INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS
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Prepared For:

The Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

Hearing: Critical Mission: Ensuring the Success of the National Security Personnel System

Tuesday, March 15, 2005 - 10 a.m.

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I would like to thank the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia for holding today's hearing. I would also like to extend a special note of appreciation to both Chairman Voinovich and Ranking Member Akaka for giving me an opportunity to testify today.

Before I begin with my personal remarks, I would like to join my good friend, AFGE President John Gage, in submitting for the official record the comments of the United DoD Workers Coalition (UDWC), of which IFPTE is a member. The document represents the official testimony of the UDWC, a coalition of 36 unions working together on this NSPS issue. I would like to directly associate myself with this UDWC document, which was delivered to this committee last week.

I will restrict my comments for the record to the Department's subparts on Appeals and Labor Relations. The features of these two sections are critically important if we want preserve fairness and equity for the civilian workforce of the Department of Defense, and the accountability of management. But the National Security Personnel System does not preserve fairness or equity in the process laid out for appeals of adverse actions like suspensions or discharges, and it does not preserve basic labor relations protections that have been successful throughout the public and private sector.

The Department has insisted that it requires 'flexibility' in its personnel system, and that this is necessary to better our Nation's security. But so far we have seen no evidence that this system, despite its title, was developed with our national security in mind.

The Appeals Subpart of the Regulations Deprives Employees of Fair and Impartial Review

DOD states that the current appellate system is complex, legalistic, and slow. But gutting the current procedures and effectively starting over simply won't work. First, it strikes at the heart of a system of justice that is crucial to assuring employees that they work in an environment where 'their side of the story' is heard and not ignored. Second, in some ways it will not streamline the system but make it more complex. The new system adds new, untested and vague legal standards and creates additional steps in the appeals process - steps which only increase management's ability to fire or suspend employees. Third, it will push good employees out of government service and discourage qualified employees from even applying.

Furthermore, since the new features of the National Security Personnel System will introduce pay banding and merit pay increases, any adverse actions taken along these lines should be subject to impartial review. As in the rest of the federal workforce, suspensions of 14, rather than 30, days should be appealable. Under the current proposal, employees without a labor organization to protect them will apparently have no ability to appeal a suspension of less than 30 days to a neutral party. It appears that employees subject to reductions in force or "internal placement programs" will also not be to appeal to an impartial arbiter. Without impartial review of these actions, managers with a personal axe to grind, without consideration of an employee's merit, will be able to avoid accountability, because employees won't be able to appeal to a neutral party.

Section § 9901.807 provides numerous additional steps over the current appeal process so that management may in one way or another deprive an employee of a fair

process. The Director of OPM is granted the authority to intervene "at any time." § 9901.807(e). Time periods for appeals have been drastically shortened, meaning that employees who have trouble finding or affording representation may lose out on their chance to save their job. Payment of attorneys' fees for employees who *do* succeed in an appeal is only awarded under vague and unresolved terms; this will obviously discourage employees from taking meritorious appeals.

At every juncture in these regulations one may find that the Department is seeking to avoid being held to any objective standards. Even third parties like the MSPB are required to afford DOD "great deference" in interpretation of the regulations. (§ 9901(a)(2).) The MSPB is also obligated to give deference to DOD's mission requirements "as defined by the Secretary" when considering whether to reduce or overturn a disciplinary action. This creates an entirely new legal standard when an established body of law under the MSPB already exists, and is yet another loophole for managers to escape accountability for their actions. The principle of "just cause" has been applied by many arbitrators in private sector cases for the past 40 years, and provides the correct balance between the legal burden appropriately placed upon the employer in disciplinary and discharge matters, and the right an employee has to defend him/herself in such actions.

DOD has not even provided evidence why the MSPB's authority to provide impartial review should be usurped. We do not think that it is required to protect our Nation's security, since under the current personnel system, separation or removal already may be effected rapidly if "in the interests of national security." 5 U.S.C. § 7532.

When such a provision already exists, how can the Department justify such drastic restrictions on employees' rights?

The regulations also propose mandatory removal offenses (§9901.712), but do not specify what they are and, incredibly, simply reserve to the Secretary the right to delineate whatever offenses may result in immediate separation without review. The inability of an employee to have the penalty mitigated upon review by an independent reviewer and the uncertain availability of judicial review further undermines the process's credibility. Employees will have no confidence that their due process rights will be protected because the outcome of any "hearing" will be pre-determined. No impartial party will hear their cases, but a panel hand-picked by the same employer that imposed the penalty will decide these cases. (See §9901.808.)

The use of mandatory removal offenses runs contrary to the direction taken by Congress and the Administration in H.R. 1528, a bill that would repeal statutory mandatory termination offenses currently applicable to Internal Revenue Service employees. H.R. 1528 was drafted by the Administration and has already passed the House with strong bipartisan support. If implemented, your concept would have the same negative effect as that targeted for repeal in H.R. 1528. This concept must be dropped.

Finally, DOD claims that the complexity of the existing system deters managers from taking the necessary action against poor performers and those engaged in misconduct. If those managers are not fulfilling their responsibilities, why is the chain of command within DOD not taking the appropriate steps to address its management performance problems? We have long maintained that proper training and resource

management within the *existing* personnel system would allow managers to maintain discipline, ensure efficiency and good performance while maintaining fairness and esprit de corps for the workforce. Certainly, it would be cheaper than creating an entirely new and untested system.

The Process By Which the Department Developed The Labor Relations Regulations Was Unlawful

As members of this Committee are no doubt aware, a coalition of DOD labor organizations had brought suit to challenge the unlawful process by which the Department has constructed its labor relations regulations. The court complaint in *AFGE v. Rumsfeld*, Civ. A. No. 05-367 (EGS) (U.S. Dist. Ct. D.C. complaint filed February 23, 2005) states in part:

> 15. The National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 139 (2003), which includes 5 U.S.C. § 9902(m), became law on November 24, 2003. In § 9902(m)(1) Congress authorized "the Secretary, together with the Director," to "establish and from time to time adjust a labor relations system for the Department of Defense."
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> 16. In § 9902(m)(3), Congress directed that the Secretary and the Director "ensure the that the authority of this section is exercised in collaboration with, and in a manner that ensure the participation of, employee representatives in the development and implementation of the labor management system. . . ." Congress specified that the "process for collaborating with employee representatives . . . shall begin no later than 60 days after the date of enactment of this subsection." § 9902(m)(3)(D). In § 9902(m)(3)(A) Congress specified additional requirements of the collaboration process:
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> (A) The Secretary and the Director shall, with respect to any proposed system or adjustment-
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> (i) afford employee representatives and management the opportunity to have meaningful discussions concerning the development of the new system;

(ii) give such representatives at least 30 calendar days (unless extraordinary circumstances require earlier action) to review the proposal for the system and make recommendations with respect to it; and

(iii) give any recommendations received from such representatives under clause (ii) full and fair consideration.

17. After enactment of the law, defendants over the course of more than a year developed their proposed labor relations system—to the point of publication in the Federal Register—using secret working groups. During this time, despite plaintiffs' repeated requests, defendants denied plaintiffs opportunity to collaborate with, participate in, or have discussions with the secret groups, and refused to reveal to plaintiffs any of defendants' instructions to the groups, or any of the groups' preliminary draft proposals or other work products.

18. While the secret groups developed the labor relations system behind closed doors, defendants' representatives gave plaintiffs "concept" papers and engaged plaintiffs in meaningless discussions, in which defendants presented no proposals. Defendants did not even claim that these papers and discussions were the "meaningful discussions" required by § 9902(m)(3); rather, they expressly said that these papers were not proposals and that the discussions were "pre-statutory."

19. Defendants announced that they would establish DOD's labor relations system through formal, notice-and-comment rulemaking. Defendants then asserted that this formal rulemaking process prohibited DOD from revealing to or discussing with plaintiffs (or anyone else outside the agency) any preliminary or the final draft of the proposed labor relations system regulation before publication of the proposed final regulation in the Federal Register. Based on this assertion, defendants rejected plaintiffs' requests to collaborate with, participate in, or have discussions with defendants' secret working groups; and denied plaintiffs' requests to review defendants' instructions to the groups, the groups' preliminary draft proposals, and the final proposed regulation, before its publication in the Federal Register.

20. Defendants Secretary and Director have failed to ensure that the authority of § 9902(m) was exercised in collaboration with, and in a manner that ensured the participation of, employee representatives in the development of the labor management relations system for the DOD, in violation of 5 U.S.C. § 9902(m)(3). In particular, defendants have breached their § 9902(m)(3) duty not to develop a "labor relations system" without "afford[ing] employee representatives . . . the opportunity to have meaningful discussions concerning [its] development." Congress required

> that "collaboration with, and . . . participation of, employee representatives in the development . . . of the labor management relations system," including "meaningful discussions," start "no later than 60 calendar days after the date of enactment." In imposing this requirement, Congress required collaboration with, participation of, and meaningful discussions with employee representatives in the *early* development of the system. Defendants' use of secret working groups over the course of more than a year to develop to the point of publication in the Federal Register DOD's proposed labor relations system; defendants' denial of the opportunity for plaintiffs and other employee representatives to collaborate with, participate in, or have discussions with the secret groups; and defendants' refusal to reveal to plaintiffs and other employee representatives any of defendants' instructions to the groups; any of the groups' preliminary draft proposals or other work products; or the final proposed regulation, before publication in the Federal Register violated plaintiffs' rights under § 9902(m)(3).

In short, the Department conducted meetings and working groups in secret without divulging its plans for the system in any detailed or substantive manner. No "meaninful discussions" occurred as required by the statute, nor did the Department respond to requests for information with anything but generalized statements. This violates the statutory process set forth by Congress.

The Labor Relations Provisions of the Regulations Gut Employees' Rights and Shed the Department of Accountability for Its Actions

The goal that the Department says it seeks to accomplish, the "ability to carry out its mission swiftly and authoritatively," can be accomplished, as it always has been, by continued adherence to the provisions of chapter 71. The Department has not pointed to a single instance in which the Department ever has failed to carry out its mission swiftly and authoritatively due to the existence of a chapter 71 requirement. Congress provided the Department two new tools to increase efficiency—bargaining above the level of

bargaining unit recognition and new, independent third-party review of decisions. To act with requisite swiftness and authority and to achieve increased efficiency, the Department need only use these new tools properly and train its managers and supervisors properly to use the authority that current law provides.

Despite the plain meaning of the statute, the Department is attempting to eradicate existing labor law protections. Again, the sole purpose appears to avoid accountability, not protect national security. The regulations drastically limit subjects of bargaining, radically expands management "right" to act unilaterally and against the interests of employees without any recourse, restricts the right of employees to have a union representative attend meetings with employees and speak on their behalf, and eliminates the right of union representatives to information under Chapter 71 of Title 5.

By far the most outrageous feature of Subpart I is the creation of what can only be described as a kangaroo labor board – the National Security Labor Relations Board. Board members are to be appointed by the Secretary, and will essentially replace the FLRA, which just celebrated 25 years of success in the federal labor relations business. For 600,000 civilian employees of the Department of Defense, that is 25 years of carefully-balanced and thoughtful labor law down the drain. For management, it is an invitation to act irresponsibly and without accountability.

Conclusion

Every civil service system - at least, every successful one - ensures a few basic and critical concepts: flexibility, yes, but also fairness, consistency, and accountability. The Department has taken a straightforward mandate from Congress and abused it; it has reserved to itself a great deal of "flexibility" while shedding accountability and making a

mockery of fairness. Employees will not accept a personnel system in which management can act without, at some point, being held accountable for the actions it takes that harm employees. They will not tolerate working in a personnel system that does not give them a fair opportunity to have their grievances heard. And if these regulations go into effect they will not understand why Congress allowed the Department to deprive them of basic civil service protections.

The United DOD Workers Coalition strongly urges Congress to step in. Any new personnel system should preserve, at the very least, the following attributes:

It should provide, as does the current system, for a choice between the Merit Systems Protection Board and the negotiated grievance/arbitration procedure for ***all*** serious adverse actions.

It should provide for impartial review of labor relations disputes by an independent entity like the Federal Labor Relations Authority. We recommend that the FLRA's current role be preserved in its entirety.

It should, as the law requires, protect the due process rights of employees and provide them with fair treatment. Employees must have the right to a full and fair hearing of adverse actions appeals before an impartial and independent decision maker, such as an arbitrator or the MSPB. DoD should be required to prove, by the preponderance of the evidence, that adverse actions imposed against employees promote the efficiency of the service. An impartial and independent decision maker must have the authority to mitigate excessive penalties.