

STATEMENT BY

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REPRESENTING

THE UNITED DEPARTMENT OF DEFENSE WORKERS COALITION

BEFORE

THE SENATE ARMED SERVICES COMMITTEE

REGARDING

**NATIONAL SECURITY PERSONNEL SYSTEM:
THE NEW DOD CIVILIAN PERSONNEL SYSTEM**

ON

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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. 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.
2. 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.

3. 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.

4. 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.

5. 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.
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 an employee 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

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.

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 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 Partnership 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 Partnership 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.