

STATEMENT BY

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BEFORE

THE SUBCOMMITTEE ON READINESS  
HOUSE COMMITTEE ON ARMED SERVICES

REGARDING

THE NATIONAL SECURITY PERSONNEL SYSTEM  
OF THE DEPARTMENT OF DEFENSE

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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.

Mr. Chairman, the National Security Personnel System has been a ruse designed to:

- strip DoD employees of their collective bargaining rights,
- make DoD employees virtual at will employees by creating a “kangaroo court” style appeals system designed to eliminate the right to fair treatment in adverse action cases, and
- lower the standard of living with a pay system that will suppress future wage adjustments and subject employees to a non transparent pay system where pay is more budget driven than performance driven.

The administration’s credibility is now shattered after three court decisions in DHS and DoD. Congress gave this authority to DoD in good faith. DoD has misled the Congress about its true intentions. From the start it intended to strip Americans of their rights and reduce their standard of living. It is time now for this Congress to hold them accountable for their untrustworthy behavior. It is time now for this Congress to act immediately and fully repeal the NSPS authority.

Since September 11, 2001, the Bush Administration has taken every opportunity available to advocate for a profound erosion of civil service protections and collective bargaining rights for federal employees. First, the Bush Administration reluctantly agreed that the terrorist attacks necessitated federalizing airport security functions, but they also insisted that the legislation not allow federal TSOs the rights and protections normally provided to federal employees and the collective bargaining rights afforded to private contractor TSOs.

In 2002, the Bush Administration reluctantly agreed with Senator Joseph Lieberman that the creation of a Department of Homeland Security (DHS) was necessary. However, the Bush Administration insisted on a *quid pro quo* for that acquiescence; specifically, that federal employees who were transferred into the new department would not be guaranteed the collective bargaining rights they had enjoyed since President Kennedy was in office. In addition, the Bush Administration insisted that the legislation which was eventually signed into law exempt the DHS from compliance with major chapters of Title 5 of the U.S. Code, including pay, classification, performance management, disciplinary actions and appeal rights, as well as collective bargaining rights. AFGE filed a lawsuit challenging the Department’s final regulations. On August 12, 2005, Federal

District Court Judge Rosemary Collyer ruled that major portions of the DHS regulations were illegal, and enjoined the labor relations system. AFGE had stated that MAXHR would gut collective bargaining and undermine fair treatment in the adverse action appeals process. In the meantime, the Administration continued to tell Congress the information being provided by the unions was wrong and that collective bargaining and a fair appeals process was being preserved. On June 27, 2006, the Court of Appeals upheld her decision.

On due process, Judge Collyer found:

“First the Court seriously doubts that by insisting on fairness, the Congress meant that DSH could discipline or discharge employees without effective recourse. Second, rather than afford a right of appeal that is impartial or disinterested, the Regulations put the thumbs of the Agencies down hard on the scales of justice in their favor.”

On Collective Bargaining, Judge Collyer found:

“Thus, while the Agencies might be entitled to deference in filling in the details of a collective bargaining system, they were not permitted to create a system that is not collective bargaining’ at all.”

On June 27, 2006, the Court of Appeals was even harsher in their criticism of DHS. The Court found that:

“The right to negotiate collective bargaining agreements that are equally binding on both parties is of little moment if the parties have virtually nothing to negotiate over. That is the result of the Final Rule adopted by DHS. The scope of bargaining under the HR system is virtually nil, especially when measured against the meaning of collective bargaining under Chapter 71. And this is saying a lot, because the scope of bargaining under Chapter 71 is extraordinarily narrow.”

In 2003, then Secretary of Defense Donald Rumsfeld insisted that the Defense Authorization bill include similar provisions which attacked the civil service protections and collective bargaining rights of 700,000 Department of Defense civilian employees. Despite months of debate over serious objections raised by AFGE and Representatives and Senators from both parties, the Department was granted the ability to write regulations creating a new personnel system. The regulations eliminated many civil service protections and some collective bargaining rights from DoD civilians. In November 2005, AFGE and its union coalition partners filed a lawsuit to enjoin implementation of the labor relations and appeals sections of DoD’s final National Security Personnel System regulations.

On February 27, 2006, Federal District Court Judge Emmett G. Sullivan ruled illegal several key labor-management components of the new system, including collective bargaining and independent third-party review of labor-management disputes. The Administration, Secretary Rumsfeld and other DoD officials misled the Congress when they assured Congress that collective bargaining and fair treatment is adverse actions would be protected. Judge Sullivan found that NSPS did in fact “eviscerate” collective bargaining rights for DoD employees. Contrary to DoD’s assurances of fair treatment, Judge Sullivan found “each of the regulations is the antithesis of fair treatment.”

## **Department of Defense: National Security Personnel System (NSPS)**

### ***Background***

On February 14, 2005, the Department of Defense (DoD) published draft regulations to create the National Security Personnel System (NSPS). These sweeping regulations would replace current provisions of Title 5, U.S. Code, affecting pay, classification, personnel management, employee appeal rights, and collective bargaining for 700,000 civilian employees in the Department. DoD’s authority to create an alternative personnel system -- within certain parameters -- was granted under the FY 2004 National Defense Authorization Act (Public Law 108-136).

The law required the NSPS to be established jointly with unions through a “meet and confer” process. It also required union participation in the planning and development of the system. In order to ensure that the meet and confer process did not bog down, the 36 unions representing employees in DoD formed a joint United Department of Defense Workers Coalition (UDWC). The UDWC has testified several times about numerous serious objections to the draft regulations that DoD published on February 14, 2005. The Coalition submitted comments detailing its critique of the Department’s proposals with regard to collective bargaining, employee appeals of adverse actions, and the establishment of a pay system to replace existing statutory pay systems. In addition, the Coalition spent months in “meet and confer” offering DoD options and alternatives which would have changed and enhanced current procedures without sacrificing important employee rights that Congress intended to be safeguarded by the law. We produced and distributed a document entitled: *Contrasting Plans for the Department of Defense: Labor’s Proposals for Positive Change Versus Management’s Unlawful Return to the 19<sup>th</sup> Century* to demonstrate clearly how our suggestions could achieve these objectives.

Unfortunately, despite months of meetings, DoD failed to take the process seriously and, for all practical purposes, ignored UDWC proposals. DoD made clear they simply want unlimited authority with no effective outside review. It should be

noted that almost every member of the union side of these meetings came away with a clear feeling that these meetings were held simply to meet the technical requirements that they happen and DoD lacked any genuine desire to reach any agreement that was mutually beneficial. To the surprise of no one, at the end of the process, DoD's NSPS regulations, published in final form on November 1, 2005, are unilateral, arbitrary and go well beyond the original intent of the law. On November 7, 2005, ten federal employee unions jointly filed suit against the regulations, and on February 27, 2006, Judge Emmett G. Sullivan issued his decision, ruling illegal several key labor-management components of the new personnel system and enjoining the agency from implementation. Although this case is on appeal, DHS chose to cease its appeals to create a similar system after a similar negative ruling was upheld by the U.S. Court of Appeals for the District of Columbia.

### ***Collective Bargaining Rights***

Public Law 108-136 called for a new labor relations system ostensibly for DoD to engage in national level bargaining with unions, rather than negotiate the same issues at each local installation. It is interesting to note that DoD claimed national level bargaining was needed, yet since the passage of this law in 2003, at no time has DoD ever approached AFGE formally or informally to negotiate on any issue at the national level. In addition, the law addressed the need to retain an independent third party to resolve labor-management issues. AFGE strongly supported these principles.

DoD's NSPS legislative proposal, passed by the House, waived Chapter 71, the federal labor-management relations section of Title 5, U.S. Code. However, as explained by Senator Susan Collins (R-ME) on November 11, 2003, the final conference report stripped DoD's authority to waive Chapter 71 from the NSPS legislation. Instead, DoD was only authorized to make two specific modifications to Chapter 71: to provide for national level bargaining and *independent* third party review of labor relations decisions.

DoD showed its disregard of the latitude given by Congress and, contrary to the statute, drafted NSPS regulations allowing DoD to waive Chapter 71 in its entirety. Specifically, the regulations go beyond the concept of national level bargaining, and instead virtually eliminate collective bargaining over matters that go to the very heart of employee issues, including overtime, shift rotation, flexitime and compressed work schedules, safety and health programs, and deployment away from the regular worksite. These and many other issues have been negotiated successfully for years by employee representatives with Department management officials. The result of that bargaining has been the creation of smooth systems which both ensure that the work gets done and that employees are able to enjoy safe workplaces and properly balance their work lives with their responsibilities to their families. In addition, the regulations eliminate the statutory

right to collective bargaining by providing the Secretary unlimited power to remove ANY subject from bargaining by unilateral “issuance.”

Further, the regulations replace the current independent, statutorily-created Federal Labor Relations Authority and the Federal Service Impasses Panel with an internal board whose members are selected solely by the Secretary. The board’s composition ensures that it will lack impartiality and thus undermine the credibility of the new collective bargaining system among employees. This internal board is not independent, as required by the statute.

AFGE as a part of the UDWC, did not simply oppose the DoD regulations. We have listened carefully to the concerns of DoD and made concrete proposals to address them in a constructive framework. We offered to engage in national-level, multi-unit, and multi-union bargaining. We also offered to speed up the timeframes for bargaining and to engage in mediation-arbitration processes by mutually selected independent arbitrators in order to quickly resolve any bargaining disputes. We believe these changes alone would allow DoD to succeed in implementing new processes that would enhance the mission of the agency.

Unfortunately, DoD has simply ignored the union proposals. At no time has DoD made any concrete showing how the failure to have any of the new regulations impacted national security. If DoD is acting in good faith on these proposals, they could made a national security explanation for each proposal. They have had plenty of time to do so and have not. They have now had since 2003 to bring forward post 9/11 examples of the need for NSPS. The need simply does not exist. It never did.

### ***Employee Appeal Rights***

Under Title 5, federal employees have the right to appeal an agency’s adverse actions to the independent MSPB. The NSPS statute mandated that DoD protect due process rights and ensure that any new adverse action procedures be “fair” to employees. The statute authorized DoD to create a “streamlined” procedure for employee appeals.

The NSPS regulations do not streamline the process, but actually add steps to the process. Under Title 5, arbitrator decisions in discipline cases are subject to immediate judicial review. However, the NSPS regulations subject arbitrator decisions, as well as MSPB Administrative Judge (AJ) decisions (in cases where employees do not elect arbitration), to two layers of administrative review. The first review is by DoD itself and allows the Department the unilateral right to overturn the decision of the independent AJ or arbitrator before the case can even be appealed to the full MSPB. Instead, decisions will become essentially advisory subject to DoD review and then may be reviewed by the MSPB, thus reducing the rule and power of arbitrators and Administrative Judges. This 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. This change will dramatically increase the MSPB workload, delay results, and cause inefficiency in the system.

Further, the NSPS regulations prohibit an AJ or arbitrator from mitigating DoD's penalty unless it is "totally unwarranted." This new standard, never before used, is clearly designed to prevent DoD from ever having a disciplinary action mitigated, no matter the circumstances. This is hardly a system that could be considered "fair to employees." DoD's failure to insure a level of fundamental fairness is a core reason why the court's have taken a dim view of the NSPS regulations.

Here again, the UDWC, and the union side of the process, took seriously this opportunity. We have discussed several proposals including constructive changes such as developing a single standard of proof, a speedier and more efficient process, having immediate judicial review of arbitration decisions, and giving full authority to Administrative Judges, arbitrators, and the Merit System Protection Board to determine the adequacy of proof and to mitigate penalties.

### ***Pay and Classification***

While not every detail about the pay system has emerged, we know enough about the system to appreciate its design is not transparent, not fair, will enhance favoritism and will suppress wages over time.

DoD describes their system as two fold – (1) market based and (2) pay for performance. George Nesterzuk, hired by OPM as a special policy advisor on NSPS, wrote a paper entitled "Taking Charge of Federal Personnel" in January 2001 calling for personnel reform. It is important to note that he viewed that federal employees were overpaid in contradiction to the Federal Salary Council and the pay comparison studies by the Department of Labor. Rest assured his pay system is designed to implement his view by decoupling DoD pay from the GS pay surveys. Instead, DoD would hire a private contractor to provide the "right" answer in the form pay data that will be used to show that DoD employees are overpaid. DoD annual raises would then be suppressed over a period of years. The pay would be DoD budget driven rather than based on the comparability studies associated with the rest of the government. When the Department argues that money needs to be spent for troops and troop support, the funding for pay raises will be extremely tight. Employees will lose out and fall behind federal employees in other agencies.

The pay band system holds less promise for most employees than previously advertised. The argument for collapsing grades into bands was to create greater opportunity for people to move beyond their current maximum salary. However

DoD has indicated that there are in fact invisible fences inside the bands (that look a lot like the old grades) that will make this advertised promise more false than true.

At the same time, NSPS undermines the word “merit” in merit promotion systems. No longer will positions within a collapsed band need to be posted for merit promotion purposes. Rather supervisors will bypass the need for merit promotion and merely assign whomever they want additional duties along with additional compensation. In effect, they are empowered to promote whomever they desire. In some cases merit might be key, in others it might be based on who you know. Abuse and favoritism are inevitable

Although, under NSPS, employees performance is supposed to guide the size of their pay raise, they will not receive the rating from their supervisor. This fails the simple but important transparency test.

Rather a supervisor will rate employees. Then supervisor will attend a meeting with other supervisors to compare and re-rate their employees in order to divide the pay pool within the budget. In effect other supervisors who do not supervise an employee’s work will determine the rating and the subsequent payout. DoD argues that this is designed to correct hard raters vs. soft raters. But in reality it will have a lot to do with budget, bell curve distribution and whether the personality of one’s supervisor is strong or weak; i.e. whether the supervisor is a good or bad advocate in the meeting. Once all the supervisors have agreed on an employee’s rating, then the worker will receive that rating. It fails the fairness test, the transparency test and even the pay for performance test.

There are other real problems with the NSPS pay system. In summary, it will lead to serious morale problems and consequently undermine the mission and performance of DoD’s mission.

## ***Conclusion***

The National Security Personnel System, envisioned by DoD regulations, is contrary to the statute. The regulations are unfair to employees, and if implemented, they will undermine the contribution to mission that DoD civilians have demonstrated so ably over the years. Congress should repeal the statutory authority for NSPS.

AFGE’s and the UDWC’s support of collective bargaining rights and civil service protections for federal employees has never wavered. These are fundamental American rights and they should never have been taken away. Without these rights and protections, it will be impossible for the government to attract and retain quality employees, and our democracy as well as our national security will suffer. We urge the committee to repeal the provisions of the National Security Personnel System of the FY 2004 Defense Authorization Act.



That concludes my statement. I will be happy to respond to any questions.