

Statement of

The Honorable Gordon R. England

Acting Deputy Secretary of Defense

Senior Executive for the National Security Personnel System

Before the

Senate Committee on Homeland Security and Governmental Affairs

“From Proposed to Final:
Evaluating Regulations for the National Security Personnel System”

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Madam Chairman and members of the committee. Thank you for the opportunity to appear before you to discuss the final design of the National Security Personnel System (NSPS). More importantly, thanks to the Congress for granting the Department the authority to establish, in partnership with the Office of Personnel Management (OPM), a new civilian human resources management system to support our critical national security mission. Madam Chairman and the members of this Committee, my special thanks to you for your constant support. DoD and OPM have worked hard to balance our vital national security mission with protecting the interests of the Department's most valuable resource, our people.

Linda Springer, Director of the Office of Personnel Management and our partner in the development of NSPS, joins me today. DoD is grateful for Linda's leadership and the assistance of the OPM team, and we look forward to continuing to work with OPM during the transition to the next steps in this process. Also with me today are Brad Bunn, Deputy Program Executive Officer for NSPS, and George Nesterzuk, Linda Springer's principal advisor on NSPS at OPM, who will be pleased to answer your detailed implementation questions.

My thanks also go to David Walker and the Government Accountability Office for sharing GAO's experience with us throughout the development process. We look forward to their continued insight as we begin the implementation of NSPS.

Madam Chairman, you asked that we (1) address the process used to involve employees in developing the final regulations, (2) provide information on our training and communications programs and (3) other details associated with implementation.

Let me first give you an update on the status of NSPS implementation. As you are likely aware, several unions have recently filed a lawsuit challenging certain aspects of NSPS, including the process leading to the regulations. DoD is currently in dialog with the Department of Justice and the unions. As you are aware, NSPS is event driven, and the Department looks forward to working with everyone on the next steps.

NSPS development has been a broad-based, participative process involving not only employees, managers and supervisors, but also union partners, OPM, Congress, and numerous public interest groups. Prior to publication of the proposed regulations, over 100 focus groups were conducted involving hundreds of DoD employees. Over 50 town hall meetings were held all over the world to seek employee input into the system. Additionally, a series of meetings were held with our labor organizations. Following publication of the proposed regulations, the Department received over 58,000 comments during the public comment period from employees, managers, labor organizations, numerous public interest groups, and Congress. Many of the Congressional views, special concerns, and recommendations have been incorporated.

During almost two months of meetings with our unions during the meet and confer process, their concerns and comments were solicited to find common ground. As might be expected, all differences were not resolved. However, DoD and OPM gained a great deal from the process and, as a result, made meaningful changes to the regulations.

The culmination of this process was the issuance of the final regulations, published in the Federal Register on November 1. Preserving the fundamental rights of DoD employees was a critical design principle throughout the process. The final regulations preserve all core civil service protections, veterans' preference, and due process. NSPS leaves untouched the protections against discrimination, retaliation against whistleblowers, and other prohibited personnel practices, and ensures that employees may organize and bargain collectively. In the Department's judgment, the regulations strike a balance between employee interests and DoD's need to accomplish its mission effectively and to respond swiftly to ever-changing national security threats.

A core NSPS objective is to provide an environment where employees will be encouraged to excel, challenged with meaningful work, and ultimately recognized for their contributions. NSPS will also provide Department leadership with much needed flexibilities to properly compensate, reward, and develop employees based on performance and contribution to mission.

DoD has over 20 years of experience with transformational personnel demonstration projects, covering nearly 45,000 DoD employees. These projects

have shown that the fundamental workforce changes being implemented will have positive results on individual career growth and opportunities, workforce responsiveness, and innovation with a multiplying effect on mission effectiveness.

The unique national security challenges facing DoD today clearly point to the need for civilian workforce transformation: civilians are being asked to assume new and different responsibilities, to be more innovative, agile, and to be more accountable than ever before. It is essential that DoD provides the entire civilian workforce with modern management systems – particularly a new human resources system to support and protect their critical role in DoD’s total force effectiveness. NSPS provides the Department the opportunity to meet this transformation challenge.

The NSPS regulations are designed to promote a performance culture in which the performance and contributions of the DoD civilian workforce are more fully recognized and rewarded. This new system offers the civilian workforce a contemporary pay-banding construct, which will include performance-based pay. As a result, the Department will be more competitive in offering salaries, and it will be able to adjust salaries based on various factors, including labor market conditions, performance, and changes in duties. The human resources system is designed to be a leaner, more flexible support structure to help attract skilled, talented, and motivated people, while also providing for retaining and for improving the skills of the existing workforce.

A key to the success of NSPS is to ensure that employees perceive the system as fair with trust between employees and supervisors. The Department repeatedly heard concerns about ensuring that fairness be addressed in the design of NSPS. The Department listened and responded. The Department and OPM addressed fairness in NSPS in several dimensions of the system design, including the right to seek review of important management decisions, such as performance appraisals; ensuring due process in carrying out disciplinary actions; and ensuring that employees know and understand what is expected from them; and building accountability at all levels.

For instance, important changes to the final regulations include (1) an explicit requirement that performance expectations be in writing; (2) a mandate that employee performance evaluations will be conducted annually; (3) establishment of a minimum 6 percent salary increase for promotions; (4) use of multiple years of performance ratings for reduction in force; (5) prohibition on probationary employees from displacing career employees during reduction in force; and (6) a specification that there may only be one reduction per year in an employee's basic pay due to performance or conduct problems, just to name a few.

Furthermore, NSPS continues employees' and labor organizations' rights to challenge or seek review of key decisions. All employees will be able to request reconsideration of their performance ratings through an administrative reconsideration process. Bargaining unit employees will have the option of using

a negotiated grievance procedure. Labor organization officials may still file unfair labor practice claims or grievances.

In our judgment, NSPS is a fair system and it protects the rights of our employees. While the final regulations streamline some processes, they do so without compromising due process for our employees. Employees will still receive notice of a proposed adverse action, will still have the right to reply, will still be given a decision notice that includes the reason for the decision, and will still have the right to appeal actions they feel were taken wrongfully. While NSPS tightens the standard under which MSPB Administrative Judges and arbitrators may mitigate penalties to give greater deference to the DoD mission, your concerns and those of employee representatives on the mitigation standards in the proposed regulations have been recognized. Accordingly, that standard in our regulations will be similar to the standard recognized by the Federal Circuit Court of Appeals while still ensuring that appropriate consideration is given to the Department's national security mission when mitigating any management determined penalty.

Collective bargaining was an area where valuable insight from you and our labor organizations was heard. Based on these concerns, NSPS preserves the right to bargain over many matters. However, bargaining is limited with regard to operational matters that impact DoD's ability to act and to act swiftly. The ability to act quickly is central to the Department's national security mission – not just during emergencies but, more importantly, to prepare for or to prevent

emergencies and to meet day-to-day operational demands. Your concerns and the concerns of the unions during the meet and confer process were heard, and the regulations therefore recognize that there are times when it will be in the best interests of the Department to allow for bargaining in certain situations in which it would not otherwise be required. As a result, the final regulations allow for bargaining when the Secretary of Defense makes that determination. Even where bargaining is restricted, the regulations require consultation with the unions on such matters, ensuring that employee representatives continue to have a voice on workplace matters.

A provision has been included to establish a National Security Labor Relations Board (NSLRB) that will function as an independent third party review board with members who are known for their integrity, impartiality and expertise in labor relations and/or national security matters appointed by SECDEF.

On this issue, the Department again heard your concerns as well as those of our employee representatives relative to union input into the Board composition. The final regulations include a provision to allow DoD labor unions the opportunity to submit nominations for consideration as members of the Board. Hopefully, the unions will take advantage of this opportunity to submit nominees that meet common criteria that will be used by the Secretary. Such nominations will be given full consideration. While all suggestions related to the NSLRB have not been adopted, the final regulations ensure that NSLRB members will discharge their duties in a fair and impartial manner.

And Madam Chairman, while the Department has designed a labor management relations system that provides appropriate checks and balances to ensure employee rights are protected, let me mention an additional check that Congress wisely included in the NSPS enabling statute. In November 2009, our authority for the labor relations provisions expires, unless it is extended by Congress. The consequence of this statute is that the Department has four years to demonstrate to the Congress that we can exercise these authorities and flexibilities in a responsible manner, or the labor relations portion of NSPS will revert back to current Chapter 71 rules. That is a powerful incentive for DoD.

Some have recommended that the regulations should include far greater specificity. DoD does not agree. Of all the objectives set by Congress for NSPS in the enabling legislation, flexibility was the very first enumerated. Including detail in regulations would not provide requisite flexibility the Department requires and as envisioned by the Congress. As a result of the meet and confer process, and to be fully collaborative, the Department has added greater detail to certain sections. However, even with added detail, the subparts retain their original structure in the final regulations, establishing a general policy framework to be supplemented by detailed Departmental implementing issuances. The regulations require the Department to provide employee representatives an opportunity to participate in the development of Department-level implementing issuances through continuing collaboration. This will provide the unions with an opportunity to have even greater involvement in workforce issues where they have

no role under current rules. The Department looks forward to this collaborative, issue-based approach to labor relations.

DoD also agreed that the authority to issue policies that implement NSPS and supercede conflicting provisions of existing collective bargaining agreements should be limited to a very few senior officials in the Department. As a result, the final regulations specify that only the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries of the Military Departments may issue such policies. This authority is expected to be limited to fewer than 20 people in DoD who are at senior management positions.

Concerns have also been raised relative to ensuring that sufficient resources are available to fund pay pools at adequate levels. Proper funding of pay pools is fundamental to the success of NSPS. As such, to make meaningful distinctions in performance, funding will not be less than the amount that would have gone to step increases and promotions to make the pay decisions equally as meaningful. DoD is committed to this funding.

LOOKING AHEAD

Today, DoD is preparing for implementation of NSPS. Among the first steps will be development of the implementing issuances. Issuances will provide the details for NSPS implementation. Many of these implementation details were shared with the unions during the meet and confer process. The Department looks forward to continuing this exchange as part of a continuing collaboration process.

As discussed on numerous occasions, both in testimony and during individual meetings with the Congress, training is paramount to the success of NSPS. Fortunately, training is a core competency of DoD. For NSPS, DoD is tapping into that infrastructure to deliver a robust training program that features both web-based and classroom instruction. All employees will have training opportunities on the fundamentals of NSPS as well the behavioral-based training referred to as “soft skills,” such as communication skills, team building, and coaching for supervisors, which are critical to succeed in changing the culture to one that is performance-based and results-driven.

Ongoing communication with our employees is also critical. Employees deserve nothing less than to be fully informed. DoD will provide them with information as it becomes available through commanders and supervisors, human resource practitioners, NSPS and Component websites. Printed material will be a constant source of information about NSPS. DoD is committed to transparency in the process and committed to transparency in implementation. Open and ongoing communication is paramount at all levels.

There is still much work to do -- hard work. As challenging as the design of NSPS has been, the greatest challenges lie ahead. Please know that DoD is committed to an event-driven approach to NSPS and this will continue during the next phases. Our iterative approach to implementing NSPS has been detailed. Assessment and evaluation is the cornerstone of the implementation plan.

Mistakes will be identified and corrected.

The Department will use human resources management accountability reviews to identify and address issues regarding the observance of merit system principles and regulatory and policy requirements. The Department will also monitor the outcomes of administrative and negotiated grievances, performance rating reconsiderations, equal employment opportunity complaints, and whistleblower complaints to correct chronic problems or particular failings. Greater flexibility requires greater accountability, and DoD is committed to that accountability.

Finally, the NSPS Program evaluation findings will be used to determine whether the design of NSPS and the pattern of its results meet statutory requirements, like fairness and equity, and the specific performance expectations of a credible and trusted system.

Thank you again for the opportunity to testify. Your questions and observations are most welcome.