collaboration involving a multitude of DOD employees, managers, supervisors, labor union partners and key stakeholders. Over the course of the last year, DOD held over 50 Town Hall meetings in locations throughout the world. Over 100 Focus Groups were convened separately with employees (including bargaining unit representatives), managers, and HR professionals and practitioners. Briefings were initiated with a host of public interest groups, employee advocacy groups, and other stakeholders including veterans service organizations.

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

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

We also launched a special effort to engage the Department's 43 unions in meaningful discussions over key components of the NSPS. Beginning in April of last year until early December, we held 10 meetings with the unions. In an attempt to address each other's priorities, OPM and DOD set the agenda for some of the meetings, while the unions set the agenda for others. We developed presentations of possible NSPS design options in order to better focus discussion in specific issue areas. The meeting format was plenary in nature, with 25 to 30 unions from their Coalition participating in most of

the sessions. We even held separate meetings with the smaller number of non-Coalition unions. We received what we consider useful input from these meetings, particularly as the unions shared experiences of past practices that had worked or failed in DOD and other government agencies.

This process is far from over. The formal "meet and confer" process established in the NSPS statute is scheduled to begin April 18th. Two pre-meetings have already been held with the unions to work out details such as the meeting schedule and to accommodate other concerns raised by the unions such as the assurance of adequate access to documents. We are looking forward to several weeks of productive meetings and are very interested in receiving their views on the proposed regulations through this formal process.

III. Continued Collaboration

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

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

We also propose to have the Secretary develop procedures to allow continuing collaboration with organizations that represent the interests of substantial numbers of non-bargaining unit employees. We believe this process will allow the Department to maintain a broad outreach to its stakeholder community during the continuing evolution of the NSPS.

IV. Pay, Performance, and Accountability

Mr. Chairman, I would now like to address key highlights of the proposed regulations. As I mentioned earlier, these important components of the proposal are still being reviewed and discussed through the formal comments we have received and also through the upcoming "meet and confer" process.

The new pay system proposed in the regulations was designed to fundamentally change the way DOD employees are paid, to place far more emphasis on performance and the labor market in setting and adjusting rates of pay. Instead of a "one size fits all" pay system based on tenure, we have proposed a system that bases all individual pay

adjustments on performance. No longer will employees who are rated as unacceptable performers receive annual across-the-board pay adjustments, as they do today. No longer will those annual pay adjustments apply to all occupations and levels of responsibility, regardless of market or mission value. Instead, those adjustments will be based on national and local labor market trends, recruiting and retention patterns, and other key employment factors. And no longer will employees who merely meet time-in-grade requirements receive virtually automatic pay increases, as they do today. Instead, individual pay raises will be determined by an employee's annual performance rating.

This system is entirely consistent with the merit system principles that are so fundamental to our civil service. One of those principles states that Federal employees should be compensated ". . . with appropriate consideration of both national and local rates paid by employers . . . and appropriate incentives and recognition . . . for excellence in performance." See 5 U.S.C. 2301(b)(3). The current system falls short because it has minimal ability to encourage and reward achievement and results. Over 75 percent of the increase in pay under the current system bears no relationship to individual achievement or competence. However, some have argued that by placing so much emphasis on performance, we risk "politicizing" DOD and its employees. Such "politicization" would constitute a prohibited personnel practice, something expressly forbidden by the Congress in giving DOD and OPM authority to jointly prescribe the NSPS. Moreover, it would tear at the very fabric of our civil service system.

The merit system principles provide that Federal employees should be ". . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." See 5 U.S.C. 2301(b)(8)(A). And they are. Section 2302(b)(3) of title 5, United States Code, makes it a prohibited personnel practice to "coerce the political activity of any person . . . or take any action against any employee" for such activity. Those laws remain unchanged, intact and binding on DOD. The law forbids coercion for partisan political purposes in taking any personnel action with respect to covered positions, and it most certainly applies to making individual pay determinations. The proposed NSPS regulations did not dilute these prohibitions in any way. A close examination of the proposed regulations reveals that they include considerable protection against such practices – and no less than every other Federal employee enjoys today.

For example, if a DOD employee believes that decisions regarding his or her pay have been influenced by political considerations, he or she has a right to raise such allegations with the Office of Special Counsel (OSC), to have OSC investigate and where appropriate, prosecute, and to be absolutely protected from reprisal and retaliation in so doing. These rights have not been diminished in any way whatsoever. Moreover, supervisors have no discretion with regard to the actual amount of performance pay an employee receives. That amount is driven strictly by mathematical formula. Of the four variables in the formula -- the employee's annual performance rating; the "value" of that rating, expressed as a number of points or shares; the amount of money in the performance pay pool; and the distribution of ratings – only the annual rating is determined by an employee's immediate supervisor, and the rating is subject to review and approval by the employee's second-level manager.

Once the rating is approved, an employee can still challenge it before it is final through an administrative process if he or she does not think it is fair. Finally, the other factors governing performance pay are also shielded from any sort of manipulation.

Individual managers will have no say in how many points or shares a rating is worth, or how much money is in the pay pool; that will be determined at the headquarters level – by the Department or possibly its component organizations. And as far as the distribution of ratings is concerned, the regulations ban any sort of quota or forced distribution.

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

Of course, DOD managers will receive intensive training in the new system, a further safeguard against abuse. And they too will be covered by it, with their pay determined by, among other performance criteria, how effectively they administer this system. The same is true of their executives, now covered by the new Senior Executive Service pay-for-performance system – indeed, OPM regulations governing that system establish clear chain-of-command accountability in this regard. With these considerable protections in place, we believe ample safeguards will exist to prevent the pay of individual DOD employees from becoming "politicized" in a performance-based environment. To the contrary, we believe the American people expect that performance should affect the pay of public sector employees. That is exactly what the NSPS pay system is intended to do.

The institution of a modern performance culture is no easy task, but neither is it a partisan issue. Performance based accountability is widely recognized as the most effective way to manage employees whether in the private or public sector, in a large or small organization, whether by a Republican or Democrat Administration. The proposed NSPS pay system incorporates the essential elements of good government: accountability, due process, transparency, and fairness. The dedicated and hard working employees of the Department of Defense will flourish in a system that finally sets clear expectations, and rewards employees accordingly, for accomplishing results. The best and brightest demand a performance culture that rewards excellence. DOD must have a modern pay system to be a competitive employer in the 21st Century.

V. Staffing Flexibilities

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

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

the duration of time-limited appointments, advertising requirements, examining procedures, and appropriate uses of time-limited employees.

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

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

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

VI. Accountability and Due Process

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

In this regard, DOD employees will still be guaranteed notice of a proposed adverse action. While the proposed regulations provide for a shorter, 15-day minimum notice period (compared to a 30-day notice under current law), this fundamental element of due process is preserved. Employees also have a right to be heard before a proposed adverse action is taken against them. This too is a fundamental element of due process, and the regulations also provide an employee a minimum of 10 days to respond to the charges specified in that notice – compared to 7 days today. In addition, the proposed

regulations continue to guarantee an employee the right to appeal an adverse action to the Merit Systems Protection Board (MSPB). The proposed regulations also provide bargaining unit employees the option of contesting an adverse action through a negotiated grievance procedure all the way to a neutral private arbitrator, if their union invokes arbitration.

In adjudicating employee appeals, regardless of forum, the proposed NSPS regulations place a heavy burden on the agency to prove its case against an employee. Indeed, we propose to establish a *higher* burden of proof: a "preponderance of the evidence" standard for all adverse actions, whether based on misconduct or performance. While this is the standard that applies to conduct-based adverse actions under current law, it is greater than the "substantial evidence" standard presently required to sustain a performance-based action.

Finally, the proposed regulations authorize MSPB (as well as arbitrators) to mitigate penalties in adverse action cases, but only under limited circumstances. Thus, the proposed regulations provide that *when the agency proves its case against an employee by a preponderance of the evidence,* MSPB (or a private arbitrator) may reduce the penalty involved *only* when it is "so disproportionate to the basis for the action that it is wholly without justification." Although it is admittedly tougher than the standards MSPB and private arbitrators apply to penalties in conduct cases today, it provides those adjudicators considerably more authority than they presently have in performance cases. Currently, the law (chapter 43 of title 5) literally precludes them from mitigating a penalty in a performance-based action taken under that chapter. Moreover, MSPB's current mitigation standards basically allow it (and private arbitrators) to second-guess the reasonableness of the agency's penalty in a misconduct case, without giving any special deference or consideration to unique circumstances of an agency's mission.

The President, the Congress, and the American public all hold the Department accountable for accomplishing its national security mission. MSPB is not accountable for that mission, nor are private arbitrators. Given the extraordinary powers entrusted to the Department and its employees, and the potential consequences of poor performance or misconduct to that mission, DOD should be entitled to the benefit of any doubt in determining the most appropriate penalty for misconduct or poor performance on the job. There is a presumption that DOD officials will exercise that judgment in good faith. If they do not, however, providing MSPB (and private arbitrators) with limited authority to mitigate is a significant check on the Department's imposition of penalties. That is what the new mitigation standard is intended to do, and it is balanced by the higher standard of proof that must first be met.

VII. Mission Imperatives and Labor Relations

As I stated before, the Department is a large and complex organization, with widely dispersed components and commands, and varied mission elements mixing both military and civilian workforces. With lives literally at stake, the Department's commanders cannot afford mission failure. The chain of command depends on an ethos of accountability, and this goes to the heart of some of the most important provisions of the proposed regulations: labor relations. Accountability must be matched by authority, and here, the current law governing relations between labor and management is out of

balance. Its cumbersome requirements can impede the Department's ability to act, and that cannot be allowed to happen. The proposed regulations ensure that the Department can meet its mission, but in a way that still takes union and employee interests into account.

Critics of these proposed changes will argue that current law already allows the agency to do whatever it needs to do in an emergency. However, that statement, while true, explains why the current law is inadequate when it comes to national security matters. The Department needs the ability to move quickly on matters before they become an emergency. Current law simply does not allow DOD to take action quickly to prevent an emergency, to prepare or practice for dealing with an emergency, or to implement new technology to deter a potential threat. Rather, the current law requires agencies to first negotiate with unions over the implementation, impact, procedures and arrangements before it can take any of those actions. By the time an "emergency" has arisen, it is literally too late. OPM recognizes that this simply cannot continue.

Permit me to elaborate on one other related issue. The proposed National Security Labor Relations Board (NSLRB), will be an independent Board appointed by the Secretary to resolve collective bargaining disputes in the Department. The NSLRB is expressly designed to ensure that those who adjudicate labor disputes in the Department have expertise in its mission. Its members will be every bit as independent as any of the many other Boards or Panels in the Department, or any agency's Administrative Law Judges (ALJs). Just as an agency's ALJs operate outside the chain of command, so too will NSLRB's members. Just as ALJ decisions are binding on the agency that employs them, so too will NSLRB's decisions be binding. However, the proposed regulations make it clear that the NSLRB's decisions will be subject to at least *two levels* of outside review through appeal by either party to the Federal Labor Relations Authority and the Federal courts of appeals. While I believe this approach is well balanced, we are open to exploring options to enhance this proposed process and this will very likely be an area of consideration in the "meet and confer" process.

VIII. Conclusion

If DOD is to be held accountable for national security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM the authority to waive and modify the laws governing staffing, classification, pay, performance management, labor relations, adverse actions, and appeals. In developing the proposed regulations we believe that we have succeeded in striking a better balance – between union and employee interests on one hand and the Department's mission imperatives on the other. At the same time we made sure the core principles of the civil service were preserved.

Mr. Chairman this concludes my statement. Thank you for the opportunity to appear before the subcommittee. I would be pleased to respond to any questions you and members of the subcommittee may have.

Mr. PORTER. Mr. McPhie.

STATEMENT OF NEIL A.G. McPHIE

Mr. MCPHIE. I was hoping he would say something nice about me, but——

Mr. PORTER. There is still time.

Mr. MCPHIE. Chairman Porter and Ranking Member Davis and Member Van Hollen, My name is Neil McPhie, and I have the honor of serving as chairman of the U.S. Merit Systems Protection Board.

Thank you for the opportunity to appear before you and participate in this hearing on the proposed Department of Defense National Security Personnel System [NSPS]. First, I want to congratulate DOD and OPM, the designers of the NSPS, for proposing an appeals process that guarantees due process to public employees.

MSPB's formal statutory role in design process is to consult DOD and OPM to assist those agencies in ensuring that all employees are afforded the protections of due process. The Board consulted with DOD and OPM to develop the regulations to implement the NSPS.

Members of my staff participated in working groups and attended numerous meetings throughout this process. Some of that staff is present here today. The proposed regulations reflect some of the suggestions generated from the collaborative process. For example, I appreciate DOD's and OPM's recognition of the need for carefully defined mandatory removal offenses.

As an independent adjudicatory agency, MSPB is not in a position to judge among the various personnel systems that policymakers may devise. Rather, MSPB's role is to adjudicate employee appeals pursuant to the system applicable to a particular department or agency.

MSPB is pleased that the DOD has chosen to retain MSPB's adjudicatory services. I believe that MSPB's participation is critical to establishing the credibility of the process. The DOD appeals system envisions MSPB's involvement at two stages. An employee has a right to appeal an adverse action to an MSPB administrative judge. After DOD finalizes the administrative judge's decision, either taking no action or by modifying it within the prescribed period, the employee has the statutory right to petition the full board for review.

MSPB has a distinguished history of providing fair proceedings and sensible decisions. The full Board at MSPB and administrative judges will bring integrity and objectivity to the NSPS employee appeals process and will continue MSPB's tradition of providing fair proceedings and objective decisions. I am confident that the Board will provide the same high quality of services for which it has become known.

The compressed timeframes in the proposed system will create a more efficient appeals system, but may pose a challenge to current Board resources as it strives to reduce its processing time for all board cases.

However, several provisions of the proposed regulations may prove especially helpful in reducing the amount of time it takes to

adjudicate DOD cases. For example, the provision grants the Board to issue a summary judgment when there are no material facts in dispute, will facilitate the expedited adjudication of DOD appeals.

The Board understands the challenges it faces and has already begun to examine ways to reduce case processing times. That study is not complete, but indications are that case processing times can be significantly reduced by streamlining processes, instituting technological innovations, implementing more efficient management practices and securing additional resources.

My goal as head as the MSPB is to treat all cases equally. That is why the Board has requested additional funds as part of its budget request for fiscal year 2006, to enable the Board to hire more staff and provide appropriate training and enhance technology. These additional resources will facilitate the Board's efforts to adjudicate DOD and DHS employee appeals within the required timeframes, while continuing to provide efficient and timely adjudicatory services to other client agencies.

In conclusion, I'm optimistic of the future of the Federal Civil Service. The service is poised to undergo a significant transformation that may culminate in far-reaching changes in how the government operates. I believe that in the end, the Federal Civil Service will be a more attractive place to work. The Board recognizes that its role in safeguarding Civil Service protections is an important component in the current transformation of human resource management practices governmentwide. The implementation of the NSPS will be a significant early step in this process.

We look forward to continued opportunities for consultation with our colleagues at DOD and OPM as they move toward final regulations and ultimately to implement the NSPS.

That ends my oral statement. And I will be happy to take any questions you may have.

Mr. PORTER. Thank you very much.

[The prepared statement of Mr. McPhie follows:]

Hearing Statement

Submitted by

Neil A. G. McPhie, Chairman

U. S. Merit Systems Protection Board

"NSPS: The New Department of Defense Civilian Personnel System – Reaching Readiness"

Subcommittee on the Federal Workforce and Agency Organization

Committee on Government Reform

United States House of Representatives

The Honorable Jon Porter	**The Honorable Danny K. Davis**
Chairman	**Ranking Member**

April 12, 2005

Good afternoon Chairman Porter, Ranking Member Davis and Members of the Committee,

My name is Neil McPhie and I have the honor of serving as Chairman of the U.S. Merit Systems Protection Board. Thank you for the opportunity to appear before you and participate in this hearing on the proposed new Department of Defense (DoD) National Security Personnel System (NSPS). First, I want to congratulate DoD and the Office of Personnel Management (OPM), the designers of the NSPS, for proposing an appeals process that guarantees due process to its covered employees.

MSPB's formal statutory role in the design process is to consult with DoD and OPM to assist those agencies in "ensur[ing]" that all employees "are afforded the protections of due process." 5 U.S.C. 9902 (h)(B) As mandated by that statute, the Board participated in the consultative process with DHS and OPM for developing the regulations to implement the NSPS. Members of my staff participated in working groups and attended numerous meetings with DoD and OPM representatives throughout this process. The proposed regulations as published in the Federal Register on February 14, 2005, reflect some of the suggestions generated from the collaborative process. For example, I appreciate DoD's and OPM's recognition of the need for carefully and narrowly defined mandatory removal offenses.

As an independent adjudicatory agency, MSPB is not in a position to judge among the various personnel systems that policy makers may devise for particular departments and agencies. Rather, MSPB's role is to adjudicate employee appeals pursuant to the system applicable to a particular department or agency. MSPB is pleased that the DoD has chosen to retain MSPB's adjudicatory services. I believe that MSPB's participation is critical to establishing the credibility of the process. The DoD appeals system envisions MSPB involvement at two stages. By regulation, an employee has the right to appeal an adverse action to an MSPB administrative judge. After DoD finalizes the administrative judge's decision, either by taking no action or by modifying it within the prescribed period, the employee has the statutory right to petition the full Board for review.

MSPB has a distinguished history of providing fair proceedings and sensible decisions. The full Board and MSPB's administrative judges will bring integrity and objectivity to the NSPS employee appeals process, and will continue MSPB's tradition of providing fair proceedings and objective decisions. I am confident that the Board will provide the same high quality of services for which it has become known.

The compressed timeframes in the proposed system will create a more efficient appeals system, but may pose a challenge to current Board resources as it strives to reduce its processing time for all Board cases. Several provisions of the DoD regulations may prove especially helpful in reducing the amount of time it takes to adjudicate DoD cases. For example, the provision which grants the Board the authority to issue a summary judgment when there are no material issues of fact will facilitate the expedited adjudication of DoD employee appeals. The Board understands the challenges it faces and has already begun to examine ways to reduce case processing times. That study is not complete, but indications are that case processing times can be significantly reduced by streamlining processes, instituting technological innovations, implementing more efficient management practices, and securing additional resources.

My goal as head of the MSPB is to treat all cases equally. That is why the Board has requested additional funds as part of its budget request for fiscal year 2006 to enable the Board to hire more staff, provide appropriate training and enhance technology. These additional resources will facilitate the Board's efforts to adjudicate DoD and DHS employee appeals within the required timeframes while continuing to provide efficient and timely adjudicatory services to all other client agencies.

In conclusion, I am optimistic about the future of the Federal civil service. The Federal civil service is poised to undergo a significant transformation that may culminate in far-reaching changes in how the government operates. I believe that in the end, the Federal civil service will be a more attractive place to work. I believe however, that the changes must be appropriately managed and adjustments made from time to time, when appropriate.

The Board recognizes that its role in safeguarding civil service protections is an important component in the current transformation of human resource management practices government-wide. The implementation of the NSPS will be a significant early step in this process. The staff and management of the Merit Systems Protection Board are uniquely positioned to contribute in a meaningful way to Federal human capital reform and we welcome the opportunity to do so. We look forward to continued opportunities for consultation with our colleagues at DoD and OPM as they move forward to finalize these regulations and ultimately to implement the NSPS.

Again, thank you for the opportunity to participate in this hearing and I will be happy to respond to any questions you might have at this time.

Mr. PORTER. I would now like to open up our Q and A period. I would like to ask my friends at DOD and OPM, Mr. Walker has discussed for a number of years, but specifically today, about the creation of a Deputy Secretary of Defense for Management. What do you think about that idea?

Mr. ABELL. Mr. Chairman, I think that over the history of the Department, the role that the Secretary of Defense has laid out for the Deputy Secretary of Defense has varied. Many times, the Deputy Secretary of Defense is the Chief Operating Officer. Other times, he's been—another role has been defined for him. I think the organization and management of the Department of Defense should be one that fits the style and the talents of the Secretary of Defense.

So I would urge that you and your colleagues engage the Secretary of Defense on this question and see how he would do that or what he would suggest to you. I would note that a bifurcation of the chain of command is almost always a bad thing. So if the Department of Defense was split and some things going to one Deputy Secretary and some things going to another, I would suspect that we would end up with gaps and seams, but that is just my personal view on that one.

Mr. PORTER. I think there are gaps and seams the way it is. And I appreciate your comments and I understand in your capacity, as you should be, of being selective in your comments, but it's something I want to spend some time on and look forward to continued discussions on that subject.

Mr. Nesterczuk.

Mr. NESTERCZUK. We don't really have an institutional position on that, and so I would rather not speak for OPM. That really is an issue for the Executive Office of the President together with the Secretary of Defense to sort out.

I can comment personally on it, having been an observer on these matters for loath 25, 30 years, that I tend to share Charlie's view on that; that bifurcation really doesn't serve the Department or any department well. We tend to integrate both policy and resource responsibilities in the second, third, and fourth-level chains of command. All managers are responsible for integrating their resource requirements with their policy consideration and evaluate it as such. That kind of dynamic decisionmaking, as it works its way up the chain, I think serves the organization as a whole the best.

Mr. PORTER. Back to, I guess, a question I had earlier, and that is regarding some of the concerns from employees and management and funding of that training and making sure they understand the new culture and the direction. What assurances can we give to your employees that, in fact, the managers will be trained to manage, and employees will then understand the processes, and whether it's in writing or verbal? What assurances do we have that you are going to be able to take this work force and modify it into a pay for performance?

Mr. ABELL. First of all, Mr. Chairman, it's not in our ethos or not in our interest to fail, so we want to succeed, and training is the key to success. It's also one of the things that the Department does well every day. For NSPS in particular, we have developed several training courses, core training courses essentially. They will be ad-

ministered in a decentralized way by the services and defense agencies. Managers and supervisors will get a minimum of 18 hours of training; employees, a minimum of 13 hours of training; HR practitioners, up to 40 hours of training; and senior leaders, senior supervisors, a minimum of 6.

We have a lot of experience with our alternative personnel systems and various demonstration projects. We are developing now an evaluation system to ensure that the training took, so it will be standards-based as opposed to hours-based. Merely completing the program doesn't necessarily get you a go. Before anyone has their pay subject to a performance Board, we will have mock payouts, where the employees and the managers and the supervisors will get to practice this all at once in a transparent way so we can see where the competencies are and get that credibility, if you will, but also tell us where we need additional training resources. We are going to track the training in our automated system so we know who has been trained and who has not. And we plan to have a readiness checklist. Before NSPS is deployed to an organization, the organization must have met the standards on a checklist. We think we have a good program. We won't put an organization into NSPS until they are ready.

Mr. PORTER. Mr. Davis.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman.

Mr. Secretary, let me ask you, DHS has contracted with Northrop Grumman to write the details to implement its new personnel system. Will the details of DOD's system be crafted by agency, human resources management staff, or do you see that being contracted or outsourced out?

Mr. ABELL. Sir, we don't plan to contract the creation of those regulations out. Again, we have extensive experience. We are using working groups which are not just HR practitioners but also employees and supervisors to assist us as we do that.

Mr. DAVIS OF ILLINOIS. Chairman McPhie, you heard the discussion with Mr. Walker relative to more detailed expectations. Would that help you and your colleagues when it's time for you to do a review on appeal? Would that help you to be in a better position, you think, to make the best decisions?

Mr. MCPHIE. Well, let me answer it this way, Mr. Davis. I have practiced law myself, and it seems to me I have always gotten better outcomes when I had objective pieces of evidence in the record. I can't speak for every MSPB judge, but I assume a judge wants to have a fully explicated record.

The thing I would urge, though, this is a brand-new system. You know, lots of things have to be worked out, even at the level of MSPB in hearing a specific case. I believe MSPB judges are going to try to get into the record or urge the parties to provide the record with all the documentation so that the judge may render a fair and good decision.

Mr. DAVIS OF ILLINOIS. Sounds to me—and I'm not a lawyer—that you're saying that the clearer the evidence or the expectations, the more comfortable one can be that the decisions they arrive at are rendered based upon evidence that two people looking at would see the same way, as opposed to one person looking at the glass

and perhaps saying, that glass is half empty and another person saying it's half filled?

Mr. MCPHIE. Documentary evidence is documentary evidence. Oral evidence is different, and there you go to credibility of people and so on. Additional documents won't help you. But it seems to me as I sit here and think of it, if you're going to have de novo review, that is, review based on the record developed below, I believe it's very important to have a fully developed record below, so that the Board, when it reviews it, ultimately the Federal circuit court when it reviews it, would have a full record before it so it can render, I believe, an objective, usable decision.

Mr. DAVIS OF ILLINOIS. Thank you very much. And I think people who kind of follow the way I think about some of these situations know that I kind of feel that OPM plays a junior partner role in some of these deliberations as opposed to being an equal partner. And I'm looking at the general provisions section 9901–105 in coordination with OPM, and it says that the OPM Director will be provided an opportunity as part of DOD's normal coordination process to review and comment on recommendations and officially concur or not concur with all or part of them. The Secretary of Defense will take the Director's comments and concurrence or nonconcurrence into account and advise the Director of his determination with reasonable advanced notice of its effective date. Thereafter, the Secretary and the Director may take such action or actions as they deem appropriate consistent with their respective statutory authorities and responsibilities.

This section does not read as though the Secretary and Director are equal partners. Is there any recourse, Mr. Secretary, Mr. Nesterczuk, for OPM—I mean when there's disagreement—let's say you can't arrive at an agreement, what happens? Who prevails in this kind of situation?

Mr. ABELL. The process you described—and they are in the proposed regulations—is not different than the processes that are in place today, in that two officers who are appointed by and report to the President have their conversations through their staffs, make their points. And should they ultimately not agree, the disagreement is adjudicated in the Executive Office of the President. That's what that says.

The practical effect of all that is that very few disagreements would ever reach the Secretary and Director level of adjudication. Folks like George and I, or Dr. Sanders and Mary Lacy, will work those out. But if there is something so fundamental to the core responsibilities of either and it does reach that level, it will be adjudicated in the Executive Office of the President, not unlike a disagreement between Treasury and Commerce.

Mr. NESTERCZUK. Let me comment on that, Mr. Davis, if I may. The language you specifically cited addresses an issue that goes way beyond the enabling regs, way beyond implementing issuances into practical day-to-day decisions where we have reserved basically some role for OPM. In issuing enabling regulations, we are full partners. There's no question of that in the enabling regulations that we're discussing, which require both signatures of the Director of OPM and the Secretary of Defense. And following that

with more detail in implementing issuances, we will be working with the Department in implementing those issuances.

Once they are in effect, we have reserved for OPM an additional consultative role, and how that consultative role plays out is the language you specifically read.

We don't anticipate collisions in those areas very often. These will be practical issues of setting pay levels based on surveys, pay surveys, market conditions, and things of that sort or when it comes time to implementing hiring authorities, specific details on that, we would be consulting with DOD before they issue those. But we listed the specific instances where those provisions would kick in, and those are in the regulations as well.

Mr. DAVIS OF ILLINOIS. The National Defense Authorization Act specifically states "jointly prescribe," but I certainly appreciate the practicality of the Executive Office sort of adjudicating any disputes.

Thank you very much.

Mr. PORTER. Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. And thank you, gentlemen, for your testimony.

I just wanted to followup on a couple of issues that have been raised, especially the testimony by Mr. Walker. I was not able to be present when he delivered the testimony, but I have been reviewing the testimony. And much of the concerns he raised there have been raised in earlier hearings with respect to regulations and Department of Homeland Security as they relate to pay for performance. And pay for performance is something I think everyone agrees with in concept. We want to reward employees who perform better. And certainly employees who are not up to par should not be rewarded. The key is coming up with a system that does that in a fair, predictable manner, one that the employees have faith and confidence in, one that is not going to be used for political purposes or one that is not going to be there to reward the pet of the manager.

And the devil is in the details and the details are absolutely critical in this area. This committee reviewed the pay-for-performance plans that were put in place by GAO some time ago and decided that based on the way they phased it in in a predictable manner in the oversight and the ability for employees to have input into that process and know the standards which they were being asked to perform, that is something we can move forward with.

In reviewing the regulations with respect to the Department of Defense, there are a couple of issues that have been raised here. First was the issue of defining the details of implementation of the system. Now, as I understand your testimony, Mr. Secretary, you agree that needs to be spelled out and you are going to be sure that before this is actually fully implemented in any particular agency, that you're going to flush out the details; is that correct?

Mr. ABELL. Yes, sir. We will flush out details during the meet-and-confer process which begins on April 18. At the end of that process, I think the detail that many have asked for will be apparent. But we will also make sure that we have moved from regulation to execution by—through training, and we will have a mock payout.

I agree with you, it is essential to the system that good performance be rewarded, that bad performance be incentivized to turn to good performance, that the system is credible and has the trust of the employees. I agree with you on all those points.

Mr. VAN HOLLEN. With respect to predictability and the expectations we are going to measure against, one of the other issues raised in Mr. Walker's testimony is that while the regulations allow the core competencies to be spelled out in writing, it doesn't require it. And I ask you, would you object to them requiring they be spelled out?

Mr. ABELL. Sir, it's my expectation, we will flush this out during meet and confer, but my expectation is that written performance standards will be part of the final regulations, but it is something that we are anxious to talk to our union counterparts in the meet-and-confer process.

Mr. VAN HOLLEN. Finally, the issue of making sure there is a formal or an established process for continuous input from employees, that is going to be I hope part of your proposal going forward; is that right?

Mr. ABELL. I would go beyond that. The continuing and informal process will go both ways. We need supervisors to counsel and mentor their employees. We need employees to be able to express their views to their supervisors and perhaps make suggestions as to how their performance should be judged. It goes both ways; and that is continuous, I agree.

Mr. VAN HOLLEN. I know this committee will continue to work with you in this area. If things get off on the wrong track, it becomes very difficult to regain the confidence and faith of employees.

Mr. McPhie, if I could ask you, because we had an earlier hearing on the Department of Homeland Security's regulations; and, as I recall, your testimony at that time was more critical of their proposals going forward than your testimony seemed today of the Department of Defense's provisions regarding employee ability to appeal. What are the differences here? Are there some differences here that you are concerned of? Could you elaborate on the differences?

Mr. MCPHIE. I don't think they were more critical or less critical. I think what got buried was the statements that good things will happen in the DHS system.

The criticism that I made and continue to make here, if you want to call it that, I think it's more of a reality check. The MSPB is going to have to overcome some challenges to maintain its part of the bargain. Now, clearly, that brings into question some of the things I testified at the DHS hearing and now. Resources is an issue I stressed then and I made the point here again. The compressed timeframes are going to have—they require great efficiencies in the system. And the point I tried to make there, perhaps I will make a little bit more clearer here, is that MSPB is critical in ensuring credibility. That's what I think a lot of people are alluding to at this hearing.

You know, most DHS and DOD require a more efficient system. There's no question about that. And to get those efficiencies will require MSPB to change the way it does business. That's a challenge. And we are trying to solve that challenge as we speak. We are

looking at different ways to do business differently so that we not only do DHS or DOD cases promptly, but we do everybody else's case promptly. The last time I was a little bit more detailed about two tracks and so on. That's not the goal. The goal is one case-processing system.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. I don't have other testimony, but this is a much shorter set of testimony than before. And my sense is that there are not that many differences between the two proposals. And you in your previous testimony were critical of the standard of review and some other things as well. There is one thing in the DOD regulations that actually is less protective of employee appeal rights as I read this than in the Department of Homeland Security, and this is raised not in your testimony but in the GAO testimony. And I was just surprised that I didn't hear you mention it, which I understand is in contrast to DHS's final regulations. These proposed regulations permit an internal DOD review of the initial decisions issued by MSPB adjudicating officials. And under this internal review, DOD can modify or reverse an initial decision or remand the matter back to the adjudicating official for further consideration.

Doesn't that significantly undercut the existing power and independence of the Merit Systems Protection Board? And there are no regulations at all that offer additional details on the Department's initial review process; how they are going to handle that. What is your response to that?

Mr. MCPHIE. That point is covered in my written testimony and my oral comments here today. I noted that. But this review body, somebody who is not satisfied—either party who is not satisfied with what the review body does, as I note, has the right to appeal that decision to the full Board. And why is that important? Because any review beyond that to the circuit court has to be from a final Board decision. That's how the NSPS is drafted.

Mr. VAN HOLLEN. I look forward to continuing to discuss this issue. It's not clear in the regulations as to how that process would unfold.

Mr. PORTER. Congresswoman Norton.

Ms. NORTON. Thank you, Mr. Chairman. I apologize. I have been detained in an important meeting, but I wanted to come by. And I have listened to the questioning thus far and asked staff about the clarification—I heard some clarification on pay for performance.

And I want to issue a warning that I think any lawyer in the room will agree with me will be the case. Pay for performance is something that I certainly prefer. In my office, some people get bonuses at the end of the year and some people get higher bonuses than other people. We can do that in the Congress. So, you might wonder, why didn't the Congress go to this sooner? And let me tell you why, so everybody understands what you're walking straight into. Why are they stuck with this system which seems so uniform? My friends, it's because of State action and due process. Unlike other employers, a State employer is bound by the Constitution to offer due process. That's very different from if you work for a private employer.

What does that mean here? You are radically moving to a different system where the Federal Government has not protected

itself as the present system does against State action lawsuits. If you get dismissed from the Federal Government, how you get promoted, very different from how you do it at GM. And my friends, in case you think it's because Uncle Sam is the fairest employer, you know, or in case you think it's because the unions made him do it, let's understand that we're talking about an employer that is bound by the 14th amendment and all that implies about due process.

OK. Then let us move to a pay-for-performance system where, at least so far, the employer must convey somehow or other—we have to assume because we have seen nothing in writing or orally—what the expectations are. The first time that this system goes into place large scale, and there are differences in how people are paid and evaluated without written expectations beforehand, you will not be able to count the lawsuits. And there will not be any distinction between so-called conservative judges and liberal judges. It will be a straight-out whether there has been due process to deprive somebody of pay he might otherwise have received because that person has not met expectations which have not been communicated to him in writing.

So I don't care what you think about it. Understand you are moving to a system that is the way it is because the Federal Government recognizes the great difference between it and any private employer, that State action is involved every time it handles an employment matter with an employee.

Now, if you want to move radically from that, fine. But don't think you are going to be able to move off of due process 14th amendment requirements. And my friend, you are not going to be able to differentiate who gets what pay when you are hauled into court without pulling out a piece of paper saying, "I told them what the expectations were." And you will be called into court. You are still the United States of America. You are still subject to the due process clause of the 14th amendment. You will be hauled into court. You have to be able to say, she didn't do this, that, or the other, and she did. And that's why she got more pay than she got. And if you say, look, I told her so, you're out of court right there.

So whatever you think of our view here about the fairness of telling somebody in advance in writing what you expect before you evaluate them and either give them a certain amount of pay or don't, regardless of whether you are for that or not, understand that it is not for you to decide. That has been decided for you by the Constitution of the United States. We can argue about how much you have to do, but this much is clear. Oral communication—unless you got a tape recorder there so that the employer can take it down and have a copy—on its face does not meet due process requirements if pay is to be based on what you have, "told the employee."

I want to leave that with you, Mr. Chairman, quite apart from what we ought to do. I think there is a serious problem of possible litigation unless we get some greater clarity on written evaluations. I speak not only from a matter of fairness, but constitutional fairness. Thank you very much.

Mr. PORTER. I would like to have the witnesses respond to a few of your thoughts. I think it is a good opportunity.

Ms. NORTON. Anybody with a bar card want to disagree with what I just said?

Mr. MCPHIE. Maybe it's only fair—I touched on it early on, not in as much detail, but due process, the fundamentals of due process is notice of what you are being accused of and an opportunity to defend yourself in a meaningful fashion. I believe, as I said early on, this process guarantees that, and therefore it guarantees the due process that's expected in the Constitution, which is minimum due process. Beyond that, I can't comment.

Ms. NORTON. Can you clarify what the notice is here?

Mr. MCPHIE. Right now, employees are told what they are being accused of.

Ms. NORTON. You think any court—first of all, you are not accused of anything. You didn't get the same pay as anybody else.

Mr. MCPHIE. Accused of or being disciplined for, somebody crafts an order and hands it to the employee consistent with prevailing judicial precedent that's required. There's no question that it is required; it is. And there is no question that the Federal Government follows it; it does. And at some point in time, the employee is entitled to a hearing and whatnot in this process.

The hearing is initially going to be in front of an MSPB judge with appeal, with an in-between step to an internal review body, and then an appeal upstream to the full MSPB Board. And if you follow the life of a case beyond the Board, there is always review by the Federal circuit court. So you know, except for some details, there's not much difference, say, between this process and some other due process—some other due process processes.

Ms. NORTON. I understand the notice. You have the notice that you aren't going to get your pay. I'm talking about the notice as to what the expectations were that resulted in your not getting your pay. And I say if you cannot point to that notice, you have violated due process and it's a slam-dunk loss to the government.

Mr. NESTERCZUK. Let me address some of the comments that you made, Ms. Norton. I can't imagine Federal work force not having written performance standards. The question is, how many, how much, how frequently are they updated? If you're dealing with a problem employee, you would be insane as a supervisor or manager not to document every instance of poor performance; otherwise you won't meet the standards that Mr. McPhie has just been speaking about.

However, you cannot impose that kind of evidentiary standard on every employee in the work force. Thank goodness, the overwhelming majority perform very well. We even have outstanding performers. They don't need a great deal of documentation. So the notion is to find the right amount of documentation for the right circumstances.

And I believe there's no question that under NSPS as we have been practicing today, the standard for poor performers or difficult performers or problem employees is going to be a great deal of paperwork to document the problems. But in the case of outstanding performers, that requirement will tail off rapidly. When you are dealing with good employees, quite frequently, they know better than you do the details and the day-to-day requirements of their job. So it's a matter of communicating back and forth on a regular

basis. And as you assign tasks to be completed, that there is a feedback mechanism provided so the employees know where they stand.

But in the case of difficult employees, there's no question, Mrs. Norton, that the requirement to document and document thoroughly will still be there.

Ms. NORTON. You know, I'm inclined to say that I know that it isn't true; that you all just don't get it, because you keep answering another question. I never raised the question about poor performers. I know what to do. I ran a Federal agency. I had to clean out a whole lot of poor performers. I know how to keep records. I'm talking about the following—and I agree with you it has to be at a level so that we're not completely drowned in paperwork. But I'm saying that if you come to work for me as a legislative assistant in my office, you get in my office a written notion of what it is that a legislative assistant does. Now, that has to be broken down, obviously, to individual jobs, but those jobs cover a whole lot of folks. So I really don't think this is onerous. You are not going to pay for performance for poor employees. You're not going to pay for performance for outstanding employees. You are going to pay for performance for everybody. You have never done it before.

I am telling you what I believe as a lawyer who continues to be a lawyer, if I may, so I continue to teach at Georgetown and teach a course over there every year. I believe that there is a terrible problem if you don't defend yourself by making sure that these employees have a written expectation, not down to you, Mary, what I would like you to do is this; John, what I would like you to do is that; but what are the expectations for this job, so when that person comes up for the pay period, you can say you have met the expectations less than somebody else and that is why you are getting less pay than somebody else.

All I'm saying is the best defense is an offense. The offense here is to have written expectations for job categories so that everybody understands up front what is expected of her and cannot be on your back when she gets less than she would like.

Mr. NESTERCZUK. I agree with you.

Mr. PORTER. Mr. Abell.

Mr. ABELL. I agree with my colleague from OPM. As we go through the meet-and-confer process, we will flush out the details in this area. And it is my expectation that there will be written performance standards for all employees and then the degree of the detail, as you've said and Mr. Nesterczuk has said, is something that we'll have to work out.

I will take exception to one thing you said. In fact, the Department of Defense does do pay for performance today in our demonstration projects and in our alternative personnel systems, quite successfully, we believe. We have not faced the lawsuits and the recriminations you have described. So we intend to use those lessons as we move forward in the rest of the Department.

Ms. NORTON. I won't bother to ask him what those circumstances are, but I do want to warn you, how many employees do you have at the Department of Defense?

Mr. ABELL. About 600,000 or so.

Ms. NORTON. And I could find out a great deal more, if we had more time, about what that involves, the level that involves, how that particular section was chosen to be the demonstration. But my problem is this: We are talking about the Department of Defense and 600,000 Federal employees, and you better not forget it. And I don't see why anybody—your best lawyers would say to you, certainly if you were in the private sector, protect yourself against litigation. This is a fairly easy way to do it.

Mr. PORTER. Thank you, gentlemen. We appreciate your testimony.

I would like to invite our third panel of witnesses to come forward today. First we will hear from Karen Heiser, organizational development program manager at the Federal Managers Association; Mr. John Gage, national president at the American Federation of Government Employees; and, finally, we will hear from Mr. Ron Ault, President of the Metal Trades Department.

Like the previous panels, I would like to recognize each of you for your opening statements and please summarize your statements in approximately 5 minutes.

I would like to recognize Ms. Heiser. You are recognized for 5 minutes.

STATEMENTS OF KAREN HEISER, ORGANIZATIONAL DEVELOPMENT PROGRAM MANAGER, FEDERAL MANAGERS ASSOCIATION; JOHN GAGE, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; AND RON AULT, PRESIDENT, METAL TRADES DEPARTMENT

STATEMENT OF KAREN HEISER

Ms. HEISER. Chairman Porter and Congressman Davis, thank you all. As a member of the Federal Managers Association, thank you for allowing me this opportunity to express our views on the proposed regulations for the new DOD National Security Personnel System.

Our mission at FMA is simple. We promote excellence in public service by creating an efficient and effective Federal Government. We are grateful to be here and look forward to continuing this important dialog.

I currently manage organizational development programs at Watervliet Arsenal, just outside Albany, NY. I have an MBA in human resources and several years of private sector experience as an HR manager in manufacturing and health care. However, the bulk of my experience has been with the Federal Government in labor relations and quality programs.

As you are aware, managers and supervisors are in a unique position under these proposed regulations. They will be responsible for implementation of the Department's new personnel system and also subjected to its requirements. As such, managers and supervisors are pivotal to ensuring the success of the new system.

We at FMA recognize that change does not happen overnight and we remain cautiously optimistic that the new system may help bring together the mission and the goals of the Department with on-the-ground functions of the defense work force. Two of the most important components to successfully implementing the new sys-

tem are training and funding. Managers and employees need to see leadership from the Secretary on down that supports a collaborative training program and budget proposals that make room to do so. We also need consistent oversight and appropriation of proper funding levels from Congress to ensure that both employees and managers receive sufficient training in order to do their jobs most effectively.

There are two primary areas in which we see the need for performance management training. Operations training is required in order for managers to understand the nuts and bolts of the new system, their responsibilities and authorities, and the rights and responsibilities of their employees and their supervisors.

Of equal or more importance is the training required to enable managers at all levels to understand how to translate organizational goals into performance standards. The process begins with an organization understanding its goals and objectives and making them clear to members of their organization. Goals and objectives are transmitted down through the organization, translated into executable plans and then to performance elements and standards of employees on the ground floor.

Theoretically, since organizational goals are the result of a desire to meet customer requirements, this is how performance management directly links employee's success to organizational success. Our consistent message is this: As managers and supervisors, we cannot do this alone. Collaboration between manager and employee must be encouraged to debunk myths and create the performance and results-oriented culture that is so desired by the proposed regulations.

As any Federal employee knows, the first item cut when budgets are cut is training. It is crucial this not happen in the implementation of these regulations. Not to be underestimated is the effect of more than 10 years of Federal work force downsizing. During this time, missions have continued to be accomplished because of dedicated skilled managers and employees. However, performance management during this time has taken the form of a survival mode: Do what it takes, do more with less. It has not been as formal or as consistent as what is required or envisioned by the NSPS.

Making a change to pay for performance without first addressing the need to refine these organizational and management skills in this area will have serious detrimental consequences. DOD is the largest employer in the Federal Government. For Civil Service reform to be implemented throughout government, it must be successful in DOD.

FMA further supports a fair and open labor relations process that protects the rights of employees and creates a work environment that allows employees and managers to do their jobs without fear of retaliation or abuse. The past 10 years have seen improvements in labor/management partnership across DOD. At my site, for example, much organizational progress has been possible because of a strong cooperative relationship of labor and management with a shared goal of organizational success.

Let us not lose sight of this type of growth in the pending implementation. The new system has relegated the authority for determining collective bargaining rights to the Secretary. In this regard,

the recognition of management organization such as FMA is a fundamental part of maintaining a collaborative and congenial work environment.

Title 5 CFR 251, 252 allows FMA, as an example, to come to the table with DOD leadership and discuss issues that affect managers and supervisors. While this process is not binding arbitration, the ability of managers and supervisors to have a voice in a policy development better enables them to support accomplishment of DOD's mission and goals and is crucial to the Department's long-term vitality.

We are cautiously hopeful that the new DOD system will be dynamic, flexible, and responsive to modern threats and as positive as its vision. The proposed regulations, however, remain vague and academic. Current guidance provides the bones of what we believe to be a workable plan. And while we remain concerned with some areas at the dawn of the system's rollout, the willingness of OPM and DOD to reach out to employee organizations such as FMA is a positive indicator of collaboration and transparency. We look forward to continuing to work closely with Department and agency officials.

Thank you for this opportunity to allow our views to be heard. And I will be happy to answer any questions you may have.

[The prepared statement of Ms. Heiser follows:]

Testimony
Before the United States House of Representatives
Committee on Governmental Reform
Subcommittee on the Federal Workforce and Agency Organization
Tuesday April 12, 2005

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

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

Statement of
Karen Heiser
Federal Managers Association

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Chairman Porter, Ranking Member Davis and Members of the House Subcommittee on the Federal Workforce and Agency Organization:

My name is Karen Heiser. On behalf of the 200,000 managers and supervisors in the Federal government whose interests are represented by the Federal Managers Association (FMA), I would like to thank you for inviting us to present our views for this joint hearing before the House Government Reform Subcommittee on the Federal Workforce and Agency Organization regarding the new National Security Personnel System (NSPS). I am currently the Organizational Development Manager at Watervliet Arsenal in New York, U.S. Department of the Army. My statements are my own in my capacity as a member of FMA and do not represent the official views of the Department of Defense or the Army.

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

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

The Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) have recently released the final regulations outlining its new personnel system. Similar changes are being proposed in for the DOD regulations. However, so much of the proposed regulations provide often vague and undefined guidance it is difficult to see what the final implementation would look like

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

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

We at FMA recognize that change does not happen overnight. However, we are optimistic that the new personnel system known as NSPS may help bring together the mission and goals of the Department with the on-the-ground functions of the homeland security workforce.

TRAINING AND FUNDING

Two key components to the successful implementation of NSPS and any other major personnel system reforms across the Federal government will be the proper development and funding for training of managers and employees, as well as overall funding of the new system. As any Federal employee knows, the first item to get cut when budgets are tightened is training. Mr. Chairman, you have been stalwart in your efforts to highlight the importance of training across government. Training of managers and employees on their rights, responsibilities and expectations through a collaborative and transparent process will help to allay concerns and create an environment focused on the mission at hand.

Managers have been given additional authorities under the final regulations in the areas of performance review and "pay-for-performance". We must keep in mind that managers will also be reviewed on their performance, and hopefully compensated accordingly. A manager or supervisor cannot effectively assign duties to an employee, track, review and rate performance, and then designate compensation for that employee without proper training. As a corollary, if there is not a proper training system in place and budgets that allow for adequate training, the system is doomed for failure from the start. The better we equip managers to supervise their workforce, the more likely we are to ensure the

integration and implementation of the new system – and the stronger the likelihood that managers will be able to carry out their day to day responsibilities in support of the Department's critical mission.

For employees, they will now be subject in a much more direct way to their manager's objective determination of their performance. Employees would be justified in having concerns about their manager's perception of their work product in any performance review if they felt that the manager was not adequately trained. Conversely, if employees have not been properly trained on their rights, responsibilities and expectations under the new human resources requirements, they are more apt to misunderstand and therefore have no faith in the appraisal process. This contradiction does not create the environment of performance based pay and results oriented productivity. Rather, it creates an environment of mistrust and conflict in opposition to the intended efforts of the proposed regulations.

Our message is this: As managers and supervisors, we cannot do this alone. Collaboration between manager and employee must be encouraged in order to debunk myths and create the performance and results oriented culture that is intended by the final regulations. Training is the first step in opening the door to such a deliberate and massive change in the way the government manages its human capital assets. We need the support of the Department's leadership, from the Secretary on down, in stressing that training across the board is a top priority. We also need the consistent oversight and input of Congress to ensure that both employees and managers are receiving the proper levels of training in order to do their jobs most effectively.

The Secretary and Congress must also play a role in proposing and appropriating budgets that reflect these priorities. The Department of Defense has estimated that the cost for the implementation of the new human resources management system and the internal labor relations board will be approximately $158 million with no more than $100 million spent in a given twelve month period. However, there is no clear indication of how this money will be spent, what portion will be reserved for training, and out of what budget those funds will come. The initial budget request for the implementation of the DHS MAX^{HR} system that included training for managers and employees was already underfunded by Congress for fiscal year 2005, and could be again for fiscal year 2006. This precedent, as we prepare for even larger budget deficits that the President hopes to cut into by holding discretionary spending below the level of inflation, presents a major hurdle to the overall success of and any future personnel reform efforts at other departments and agencies.

Agencies must also be prepared to invest in their employees by offering skill training throughout their career. This prudent commitment, however, will also necessitate significant technological

upgrades. The Office of Personnel Management (OPM) has already developed pilot Individual Learning Account (ILA) programs. An ILA is a specified amount of resources such as dollars, hours, learning technology tools, or a combination of the three, that is established for an individual employee to use for his/her learning and development. The ILA is an excellent tool that agencies can utilize to enhance the skills and career development of their employees.

We would also like to inform Congress of our own efforts to promote managerial development. FMA recently joined with Management Concepts to offer *The Federal Managers Practicum* — a targeted certificate program for Federal managers. As the official development program for FMA, *The Federal Managers Practicum* helps FMA members develop critical skills to meet new workplace demands and enhance their managerial capabilities.

FMA has long recognized the need to prepare career-minded Federal employees to manage the demands of the 21st century workplace through its establishment of The Federal Management Institute, FMA's educational arm, which sponsors valuable professional development seminars and workshops. *The Federal Managers Practicum* is a unique, integrated development program that links professional training and higher education – specifically created for the Federal career professional. Developed and taught by management experts, this comprehensive practicum integrates core program management skills including planning, analysis, budgeting, communication, evaluation, and leadership with functional skills and knowledge – providing a balance between theory and practice. We at FMA believe that the practicum will pave the way for the creation of much-needed development programs for Federal employees.

Clearly agency budgets should allow for the appropriate funding of the ILA as an example. However, history has shown that training dollars have been a low priority for many agency budgets. In fact, in the rare event that training funds are available, they are quickly usurped to pay for other agency "priorities." Toward this end, we at FMA support including a separate line item on training in agency budgets to allow Congress to better identify the allocation of training funds each year.

Neither the Office of Management and Budget (OMB) nor OPM collects information on agency training budgets and activities. This has only served to further diminish the minimal and almost cursory attention on training matters. Many agencies do not even have dedicated employee "training" budgets. Training funds are often dispersed through other accounts. It is no surprise that budget cuts inevitably target training funds, which is why FMA continues to advocate for the establishment of a training officer

position within each Federal agency. This would allow for better management and recognition of training needs and resources, in addition to placing increased emphasis on critical training concerns.

The Federal government must, once and for all, take the issue of continuous learning seriously. FMA advocated for the existing Chief Human Capital Officers Council, which was finally brought about as part of the Homeland Security Act of 2002. While we applaud the Council's creation of two needed subcommittees to examine performance management as well as leadership development and succession planning, we would urge the Council to add another subcommittee to evaluate training programs across the government. Without proper training, and funding for training, we cannot hope to effectuate expansive human resources changes and fully achieve them.

DEVELOPMENT AND IMPLEMENTATION PROCESS

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

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

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

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

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

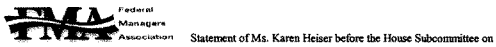
As we move forward with the thirty-day public comment/thirty-day "meet and confer"/ and thirty day congressional oversight period, otherwise known as the "30/30/30 timeframe," it has become clear that continued collaboration between OPM, DOD and representative management and employee groups will go along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

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

PAY FOR PERFORMANCE

There has been much discussion about the creation of a pay-for-performance system at both DOD and DHS. We believe that a deliberate process that takes into account both an internal and independent review mechanism for the implementation of a pay-for-performance system is crucial to its success at DOD and elsewhere in the Federal government.

The replacement of the standard General Schedule pay system with a proposed pay banding system creates a devastating problem should insufficient funds be appropriated by Congress. As it stands, the regulations will have employees competing with one another for the same pool of money, all of which is based on their performance review. If this pool of money is inadequate, the performance of some deserving Federal employees will go unrecognized, causing the new system to fail in meeting its



objective, in addition to creating dissension in the workplace. In short, the integrity of "pay-for-performance" will be severely hindered if ALL high performers are not rewarded accordingly. We believe that DOD should continue to allocate at least the annual average pay raise that is authorized and appropriated by Congress for General Schedule employees to DOD employees who are "fully successful" (or the equivalent rating), in addition to other rewards based on "outstanding" performance (or equivalent rating).

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

The performance appraisal process is key to this new personnel system. The review determines the employee's pay raise, promotion, demotion or dismissal in a far more uninhibited way than is currently established in the General Schedule. We support the premise of holding Federal employees accountable for performing their jobs effectively and efficiently. More specifically, the removal of a pass/fail performance rating system is a step in the right direction.

We are concerned, however, that within any review system there must be a uniform approach that takes into account the clear goals and expectations of an employee and a system that accurately measures the performance of that employee, with as little subjectivity on the manager's part as possible. As such, it is essential that within the review process, the methodology for assessment is unmistakable and objective in order to reduce the negative effects of an overly critical or overly lenient manager. The most important component in ensuring a uniform and accepted approach is proper training, and funding thereof, that will generate performance reviews reflective of employee performance. We would like to submit the following necessary elements for executing a pay-for-performance system that has a chance to succeed:

- adequate funding of "performance funds" for managers to appropriately reward employees based on performance;

- development of a performance rating system that reflects the mission of the agency, the overall goals of the agency, and the individual goals of the employee, while removing as much bias from the review process as possible;
- a transparent process that holds both the employee being reviewed and the manager making the decision accountable for performance as well as pay linked to that performance;
- a well-conceived training program that is funded properly and reviewed by an independent body (we recommend the Government Accountability Office as an auditor) which clearly lays out the expectations and guidelines for both managers and employees regarding the performance appraisal process.

We believe that *transparency* leads to *transportability*, as intra-Department job transfers could be complicated by the lack of a consistent and uniform methodology for performance reviews. While we need training and training dollars, we should allocate those funds towards a program that takes into account all agencies within DOD. If we are to empower managers with the responsibility and accountability of making challenging performance-based decisions, we must arm them with the tools to do so successfully. Without proper funding of "performance funds" and training, we will be back where we started – with a fiscally restricted HR system that handcuffs managers and encourages them to distribute limited dollars in an equitable fashion.

HIRING AND STAFFING

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

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

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

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

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

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

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

REDUCTIONS-IN-FORCE (RIF)

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

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

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

COLLECTIVE BARGAINING AND LABOR RELATIONS

FMA supports an open and fair labor-relations process that protects the rights of employees and creates a work environment that allows employees and managers to do their jobs without fear of retaliation or abuse.

Under the new system, various components of the collective bargaining process are no longer subject to the same rules. There is also a move away from the Federal Labor Relations Authority (FLRA) as an independent negotiating body to an internal labor relations board made up of members appointed by the Department's Secretary. This immediately calls into question the integrity, objectivity and accountability of such an important entity. Impartiality is key to this process, and it is derived from independence in the adjudication process. The workforce must feel assured that such decisions are made free of bias and politics.

The appointments for the new National Security Labor Relations Board (NSLRB) are made solely by the Secretary, with nominations and input allowed by employee organizations for two of the three positions. Submitting nominations from employee groups to the Secretary on whom we believe to be qualified candidates for this internal board must not be taken as perfunctory. They should be given serious consideration by the Department and where appropriate appointed to the board.

The new system has relegated the authority for determining collective bargaining rights to the Secretary. Towards this end, the recognition of management organizations such as FMA is a fundamental part of maintaining a collaborative and congenial work environment. Of the provisions in Title 5 that have been waived under the new National Security Personnel System, the modification of collective bargaining rights that gives the Secretary sole discretion on when to recognize the unions places into question such recognition of the Federal Managers Association by DOD.

Title 5 CFR 251/252 grants non-union employee groups the formal recognition of the Department by ensuring a regular dialogue between agency leadership and management organizations. Specifically, these provisions stipulate that:

- such organizations can provide information, views, and services which will contribute to improved agency operations, personnel management, and employee effectiveness;
- as part of agency management, supervisors and managers should be included in the decision-making process and notified of executive-level decisions on a timely basis;

- each agency must establish and maintain a system for intra-management communication and consultation with its supervisors and managers;
- agencies must establish consultative relationships with associations whose membership is primarily composed of Federal supervisory and/or managerial personnel, provided that such associations are not affiliated with any labor organization and that they have sufficient agency membership to assure a worthwhile dialogue with executive management; and
- an agency may provide support services to an organization when the agency determines that such action would benefit the agency's programs or would be warranted as a service to employees who are members of the organization and complies with applicable statutes and regulations.

In summary, Title 5 CFR 251/252 allows FMA, as an example, to come to the table with DOD leadership and discuss issues that affect managers, supervisors, and executives. While this process is not binding arbitration, the ability for managers and supervisors to have a voice in the policy development within the Department is crucial to its long-term vitality. Such consultation should be supported by all agencies and departments, thus we strongly urge the inclusion of CFR 251/252 into the final regulations in order to maintain the strong tradition of a collaborative work environment that values the input of Federal managers.

In fact, we strongly encourage the Department to make good on its call for "continuing collaboration" with management and employee groups during the implementation process by inserting language mirroring 5 CFR 251/252 in its regulations. Currently "continuing collaboration" is not more narrowly defined in the regulations, rather a blanket statement that the Department intends to do so. We would ask that the Secretary and DHS leadership set up regular meetings (monthly or bi-monthly), depending on the status of the implementation, in order to ensure this important dialogue that has been so critical to the design process continues.

ADVERSE ACTIONS AND APPEALS

As managers, we take comfort in knowing that there is an independent appeals process for employees to dispute adverse actions. The Merit System Protection Board (MSPB) was established twenty-five years ago to allow Federal employees to appeal adverse agency actions to a third-party, independent review board. Since its inception, the MSPB has maintained a reputation of efficiency and

fairness. MSPB decisions uphold agency disciplinary actions 75 to 80 percent of the time, which is evidence of the Board's broad support of agency adverse action decisions. In performance cases, the percentage is even higher in support of agency management. Decisions are also typically reached in 90 days or less. We are pleased to see that the Merit Systems Protection Board, an independent third party review board, will remain as the primary appeals decision maker. Furthermore, the expedited process requirement would hopefully improve employee and management morale in allowing decisions to be rendered more swiftly.

We are concerned, however, that the Secretary retains ultimate decision making authority on the appeals process. In many ways this creates a system of little accountability and integrity as the need for a third party intermediary to have authority over appeals is critical to the integrity of the system. Moreover, the current model has been successful because it is a uniform system for the entire Federal government. Establishing appeals processes that leave ultimate authority with the each individual Secretary might create unnecessary confusion for the Federal workforce, which will lengthen, instead of streamline, the process while potentially making the system more prone to abuse. While we recognize the desire to streamline the appeals process, we believe that the reduced time requirements are a step in the right direction, but MSPB must be given the full authority to make binding independent decisions otherwise the system runs the risk of creating a lack of trust, which will likely serve to lengthen and complicate the process.

In fact, in 1995, Congress took away Federal Aviation Administration (FAA) employees' MSPB appeals rights as part of a personnel reform effort that freed the FAA from most government-wide personnel rules. The FAA subsequently replaced the MSPB appeals process with an internal system – as is being proposed in the House version of the Defense Authorization bill – called the "Guarantee Fair Treatment" program consisting of a three-person review panel. Critics complained that the Guaranteed Fair Treatment program did not give employees access to an independent administrative review body. After numerous incidents and reports of abuse, Congress in 2000 reinstated full MSPB appeal rights to FAA employees as part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).

Based on its track record of fairness and credibility within the Federal community, we support incorporating the Merit Systems Protection Board in the appeals process. Given the MSPB's strong reputation for swiftness and fairness in the eyes of agency management and employees – as well as the

FAA's failed experiment with utilizing and internal appeals process – we at FMA believe that not doing so would create more problems than it solves.

The mission of the Department of Defense demands high performance and the utmost integrity from its employees. As the adage goes, one bad apple can spoil the rest. DOD does not have that luxury. So, it is understandable that certain egregious offenses should never be tolerated, and therefore result in immediate and decisive action.

The Mandatory Removal Offenses (MRO) authority that has been given to the Secretary is a good way to aid in creating a culture that adheres to the sensitive nature of the work being done by the Department, and reminds employees that they must be on top of their game at all times. Certain acts such as leaking classified materials, deliberately sabotaging machinery, abetting an enemy, or committing serious fraud certainly warrant the removal of an employee. These along with a few other offenses could be justified in the creation of a MRO list.

We are nevertheless concerned that Pandora's Box could be opened, and caution restraint on the part of the Secretary in establishing specific MRO's. As was seen within the "10 Deadly Sins" at the Internal Revenue Service, overwhelming fear of violating an MRO slowed the actions of employees and impeded their work. This could be a serious detriment to an agency that needs as much creativity in battling 21st century terrorists who will use any means in any context to attack our homeland. Managers and employees working in DHS are fully aware of the sensitivity of their position and mission, so we urge the Department to exercise this authority with great care for potential side-effects.

PAY BANDING, COMPENSATION AND JOB CLASSIFICATION

Pay banding is not a new concept to the public sector. The practice has been in use since the late 1980's, and it is currently underway in a few government agencies, notably in the Federal Aviation Administration as well as in the Internal Revenue Service – where FMA has a large number of members. The job classification and pay system was developed in the late 1980s, and has seen varying levels of success.

Under the proposed NSPS regulations, applicable employees will no longer be governed by the traditional General Schedule (GS) pay system. The GS system is based on the premise that an employee who commits themselves to public service will be rewarded for longevity of service and tenure in the system through regular pay raises and promotions as long as the employee is "fully performing" the

duties assigned. Under the pay banding system within pay for performance, the employee will be lumped into a broad job cluster based that combine like job functions, and then placed in one of three pay bands: Entry Level, Full Performance, and Supervisory (with the potential for more bands).

The difficult determination of the final outcome of the pay banding and job classification system is the vague outline sketched in the proposed regulations. While we can look to DHS, the Government Accountability Office, or other demonstration projects for insight, without a more clearly defined explanation of the system sought to be implemented we can only offer a general perspective. We at FMA support the use of the GS salary structure as the baseline for moving an employee into the new band as well as act as a guide for determining the low and high ends of each band. Furthermore, we would like assurances that current employees will not see any reduction in their current pay, and in fact qualified employees could receive higher salaries from this transition. The GS system is familiar to Federal managers and employees, and moving into a new pay banding system in and of itself creates some consternation. Using the GS system as the foundation will allay concerns that pay rates will be significantly reduced.

Pay bands also offer a number of benefits to the employee and manager that should be examined. The General Schedule places its emphasis on longevity, and the new system will place more emphasis on job performance than duration of employment. Pay bands provide the opportunity to have accelerated salary progression for top performers. As in the IRS pay-band system, managers are eligible for a performance bonus each year. Those managers with "Outstanding" summary ratings will receive a mandatory performance bonus. Managers with "Exceeded" summary ratings are eligible for performance bonuses. However, careful consideration should be given to the use of the term "bonus". A bonus is not considered part of basic pay for retirement purposes so therefore not considered when calculating retirement entitlement.

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

Pay bands can also be designed to provide a longer look at performance beyond a one-year snapshot. Many occupations have tasks that take considerable lengths of time. Pay bands can be designed to recognize performance beyond one year. Arbitrary grade classifications in the GS system

inhibit non-competitive reassignments. Broader bands allow non-competitive reassignments. This enhances management flexibility and developmental opportunities.

Of course, there remain challenges with any proposed pay-band system for that matter. First, pay-for-performance systems are only as good as the appraisal systems they use. Since performance is the determining factor in pay-band movement, if there is no confidence in the appraisal system, there will be no confidence in the pay system.

Moreover, pay-for-performance systems can be problematic where there is an aging workforce. Experienced employees tend to converge towards the top of the pay band. This provides them little room for growth. This is particularly true for those employees whose GS grade is the highest grade in the new band. (Example: Grade 13 employee placed in an 11-13 band. S/he will be towards the top and now will need the higher grades to continue to move ahead. Previously s/he only needed time in grade and a "fully successful" rating to progress).

Finally, pay-band performance requirements can discourage non-banded employees from applying for banded positions. If the employee is converted in the upper range of a band s/he may not have confidence s/he can achieve the higher ratings requirements.

Compounding the critical mission of DOD and its new personnel system are the myriad of problems associated with the recruitment and retention of Federal employees. One piece in particular is the significant pay gap between the public and private sectors. According to a survey of college graduates, Federal and non-Federal employees conducted by the Partnership for Public Service[1], the Federal government is not considered an employer of choice for the majority of graduating college seniors. In the survey, nearly 90 percent said that offering salaries more competitive with those paid by the private sector would be an "effective" way to improve Federal recruitment. Eighty-one percent of college graduates said higher pay would be "very effective" in getting people to seek Federal employment. When Federal employees were asked to rank the effectiveness of 20 proposals for attracting talented people to government, the second-most popular choice was offering more competitive salaries (92 percent). The public sector simply has not been able to compete with private companies to secure the talents of top-notch workers because of cash-strapped agency budgets and an unwillingness to address pay comparability issues.

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

Closing the pay gap between public and private-sector salaries is critical if we are to successfully recruit and retain the "best and brightest." In this regard, we are pleased to see a shift in the determination of "locality" pay from strictly geographical to occupational. Locality pay adjustments based on regions across the country did not take into account the technical skills needed for a given occupation. The new regulations allow for a look nationwide at a given occupation within the labor market that more accurately ties the rate of pay to job function, which could overcome geographic impediments in the past in closing the gap between public- and private-sector salaries.

GOVERNMENT-WIDE STANDARDS

The passage of the National Defense Authorization Act of 2004 (P.L. 108-136) marked the second step in what is quickly becoming the largest civil service reform effort since the Civil Service Reform Act of 1978. Included in the legislation was an authorization for major changes to the pay, hiring and staffing, labor relations, collective bargaining, adverse actions, appeals process, reductions-in-force, and performance review systems governed by Title 5 of the U.S. Code. The justification was made based on the critical and urgent need to have a flexible and dynamic human resources system that would allow the Pentagon employees to respond quickly to any threats to our national security and prevent any military actions that would harm America. While this justification has come under fire, we agree that the needs of national security and protecting America's infrastructure, citizens and interests around the globe may require greater latitude within the personnel systems of appropriate Federal agencies. But striking the right balance is what we collectively should be aiming to accomplish with respect to the implementation of the new NSPS human resources transformation at the Department of Defense and the new MAX^{HR} system at the Department of Homeland Security.

The White House has recently announced that it will be pushing forward an initiative to adopt similar civil service reform efforts across the Federal government and allow each agency to create its own personnel reforms that reflect the mission and needs of the agency. It is clear that the with so many changes in the Federal government over the past few decades – significantly reduced workforce size, changes to retirement systems, higher attrition rates, and increased external factors such as terrorism and the issue of trust in government and its relationship to recruitment and retention – a modernization movement in personnel systems is justifiable. While we support the general effort to modernize and transform the civil service to reflect the current needs and resources of each agency, hastiness and the

absence of an overarching government-wide framework for these reforms could create a Balkanization of the Federal government that diminishes the uniqueness of the Civil Service.

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

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

CONCLUSION

The final regulations on the new personnel system being issued by the Department of Defense and the Office of Personnel Management are the first in what is expected to be a broader effort to transform the Civil Service as we know it. There is great hope that within these precedent-setting regulations lies the understanding that managers and employees can work together in creating an efficient and effective Federal workforce that meets the missions of each agency. We at FMA share in this hope, but it is our responsibility – and that of all the stakeholders – to do what we can in eliminating the seeds that will reap setbacks or disasters.

A shift in the culture of any organization cannot come without an integral training process that brings together the managers responsible for implementing the new personnel system and the employees they supervise. The leadership of DOD must work in tandem with Congress, managers and employees in creating a training program that is properly funded and leaves little question in the minds of those it affects of their rights, responsibilities and expectations.

A total overhaul of the GS pay system to reflect a more modern approach to performance-based pay must be funded properly in order for it to succeed. As we have explained, the lack of proper funding for "pay for performance" will work contrary to its intended results. The mission of the agency is too critical to America to create a system that is hamstrung from the start.

Furthermore, employee morale is also crucial to the successful implementation of NSPS. Ensuring that employees feel their rights are protected and safeguards are in place to prevent abuse or adverse actions derives in part from independent and effective collective bargaining, labor relations, and appeals processes. The Secretary and the NSLRB should do all in their power to create an open and fair working environment. At the same time, DOD must continue to engage in the important consultative relationship with management organizations such as FMA.

There are additional challenges that face a new pay-banding system. We are hopeful that the Department, in conjunction with OPM, is looking to the current GS system as a baseline for the job clusters and pay bands. This will go a long way towards easing some concerns for current managers and employees that their pay will be unfairly compromised.

We at FMA cannot stress enough the need to take a cautious and deliberate path for implementing the new regulations. It appears that DOD and OPM are committed to implementing the new regulations with minimal emphasis placed on a slow and reflective process. We caution this approach. We recommend continued collaboration with management and employee groups as well as independent review and auditing by the Government Accountability Office, with the oversight of Congress. Through these checks and balances, we are hopeful that a set of guiding principles will emerge to assist other agencies in their expected personnel reform efforts.

We at FMA are cautiously optimistic that the new personnel system will be as dynamic, flexible and responsive to modern threats as it needs to be. While we remain concerned with some areas at the dawn of the system's rollout, the willingness of the Office of Personnel Management and the Department of Defense to reach out to employee organizations such as FMA is a positive indicator of collaboration and transparency. We look forward to continuing to work closely with Department and Agency officials.

Thank you again, Mr. Chairman, for the opportunity to testify before your subcommittee and for your time and attention to this important matter. Should you need any additional feedback or questions, we would be glad to offer our assistance.

Mr. PORTER. Next we will have John Gage, national president of the American Federation of Government Employees.

STATEMENT OF JOHN GAGE

Mr. GAGE. Good afternoon. I'm appearing today on behalf of my union, AFGE, as well as the United DOD Workers' Coalition which represents 36 unions covering DOD workers all across the Department.

We have numerous concerns with the draft regulations, but I want to talk about what I consider the most serious problems. First, DOD has proposed radically reducing the scope of collective bargaining. The proposal effectively eliminates collective bargaining by expanding the manager's rights clause as compared to current law and rendering most previously negotiable issues to be off the table. Such issues include procedures and arrangements for overtime, shift rotation, flexible and compressed work schedules, safety and health programs, deployment away from the work site, and on and on. In addition, DOD will be able to unilaterally override provisions of collective bargaining agreements simply by sending out issuances. The scope of bargaining must be restored so that meaningful participation can continue to exist in DOD.

Proposed regulations do not follow the authorizing legal mandate to safeguard collective bargaining rights for DOD employees. When the legislation authorizing NSPS was under consideration in 2003, Secretary Rumsfeld assured the Congress that his only intent with regard to collective bargaining was to establish national level bargaining over most issues. We can live with that and we can make that work, but we can't live with the NSPS draft because it reduces the scope of bargaining to virtually nothing, far beyond any real or imagined national security concern.

Second, the Board that hears labor management disputes arising from NSPS must be independent of DOD management. In the proposed regulations, DOD would establish an internal Board made up entirely of individuals appointed by the Secretary. This Board will be paid by and beholden to DOD management. It would have no independence or credibility with the work force.

Secretary Rumsfeld promised the Congress, prior to the enactment of the law authorizing the establishment of NSPS, that any Board established to hear labor/management disputes would be independent. There is no reason for DOD to have an internal labor board which duplicates the functions and costs of the Federal labor relations authority, but if it must exist as a safeguard, it is absolutely critical that it be entirely separate and distinct from DOD management.

Third, the standard for mitigation and discipline in adverse action cases under NSPS in the proposed regulations is virtually impossible to meet and effectively removes the possibility of mitigation. DOD must change the standard from "wholly without justification" to "unreasonable," which is the court-imposed standard established over 25 years ago in order for employees to have meaningful due process and safeguard against arbitrary and capricious actions. DOD must stop the game-playing with long-established legally recognized standards.

Further, and in contrast to current law, the proposed NSPS adds additional bureaucratic delay by declaring that adverse action in arbitrations will no longer be final and binding. Instead, they will have to be reviewed by the MSPB, thereby reducing the authority of arbitrators. This is entirely insupportable and contrary to congressional intent and weakens an important safeguard for employees.

Fourth, under the NSPS, employees' performance appraisals will be the crucial determinant of salary, salary adjustment, and job security. Yet under the proposed regulations, there is no requirement for management to propose written standards against which performance will be measured. And in addition, employees are denied the right which is now available to all current Federal employees, including those under the new homeland security personnel system to use and negotiate a grievance and arbitration system, to present evidence to an impartial body as a critical safeguard for fairness and transparency.

Fifth, the proposed pay regulations open the door for a general reduction in salaries for all DOD personnel compared to the rates they would have been paid under current statutory systems. An ability to reduce entry-level salaries in addition to an ability to refuse annual adjustment of salaries for those who perform satisfactorily as permitted in the regulations will, by definition, conspire to reduce overall DOD salaries. Strong and unambiguous safeguards must be in place to prevent overall lowering of pay for the DOD civilian work force. There must be constraints on the ability of DOD to lower salaries or withhold salary adjustments across the Board. These safeguards must be established not only to protect the living standards of the civilian DOD work force relative to the rest of the Federal work force, but also to guarantee the ongoing economic vitality of communities with DOD installations.

Finally, procedures for deciding who would be affected by a reduction in force must be based on more than a worker's most recent performance appraisal. Incredibly, the proposed NSPS regulation would allow an employee with 1 year of service and an outstanding rating to have superior retention rights to an employee with 10 years of outstanding appraisals and 1 year of having been rated nearly above average. Such rules are patently unfair and must not be allowed to stand.

In conclusion, it cannot be emphasized strongly enough that the approach DOD has taken thus far, exhibited by the above examples, has been profoundly demoralizing for its civilian work force. These dedicated and patriotic Americans are extremely unsettled by the harsh prospects set forth in the proposed regulations because they are not fooled by words like "modern," "flexibility," "market-based." They see fundamental rights stripped away and a pay system rigged to lower overall DOD pay.

We strongly urge the committee to take action either legislatively or through oversight to require DOD to correct the many problems with the regulations and provide the safeguards I have mentioned. Unless substantial changes are made to the regulations, the NSPS

will become a recruitment and retention problem rather than a solution that will deflect the agency from its important mission in years to come.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gage follows:]

STATEMENT BY

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

REPRESENTING

THE UNITED DEPARTMENT OF DEFENSE WORKERS' COALITION

BEFORE

THE SUBCOMMITTEE ON THE FEDERAL
WORKFORCE AND AGENCY ORGANIZATION

HOUSE COMMITTEE ON GOVERNMENT REFORM

REGARDING

NATIONAL SECURITY PERSONNEL SYSTEM: THE NEW DOD CIVILIAN
PERSONNEL SYSTEM

ON

APRIL 12, 2005

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

AFGE has numerous serious concerns with the draft regulations that DoD published on February 14 to create the National Security Personnel System (NSPS). The comments that AFGE submitted during the public comment period that ended in March, through our participation in the United DoD Workers' Coalition, are attached to this statement for your review. They contain our detailed critique of the Department's proposals with regard to collective bargaining, employee appeals of adverse actions, and the establishment of a pay for performance system to replace existing statutory pay systems.

Today I will focus my statement on some of the most urgent practical issues related to the proposed DoD regulations that demand immediate attention. Although our union strongly opposes the replacement of objective, statutory pay systems with inherently subjective and nominally performance-based pay systems, the revocation of employee appeal rights, and the evisceration of collective bargaining; my purpose here is to spell out what we and others who have closely followed DoD's efforts on NSPS believe needs to be done to avoid a disaster that will have enormous financial and national security ramifications.

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

But Secretary Rumsfeld's promises have not been kept. Nothing in the proposed NSPS regulations is perceptibly connected to "21st century threats." And his Department has issued draft regulations that do effectively end collective bargaining by prohibiting bargaining on almost all previously negotiable issues, and granting the agency the authority to unilaterally void any and all provisions of collective bargaining agreements via the issuance of internal regulations and issuances. And that is only one aspect of the NSPS that is wholly insupportable to DoD's workforce. Furthermore, regarding his claimed urgency national level bargaining: National level bargaining became effective upon the passage of the Act in 2003. In spite of this fact, the Secretary has not yet invoked national level bargaining even once.

At this stage, the goal of NSPS should be the development of a system that both adheres to the law and can be successfully implemented. In spite of the fact that DoD's proposed regulations are so extreme and so punitive, we remain hopeful that DoD will reconsider its approach in the context of a realization that the nuts and bolts of implementation require more sober calculations than those exhibited in the draft regulations.

It cannot be emphasized strongly enough that the approach DoD has taken thus far has been profoundly demoralizing for its civilian workforce. This dedicated and patriotic workforce is extremely unsettled by both the inaccurate information conveyed by the Secretary, and by the harsh prospects set forth in the proposed NSPS regulations. This state of affairs is neither desirable nor inevitable. But alleviating it is in DoD's hands.

It is not too late for DoD to decide to work with its unionized employees, rather than against us, so that the implementation of a new system and its procedures is smooth, and conducive to high morale and continued focus on the Department's national security mission.

Six "Flashpoint" Issues

To that end, I have highlighted six "flashpoint" issues that constitute only the most egregious examples of areas where the draft regulations for NSPS have deviated from both the law and the stated objectives of Secretary Rumsfeld when he testified in 2003

that NSPS would be merely a source of freedom from the "bureaucratic processes of the industrial age" to meet the "security challenges of the 21st century."

1. Performance appraisals will be the crucial determinant of salary, salary adjustment, and job security under NSPS. Yet under the proposed regulations, not only is there no requirement for management to present written standards against which performance will be measured, but employees are also denied the right, available to all current federal employees, including those under the new Homeland Security Personnel System, to use a negotiated grievance and arbitration system to present evidence to an impartial body that their performance appraisals are inaccurate. These inequities must be rectified in order for NSPS to meet the principle affirmed by the Congress, the Comptroller General, and several experts that the performance management systems that underlie "performance-based" personnel systems be "transparent," "accountable," and perceived as fair and credible by employees.

2. Strong and unambiguous safeguards must be in place to prevent a general lowering of pay for the DoD civilian workforce. The proposed regulations permit a general reduction in salaries for all DoD personnel compared to rates they would have been paid under statutory systems. An ability to reduce entry level salaries, in addition to an ability to refuse annual adjustment of salaries for those who perform satisfactorily, as permitted in the draft regulations, will by definition conspire to reduce DoD salaries generally. Consequently, there must be

constraints on the ability of DoD to lower salaries or withhold salary adjustments generally. These safeguards must be established not only to protect the living standards of the civilian DoD workforce relative to the rest of the federal workforce, but also to guarantee the ongoing economic vitality of communities with DoD installations.

3. DoD has proposed radically reducing the scope of collective bargaining in the proposed regulations. The scope of bargaining must be restored so that the very institution of collective bargaining can continue to exist in DoD. In fact, the proposed NSPS effectively eliminates collective bargaining by greatly expanding the management rights clause as compared to current law, thereby rendering most previously negotiable issues to be "off the table." When the legislation authorizing NSPS was under consideration by Congress, Defense Secretary Rumsfeld assured the Congress that his only intent with regard to collective bargaining was to establish national-level bargaining over most issues. The proposed regulations do not follow the law with respect to its instructions to maintain collective bargaining rights for affected DoD employees. In addition, DoD must not be permitted to unilaterally override provisions of collective bargaining agreements by issuing either component-wide or Department-wide "issuances." This makes a mockery of collective bargaining and the resulting agreements.

4. The board that hears labor-management disputes arising from NSPS must be independent of DoD management. In the proposed NSPS regulations, DoD would establish an internal board made up entirely of individuals appointed by the Secretary. Such a board would have no independence or credibility, and would therefore fail to meet the standards set forth by the Comptroller General for transparency, fairness, and credibility. In addition, Secretary Rumsfeld promised the Congress prior to the enactment of the law authorizing the establishment of NSPS that any board established to hear disputes arising from NSPS would be independent. Although there is no rationale for DoD to have an internal labor board which duplicates the functions and costs of the Federal Labor Relations Authority; if it must exist, it is absolutely critical that it be entirely separate and distinct from DoD management.

5. The standard for mitigation by the Merit Systems Protection Board (MSPB) of discipline and penalties imposed on employees under NSPS in the proposed regulations is virtually impossible to meet and effectively removes the possibility of mitigation. DoD must change the standard from "wholly unjustified" to "unreasonable," the court imposed standard established over 25 years ago, in order for employees to have a meaningful right to have adverse actions mitigated by the MSPB. Further and in contrast to current law, the proposed NSPS adds additional bureaucratic delay by declaring that adverse action arbitrations will no longer be final and binding. Instead, they will have to be reviewed by the MSPB,

thereby reducing the rule and power of arbitrators, which is entirely insupportable and contrary to Congressional intent. Since DoD wins close to 90% of its current MSPB cases, there is simply no justification for eliminating a fair adjudicative process for employee appeals.

6. Procedures for deciding who will be affected by a Reduction in Force (RIF) must be based on more than a worker's most recent performance appraisal. The proposed NSPS regulation would allow an employee with one year of service and an outstanding rating to have superior retention rights to a combat veteran with 30 years of outstanding appraisals and one year of having been rated merely "above average." Such RIF rules are patently unfair and must not be allowed to stand.

Salary Determination and Performance Management

Pay and Classification

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

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

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

Accordingly, we have recommended to DoD that the pay, performance, and classification concepts be withdrawn in their entirety and published for comment and recommendations only when: 1) the Agencies are willing to disclose the entire system to DOD employees,

affected unions, Congress, and the American public; and 2) the Agencies devise a more reasonable approach to testing any radical new designs before they are implemented on any widespread basis. It is simply wrong to ask us to accept systems that establish so few rules and leave so much to the discretion of current and future officials. As the representatives of DOD employees, it is our responsibility to protect them from vague systems, built on discretionary authority that is subject to abuse.

Regardless of the ultimate configuration of the pay proposal, we believe that any proposed system must contain the transparency and objectivity of the General Schedule. Critical decisions on pay rates for each band, annual adjustments to these bands and locality pay supplements and adjustments must be made in public forums like the U.S. Congress or the Federal Salary Council, where employees and their representatives can witness the process and have the opportunity to influence its outcome through collective bargaining. We are concerned that these decisions would now be made behind closed doors by a group of DOD managers (sometimes in coordination with OPM) and their consultants. Not only will employees be unable to participate in or influence the process, there is not even any guarantee that these decisions will be driven primarily by credible data, or that any data used in the decision-making process will be available for public review and accountability, as the data from the Bureau of Labor Statistics is today.

If the system DOD/OPM has proposed is implemented, employees will have no basis on which to predict their salaries from year to year. They will have no way of knowing how much of an annual increase they will receive, or whether they will receive any annual

increase at all, despite having met or exceeded all performance expectations identified by DOD. The "pay-for-performance" element of the proposal will pit employees against one another for *allegedly* performance-based increases.[2] Making DOD employees compete among themselves for pay increases will undermine the spirit of cooperation and teamwork needed to keep our country safe at home and abroad.

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

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

[2] This element of the proposal does not really qualify as a "pay for performance" system. Employees performing at an outstanding level could not, under the proposal, ever be certain that they would actually receive pay commensurate with their level of performance.

has failed to prepare for implementation by failing to fully elaborate its design, collaborate with unions representing affected employees, or train its managers and bargaining unit employees; all of which are well-known prerequisites for any measure of success. In his testimony, he cites the Government Accountability Office's (GAO) previous reports and testimony regarding the management of "human capital" in federal agencies, including GAO.

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

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

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

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

- Assure that certain predecisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoliticization of the performance management process (e.g. , independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system, as well as reviews of performance rating decisions, pay determinations, and promotion actions **before they are finalized** to ensure that they are merit-based; internal grievance processes to address employee complaints; and pay panels whose membership is predominately made up of career officials who would consider the results of the performance appraisal process and other information in connection with final pay decisions).

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

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

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

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

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

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

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

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

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

These six shortcomings are essentially identical in content to the four "statutory safeguards" the Comptroller General said in 2003 had to be present for a system to be successful in furthering an agency's mission and preventing politicization and abuse. As such, it is fair to say that GAO appears to agree with us that DoD has failed thus far to design a system that is either workable or that adheres to the principles GAO has identified for performance-based systems that protect the merit system.

The Partnership for Public Service, an organization dedicated to the restoration of the good name of federal employment, has also weighed in on the issue of what makes for a successful performance-based management and pay system for public employees. The Partnership echoes many of the arguments advanced by the GAO, but warns that pay for performance systems are not ends in themselves, but rather "one means toward the end of creating a high performance culture" linked to the goal of "boosting government effectiveness." This is significant because although the stated rationale for the establishment of the NSPS was supposed to be an enhanced ability to meet emerging "21st century security challenges" DoD has thus far refused an approach that makes use of explicit, objective, written performance standards tied to agency mission.

The Parnership cautions that differences between the private and public sectors must be at the forefront when designing pay for performance systems because of the unique attributes and challenges that federal agencies face. In particular, the Parnership identifies "three unique challenges: 1) performance metrics can be harder to develop and measure for organizations with a public mission, as compared to companies focused simply on maximizing profits, 2) workers may be less motivated by cash rewards and more by the ability to make a difference, which can lessen the impact of monetary incentives, and 3) the greater power and flexibility given to managers can complicate civil service protections against inappropriate political interference."

Nowhere in the proposed NSPS regulations is there any evidence that DoD has acknowledged the unique challenges posed by the fact that it is a federal agency with a public mission. No concession has been made to the special importance of accountability for the distribution of public funds, or the impact of draconian treatment on the accomplishment of a national security mission.

The Partnership's work on the subject of pay for performance systems in the federal government also stresses the importance of "extensive training of supervisors so they have the skills needed to make accurate assessments of individual performance." The implementation or "spiral" schedule DoD has set neglects entirely the importance of such training. This factor as much as any other that will decide whether the NSPS pay for performance turns into a costly scandal resulting in vast quantities of litigation and confusion.

The Partnership's final caution is that unless Congress provides adequate additional resources to allow "meaningful" financial rewards to high performers that distinguish them not only from "low performers" but also from what they would have received under a statutory system, pay for performance will not be successful as a motivator of higher performance. And, of course, such additional resources should not be granted to DoD management unless and until a fair, transparent, and accountable "performance appraisal" process is in place so that taxpayers can know that their precious tax dollars are not being distributed on the basis of politics or other non-merit factors.

Labor Relations

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

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

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

1. Eliminate bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of core operational management rights.

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

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

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

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

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

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

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

Our unions have expressed strong objections to DoD's total abandonment of Chapter 71, along with the law associated with the statute's interpretation. We ask that the Subcommittee join us in reaffirming to DoD that Congress intended to have Chapter 71 rights upheld so that DoD cannot hide behind its false contention that Congress' intent was unclear. Chapter 71 should be the "floor" of any labor relations system DoD designs. However, the design of DoD's plan is to minimize the influence of collective

bargaining so as to undermine the statutory right of employees to organize and bargain collectively. We know that when Congress enacted provisions to protect collective bargaining rights, it did not intend that those rights be eviscerated in the manner that DoD's proposed regulations envision. Indeed, any regulation reflecting any of the issues listed above will be entirely unacceptable to us, and we strongly believe, unfounded in either the legislation or the law.

Restrictions on Collective Bargaining

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

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

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

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

1. Overtime Policy

In general, AFGE locals negotiate overtime policies using two basic premises. First, the union's interest is in having management assign overtime work to employees who are qualified to perform the work and who normally perform the work. Second, the union seeks a fair and consistent means of assigning or ordering overtime, so it is not used as an arbitrary reward or punishment. Prior to being able to negotiate the fair rotation of overtime, it is significant to note that employees filed hundreds of

grievances over denial of overtime. Since procedures have been negotiated, clear, transparent, and known; these grievances have literally disappeared.

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

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

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

Under current law, the agency has the right to "assign work" which would include overtime assignments. However, the statute requires bargaining over procedures and

appropriate arrangements for employees affected by the exercise of a management right if requested by the union. In this way, federal employee representatives are permitted to bargain over important issues dealing with overtime.

However, under the proposed NSPS regulations, both overtime policies in current contracts as well as the unions' right to negotiate similar provisions in the future are undermined. Specifically, management could issue a department or even a component level policy or issuance that would negate current contract language dealing with overtime procedures and preclude further negotiations.

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

2. Shift Rotation for Employees

In industrial DoD settings, shift work is common. Usually there are three shifts: day, evening, and graveyard. Although an evening or graveyard shift may appear unattractive to some, others may prefer such shifts due to increased rates of pay, or because they help the worker handle child or elder care responsibilities with a spouse who works a day shift. Shift work assignment is a frequent subject for bargaining, with the union's primary focus on providing predictability and stability in workers'

family and personal lives and on equitable sharing of any shift differentials (increased pay) or burdens of work performed outside the normal day shift. Contract language often calls for volunteers first, then the use of seniority when making decisions about shift work, or provides for the equitable rotation of shifts.

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

However, under the proposed NSPS regulation, both shift work policies in current contracts as well as the unions' right to negotiate similar provisions in the future are undermined. Specifically, management could issue a department or even component level policy or issuance that would negate current contract language dealing with shift work and preclude further negotiations.

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

3. Safety and Health Programs

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

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

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

The proposed NSPS regulations threaten both safety and health policies in current contracts as well as the unions' right to negotiate similar provisions in the future.

Specifically, management could issue a department or even component level policy or issuance that would negate current contract language dealing with safety and health policies and preclude further negotiations.

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

4. Flexitime and Compressed Work Schedules

Under chapter 61 of Title 5, U.S. Code, federal employees may work under flexitime and compressed schedules. Examples of **flexitime** are 7 am to 4 pm or 9:30 am to 6:30 pm, rather than the traditional 8 am to 5 pm shift. Examples of **compressed** work schedules are Monday through Thursday for 10 hours per day with Friday off, or Tuesday through Friday for 10 hours per day with Monday off, rather than 8 hours per day Monday through Friday.

Today's DoD installations often operate daily on a 10 to 12 hour business day meeting customer demands longer and faster than ever before in the department's history.

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

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

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

In contrast, the proposed NSPS regulations threaten flexitime and compressed work schedules in current contracts as well as the unions' right to negotiate similar provisions in the future. Specifically management could issue a department or even a component level policy or issuance that would negate current contract language dealing with flexitime and compressed work schedules, and preclude further negotiations.

In addition, the new NSPS management rights section specifically prohibits management from negotiating over the procedures used to exercise its rights and limits severely the types of provisions that could be negotiated as "appropriate arrangements." Both of these factors could further limit or eliminate bargaining over alternative schedules.

5. Deployment Away From Regular Work Location

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

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

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

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

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

In some cases, employees will be forced to make choices between family and job. Management will be able to exercise its right to assign employees and leave any

collective bargaining out of the process, including the limited procedural and appropriate arrangement requirements now in current law.

The consequences of eliminating bargaining for dealing with overtime policies, shift rotation, safety and health programs, flexitime and compressed work schedules, deployment away from regular work locations, and other important workplace issues will likely include worker burnout, increased danger to workers in unsafe situations, and strong feelings of unfairness within work units if assignments and work schedules are not offered or ordered in a fair and consistent manner. Ultimately, the inability of the employees' representatives to resolve these matters through collective bargaining will create recruitment and retention problems for the Department, as employees find more stable positions in other federal agencies, or with state and local governments. Importantly, depriving DoD's operational managers and unions of the right to negotiate mutually agreeable arrangements over these issues is in no way connected to the Secretary's stated goal of meeting "the security challenges of the 21st century."

Employee Appeals

Public Law 108-13 reflects Congress's clear determination that DOD employees be afforded due process and be treated fairly in appeals they bring with respect to their employment. When it mandated that employees be treated fairly and afforded the protections of due process, and authorized only limited changes to current appellate

processes, Congress could not have envisioned the drastic reductions in employee rights that DoD's proposed regulations set forth.

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

Conclusion

We urge the Committee to take action, either legislatively or through oversight, to require DoD to address at least the six "flashpoint" issue issues described above. Performance appraisals must be based upon written standards and be subject to negotiated grievance and arbitration procedures. Strong and unambiguous safeguards must be established to prevent either a general reduction or stagnation in DoD salaries. The scope of collective bargaining must be fully restored, and DoD must not be permitted the ability to unilaterally void provisions of signed collective bargaining agreements. Any DoD-specific labor-management board must be independent from DoD management.

Standards for MSPB mitigation need to be realistic. And finally, RIF procedures must be based upon factors beyond a worker's most recent performance appraisal. A failure on the part of DoD to address these basic issues related to fairness, transparency, and accountability will guarantee that NSPS becomes a source of corruption, scandal, and mismanagement and will deflect the agency from its important national security mission for years.

Mr. PORTER. I would like to recognize Mr. Ron Ault, who is president of the Metal Trades Department.

STATEMENT OF RON AULT

Mr. AULT. Thank you, Mr. Chairman and members of the committee. My name is Ron Ault. I'm the president of the Metal Trades Department at the AFL–CIO. On behalf of the more than 40,000 civilian employees at the Department of Defense represented by the Metal Trades Department, I thank you for the opportunity to testify today. I'm also pleased to appear on behalf of some 700,000 represented by the 36 unions in the united DOD Workers' Coalition. And I want to say we are here speaking for the DOD workers.

I've got prepared testimony I would like to enter into the record, but I want to deviate from it for a couple of seconds, because I want to put a human face on all this. This is the public comments CD that was provided to us by the NSPS office, and I would strongly recommend that every member of the committee get a copy of this and just look at the comments from the people in your district. And I won't tell anybody here that I have looked at all, some 50,000 that's reported on here, but I've looked at a lot of them; and I would suggest that if you just go through here and randomly select on any basis that you would like to select and read these comments, you would understand the upheaval that's going on and the morale of the Federal work force that we represent and speak for today.

Particularly, I would say that I've discovered seven so far in favor of NSPS, and there may be more, but I've only discovered seven. So that is indicative of the people's opinion of what's going on with NSPS.

The recent wave of adulation for the late Pope John Paul II, especially his role in collaboration with his countryman Lech Walesa in igniting the spark that destroyed the Soviet communism, is a sharp reminder to all of us, especially those of us involved in shipyard labor, of the importance of free trade unions to the fabric of freedom in our Nation. Some may recall that Mr. Walesa was a mere shipyard electrician before he became head of the first free Polish state since before World War II.

I mentioned the Pope and the Polish labor movement as a reminder to all that anything that comprises right of free trade unions to represent the aspirations of working families is an anathema to America. And I strongly suggest that NSPS represents an eminent threat to that freedom. The workers we represent are patriotic. Many like myself are veterans of military service, and we are proud of the work we perform and the reason we perform it.

One of our affiliated organizations, the International Brotherhood of Electrical Workers, recently had one of their members seriously wounded while performing work as a Federal employee in Iraq. Gary York, the vice president of local union 1688, is a power plant controller working at the Gavins Point Power Plant in Yankton, SD. He volunteered for Operation Restore Iraqi Power in October 2003. On Christmas Eve, his convoy was attacked and he was wounded. Actually was shot in the head. Lucky for him, the bullet passed through the doorpost before striking him. He also received a shrapnel wound in the shoulder, which was a minor injury

compared to the head wound. He spent several weeks in hospitals in Germany and here at Walter Reed in D.C. He returned to his job around May 2004. Gary received the Medal of Freedom from the Corps of Engineers for his service. He was also featured in one of the issues of the IBEW Journal and one of the Corps publications. Gary just returned to Iraq for his second tour of duty on April 20, 2005.

Since NSPS was first proposed, I have met with rank-and-file workers in almost every DOD work location where we hold recognitions and collective bargaining agreements. On their behalf, I want to register my most strenuous objection to the inference and implication that underlies the National Security Personnel System, that is that we oppose this plan because we are obstructionists and because it represents a departure from the status quo.

Ladies and gentlemen, we do not like status quo. We believe that constructive change in the work site is long overdue. One of the primary reasons that working people select union representation is because they want to see change and they expect us to help them implement it; change that brings about a more open, objective, atmosphere in the workplace; that enables working people to perform their jobs effectively without interference and impediment; change that removes subjective elements of personality, prejudice, and ambiguity from the workplace and supplements those elements with clear rules and standards of evaluation.

In other words, we support high-performing workplaces, clearly defined performance standards, assignments which are understandable and achievable. We support individual and organizational growth, equal opportunity and fair treatment on the job. We welcome change when it enhances our ability to have a voice on the job, where it enables us to attain improved training, improve our safety and health on the job, where it is accompanied by respect and dignity that our contributions warrant. We are skeptical of change that is initiated for the purpose of undermining our freedom of association. We are dubious about change that is unilaterally initiated for the purpose of curtailing our potential for wage growth and personal achievement.

Now, I wanted to stop there and say one of the key points that I want to emphasize today: that I personally attended every single meeting of the Department of Defense from the get-go on NSPS.

I want to stop there and say one of the key points that I want to emphasize today that I personally attended every single meeting of the Department of Defense on NSPS. And I will say this, we have yet to be involved in this process.

The information has been provided to the public and the other information that has been provided to you and Members of Congress is not accurate. We have not had any part of forming any portion of this. It's been a secret, it's like a Stealth airplane that's been designed by someone working in secret.

You heard the MSPB person testify today about the working groups. We have asked to be part of the working group's deliberations, and to be involved in this and we have been denied this. We have been denied every opportunity to help implement and form and share this program that is now out here on the street that has caused all these problems.

So I want you to understand that we are skeptical of what's going to happen from here forward. Is OPM and DOD just going to run the clock out on us for 30 days and then implement what they have written in secret for months and months, or are we going to have real dialog?

I keep hearing the words from the folks that come up and testify, but they are not reassuring words to us. And we represent the people that are the experts in this field. They are not experts. We do this every day for a living.

Our folks are the people that make it work. I agree with Comptroller Walker, only the workers can make this thing work. We have a crew today working on the USS San Francisco. No one had to make those folks go out there and work together as a team. If we implement the pay-for-performance element as it is currently designed, I fear that you are going to destroy all the teamwork and all the expertise of those folks.

And let me just say this: We are coming up on the anniversary of the USS Thresher disaster. Our folks make, repair and operate on those nuclear submarines and all kinds of weapons systems that we can't really talk about today.

You know, the very first atomic bomb was hoisted out in the desert in White Sands by a crane operator that was one of our chief shop stewards during the Manhattan project. We do nothing but national security. Everything is national security to us.

So it's an insult for our folks to hear the words that they cannot have the freedom that we are espousing in Iraq because they are Federal employees, and they are somehow less than patriotic for having a union in their workplace or for using that.

All we are asking for is a fair shake. We are asking that Congress would take control and mandate that the intent of Congress, as well as the letter of the law, is followed in NSPS.

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

[The prepared statement of Mr. Ault follows:]

STATEMENT BY

RON AULT
PRESIDENT
METAL TRADES DEPARTMENT, AFLCIO

REPRESENTING

THE UNITED DEPARTMENT OF DEFENSE WORKERS' COALITION

BEFORE

THE SUBCOMMITTEE ON THE FEDERAL
WORKFORCE AND AGENCY ORGANIZATION

HOUSE COMMITTEE ON GOVERNMENT REFORM

REGARDING

NATIONAL SECURITY PERSONNEL SYSTEM: THE NEW DOD CIVILIAN
PERSONNEL SYSTEM

ON

APRIL 12, 2005

Mr. Chairman and Members of the Committee:

My name is Ron Ault, and I am the President of the Metal Trades Department, AFL-CIO (MTD). On behalf of the more than 40,000 civilian employees of the Department of Defense (DoD) represented by MTD, I thank you for the opportunity to testify today. I am also pleased to appear on behalf of the 700,000 employees represented by the 36 unions of the United DoD Workers' Coalition.

The Metal Trades Department of the AFL-CIO represents workers in a range of occupations and facilities within the Department of Defense—all of them critical to the national defense of the United States. From nuclear specialists to crane operators, from shipwrights and pipefitters to engineers with advanced degrees—Metal Trades represented workers run the gamut of educational and vocational training and experience. We take a back seat to no one in our dedication to America's security and welfare.

The recent wave of adulation for the late Pope John Paul II—especially his role in collaboration with his countryman Lech Walesa in igniting the spark that destroyed Soviet Communism is a sharp reminder to all of us—especially those involved with shipyard labor—of the importance of free trade unions to the fabric of freedom in our own nation. Some may recall that Mr. Walesa was a mere shipyard electrician before he became head of the first free Polish state since before World War II.

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The workers we represent are patriotic. Many, like me, are veterans of military service and we are proud of the work we perform and the reason we perform it. One of our affiliated organizations, the International Brotherhood of Electrical Workers, recently had one of their members seriously wounded while performing work as a federal employee in Iraq. Gary York, IBEW LU 1688 Vice-President, is a power plant controller working at the Gavins Point power plant in Yankton South Dakota. He volunteered for Operation Restore Iraq Power in October 2003. On Christmas Eve, his convoy was attacked and he was wounded. Actually, he was shot in the head. Lucky for him, the bullet passed through the doorpost before striking him. He also received shrapnel wound

in shoulder,(minor injury compared to his head wound). He spent several weeks in hospitals in Germany and then Walter Reed. He returned to his job around May 2004. Gary received the Medal of Freedom from the Corps of Engineers for his service. He was also featured in one of the issues of the IBEW magazine and one of the Corps publications. Believe it or not, Gary just returned to Iraq for a second tour of duty on April 20, 2005.

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Ladies and gentlemen, we do not like the status quo.

We believe that constructive change in the worksite is long overdue. One of the primary reasons that working people select union representation is because they want to see change and they expect us to help them implement it—

- Change that brings about a more open, objective atmosphere in the workplace;
- Change that enables working people to perform their jobs effectively without interference and impediment;
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We welcome change when it enhances our ability to have a voice on the job, where it enables us to attain improved training, improve our safety and health on the job, where it is accompanied by the respect and the dignity that our contributions warrant.

We are skeptical of change that is initiated for the purpose of undermining our freedom of association.

We are dubious about change that is unilaterally initiated for the purpose of curtailing our potential for wage growth and personal achievement.

We oppose change imposed from above as a means to subject us to more authoritarian control.

I particularly resent attempts by representatives of the Secretary of Defense to paint our opposition to NSPS as irrational and self-serving.

I know that many of the distinguished members of this panel are acutely aware of the pioneering work our Department has done to deal with critical personnel issues to enhance America's Defense preparedness — from the heroic efforts of our members, both civilian and civil service, who repaired and returned the USS Cole to active service within months of the terrorist attack on her in the Gulf -- to the ongoing work our members at Pearl Harbor Naval Shipyard are now performing to return the USS San Francisco to active duty.

I call your attention to the formal agreement between the Metal Trades and the US Navy more than four years ago to establish cross-training capabilities among crafts in Navy repair facilities worldwide. My predecessor, President John Meese and Admiral Tom Porter, both worked tirelessly to help craft that agreement.

About two years ago, the Navy raised red flags over findings that the Navy's craft and trades workforce is growing perilously old and that the pipeline of younger workers in craft and trade occupations is inadequate to meet the demand.

The Navy and DOD agreed that the supply of skilled craft workers, vital to ship construction and repair, had to be augmented. The Metal Trades Department had raised concerns over that problem for several years. When, at last, the Pentagon conceded that indeed, we had a point, the Metal Trades Department not only cooperated, but provided much of the innovation and insight to create effective vocational training to develop several apprentice classes to train shipbuilding skills.

Contrary to what the Department of Defense suggests, our objections to NSPS are based on two fundamental principles:

1. Our national defense relies first and foremost on the performance of a well-motivated, well-trained corps of personnel whose morale is buttressed by a strong belief in management that operates on objective, transparent and fair rules. Neither the substance of NSPS rules as they have been unilaterally developed, nor the process under which DOD has chosen to develop them, qualifies as fair or transparent.

2. The primary result of NSPS as it has been developed will be to effectively undermine the voice and weaken the rights of DOD personnel who will be expected to work under it.

The mystery about the true cost of this new system raises additional skepticism on our part. The Department of Defense maintains that costs are minimal—although it has been careful not to challenge our own estimate that it will require every penny of $3 Billion. We assert that, without effective, costly and near-continuous training to implement so-called "merit pay" provisions, the system is destined to fail miserably. Furthermore, as now envisioned by DOD, the so-called "pay for performance" will destroy teaming and espirit de corps by pitting employees against each other in their yearly quest to receive a pay raise. No one will dare share knowledge or job experience for fear of losing ground and someone else gaining a pay advantage. Can you envision a shift of nuclear pipe welders retro fitting a damaged nuclear attack submarine like the USS San Francisco, each jealously guarding their skills and job knowledge so that no one will get their pay raise? Furthermore, DOD has refused to acknowledge the additional costs requited to establishing labor relations and third party structures that parallel those already in existence for the rest of the federal civilian workforce, NSPS will crash and burn.

DOD's purpose in the NSPS exercise has been focused on weakening the ability of labor organizations to represent and advocate for the interests of DOD civilian personnel and providing protective cover for implementing a purely subjective merit pay system. All the rest is mere window dressing.

Those objectives should not be confused with the literal meaning of the word "flexibility."

As simply as we can state it, those are the two overriding concerns we bring to you, our congressional representatives. We charge that DOD has been less than forthright in its exercise of the authority Congress gave it in November 2003; and less than forthright

in the reports it has filed with you. I know this first hand, as I have personally attended every NSPS meeting, initially with DOD, and later with DOD and OPM. We have been completely shut out of this process to the point that our requests to jointly develop the presentations or secondarily to be a part of the "Town Hall" meetings DOD held with employees were rejected. We were notified that the meetings had already been planned and scheduled, many the same week we were in meetings with DOD.

This example is but one of many such outright misrepresentations DOD/OPM has provided Congress and the general public in regard to our involvement into this process. I won't belabor the point as many of us in the UDWC have taken DOD/OPM to court in a lawsuit currently before the DC federal court.

The law is clear. The congressional intent is clear: nothing under this statute should be construed to reduce or weaken the Pentagon's responsibility to engage in collective bargaining or to compromise the rights of civilian Pentagon personnel to the redress of grievances.

In preparing this testimony, I solicited my colleagues who represent the more than two dozen labor organizations that comprise the United Defense Department Workers Coalition, and I received far more contributions than I could possibly include within the constraints of this testimony. I would offer the following examples as representative of the kind of flexible, cooperative agreements that have been accomplished through the structure of collective bargaining. I submit at the outset, most of these accomplishments would not have been possible under the stringent and inflexible structure that DOD seeks to impose under NSPS.

The background of my colleague B.A. Napoleon, a representative of the Tidewater, Virginia, Federal Employees Metal Trades Council is perhaps more representative. Brother Napoleon is also a former Navy enlisted man. As a young sailor, Brother Napoleon says his first ship was in an unfinished state at Pearl Harbor. In his words:

> "There was nothing on the ship. I thought it would take years to get the ship to the point where we could sail. I was wrong. Within 12 months, we were on sea trials. I was amazed at the level of detail and technical precision the men and women had performed to get us floating."

Some years later, as a civilian, Brother Napoleon was an apprentice painter working in bilges and tanks of ships and submarines. He writes:

> "My satisfaction and motivation came from seeing those vessels sailing away from the yard and I knew I was part of the team that made it possible. Having been in the Navy, I knew the importance of making sure everything worked the way it was supposed to work. The men and women who repair and maintain naval warships are the premier artisans of their trades and are very under recognized."

In Mr. Napoleon's service at Norfolk Naval Shipyard, he has witnessed dozens of examples of service "above and beyond" and extraordinary flexibility that achieved missions that would have been otherwise impossible.

After a collision at sea, the aircraft carrier USS Eisenhower was repaired in record time and under budget by the craftsmen and women at NNSY.

More volunteers than were needed came forward to repair the USS Iowa after a shipboard explosion—where grown men shed tears working on the damage to get the vessel into shape for an inspection by Navy brass.

The USS Radford, damaged by a collision with a tanker that left a hole big enough to drive a tractor trailer through, was put back into service ahead of schedule and under budget.

And, of course, the tragedy of the USS Cole, which necessitated volunteers from the International Federation of Professional and Technical Engineers (IFPTE) and from the Tidewater Virginia Federal Employees Metal Trades Council (TVFEMTC) to fly out to the Gulf to help refloat the vessel for passage back to Pascagoula where other Metal Trades workers restored her to service.

Civilian employees at Rock Island Arsenal represented by AFGE Local 2119 fabricate gun mounts for humvees that are a substantial improvement on the design originally provided.

Other examples provided by members of our coalition--

During the First Gulf War, members of AFGE Local 1882 in Wisconsin moved their painting operation outdoors in the middle of a Wisconsin winter in order to get equipment ready for mobilization.

Those same members worked alongside Army reservists to rebuild 915 tractors needed in the conflict.

These and other incidents demonstrate flexibility and responsiveness that is only possible where the workers are confident that their skills and rights are respected. NSPS would be a step back from that status.

If it is true flexibility and positive outcomes that DOD wants under its new personnel system, then there is no better apparatus than collective bargaining with which to achieve it.

If the Pentagon is really interested in accomplishing its mission and not tightening its control over individual workers, then I submit it should invest in strengthening the relationship between Pentagon management and the labor organizations that have been selected to represent civilian employees.

Thank you,

Ron Ault, President
Metal Trades Department, AFL-CIO

Mr. PORTER. Thank you, Mr. Ault, we appreciate your comments today and to all of you for your additional backup testimony.

I would like to ask the first question, having to do with the Managers Association. We have heard consistently that Federal managers are categorized as having the lack of necessary skills based on this new system that is being proposed. What kind of training will managers need to be most successful in his system?

Ms. HEISER. For pay? For performance? For performance management in general?

Mr. PORTER. Yes.

Ms. HEISER. I think that the whole idea of translating organizational goals to performance standards of an employee is the general framework of the training that would be required. What the gentleman was just talking about is right on point, really that the Federal workers do their jobs.

And I think in the workplace, a lot of times supervisors come from a technical pool, or rather come to a supervisory position from a technical level rather than a managerial level, and work well with employees to manage and get the work done. But as far as actually leading them and coordinating the individual work of those people toward a higher goal, I don't think that's—that's not common to the Federal sector.

And I think that type of a bigger focus is what's primarily required. And the whole idea of communicating, the whole concept of written standards versus verbal standards, I hope that's going to go away. I never understood the idea of having verbal opposed to rather than written, but they are both moot, because the point is to communicate standards effectively in whatever way it takes and it may be a combination.

I think that OPM originally thought that managers were somehow bound by a performance appraisal that listed a set of duties and that was the only discussion that took place until performance appraisal time, and I fear that has really become the way things are in government. And that's what has to go away, the idea of having continuous communication with employees about how they are doing in terms of their performance.

And it's got to be a bi-way, it has to be a two-way communication. It has to be—have the supervisor to the employee in terms of here is what I perceive. It sounds like basic communication, but I think that's what is missing.

Mr. PORTER. Do you think there would be adequate funding.

Ms. HEISER. We took a little survey there this norning, you weren't there today—we took a little survey to see what level of confidence our folks had that the money would be there. It wasn't very high. You know, I don't know.

Mr. PORTER. Thank you. Mr. Ault, I know that your information regarding Mr. York is very germane. And please let him know he is an American hero, and we appreciate what he is doing. And having been to Yankton many times, I know exactly where he works or was working, but give him our best.

And I know that you are quite bashful and your comments are reserved and subdued, and I say that with a smile, because I appreciate your candor.

But let's talk for a moment about the labor relations board that's being proposed. Tell me what you think.

Mr. AULT. As proposed, it leaves a lot to be desired, when you have an in-house program, we sometimes call these in-house unions or company unions, where, you know, you are subservient. There's no equality here. There's no—first of all, it wouldn't be transparent, it wouldn't be objective, if the Secretary can appoint and make those kinds of things happen.

Currently, there is some objectivity and there is the systems of checks and balances of impartial grievance arbitration out there, where both parties have to, by preponderance of the proof, are a just cause standard of proof, have to prove their case that this person is actually guilty or has done something that would warrant the action.

I don't see any of that going on with the system that is as proposed.

Now, I have listened to management side of the House saying we are going to work that out in collaboration. Well, I sure hope so because we haven't worked anything out up till now. We have just been meeting for the sake of meeting so that they could come up to them on the Hill and say, hey, we met with the unions today.

Mr. PORTER. Thank you.

Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman. Ms. Heiser.

Ms. HEISER. Sir.

Mr. DAVIS. I have been told often that the devil is in the details, when you look at proposals and movements and changes. And I heard Mr. Gage and Mr. Ault both delineate, I guess, what I would call a lot of devils in this proposal. Are there any that you see that are apparent devils in the proposal?

Ms. HEISER. I think the largest apparent devil is truly the funding. We did take part of our vote this morning with—we are having the FMA national convention, so we have all folks in one place—and asked how confident they and their managers would be that this money would be there to see the programs, through, let's say, in the 3 to 7 years that it would take for full program implementation. And there was not a lot of confidence.

I think that detail is truly the most significant, because managers cannot sell the potential value of this program to their employees, nor believe it themselves, unless they have confidence that the reward, I guess, would be there.

Mr. DAVIS. Mr. Ault, I was moved by your description of patriotism as you talked about the gentleman who obviously is patriotic. And yet we knew that much of this action supposedly has been driven with an emphasis on national security. And early on, when the conversations got started, people were saying, well, we need to look at this especially in DOD because of national security.

We need to look at it in homeland security because of national security, and, I mean, there are people like myself who suggest that it was essentially an opportunity to try and turn back the clock in many ways, and that is turn back the clock on the employee rights, turn back the clock on collaboration, turn back the clock on democracy in the workplace. I mean, we talk about democ-

racy. And yet it appears as though, in many instances, we are not willing to practice what we preach.

How important do you think a sense of democracy is in the work environment?

Mr. AULT. I think it's critical. The folks we represent are more than arms and legs. They are the real experts. Whenever you are going into a nuclear reactor compartment hot, you have to be able to know that the people that have worked with you are dependable, I mean, it's the democracy of workplace is just critical.

We have a unique perspective. We also represent the private sector that build these ships. So, I mean, we come from a unique perspective. And when we talk about a contemporary system and a flexible system, when we set out and negotiate, for example, with Northrop Grumman ship systems, the first thing they want in their labor relations is the involvement of the employees.

They want what DOD is throwing away. They want the employees to be part of the team. A contemporary labor relations system today is more about employee involvement and less about supervision. They want to see more self-directed work force. They want to see fewer supervisors. They want to see more people directly involved in production. They want to see cost savings from employees, ideas being implemented on the floor without going through a long and tedious process. So, Mr. Davis, to speak directly to it, it's the answer.

Unfortunately, no one from DOD is asking the question.

Mr. DAVIS. I would concur with you.

Mr. Gage, it seemed to me that you indicated that collaboration has been less than democratic, or I guess you get the impression that you don't feel that there has been partnership in the evolution and development of the proposed changes relative to your union and other unions interaction with DOD. Is that an accurate characterization?

Mr. GAGE. That's exactly accurate. We are disappointed about it. The way we read the authorizing legislation, we were supposed to be part of the design of this thing. And we have been shut out completely. We are still, you know, I am looking at it, you know, we are going to go into this meeting and confer. And we know what we think we need as safeguards, and I would really like to hear that word being used so often today.

Because if this system is so good, it should be able to stand up to scrutiny and have safeguards for employees for that transparency. So we are going into the meeting and confer, and we think we have our very good arguments, and we are hoping that DOD will look at them.

But so far they seem to have their mind made up. It's a very theoretical approach they are taking rather than the practical one that Ron is talking about and that our workers are looking for. So we are trying to get this out of the sky and out of ideology, maybe, and down to the practical, practical things that work on the worksite.

Mr. DAVIS. Well, I have no further questions, Mr. Chairman, I want to thank all of the witnesses for appearing and for their participation. And, again, I thank you for holding this hearing.

Mr. PORTER. Thank you, Mr. Davis. That would conclude my questions also. We appreciate your comments and know that many

Members will be submitting questions later. They have time to do so, and actually, I do have some questions that we will be submitting.

But let me say for the record that this committee is going to be very thoughtful in its deliberation, as we follow the process of implementation. And I know a number of points were brought up this morning that have to be addressed and haven't been, and know that many of the stages of implementation can take 8 or 9 years, if my understanding is correct. But we want to make sure that it is done right and that the employees and managers, those that are directly impacted have a say in this process.

So we appreciate all of your testimony today and look forward to following this in the future, and we will adjourn the meeting. Thank you.

[Whereupon, at 4:15 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

Summary of Basic Documents and Related Materials Being Returned

OSD-Legislative Affairs:	Classification:	OSDLA-Control No:	Date Received:
Document Control Record	Unclassified	20050079	May 16, 2005

Committee Number:	Hearing Dates:
0	April 12, 2005

Committee:
House Government Reform Committee/ Federal Workforce and Agency Organization

Subject:
"NSPS: The New Dept of Def Civilian Personnel System-Reaching Readiness"

Witness
Yes

OPR:	Committee Suspense Date:	Close Out Date:
P&R	June 3, 2005	October 5, 2005

Document Type:	Page Inventory:	Document Description:
Questions for the Record		10/05/05 - Sent another cy of P&R's QFRs Mr. Abell's (1-18) to cmte.

Attention: Christofferson Chad
Location: B-373A RHOB

Receiving Officer Signature:_____ Date:_____

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #1

Leadership

Question 1: Now that Secretary England has been nominated as the Deputy Defense Secretary, what steps are you taking to reorganize leadership, responsibility, and accountability over the design and implementation of the NSPS?

Answer: Secretary England expects to remain fully engaged in the NSPS design and implementation and continue as the Department's Senior Executive for NSPS. The Overarching Integrated Product Team (OIPT) and the Program Executive Officer (PEO) will continue to report directly to Secretary England, at least until publication of the final NSPS regulations and until the first phase of NSPS is implemented. When direct leadership is transitioned, Secretary England will continue in an active oversight role.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #2

Alignment Performance and Organizational Goals

Question 2: Exactly how will DoD ensure that individual performance expectations align with DoD's overall mission and strategic goals?

Answer: Supervisors will align the performance objectives they set with employees to the DoD's overall mission and strategic goals and to the specific goals and objectives of their respective organizations.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #3

Alignment Performance and Organizational Goals

Question 3: How will employees participate in this process?

Answer: Supervisors will work with employees to develop performance expectations. This may take a variety of forms including group discussions of goals for the organization and how they can be accomplished or individual discussions with employees. In all cases, employees will have the opportunity for input and supervisors will explain the link between the employees' performance objectives and the overall mission and goals.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #4

Pay and Performance

Question 4: The proposed regulations for NSPS provide for the establishment of control points within a pay band to limit increases in basic pay. However, in the final regulations for DHS, control points were eliminated because DHS and OPM believed that control points are at odds with pay-for-performance.

How do you reconcile pay-for-performance and the concept of control points?

Answer: DoD and OPM have not made a final determination regarding the use of control points under the NSPS pay system. However, the concept of control points is not inherently inconsistent with the goals of a pay-for-performance system, which envisions a greater link between pay decisions and an individual's performance. Several of our personnel demonstration projects have successfully used control points in their pay for performance systems. While we understand the concern that control points can be perceived to unduly limit pay progression, they can be useful in a performance based pay system, such as limiting salary progression in a pay band to top performers, which is consistent with the pay for performance system. We will ensure that if control points are used under NSPS, they are well defined and understandable to employees.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #5

Pay and Performance

The proposed regulations do not fully explain how employees will receive performance pay adjustments.

Question A: Could you provide more information about how employees will receive adjustments to their pay based on acceptable performance?

Answer: The proposed NSPS regulations provide that employees with a rating of record above unacceptable will receive any adjustment in the minimum rate of the rate range for their position. In addition, such employees also would receive the full amount of any increase in the applicable "local market supplement" for their position. Finally, employees with a "fully successful" (or equivalent) or better rating of record would receive a performance payout in the form of an increase in basic pay or a lump-sum payment, or a combination of both.

Question B: How will DoD ensure that supervisors are accountable for exercising their responsibilities under NSPS?

Answer: In addition to the system requirements at § 9901.405(b)(4) and (c) that hold supervisors accountable for effective performance management, the proposed regulations provide in § 9901.406(c) that the performance expectations for supervisors and managers will include the assessment and measurement of how well they exercise their performance management responsibilities under NSPS.

Additionally, the performance assessment process provides for evaluation of performance and contribution through a pay pool panel. Meetings, chaired by a senior manager, allow supervisors and managers to explain the reasoning for performance ratings, which facilitates greater consistency among performance ratings across organizations in the pay pool. Reconciliation allows for additional opinions and perspectives for an employee's performance; thus, creating a more accurate final rating.

We will provide employees avenues to have performance evaluations reconsidered.

Question C: What training will employees and managers receive prior to NSPS implementation? Please be specific.

Answer: The NSPS training plan is a comprehensive, well-planned learning strategy to prepare the DoD workforce for the transition to NSPS. Participants need to be informed and educated about NSPS and trust and value it as a system that fosters accountability, respects the individual and protects his and her rights under the law.

The plan focuses on four target audiences: DoD employees; supervisors and managers; human resource (HR) practitioners; and labor relations (LR) practitioners. We estimate the initial employee training will take approximately a day and a half. Supervisors and managers will receive additional training so that they can fairly manage, appraise and rate employees. That training is expected to take a minimum of 18 hours. The notional design of the pay for performance system includes the use of pay pools and we will provide training for pay pool managers. Specialized training for HR practitioners will cover the implementation of the HR system and the new labor relations and appeals system. This specialized training is expected to take up to 40 hours. The LR practitioners and attorneys will have a two-day course on the new labor relations system.

The plan incorporates a blended learning approach featuring web based and classroom instruction supplemented by a variety of learning products, informational materials and workshops to effectively reach intended audiences with engaging, accurate and timely content.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #6

Core Competencies

GAO has stated that one concern it has with the new DHS performance management system is that it does not require core competencies to be in writing. Similarly, the proposed regulations on NSPS do not provide that core competencies be in writing.

Question A: Will core competencies be provided to employees in writing?

Answer: We intend to modify the regulations to include a requirement that performance requirements or objectives, which may be expressed in the form of "core competencies," will be communicated to employees in writing.

Question B: Would providing minimal written core competencies to employees significantly impede DoD's flexibility with regard to performance management?

Answer: We do not anticipate that providing employees with written performance requirements (or "core competencies") would impede DoD's flexibility with regard to performance management.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #7

Safeguards

In his testimony, Mr. Walker stated that he is concerned that the proposed regulations do not contain sufficient detail regarding adequate safeguards to help ensure fairness and guard against abuse.

Question A: Will the final regulations for the NSPS provide additional safeguards to help ensure fairness and guard against abuse?

Answer: We understand that Mr. Walker's concern in this area relates to the proposed performance management system. As is detailed below, we are considering additional requirements or safeguards to include in the final regulations. We spent a significant amount of time during meet and confer discussing this issue with employee representatives, and will consider those discussions in finalizing the regulations.

Question B: If not, please explain in detail why DoD feels that such safeguards are not appropriate.

Answer: N/A

Question C: What predecisional internal safeguards will be incorporated into the performance management process to help achieve consistency, equity, and ensure nondiscrimination and nonpoliticization?

Answer: The specific processes for performance management and the accompanying performance-based pay decisions will be addressed in DoD implementing issuances. However, the responsibilities of a pay pool manager under a pay-for-performance system typically include the review of supervisors' proposed ratings of record for consistency and equity across organizational units and to guard against potential discrimination or politicization before finalizing ratings. Our experience with our personnel demos indicates that this is an effective way to achieve consistency and equity.

Question D: Will the final regulations require DoD to publish overall results of performance management and individual pay decisions so that there is reasonable transparency and appropriate accountability?

Answer: While the exact content of the final regulations has not yet been determined, among the options under consideration is a requirement for publishing aggregate data on the distribution of ratings and pay decisions.

Question E: Will the final regulations require DoD to periodically conduct and report on internal assessments and employee surveys relating to the NSPS performance management system?

Answer: The proposed regulation requires DoD to establish procedures for evaluating all aspects of NSPS, including performance management. DoD is developing a program evaluation process that will utilize a variety of tools, including employee surveys, analysis of promotion, turnover, and salary data, and special reports on specific areas of interest. There will be heavy focus on the performance management aspects of NSPS in this evaluation process.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #8

Safeguards

One of GAO's concerns is that the NSPS does not identify a process for continuing involvement of employees in the design and implementation of the NSPS. The final regulations for the new DHS personnel regulations provide a place for employees to participate in pay decisions through the establishment of a Compensation Committee. The proposed regulations for DoD do not include specific provisions establishing either a Compensation Committee or a Performance Review Board.

Question A: Are you considering the establishment of a Compensation Committee or a Performance Review Board?

Answer: Compensation Committee(s) and Performance Review Boards are among the options that would ensure the continuing participation of employees and their representatives in the process that leads to decisions about the distribution and allocation of future pay adjustments for employees covered by NSPS. This has been discussed with the unions during the meet and confer process, including how they might participate in these functions.

Question B: What are your plans for including employees in the planning, development, and implementation of the NSPS?

Answer: The proposed NSPS regulations identify a continuing collaboration process for continuing involvement of represented employees in the design and implementation of the NSPS.

Question C: What are your plans for a comprehensive communications strategy to provide continuing meaningful two-way communication between DoD and employees?

Answer: The Department recognizes the critical need to communicate with its employees throughout the design and implementation of NSPS. Our communications objectives include: (1) demonstrate the rationale for and benefits of NSPS; (2) demonstrate openness and transparency in the design and process of converting to NSPS; (3) express DoD's commitment to ensuring NSPS is applied fairly and equitably; and (4) address potential criticism of NSPS. We have and will continue to use various means for communicating and getting input from our employees and employee organizations throughout the process, including print and electronic media, brochures and pamphlets, e-mail, town hall meetings with senior DoD officials, focus groups, speeches and briefings.

The NSPS website (www.cpms.osd.mil/NSPS) has been the primary tool for providing all our stakeholders with the most up-to-date information on matters relative to NSPS. It includes an immediate feedback feature for direct responses to email inquiries. Furthermore, each of the Components has their own website and newsletters that include the component-specific information on NSPS.

During the summer of 2004, we conducted over 100 focus groups at installations throughout the world as well as over 50 town hall meetings to inform our employees and to gain insight into their concerns. We continue to conduct town hall meetings even as we progress in the process. Additionally, senior DoD leaders have addressed numerous employee groups and public interest groups on NSPS.

Throughout the design process, the Department held a series of meetings with our employee representatives to discuss design elements, options, and proposals under consideration and to solicit their feedback. Their input was valuable and resulted in inclusion of some of their suggestions in the proposed regulation. The meet and confer process and the proposed continued collaboration process outlined in the proposed regulations will provide ongoing means for communicating with employee unions.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #9

Labor-Management Relations

Labor organizations also have expressed reservations regarding the independence of the National Security Labor Relations Board (NSLRB) because the Secretary of Defense appoints the members of the NSLRB. Under the proposed regulations, DoD labor organizations have no role in the appointment process.

Question A: Since the Secretary of Defense appoints all of the members of the NSLRB without the participation of labor organizations, how will the NSLRB be able to maintain its independence?

Answer: Although appointed by the Secretary, the three board members' independence and freedom from undue influence by the Department is assured by appointing the members to a fixed term with a very limited basis for removal. The stringent criteria for removal are the same as those that apply to MSPB members and FLRA members: inefficiency, neglect of duty or malfeasance. The intent is to make removal of such individuals difficult, in order to preserve their independence.

Question B: Why should employees be confident that the NSLRB will be fair and impartial?

Answer: The proposed regulations require the members to be independent, distinguished citizens known for their integrity, impartiality and expertise in labor relations and/or relevant national security matters. In addition, all decisions of the NLSRB are reviewable by the FLRA and the United States Courts of Appeals.

All of these safeguards ensure a fair review of labor disputes will be made by the NSLRB without undue influence by the Secretary or DoD management.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #10

Labor-Management Relations

Question 10: Please explain why DoD needs to limit collective bargaining in NSPS.

Answer: The NSPS statute recognizes that maintaining the status quo with respect to labor-management relations would not provide DoD with a workforce that is sufficiently agile and flexible to execute the current and future national security mission. To carry out its national security mission, the regulations provide the Department the authority to take actions quickly to confront threats in an ever-changing national security environment without unnecessary delay.

To permit DoD to take actions quickly, the proposed regulations have narrowed the scope of bargaining. The proposed regulations are consistent with the requirements of the statute regarding collective bargaining. The proposed regulations strike a balance between employee interests and DoD's need to accomplish its mission effectively and expeditiously.

While the proposed regulations eliminate bargaining on procedures regarding operational management rights, they do not eliminate bargaining on procedures. In fact, the regulations provide that management must consult with unions in exercising core operational rights. The regulations continue to provide for bargaining on procedures for personnel management rights, and continue to provide for bargaining on impact and appropriate arrangements for all management rights. Finally, the proposed regulations provide for consultation on procedures regarding operational management rights. While the scope of bargaining is restricted compared to what occurs today, the proposed regulations continue to provide many opportunities for the union to have a voice in workplace issues.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #11

Labor-Management Relations

The proposed regulations do not allow DoD management to bargain over certain operational DoD decisions. For example, management cannot bargain over the assignment of employees or the technology, method, and means of performing work. However, management will bargain over appropriate arrangements for employees adversely affected by an operational decision, provided that the effects of the decision are "foreseeable, substantial, and significant in terms of both impact and duration...."

Question A: Why does an adverse effect have to be foreseeable for management to bargain over corrective action?

Answer: Establishing new standards for the duty to bargain is intended to focus bargaining on those matters that are of significant concern and impact and relieve the parties of potentially lengthy negotiations over matters that are limited in scope and effect. With regard to the term "foreseeable," this helps ensure negotiations are focused on those matters that a reasonable person would expect to occur or exist under the circumstances. Although the term "foreseeable" is not noted in the 5 U.S.C. chapter 71 provision for appropriate arrangements, under current case law, for a particular proposal to be an appropriate arrangement, it must first be shown that the exercise of a management right has an adverse impact on employees. Absent the foreseeing of that adverse impact, the proposal is not an appropriate arrangement. However, as with matters concerning appropriate arrangement bargaining under chapter 71, we expect this to be further defined in case law established by the NSLRB.

Question B: If an adverse effect on a group of employees is entirely unforeseeable, would management be unable to bargain over corrective action?

Answer: Not necessarily. Ultimately, it will be up to management at the level of recognition to determine whether an adverse effect on employees is entirely unforeseeable. However, whether the event is "unforeseeable" should not be viewed in isolation. Management must weigh all the factors together, including whether the change is significant and substantial, when making its decisions on duty to bargain. If the union disagrees, the union may challenge this with the National Security Labor Relations Board (NSLRB) as they could challenge with the FLRA today on disputes concerning duty to bargain.

Question C: How long would an adverse effect have to last for it to be of sufficient duration?

Answer: There is no simple answer to this question. The Department intentionally did not place an arbitrary time limit on the duration of an action or number of employees impacted. Again, this cannot be viewed in isolation. We expect management to weigh all the factors together when making decisions over the duty to bargain, and whether changes are significant, substantial, and foreseeable are situational and mission sensitive. That is why we put in place the safeguard to bargain on appropriate arrangements. Ultimately, we expect this to be further defined in case law established by the NSLRB.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #12

Adverse Actions and Appeals

After an MSPB administrative judge issues an initial MSPB decision in an adverse action appeal, DoD may reconsider the administrative judge's decision and modify or reverse the initial MSPB decision. § 9901.807(k)(8)(iii)(A). Similarly, "[w]here the Department determines that the initial [MSPB] decision has a direct and substantial adverse impact on the Department's national security mission, or is based on an erroneous interpretation of law, Governmentwide rule or regulation, or [the NSPS regulations], [DoD may] issue a final DoD decision modifying or reversing that initial decision." § 9901.807(k)(8)(iii)(B). Further, DoD may decide that the initial decision of an MSPB administrative judge should serve as a precedential decision. § 9901.807(k)(8)(iii)(C).

Question A: Why should DoD have the power to modify or reverse a decision of an administrative judge?

Answer: The NSPS statute authorizes the Department to establish an appeals process that results in a final decision of the Department, which is reviewable by the full Merit Systems Protection Board (MSPB). The Department has elected to utilize MSPB administrative judges (AJs) as the first step in the Department's appeals process with a review by the Department that results in a final decision of the Department. This review by the Department ensures that MSPB AJs interpret NSPS and the regulations in a way that recognizes the critical mission of the Department and to ensure that MSPB AJs give proper deference to such interpretation. While the Department may modify or reverse MSPB AJs initial decisions, modification or reversal is based on very stringent criteria. As reflected in those criteria, it is anticipated that relatively few initial decisions would be reviewed by DoD.

Question B: What procedures and standard of review would DoD use to reconsider an administrative judge's decision?

Answer: The procedures for review of an administrative judge's decision will be developed and disseminated through implementing issuances. These procedures are subject to continuing collaboration with the unions. Additionally, the Department will coordinate with MSPB on the procedures for review of an AJ's decision. The standards for review will provide for meaningful corrective action and preserve statutory requirements of fair treatment and due process. The Department's review of the initial AJ decision will be limited to those where either party has timely filed a request for review. The Department may remand or issue a final DoD decision modifying or

reversing the initial decision when the Department believes that there has been a material error of fact, or that there is new and material evidence available that was not available when the record closed. The Department may modify or reverse the initial administrative judge decision when it determines that the decision has a direct and substantial adverse impact on the Department's national security mission or is based on erroneous interpretation of law, Government wide rule or regulation, or NSPS regulations. These are very stringent criteria.

Employees have the right to challenge DoD decisions with the full Merit Systems Protection Board (MSPB). If dissatisfied with the MSPB's decision employees may request review by the Court of Appeals for the Federal Circuit.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #13

Hypothetical Concerning Appeals Process

Under 5 C.F.R. § 9901.807(k)(8)(iii), if an MSPB administrative judge issues an initial decision against DoD, DoD can file a "request for review" and then reconsider the initial decision of the administrative judge. Under §9901.807(k)(8)(iii)(B), DoD can then decide that the initial decision "is based on an erroneous interpretation of law, Government-wide rule or regulation, or this part" and modify or reverse the administrative judge's decision. If the employee then files a petition for review to the full MSPB, the Board would, under §9901.107, have to accord DoD's interpretation of the regulations "great deference."

Question A: Is my reading of this correct?

Answer: It is correct in part. The request for review would be filed at a lower level in DoD, generally by management at the installation level. The actual review itself is conducted at the Department level. The proposed regulations clearly indicate the review authority is not unlimited. The modification or reversal of an administrative judge's initial decision is based on very stringent criteria.

Question B: How does this procedure and deferential standard of review constitute a fair and impartial external review of DoD decisions?

Answer: The NSPS statute authorizes the Department to establish legal standards and procedures for a new appeals process. With this in mind, the use of MSPB administrative judges goes a long way to ensuring fairness and impartiality in the proposed appeals system. While the Department may review initial decisions made by MSPB administrative judges, the review is based on very stringent criteria. Even though the MSPB is bound by the legal standards which provides that NSPS regulations be interpreted in a way that recognizes the critical national security mission of the Department, Congress specifically required that the full MSPB may order corrective action as it considers appropriate if the Board determines that the Department's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule or regulation having been followed or unsupported by substantial evidence. These requirements do not conflict with each other. Finally, the federal courts retain jurisdiction to review decisions of the Department after review by the full MSPB.

Question C: Some would argue that DoD could overturn any initial MSPB decision it doesn't like—how would you respond to this criticism?

Answer: This is simply incorrect. Overturning a decision is based on very strict criteria. The Department's ability to overturn a decision is not unlimited and cannot be based on whether or not the Department dislikes the decision.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #14

Hypothetical Concerning Appeals Process

Question A: Would DoD's authority under § 9901.807(k)(8)(iii)(C) of the regulations, which allows DoD to determine that an initial MSPB decision is precedential, conflict with the full Board's authority to issue precedential MSPB decisions?

Answer: No. DoD's authority to determine that an initial MSPB administrative judge's decision is precedential does not conflict with the full Board's authority to issue precedential MSPB decisions. The full MSPB is a higher reviewing authority that can overturn the Department's decision.

Question B: Why does DoD need this authority?

Answer: DoD needs the authority to determine an initial MSPB decision is precedential because the Department must establish case law that recognizes the Department's critical national security mission and the specific requirements of 9902. Until the Department establishes case law, MSPB case law applies except where it conflicts with NSPS regulations.

Question C: In light of DoD's authority to amend, clarify, or interpret the NSPS regulations through notice and comment rulemaking, is § 9901.807(k)(8)(iii)(C) of the proposed regulations really necessary?

Answer: Yes, it is necessary. The Department was provided authority to establish a new appeals process; it is critical that the Department have the ability to establish case law that recognizes the Department's national security mission. This is consistent with the MSPB establishing new legal standards through case law under the current appeals system. Also, MSPB today does not routinely go through a rigorous process of amending, clarifying, or interpreting law through notice and comment rule making.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #15

Hypothetical Concerning Appeals Process

Question 15: Why is it necessary to limit MSPB's authority to mitigate penalties in adverse action appeals?

Answer: The Department bears full accountability for national security, therefore is in the best position to determine the most appropriate adverse action for unacceptable performance or misconduct. The standard for mitigation under NSPS is consistent with Federal Circuit precedent, which holds that the court will normally defer to the judgment of the agency as to the appropriate penalty for employee misconduct unless the severity appears totally unwarranted. Despite Federal Circuit precedent, the MSPB has not applied its mitigation standard as strictly as the court has mandated. The court has had to remind the Board not to substitute its judgment for that of agency officials in determining the appropriate penalty in cases. The proposed standard for mitigation is consistent with the authority provided in the NSPS statute. However, the Department is currently evaluating to what extent this standard may be applied to the full MSPB, which reviews Department decisions as opposed to MSPB Administrative Judges which are being used in the Department's appeals process.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #16

Hypothetical Concerning Appeals Process

Question 16: Is the "wholly without justification" standard for mitigation of a penalty too restrictive?

Answer: The standard is consistent with Federal Circuit precedent, which holds that the court will normally defer to the judgment of the agency as to the appropriate penalty for employee misconduct unless the severity appears totally unwarranted. Despite Federal Circuit precedent, the MSPB has not applied its mitigation standard as strictly as the court has mandated. The court has had to remind the Board not to substitute its judgment for that of agency officials in determining the appropriate penalty in such cases. With this in mind, the NSPS statute authorizes the Secretary to "establish legal standards and procedures for personnel actions, including standards for applicable relief, to be taken on the basis of employee misconduct or performance that fails to meet expectations." This proposed standard is consistent with this authority. However, the Department is currently evaluating to what extent this standard may be applied to the full MSPB, which reviews Department decisions as opposed to MSPB Administrative Judges which are being used in the Department's appeals process.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #17

Mandatory Removal Offenses

Question 17: Will DoD publish a list of mandatory removal offenses in the *Federal Register?*

Answer: No, however, the Department will identify and publish mandatory removal offenses (MROs) through implementing issuances in advance of their application. We will ensure that all employees are fully aware of those offenses designated as MROs.

Hearing Date: April 12, 2005
Committee: House Government Reform Subcommittee
On the Federal Workforce and Agency Organization
Member: Chairman Porter
Witness: Mr. Abell
Question #18

Hiring and Workforce Shaping

Question 18: Will DoD conduct gap analyses of the critical skills and competencies needed for DoD's future workforce so that the hiring and reduction in force flexibilities available to DoD are used effectively?

Answer: The Department uses a variety of tools, including skill gap analyses and competency assessments, to determine hiring needs and to anticipate the effect of mission changes on workforce requirements. NSPS will provide managers with the human resource management flexibilities they need to respond to these changes.

"NSPS: The New Department of Defense Civilian Personnel System—Reaching Readiness"
Subcommittee on the Federal Workforce and Agency Organization
Chairman Jon C. Porter
Questions for the Record
April 12, 2005

Panel 1: David M. Walker, Comptroller General, Government Accountability Office

Regulations versus "Implementing Issuances"

- In your testimony, you noted the lack of detail in the proposed regulations. The proposed regulations for the NSPS allow DOD to address the specific details of the system through "implementing issuances."
  - Which specific subjects of the NSPS regulations should be included in the final regulations?
  - Which aspects are appropriate for "implementing issuances."

Deputy Secretary of Defense for Management

- In your testimony you recommend that DOD appoint a Deputy Secretary of Defense for Management to guide the transition to the NSPS. In their oral testimony, Mr. Abell and Mr. Nesterczuk indicated that it would not be helpful to have a divided leadership structure for the transition to the NSPS and that an additional layer of leadership would be a hindrance.
  - What is your response to Mr. Abell's and Mr. Nesterczuk's concerns?
  - How significant is the risk that the transition to the NSPS could fail if DOD does not appoint a Deputy Secretary of Defense for Management?
  - What specific authorities should the Secretary grant to the Deputy Secretary of Defense for Management so that the new position can exercise effective leadership over the business transformation process?
  - How can DOD ensure that the position of Deputy Secretary of Defense for Management does not become just another unnecessary layer of bureaucracy?

Alignment of Performance and Organizational Goals

- What specific procedures would you suggest to ensure that individual performance expectations align with DOD's mission and strategic goals?

- How could employees participate in this process?

Employee Involvement

- You have expressed concerns that the NSPS does not identify a process for continuing involvement of employees in the design and implementation of the NSPS. The proposed regulations for the DHS human resources system contained provisions for a Performance Review Board (PRB). The final regulations for the DHS human resource system provide a place for employees to participate in pay decisions through the establishment of a Compensation Committee rather than a PRB. The proposed regulations for the NSPS do not include specific provisions establishing either a Compensation Committee or a Performance Review Board.
    - Would you recommend the creation of a Compensation Committee or a Performance Review Board for the NSPS?
    - Would such institutions for internal review of decisions improve the fairness, credibility, and transparency of the NSPS?

Core Competencies

- One concern you have with the new DHS performance management system is that it does not require core competencies to be in writing. Similarly, the proposed regulations on NSPS do not provide that core competencies be in writing.
    - Assuming that you also think the NSPS regulations should require that core competencies be issued in writing, do you see the value for not having any expectations in writing?

Pay and Performance

- The proposed regulations for NSPS provide for the establishment of control points within a pay band to limit increases in basic pay. However, in the final regulations for DHS, control points were eliminated because DHS and OPM believed that control points are at odds with pay-for-performance. In your written testimony, you indicate that control points can be useful.
    - Are control points a necessary part of the NSPS pay-for-performance rules?
    - If so, how do you respond to OPM's concern?

Labor-Management Relations

- Labor-management disputes will be handled by an internal National Security Labor Relations Board (NSLRB) whose three members will be appointed by the Secretary

of Defense. Some have voiced concerns over the independence of the Board, fearing that the members will act from a political position rather than from a neutral one.

- Would the appointment of members of the NSLRB for a fixed term improve the independence of the Board?
- Other than allowing labor organization participation in the appointment of Board members, how could the independence of the Board be enhanced?
- What value does the internal NSLRB bring to DOD?
- Will the NSLRB streamline the process or just add another layer of unneeded bureaucracy?

Adverse Actions and Appeals

- The appeals process that the proposed regulations would establish is rather complex. For example, after an MSPB administrative judge issues an initial MSPB decision in an adverse action appeal, DOD may reconsider the administrative judge's decision and modify or reverse the initial MSPB decision. § 9901.807(k)(8)(iii)(A). Similarly, "[w]here the Department determines that the initial [MSPB] decision has a direct and substantial adverse impact on the Department's national security mission, <u>or is based on an erroneous interpretation of law, Governmentwide rule or regulation, or [the NSPS regulations], [DOD may] issue a final DOD decision modifying or reversing that initial decision</u>." § 9901.807(k)(8)(iii)(B). Further, DOD may decide that the initial decision of an MSPB administrative judge should serve as a precedential decision. § 9901.807(k)(8)(iii)(C).
  - Are the provisions of the proposed regulations that allow DOD to review initial MSPB decisions consistent with an independent external appeals process?
  - Do you see any pitfalls with this proposed appeals process?

Panel 2: **Mr. Charles S. Abell, Principal Deputy Under Secretary of Defense (Personnel & Readiness);**
George Nesterczuk, Senior Policy Advisor on the Department of Defense, U.S. Office of Personnel Management; and
The Honorable Neil A. G. McPhie, Chairman, U.S. Merit Systems Protection Board.

Mr. Abell:

Leadership

- Now that Secretary England has been nominated as the Deputy Defense Secretary, what steps are you taking to reorganize leadership, responsibility, and accountability over the design and implementation of the NSPS?

Alignment Performance and Organizational Goals

- Exactly how will DOD ensure that individual performance expectations align with DOD's overall mission and strategic goals?

- How will employees participate in this process?

Pay and Performance

- The proposed regulations for NSPS provide for the establishment of control points within a pay band to limit increases in basic pay. However, in the final regulations for DHS, control points were eliminated because DHS and OPM believed that control points are at odds with pay-for-performance.

  - How do you reconcile pay-for-performance and the concept of control points?

- The proposed regulations do not fully explain how employees will receive performance pay adjustments.

  - Could you provide more information about how employees will receive adjustments to their pay based on acceptable performance?

  - How will DOD ensure that supervisors are accountable for exercising their responsibilities under NSPS?

  - What training will employees and managers receive prior to NSPS implementation? Please be specific.

Core Competencies

- GAO has stated that one concern it has with the new DHS performance management system is that it does not require core competencies to be in writing. Similarly, the proposed regulations on NSPS do not provide that core competencies be in writing.

  - Will core competencies be provided to employees in writing?

  - Would providing minimal written core competencies to employees significantly impede DOD's flexibility with regard to performance management?

Safeguards

- In his testimony, Mr. Walker stated that he is concerned that the proposed regulations do not contain sufficient detail regarding adequate safeguards to help ensure fairness and guard against abuse.
    - Will the final regulations for the NSPS provide additional safeguards to help ensure fairness and guard against abuse?
    - If not, please explain in detail why DOD feels that such safeguards are not appropriate.
    - What predecisional internal safeguards will be incorporated into the performance management process to help achieve consistency, equity, and ensure nondiscrimination and nonpoliticization?
    - Will the final regulations require DOD to publish overall results of performance management and individual pay decision so that there is reasonable transparency and appropriate accountability?
    - Will the final regulations require DOD to periodically conduct and report on internal assessments and employee surveys relating to the NSPS performance management system?
- One of GAO's concerns is that the NSPS does not identify a process for continuing involvement of employees in the design and implementation of the NSPS. The final regulations for the new DHS personnel regulations provide a place for employees to participate in pay decisions through the establishment of a Compensation Committee. The proposed regulations for DOD do not include specific provisions establishing either a Compensation Committee or a Performance Review Board.
    - Are you considering the establishment of a Compensation Committee or a Performance Review Board?
    - What are your plans for including employees in the planning, development, and implementation of the NSPS?
    - What are your plans for a comprehensive communications strategy to provide continuing meaningful two-way communication between DOD and employees?

Labor-Management Relations

- Labor organizations also have expressed reservations regarding the independence of the National Security Labor Relations Board (NSLRB) because the Secretary of

Defense appoints the members of the NSLRB. Under the proposed regulations, DOD labor organizations have no role in the appointment process.

- Since the Secretary of Defense appoints all of the members of the NSLRB without the participation of labor organizations, how will the NSLRB be able to maintain its independence?
- Why should employees be confident that the NSLRB will be fair and impartial?

- Please explain why DOD needs to limit collective bargaining in NSPS.
- The proposed regulations do not allow DOD management to bargain over certain operational DOD decisions. For example, management cannot bargain over the assignment of employees or the technology, method, and means of performing work. However, management will bargain over appropriate arrangements for employees adversely affected by an operational decision, provided that the effects of the decision are "foreseeable, substantial, and significant in terms of both impact and duration...."
  - Why does an adverse effect have to be foreseeable for management to bargain over corrective action?
  - If an adverse effect on a group of employees is entirely unforeseeable, would management be unable to bargain over corrective action?
  - How long would an adverse effect have to last for it to be of sufficient duration?

Adverse Actions and Appeals

- After an MSPB administrative judge issues an initial MSPB decision in an adverse action appeal, DOD may reconsider the administrative judge's decision and modify or reverse the initial MSPB decision. § 9901.807(k)(8)(iii)(A). Similarly, "[w]here the Department determines that the initial [MSPB] decision has a direct and substantial adverse impact on the Department's national security mission, or is based on an erroneous interpretation of law, Governmentwide rule or regulation, or [the NSPS regulations], [DOD may] issue a final DOD decision modifying or reversing that initial decision." § 9901.807(k)(8)(iii)(B). Further, DOD may decide that the initial decision of an MSPB administrative judge should serve as a precedential decision. § 9901.807(k)(8)(iii)(C).
  - Why should DOD have the power to modify or reverse a decision of an administrative judge?
  - What procedures and standard of review would DOD use to reconsider an administrative judge's decision?

- **Hypothetical Concerning Appeals Process**

  - Under 5 C.F.R. § 9901.807(k)(8)(iii), if an MSPB administrative judge issues an initial decision against DOD, DOD can file a "request for review" and then reconsider the initial decision of the administrative judge. Under §9901.807(k)(8)(iii)(B), DOD can then decide that the initial decision "is based on an erroneous interpretation of law, Governmentwide rule or regulation, <u>or this part</u>" and modify or reverse the administrative judge's decision. If the employee then files a petition for review to the full MSPB, the Board would, under §9901.107, have to accord DOD's interpretation of the regulations "great deference."

  - Is my reading of this correct?

  - How does this procedure and deferential standard of review constitute a fair and impartial external review of DOD decisions?

  - Some would argue that DOD could overturn any initial MSPB decision it doesn't like—how would you respond to this criticism?

- Would DOD's authority under § 9701.807(k)(8)(iii)(C) of the regulations, which allows DOD to determine that an initial MSPB decision is precedential, conflict with the full Board's authority to issue precedential MSPB decisions?

  - Why does DOD need this authority?

  - In light of DOD's authority to amend, clarify, or interpret the NSPS regulations through notice and comment rulemaking, is § 9701.807(k)(8)(iii)(C) of the proposed regulations really necessary?

- Why is it necessary to limit MSPB's authority to mitigate penalties in adverse action appeals?

- Is the "wholly without justification" standard for mitigation of a penalty too restrictive?

Mandatory Removal Offenses

- Will DOD publish a list of mandatory removal offenses in the *Federal Register*?

Hiring and Workforce Shaping

- Will DOD conduct gap analyses of the critical skills and competencies needed for DOD's future workforce so that the hiring and reduction-in-force flexibilities available to DOD are used effectively?

Mr. Nesterczuk:

Pay and Performance

- The proposed regulations for NSPS provide for the establishment of control points within a pay band to limit increases in basic pay. However, in the final regulations for DHS, control points were eliminated because DHS and OPM believed that control points are at odds with a pay for performance system.
    - How do you reconcile pay-for-performance and the concept of control points?
- The proposed regulations do not fully explain how employees will receive performance pay adjustments.
    - Could you provide more information about how employees will receive adjustments to their pay based on acceptable performance?
    - How will supervisors be accountable for exercising their responsibilities under NSPS?
    - What training will employees and managers receive prior to NSPS implementation? Please be specific.

Core Competencies

- GAO has stated that one concern it has with the new DHS performance management system is that it does not require core competencies to be in writing. Similarly, the proposed regulations on NSPS do not require that core competencies be in writing.
    - Will the final regulations require that core competencies be provided to employees in writing?
    - Would providing minimal written core competencies to employees significantly impede DOD's flexibility with regard to performance management?

Safeguards

- In his testimony, Mr. Walker stated that he is concerned that the proposed regulations do not contain sufficient detail regarding adequate safeguards to help ensure fairness and guard against abuse.
    - Will the final regulations for the NSPS provide additional safeguards to help ensure fairness and guard against abuse?

- If not, please explain in detail why OPM feels that such safeguards are not appropriate.

- What predecisional internal safeguards will be incorporated into the performance management process in the regulations to help achieve consistency, equity, and ensure nondiscrimination and nonpoliticization?

- Will the final regulations require DOD to publish overall results of performance management and individual pay decision so that there is reasonable transparency and appropriate accountability?

- Will the final regulations require DOD to periodically conduct and report on internal assessments and employee surveys relating to the NSPS performance management system?

- One of GAO's concerns is that the NSPS does not identify a process for continuing involvement of employees in the design and implementation of the NSPS. The final regulations for the new DHS personnel regulations provide a place for employees to participate in pay decisions through the establishment of a Compensation Committee. The proposed regulations for DOD do not include specific provisions establishing either a Compensation Committee or a Performance Review Board.

  - Are you considering the establishment of a Compensation Committee or a Performance Review Board?

  - What mechanisms will ensure that employees are included in the planning, development, and implementation of the NSPS?

Labor-Management Relations

- Labor organizations also have expressed reservations regarding the independence of the National Security Labor Relations Board (NSLRB) because the Secretary of Defense appoints the members of the NSLRB. Under the proposed regulations, DOD labor organizations have no role in the appointment process.

  - Since the Secretary of Defense appoints all of the members of the NSLRB without the participation of labor organizations, how will the NSLRB be able to maintain its independence?

  - Why should employees be confident that the NSLRB will be fair and impartial?

  - What value does the internal NSLRB bring to DOD?

  - Will it streamline the process or just add another layer of unneeded bureaucracy?

- The proposed regulations do not allow DOD management to bargain over certain operational DOD decisions. For example, management cannot bargain over the assignment of employees or the technology, method, and means of performing work. However, management will bargain over appropriate arrangements for employees adversely affected by an operational decision, provided that the effects of the decision are "foreseeable, substantial, and significant in terms of both impact and duration...."

    - Why does an adverse effect have to be foreseeable for management to bargain over corrective action?

    - If an adverse effect on a group of employees is entirely unforeseeable, would management be unable to bargain over corrective action?

    - How long would an adverse effect have to last for it to be of sufficient duration?

Adverse Actions and Appeals

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    - Why should DOD have the power to modify or reverse a decision of an administrative judge?

    - What procedures and standard of review would DOD use to reconsider an administrative judge's decision?

- **Hypothetical Concerning Appeals Process**

    - Under 5 C.F.R. § 9901.807(k)(8)(iii), if an MSPB administrative judge issues an initial decision against DOD, DOD can file a "request for review" and then reconsider the initial decision of the administrative judge. Under §9901.807(k)(8)(iii)(B), DOD can then decide that the initial decision "is based on an erroneous interpretation of law, Governmentwide rule or regulation, or this part" and modify or reverse the administrative judge's decision. If the employee then files a petition for review to the full MSPB, the Board would, under §9901.107, have to accord DOD's interpretation of the regulations "great deference."

- Is my reading of this correct?
- How does this procedure and standard of review constitute a fair and impartial external review of DOD decisions?
- Some would argue that DOD could overturn any initial MSPB decision it doesn't like—how would you respond to this criticism?

- Would DOD's authority under § 9701.807(k)(8)(iii)(C) of the regulations, which allows DOD to determine that an initial MSPB decision is precedential, conflict with the full Board's authority to issue precedential MSPB decisions?
  - Why does DOD need this authority?
  - In light of DOD's authority to amend, clarify, or interpret the NSPS regulations through notice and comment rulemaking, is § 9701.807(k)(8)(iii)(C) of the proposed regulations really necessary?
- Why is it necessary to limit MSPB's authority to mitigate penalties in adverse action appeals?
- Is the "wholly without justification" standard for mitigation of a penalty too restrictive?

Chairman McPhie:

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  - Is my understanding correct?
  - Doesn't the procedure set out above give DOD an unusual amount of influence in the appeal process?
  - Does DOD have too much control over the appeal process at the Board?

- Are you reconsidering these provisions?

- **Hypothetical Concerning Appeals Process**

  - Under 5 C.F.R. § 9901.807(k)(8)(iii), if an MSPB administrative judge issues an initial decision against DOD, DOD can file a "request for review" and then reconsider the initial decision of the administrative judge. Under §9901.807(k)(8)(iii)(B), DOD can then decide that the initial decision "is based on an erroneous interpretation of law, Governmentwide rule or regulation, or this part" and modify or reverse the administrative judge's decision. If the employee then files a petition for review to the full MSPB, the Board would, under §9901.107, have to accord DOD's interpretation of the regulations "great deference."

  - Is my reading of this correct?

  - In your opinion, does this procedure and deferential standard of review ensure a fair and impartial external review of DOD decisions?

- Under the proposed regulations, does DOD's authority to determine that an initial MSPB decision is precedential conflict with the full Board's authority to issue precedential MSPB decisions?

  - Should MSPB retain this authority?

  - Could DOD accomplish the same purpose through amendments to the NSPS regulations?

Panel 3: **Karen Heiser, Organizational Development Program Manager, Federal Managers Association, John Gage, National President, American Federation of Government Employees and; Ron Ault, President, Metal Trades Department.**

Mr. Gage:

Labor-Relations Board

- You have been critical of the three-member National Security Labor Relations Board because all members are to be appointed by the Secretary of Defense, which you believe will lead to unfair favoritism toward agency management.

  - If labor organizations were allowed to nominate individuals to the NSLRB, how would that improve the impartiality of the NSLRB?

Collective Bargaining

- The final regulations provide DOD with the authority to make "operational" decisions without engaging in collective bargaining.
    - How would collective bargaining over operational matters help DOD to perform its mission?

Adverse Actions and Appeals

- Under the new appeals system, MSPB will not be able to mitigate (reduce) a performance-based adverse unless the action taken by the manager against an employee is deemed 'wholly unjustified.' It is my understanding that MSPB had no power to mitigate penalties in such cases before, although it did have that power in conduct-based cases.
    - In your opinion, would you rather have this new high standard, which allows MSPB mitigation for performance-based adverse actions, or the previous rules in which no mitigation was allowed?

Pay

- Currently, General Schedule employees are paid according to a Congressionally mandated one-size-fits all pay increase at the beginning of every January. The new plan at DOD would allow for much more targeted increases for employees in jobs varying by locality and type.
    - Do you think it is at least theoretically possible that, if designed and executed well, employees could be better off under the new pay system?

Mr. Ault:

- You have been critical of the three-member National Security Labor Relations Board because all members are to be appointed by the Secretary of Defense, which you believe will lead to unfair favoritism toward agency management.
    - If labor organizations were allowed to nominate individuals to the NSLRB, how would that improve the impartiality of the NSLRB?

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Pay

- Currently, General Schedule employees are paid according to a Congressionally mandated one-size-fits all pay increase at the beginning of every January. The new plan at DOD would allow for much more targeted increases for employees in jobs varying by locality and type.
  - Do you think it is at least theoretically possible that, if designed and executed well, employees could be better off under the new pay system?

Ms. Heiser:

Role of Managers

- What is your overall impression of the new personnel system in regards to the increasingly important role of managers at DOD?
  - What are your specific concerns?

Performance Evaluations

- Employee groups and others have characterized Federal managers as lacking the necessary skills and training to implement a performance management system in which employees are evaluated fairly.
  - What kind of training will managers most need to be successful under the new system?
  - Do you believe that adequate funding will be available to conduct the necessary training for managers in the new system?

- If not, how do you propose this be accomplished?

"NSPS: The New Department of Defense Civilian Personnel System — Reaching Readiness"
Subcommittee on the Federal Workforce and Agency Organization
Chairman Jon C. Porter
Questions for the Record April 12, 2005

Responses to Post-Hearing Questions
Submitted by
Neil A. G. McPhie, Chairman
U. S. Merit Systems Protection Board

Question No. 1 - Adverse Actions and Appeals

After an MSPB administrative judge issues an initial MSPB decision in an adverse action appeal, DOD may reconsider the administrative judge's decision and modify or reverse the initial MSPB decision. § 9901.807(k)(8)(iii)(A). Similarly, "[w]here the Department determines that the initial [MSPB] decision has a direct and substantial adverse impact on the Department's national security mission, or is based on an erroneous interpretation of law, Government-wide rule or regulation, or [the NSPS regulations], [DOD may] issue a final DOD decision modifying or reversing that initial decision." § 9901.807(k)(8)(iii)(B). Further, DOD may decide that the initial decision of an MSPB administrative judge should serve as a precedential decision. § 9901.807(k)(8)(iii)(C).

Question 1a: Is my understanding correct?

Response: Yes.

Question 1b: Doesn't the procedure set out above give DoD an unusual amount of influence in the appeal process?

Response: On its face, the provisions quoted give DoD significant and unprecedented latitude over initial MSPB decisions. However, by statute, DoD has been granted broad authority to establish an employee appeals system that accommodates its unique agency mission and provides due process to covered employees. The Board's role is not to design the appeals process, but to ensure through consultation, the DoD's employee appeals system affords due process.

Question 1c: Does DOD have too much control over the appeal process at the Board?

Response: See response to 1b. When an initial MSPB/DoD decision is before the Board on a petition for review, DoD has no control over the Board's decision.

Question 1d: Are you reconsidering these provisions?

Response: The Board has no statutory authority to draft or to reconsider the provisions of the regulations establishing the DoD National Security Personnel System.

Question 2. Hypothetical Concerning Appeals Process

Under 5 C.F.R. § 9901.807(k)(8)(iii), if an MSPB administrative judge issues an initial decision against DoD, DoD can file a "request for review" and then reconsider the initial decision of the administrative judge. Under § 9901.807(k)(8)(iii)(B), DoD can then decide that the initial decision "is based on an erroneous interpretation of law, Governmentwide rule or regulation, or this part" and modify or reverse the administrative judge's decision. If the employee then files a petition for review to the full MSPB, the Board would, under § 9901.107, have to accord DoD's interpretation of the regulations "great deference."

Question 2a: Is my reading of this correct?

Response: While this is the language of the regulations, I respectfully decline to issue an opinion regarding the interpretation of these regulations until specific issues are brought before the Board for adjudication.

Question 2b: In your opinion, does this procedure and deferential standard of review ensure a fair and impartial external review of DOD decisions?

Response: I believe that DoD has developed an appeals process which can provide fair and impartial decisions. However, to the extent that the process is perceived as unfair, the process may fail. MSPB's involvement is critical to ensuring the credibility of the process. The Board already has a distinguished record of issuing well reasoned, objective decisions. I believe that Board administrative judges and the full Board on appeal will continue to render such decisions. Nevertheless, it is worth noting that to the extent litigants perceive that Board decisions are unduly influenced by either party, the process as a whole will lose credibility. It is way too early to make predictions of unfairness, however, when the first case under the proposed system has not even been filed.

Question No. 3a Under the proposed regulations, does DOD's authority to determine that an initial MSPB decision is precedential conflict with the full Board's authority to issue precedential MSPB decisions?

Response: No, I do not anticipate a conflict between the Board's authority and DoD's authority to render precedential decisions. As a reviewing authority, the 3-member Board is not bound by the decisions of lower level adjudicators, even those initial decisions determined to be "precedential" by the DoD. It is my view that the full Board retains the authority to overrule such decisions, where warranted. See 5 U.S.C. § 9902(h)(5) (the Board may modify a final DoD decision if it determines that the decision was "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) obtained without procedures required by law, rule, or regulation having been followed; or (C) unsupported by substantial evidence.").

Question No. 3b Should MSPB retain this authority?

Response: See my response to Question 3a. I do not believe that the full Board has lost its authority to issue precedential decisions.

Neil A. G. McPhie, Chairman
U. S. Merit Systems Protection Board
May 27, 2005

Question 3c: Could DoD accomplish the same purpose through amendments to the NSPS regulations?

Response: I do not think that it would be appropriate for me to speculate as to the objectives of DoD officials. I therefore defer a response to this question to DoD officials.

Neil A. G. McPhie, Chairman
U. S. Merit Systems Protection Board
May 27, 2005

CHEMICAL & Engineering News

Latest News

September 8, 2005

GOVERNMENT & POLICY

Nevada Sues NRC Over Yucca License

State claims federal agency has prejudged licensing process for nuclear waste facility

Glenn Hess

Nevada has filed a lawsuit against the Nuclear Regulatory Commission (NRC) that accuses the agency of prejudging the outcome of the Department of Energy's upcoming application for a license to open a nuclear waste disposal facility at Yucca Mountain, in Nevada.

The suit, filed in the U.S. Court of Appeals for the District of Columbia Circuit, charges that NRC unlawfully rejected the state's March 1 petition challenging the so-called waste confidence rule. The regulation allows NRC to continue licensing new nuclear power plants and waste storage facilities with the expectation that a geologic repository for the disposal of nuclear waste will be available by 2025.

NRC's 1990 rule was based on its determination that if Yucca Mountain were to fail to receive a license by a projected date of 2000, there would still be sufficient time—25 years—to locate, license, and construct an alternative repository. "The only way NRC can meet its requirement that a repository will be available by 2025 is to presume it will give Yucca a license," Nevada Attorney General Brian Sandoval says. "For an ostensibly impartial regulator to make that prejudgment is simply unlawful."

An NCR spokesman says the commission is committed to a fair and comprehensive review of DOE's licens application, which the department plans to file in March.

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Response of Ronald E. Ault, President
Metal Trades Department, AFL-CIO
To Subcommittee on the Federal Workforce and Agency Organization
Jon C. Porter, Chairman
Questions for the Record

- In response to NSLRB question of fairness\ impartiality of a Board appointed by the DOD Secretary... Mr. Chairman, I don't think theories of fairness and impartiality bear out the experiences of federal employees in the DOD, today. I don't believe and appointed Board could be designed in such as way as to be fair and impartial. That is why we have proposed to DOD/OPM to have a specially qualified panel of independent arbitrators in lieu of a "NSLRB." This proposal would be less expensive than setting up permanent DOD paid positions, offices, staff, etc. of the DOD dominated NSLRB and much more responsive.
- In response to the question of elimination of bargaining obligations over operational matters...Mr. Chairman, as defined by DOD, any work performed by any DOD employee including cleaning toilets or cutting grass is "performing DOD's mission." Therefore such mundane things as fair distribution of overtime work among a work gang of 50 qualified plumbers working at Navy Base Housing would no longer be subject to bargaining. Any supervisor could reward or punish any employee with overtime assignments without having to justify such unfair action in a negotiated employee grievance review process. If the definition of DOD's mission that excluded bargaining was defined as work that directly affects DOD's National Security mission that would be a different matter. But that is not the case, at all. Collective bargaining over employees' working conditions and DOD employees having a voice in conditions of employment that affect them and the quality of their work life enhances employee morale and improves productivity without sacrificing any aspect of efficiency of DOD performing its mission.
- Response to question regarding Adverse Actions and Appeals of MSPB...Mr. Chairman, in my experience of more than thirty years as a labor representative representing federal employees, the employer wins almost every MSPB case anyway. I would never advise any employee to use MSPB if there were any other appeals process available to him or her. Under the new standard the only difference is the employer would win every case.
- Response to question in regard to GS pay under NSPS- Mr. Chairman, in a perfect world it is possible to design and execute such a system in such a manner that would improve the present GS pay system. However, as explained to us by DOD/OPM the NSPS "pay for performance" is to be "budget neutral" meaning that in order to pay some higher annual percentages, there will be losers who will not receive a pay increase under the proposed system. As is proposed, without a meaningful, enforceable system of checks and balances, the new pay system is a disaster and will be a magnet for "due process" lawsuits, EEOC complaints and morale destroying unfairness.

Thank you, Mr. Chairman, for the opportunity to answer these questions.
Respectfully submitted,
Ronald E. Ault,
President
Metal Trades Department, AFL-CIO
In behalf of the United DOD Workers Coalition

Questions for the Record
Before the United States House of Representatives
Committee on Government Reform
Subcommittee on the Federal Workforce and Agency Organization
Friday May 27, 2005

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

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

Questions for the Record by
Karen Heiser
Federal Managers Association

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Q: What is your overall impression of the new personnel system in regards to the increasingly important role of managers at DOD?

A: Managers duties and responsibilities to link employees' pay to their expectations, performance, and appraisal increases considerably under the proposed regulations for the Department of Defense (DOD) National Security Personnel System (NSPS). Where as before, managers and supervisors conducted performance reviews that affected impacted bonuses and promotions for employees, an employee's pay raise is no longer the matter for a congressional appropriation, but based on the available pool of money in a pay-for-performance fund and the rating an employee receives from their manager or supervisor. While managers have been charged with oversight and review of employees in the past, they are clearly being given more direct authorities under the new regulations.

To this end, it is important that both managers and employees are given the proper training to properly communicate the expectations of the duties and responsibilities of an employee, conduct accurate performance appraisals, and rate employees objectively on their performance as it relates to those expectations. Managers and supervisors are up to the challenge of the added responsibilities and ready to dispel the myths and concerns about their ability to do so. No doubt it will take some adjustment on the part of both the employee and manager in his or her changing roles. However, it is important as we move forward to maintain management and employee protections to ensure that as bumps in the road arise, neither manager nor employee will find themselves stuck in a position of unjust retaliation.

Q: What are your specific concerns?

A: Our dominant concern with the new system is that the strained budget cuts – impressed upon by the soaring deficits – will force the new system to be underfunded in both the necessary implementation of training and rewards for performance. For training, a manager or supervisor cannot effectively assign duties to an employee, track, review and rate performance, and then designate compensation for that employee without proper training. As a corollary, if there is not a proper training system in place and budgets that fence funds for adequate training, the system is doomed to failure from the start. The better we equip managers to supervise their workforce, the more likely we are to ensure the accountability of the new system – and the stronger the likelihood that managers will be able to carry out their non-supervisory responsibilities in support of the Department's mission.

Funding for the new system is also critical. Training must be prioritized in budgets and appropriations. Managers cannot reward their employees properly for high performance if the funds are not there to do so. Further, if employees are not confident that their performance will be properly rewarded, their work product will suffer and the critical mission at the DOD will suffer as well. It is essential that in the roll out of the new system these two pieces of training and funding are properly addressed.

Another critical attribute for the new system lies in its transparency and communication value. The manager or supervisor must be given ample opportunity to set measurable standards with their employees that detail the result upon achievement. Time must be provided for one-on-one discussions throughout the year – perhaps quarterly – to assess progress toward meeting those goals. I see no way

this can be accomplished other than written assessments of the meetings being held to highlight both the occurrence of such a meeting and its discussion content.

Employee groups and others have characterized Federal Managers as lacking the necessary skills and training to implement a performance management system in which employees are evaluated fairly.

Q: What kind of training will managers need to be successful under the new system?

A: There are two primary areas in which we see the need for Performance Management training. Operations training is required in order for managers to understand the nuts and bolts of the new system - their responsibilities and authorities; and the rights and responsibilities of their employees and their supervisors.

Of equal or more importance is the training required to enable managers at all levels to understand how to translate organizational goals into performance standards. The process begins with an organization understanding its goals and objectives and making them clear to members of the organization. Goals and objectives are transmitted down through the organization, translated into executable plans, then to the performance elements and standards of employees on the ground floor. Theoretically, since organizational goals are the result of a desire to meet customer requirements, this is how performance management directly links employee success to organizational success.

Q: Do you believe that adequate funding will be available to conduct the necessary training for managers in the new system?

A: With the soaring budget deficits and a proposed overall reduction in discretionary spending, we are not confident that the system will be adequately funded. At a hearing in the Senate Governmental Affairs Subcommittee on the Oversight of Government Management, the Federal Workforce and the District of Columbia, DOD officials were asked repeatedly how much money is budgeted and spent on training. This was a figure they could not pin down. There currently is not enough funding for training to meet the current needs of managers and employees. This does not strike much confidence in our minds that the Department will elevate the funding for training to the level necessary to ensure its success.

Q: ***If not, how do you propose this be accomplished?***

A: We, at FMA, continue to advocate for line item budgeting for training as well as a training officer position that will oversee the Department's budget and training programs. We further recommend for the money allocated to the training officials department be frozen so that they will be able to properly plan for the coming year what training programs they can fund for their managers and employees.