

**Statement of
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Before the

**Committee on Armed Services
United States Senate**

On

“Collaboration and Modernization: the National Security Personnel System”

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I. Introduction

Mr. Chairman, it is my pleasure to appear before you today to discuss the proposed regulations implementing the National Security Personnel System (NSPS) at the Department of Defense (DOD) and the process of collaboration and cooperation that has brought us to this point. The regulations as proposed, will establish a new human resources (HR) management system that we believe is flexible, modern, and responsive thus fulfilling the vision of the President and the Congress. The proposed regulations are the result of an intense collaborative process that has taken over a year, and we are still only halfway. There is much to do before the NSPS proposal can be finalized, beginning with the ongoing review of the extensive comments we have received. Beyond that will

be the official meet and confer process with DOD unions. 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. We owe you our appreciation and respect for your efforts to make it possible 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 (Public Law 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 measured and delicate 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 DOD and OPM strike that balance in all of the key components of the system: performance-based pay, staffing flexibility, employee accountability with 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 your invitation to this hearing you asked we address the process employed to gather employee input, the proposed regulations that have resulted from this process, and how OPM will continue to work with DOD to ensure employees have meaningful input in the remaining design and implementation process. I will address the

important points regarding the process first and then address some key highlights 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 Senator Collins, the special concerns raised by Senator Levin, and the indepth commentary from Senator Akaka. 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. All

along the way, OPM and DOD have worked as partners to fulfill the spirit and letter of the law as well as the trust the Congress and the President have placed in us.

This extensive development process, which continues, is not a laboratory of mere compromise, but rather the critical place where perspectives are weighed and considered to ensure the best possible system is developed for NSPS. Through this process, we sought to identify the critical balance between a modern flexible system and the core values of the civil service.

OPM is no stranger to this unique process or the challenges of building trust, respect, and cooperation with managers, employees and their representatives. Our recent experience with the Department of Homeland Security (DHS), though different in many respects, has provided lessons and tools to improve our efforts with NSPS. The NSPS working groups were well served by the extensive research that had been compiled by similar teams who worked on the DHS personnel system some months earlier.

In following the legislative direction, 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 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. From this series of meetings, we received what we consider useful input, particularly as the unions shared experiences of past practices that had worked or failed in DOD and other government agencies.

Permit me to emphasize that 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. Later in my testimony, I will address several areas where I believe it is critically important to engage in an honest, meaningful and productive dialogue as we move forward to ensure the ultimate success of NSPS.

You also asked us to address the role of OPM throughout implementation of the NSPS, and the process that will be in place to coordinate and resolve policy differences between DoD and OPM.

This is an important issue, and I appreciate your raising it. In the interests of transparency, we believe a continuing process of coordination needs to be in place and we defined this process in the proposed regulations. The Congress mandated a specific

approach to ensuring a balanced process for developing NSPS. That process calls for the heads of DoD and OPM to jointly prescribe the system, after a period of collaboration with employee representatives and notification to Congress. As a key partner, we are very pleased with the cooperation from and collaboration with the Department of Defense. Since April of 2004, the Department has made great strides in ensuring a transparent and constructive process for developing NSPS with employee input and collaboration with employee representatives. DoD and OPM together have championed an open, collaborative, and constructive process and environment for raising, discussing and resolving critical issues.

However, the effort does not end with jointly prescribing NSPS. OPM and DoD have agreed that OPM must have a role of close and continuing coordination – the regulations refer to this as “pre-decisional coordination” - as policies for implementing NSPS are developed. This process of coordination recognizes the Secretary’s authority to direct the operations of DoD as well as the Director’s institutional responsibility to oversee the Federal civil service system. Based on our experience thus far, the combination of OPM’s governmentwide expertise and DoD’s mission specific experience, the joint efforts have been very fruitful. Our agencies have reinforced each other’s capabilities during NSPS development in a very positive and constructive manner. I have every expectation that our respective views during implementation will be equally complementary and constructive.

III. Continued Collaboration

OPM is committed to work with DOD to ensure the continued involvement of employees in the development and implementation process. Together 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 important 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 an outmoded “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 annual pay adjustments apply to all occupations and levels of responsibility, regardless of market or mission value. Instead, adjustments will be strategically 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.

Unlike where our current system falls short, this proposed 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 it is subject to review and approval by the employee’s second-level manager. Once that 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. And as far as the distribution of ratings is concerned, the Department has unequivocally stated it will not use 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 many of them 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 influence 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 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. Incidentally, in addition to being a consistent element of DOD’s new performance culture, this is an excellent example of where the collaborative process with employees and stakeholders made a substantial impact on the proposed regulations.

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 an agency’s unique 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 the intention of the new mitigation standard, which is balanced by the higher standard of proof that must first be met.

VII. Critical Missions 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, before taking any of those actions, the current law requires agencies to first negotiate with unions over the implementation, impact, procedures and arrangements. 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 are 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, all along the way, we made sure the core principles of the civil service were preserved.

Mr. Chairman, as the development and implementation process moves forward I ask for your continued support as we work to refine NSPS to ensure DOD has the flexible, modern, and responsive personnel system that the President and the Congress expect. Thank you for the opportunity to appear before this committee. I would be pleased to respond to any questions you and members of the committee may have.