Statement of

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On

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I. Introduction

Mr. Chairman, I am George Nesterczuk, the Senior Advisor to the Director of the Office of Personnel Management (OPM) on matters related to the National Security Personnel System (NSPS). It is my privilege to represent the Office of Personnel Management before you today to discuss the proposed regulations implementing NSPS in the Department of Defense (DOD). The proposed regulations will establish a new human resources (HR) management system that we believe is as flexible, contemporary, and responsive as the President and the Congress envisioned. It has been a privilege for me

and the team at OPM to work with the dedicated men and women of DOD, its employees and senior leadership in the development of this system. The proposed regulations are the result of an intense collaborative process that has taken over a year. There is still much to do before the NSPS proposal can be finalized, beginning with the assessment of all the comments we are currently receiving and beyond that a hopefully productive period of conferring with DOD unions. Nevertheless, I want to express our appreciation to you for your leadership and continued interest, and that of this Subcommittee. Without your efforts, we would not be here today.

Mr. Chairman, with passage of the National Defense Authorization Act of 2004 (Pub. L. 108-136), you and other Members of Congress gave the Secretary of Defense and the Director of OPM broad authority to establish a new human resources management system to fully support the Department's vital mission without compromising the core principles of merit and fairness. Striking the right balance, between transformation on one hand and protecting core values on the other, is the essence of the transformation process that you established in that statute. We believe the regulations we have jointly proposed strike that balance in all of the key components of the NSPS: performance-based pay, staffing flexibility, employee accountability and due process, and labor-management relations. In each case we struck a careful and critical balance between operational imperatives and employee interests, without compromising either mission or merit.

Mr. Chairman, in inviting OPM to this hearing you asked, in addition to discussing the proposed regulations, that we address the process employed to gather employee input and also how OPM will work with DOD to ensure employees have

meaningful input in the remaining design and implementation. I will address these two procedural points first and then summarize the major highlights of each of the key components of the proposed regulations.

II. Outreach and Employee Involvement

Just about a year ago, the Department stopped its NSPS development efforts in order to assess its progress and its direction. As a result of that pause, a new program office was created to manage the joint development of NSPS regulations with OPM, and a broad outreach effort was initiated to ensure the participation of DOD managers, employees and their representatives. Over a period of several months, the Department held over 50 Town Hall meetings in locations throughout the world. Over 100 Focus Groups were convened separately with employees (including bargaining unit representatives), managers, and HR professionals and practitioners. Briefings were initiated with a host of public interest groups, employee advocacy groups, and other stakeholders including veterans service organizations.

Comments, observations, and suggestions from these many sources were compiled and provided to NSPS working groups organized to gather information, provide research, synthesize findings and develop design options. We were well served in this process by the extensive research that had been compiled by the teams working on the Department of Homeland Security (DHS) personnel system some months earlier. All of the DHS reference materials were provided to our NSPS teams, so we were well informed by that earlier effort.

We also have the benefit of DOD's experience with alternative pay and personnel systems going back nearly 25 years. The employee evaluations and comments amassed through studies of these demonstration projects were part of the information base provided to our working groups. OPM has done an extensive analysis of the DOD demonstration projects and generated a comprehensive report. Copies of all of these compilations and reports were also provided to DOD unions as an aid in our discussions and deliberations.

We also launched a special effort to engage the Department's 43 unions in meaningful discussions over key components of the NSPS: performance pay, staffing flexibilities, adverse action and appeals, and labor management relations. Beginning in April of last year until early December, we held 10 meetings with the unions. In an attempt to address each other's priorities, we set the agenda for some of the meetings, while the unions set the agenda for others. We developed presentations of possible NSPS design options in order to better focus discussion in specific issue areas. The meeting format was plenary in nature, with 25 to 30 unions from their Coalition participating in most of the sessions. We held separate meetings with the smaller number of non-Coalition unions. We received what we consider useful input from these meetings, particularly when some of the unions shared experiences of practices that had worked or failed.

We expect to reconvene our meetings with the Department's unions during the upcoming "meet and confer" process established in the NSPS statute. We are very interested in receiving their views on the proposed regulations, and we look forward to a productive set of meetings.

III. Continued Collaboration

Mr. Chairman you asked how OPM will work with DOD to ensure the continued involvement of employees in the development and implementation process. We have addressed this specific issue in our regulations and have proposed a process that will ensure employee representatives are provided the opportunity to discuss their views with DOD officials. The proposal specifically identifies conceptual design and implementation issues as subject to discussion. Unions will be provided access to information to make their participation productive, including review of draft recommendations or alternatives.

The proposed collaboration process draws on our experience over the past several months. While we value the participation of all DOD unions in the NSPS development process, it is at times impractical to convene a full plenary session of all 43 unions to discuss or review a particular initiative or proposal. So we propose to provide the Secretary the flexibility to convene smaller working groups of unions or to deal with review of written materials or solicit written comments for consideration, as appropriate. Some matters may involve development of concepts; others may consist of review of issuances before they are published. The best approach is to permit the Secretary to tailor the interaction and communications with DOD unions to the circumstances at hand.

We also propose to have the Secretary develop procedures to allow continuing collaboration with organizations that represent the interests of substantial numbers of non-bargaining unit employees. We believe this process will allow the Department to

maintain a broad outreach to its stakeholder community during the continuing evolution of the NSPS.

IV. Pay, Performance, and "Politicization"

The new pay system established by the regulations was designed to fundamentally change the way DOD employees are paid, to place far more emphasis on performance and the labor market in setting and adjusting rates of pay. Instead of a "one size fits all" pay system based on tenure, we have established one that bases all individual pay adjustments on performance. No longer will employees who are rated as unacceptable performers receive annual across-the-board pay adjustments, as they do today. No longer will annual pay adjustments apply to all occupations and levels of responsibility, regardless of market or mission value. Instead, adjustments will be based on national and local labor market trends, budget, recruiting and retention patterns, and other employment factors. And no longer will employees who merely meet time-in-grade requirements receive virtually automatic pay increases, as they do today. Instead, individual pay raises will be determined by an employee's annual performance rating.

This system is entirely consistent with the merit system principles that are so fundamental to our civil service. One of those principles states that Federal employees should be compensated ". . . with appropriate consideration of both national and local rates paid by employers . . . and appropriate incentives and recognition . . . for excellence in performance." See 5 U.S.C. 2301(b)(3). However, some have argued that by placing so much emphasis on performance, we risk "politicizing" DOD and its employees. This

is a most serious charge. Such a result, if true, would constitute a prohibited personnel practice, something expressly forbidden by the Congress in giving DOD and OPM authority to jointly prescribe the NSPS. Moreover, it would tear at the very fabric of our civil service system. Fortunately, nothing could be further from the truth.

The merit system principles provide that Federal employees should be ". . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." See 5 U.S.C. 2301(b)(8)(A). And they are. Section 2302(b)(3) of title 5, United States Code, makes it a prohibited personnel practice to "coerce the political activity of any person . . . or take any action against any employee" for such activity. Those laws remain unchanged, intact and binding on DOD. The law forbids any political influence in taking any personnel action with respect to covered positions, and it most certainly applies to making individual pay determinations. The proposed NSPS regulations did not dilute these prohibitions in any way; indeed, they could not and we would not. This is no hollow promise. A close examination of the proposed regulations reveals that they include considerable protection against such practices – and no less than every other Federal employee enjoys today.

For example, if a DOD employee believes that decisions regarding his or her pay have been influenced by political considerations, he or she has a right to raise such allegations with the Office of Special Counsel (OSC), to have OSC investigate and where appropriate, prosecute, and to be absolutely protected from reprisal and retaliation in so doing. These rights have not been diminished in any way whatsoever. Moreover, supervisors have no discretion with regard to the actual amount of performance pay an employee receives. That amount is driven strictly by mathematical formula. Of the four

variables in the formula – the employee's annual performance rating; the "value" of that rating, expressed as a number of points or shares; the amount of money in the performance pay pool; and the distribution of ratings – only the annual rating is determined by an employee's immediate supervisor, and it is subject to review and approval by the employee's second-level manager.

Once that rating is approved, an employee can still challenge it if he or she does not think it is fair. Finally, the other factors governing performance pay are also shielded from any sort of manipulation. And as far as the distribution of ratings is concerned, the Department has stated it will not use any sort of quota or forced distribution.

Ultimately there is no better guarantor of compliance to laws and standards than transparency and access to information. The rules and procedures governing the translation of employee ratings into pay adjustments will be available to all DOD employees, and will be part of the training everyone will receive. Unless employees readily understand how their pay adjustments are arrived at they will harbor suspicions and generate skepticism which would adversely impact the acceptance of pay for performance.

Of course, DOD managers will receive intensive training in the new system, a further safeguard against abuse. And many of them too will be covered by it, with their pay determined by how effectively they administer this system. The same is true of their executives, now covered by the new Senior Executive Service pay-for-performance system – indeed, OPM regulations governing that system establish clear chain-of-command accountability in this regard. With these considerable protections in place, we believe there is no danger whatsoever that the pay of individual DOD employees will

become "politicized" just because it will be more performance-based. To the contrary, we believe the American people expect that performance should determine the pay of public sector employees. That is exactly what the NSPS pay system is intended to do.

V. Staffing Flexibilities

To fulfill its mission requirements the Department needs a workforce suited to the complex tasks of a dynamic national security environment. The key to aligning and shaping a workforce lies in greater flexibility to attract, recruit, shape and retain high quality employees. The proposed regulations provide DoD with a set of flexible hiring tools to respond to continuing changes in mission and priorities. New flexibilities will provide options to target recruitment, expedite hiring, and adjust for the nature of the work and its duration.

Under NSPS, employees will be either career, serving without time limit in competitive or excepted service positions, or they will be time-limited, serving for a specific period (term) or for an unspecified but limited duration (temporary.) The Secretary (in coordination with the Director of OPM) will have the authority to prescribe the duration of time-limited appointments, advertising requirements, examining procedures, and appropriate uses of time-limited employees.

To expedite recruitment and hiring DOD will continue to use direct-hire authority for severe shortage or critical hiring needs but subject to the same criteria OPM currently uses to make these determinations. In addition the Director and the Secretary may jointly establish new appointing authorities subject to public notice and comment.

The proposed rules provide recruitment flexibilities in permitting DOD to target recruitment efforts consistent with merit system principles and complying fully with veterans' preference requirements. The Department will provide public notice in filling positions and will accept applications from all qualified applicants, but DOD may initially consider, at a minimum, only applicants in the local commuting area. If the minimum area of consideration does not provide sufficient qualified candidates, then DoD may expand consideration more broadly or nationally.

Finally, the proposed regulations would permit DOD to more effectively shape competitive areas during reductions in force (RIF) to better fit the circumstances driving the reduction and to minimize disruption to employees and their organizations. The competitive area may be based on one or more factors such as geographical location, lines of business, product lines, organizational units, and/or funding lines. Retention lists will be assembled using the same four retention factors of tenure, veterans' preference, performance and seniority. Veterans' preference remains untouched under NSPS RIF actions, but performance and seniority are reversed in priority. Within tenure and veterans status groupings, retention lists place high performers at the top and low performers at the bottom. Within performance categories, employees are grouped by seniority with longer years of service at the top of the category and lesser seniority at the bottom. The performance based retention inherent in this proposal is entirely consistent with the greater emphasis on performance throughout the NSPS, including the pay system.

VI. Accountability and Due Process

The Department of Defense is unique among Cabinet departments in both its size and organizational complexity. It also carries the awesome responsibility of protecting our national security – a vital mission that requires a high level of workplace accountability. Congress recognized this fact when it gave DOD and OPM the authority to waive those chapters of title 5, United States Code, which deal with adverse actions and appeals. However, in so doing, Congress also assured DOD employees that they would continue to be afforded the protections of due process. We believe the proposed NSPS regulations strike this balance. They assure far greater individual accountability, but without compromising the protections Congress guaranteed.

In this regard, DOD employees will still be guaranteed notice of a proposed adverse action. While the proposed regulations provide for a shorter, 15-day minimum notice period (compared to a 30-day notice under current law), this fundamental element of due process is preserved. Employees also have a right to be heard before a proposed adverse action is taken against them. This too is a fundamental element of due process, and the regulations also provide an employee a minimum of 10 days to respond to the charges specified in that notice – compared to 7 days today. In addition, the proposed regulations continue to guarantee an employee the right to appeal an adverse action to the Merit Systems Protection Board (MSPB), except those involving a Mandatory Removal Offense (MRO). The proposed regulations also provide bargaining unit employees the option of contesting an adverse action through a negotiated grievance procedure all the way to a neutral private arbitrator, if their union invokes arbitration.

The proposed regulations authorize the Secretary to establish a number of MROs that he or she determines will ". . . have a direct and substantial adverse impact on the Department's national security mission." The regulations provide a number of checks and balances on the use of this authority, including requiring case-by-case Secretary-level approval before an employee is charged with an offense, and providing full due process to employees charged. An employee is still entitled to a notice of proposed adverse action, the right to reply to the charges set forth in that notice, and the right to representation.

While no list of MROs has as yet been proposed, the proposed regulations reserve to the Secretary the flexibility to determine such offenses should the need arise in the future. Mandatory removal will allow management to act swiftly to address and resolve misconduct or unacceptable performance that would be most harmful to the Department's critical mission. Of course, DOD employees will be properly notified before any MROs are established.

In adjudicating employee appeals, regardless of forum, the proposed NSPS regulations place a heavy burden on the agency to prove its case against an employee. Indeed, we propose to establish a *higher* burden of proof: a "preponderance of the evidence" standard for all adverse actions, whether based on misconduct or performance. While this is the standard that applies to conduct-based adverse actions under current law, it is greater than the "substantial evidence" standard presently required to sustain a performance-based action.

Finally, the proposed regulations authorize MSPB (as well as arbitrators) to mitigate penalties in adverse action cases, but only under limited circumstances. Thus,

the proposed regulations provide that *when the agency proves its case against an employee by a preponderance of the evidence,* MSPB (or a private arbitrator) may reduce the penalty involved *only* when it is "so disproportionate to the basis for the action that it is wholly without justification." Although it is admittedly tougher than the standards MSPB and private arbitrators apply to penalties in conduct cases today, it provides those adjudicators considerably more authority than they presently have in performance cases – current law (chapter 43 of title 5) literally precludes them from mitigating a penalty in a performance-based action taken under that chapter. Moreover, MSPB's current mitigation standards basically allow it (and private arbitrators) to second-guess the reasonableness of the agency's penalty in a misconduct case, without giving any special deference or dispensation to an agency's mission.

The President, the Congress, and the American public all hold the Department accountable for accomplishing its national security mission. MSPB is not accountable for that mission, nor are private arbitrators. Given the extraordinary powers entrusted to the Department and its employees, and the potential consequences of poor performance or misconduct to that mission, DOD should be entitled to the benefit of any doubt in determining the most appropriate penalty for misconduct or poor performance on the job. There is a presumption that DOD officials will exercise that judgment in good faith. If they do not, however, providing MSPB (and private arbitrators) with limited authority to mitigate is a significant check on the Department's imposition of penalties. That is what the new mitigation standard is intended to do, and it is balanced by the higher standard of proof that must first be met.

VII. Mission Imperatives and Employee Interests

As I stated before, the Department is a large and complex organization, with widely dispersed components and commands, and varied mission elements mixing both military and civilian workforces. With lives literally at stake, the Department's commanders cannot afford mission failure. The chain of command depends on an ethos of accountability, and this goes to the heart of some of the most important provisions of the regulations: labor relations. Accountability must be matched by authority, and here, the current law governing relations between labor and management is out of balance. Its requirements potentially impede the Department's ability to act, and that cannot be allowed to happen. The regulations ensure that the Department can meet its mission, but in a way that still takes union and employee interests into account.

For example, today, in trying to reconfigure resources to deal with a host of new and deadly threats to the nation, the Secretary cannot issue personnel or other rules and regulations that are binding on his subordinate organizational units. Instead, those rules must be negotiated in over 1,500 bargaining units currently recognized by DOD, represented by 43 separate unions. The organization of the unions and the bargaining units does not always bear resemblance to the Department's organizational structure or chain of command. This cumbersome labor environment within DOD adversely affects the timeliness, uniformity and predictability of internal policy directives. The Secretary of Defense needs quick response and great certainty in the management of his Department. The proposed rules permit this by making Department and component level rules and regulations management actions not subject to bargaining. Below this level,

personnel policies, practices and working conditions would still be subject to collective bargaining. Therein lies the balance – where the Department needs expedited rules and directives and uniform implementation, it will have the means to issue such. Otherwise, where local policy discretion is appropriate local commands can negotiate through their individual bargaining units.

Today, if the Department wants to introduce new technology, it cannot – unless it first negotiates with the Department's various unions, at their various sub-component levels of recognition, over the implementation and impact of that new technology on bargaining unit employees . . . and the Department cannot act until those negotiations have been concluded. How can we hold the Department accountable for rapid response to an elusive foe if it cannot act swiftly to take full advantage of new technology? The proposed regulations give the Department the authority to do so, and they provide for consultations with unions both before and after implementation, as circumstances permit.

Today, the Department cannot permanently or even temporarily assign its front-line employees without following complicated procedures governing who, when, and how such assignments will take place – procedures that, in some cases where there are collective bargaining units, have been negotiated with unions. And if there is an operational exigency that those procedures did not anticipate, they cannot be modified without further negotiations. These situations have real operational impact, all the result of current law. The proposed regulations prohibit negotiations over these operational procedures. However, the regulations do require that managers consult with unions over such procedures, and they also permit employees to grieve alleged violations of the

procedures -- all the way to arbitration, if their union invokes it. In addition, the regulations require full collective bargaining over non-operational procedures.

Critics of these proposed changes will argue that current law already allows the agency to do whatever it needs to do in an emergency. However, that statement, while true, explains why the current law is inadequate when it comes to national security matters. The Department needs the ability to move quickly on matters before they become an emergency.   Current law simply does not allow DOD to take action quickly to prevent an emergency, to prepare or practice for dealing with an emergency, to implement new technology to deter a potential threat, or do any of the things I have described above. Rather, the current law requires agencies to first negotiate with unions over the implementation, impact, procedures and arrangements before it can take any of those actions. By the time an "emergency" has arisen, it is literally too late. OPM recognizes that this simply cannot continue.

You may also hear that the National Security Labor Relations Board (NSLRB), to be appointed by the Secretary to resolve collective bargaining disputes in the Department, will not be independent, and that its decisions will not be impartial because they are not subject to "outside review." The NSLRB is expressly designed to ensure that those who adjudicate labor disputes in the Department have expertise in its mission, and its members are every bit as independent as any of the many other Boards or Panels in the Department…or any agency's Administrative Law Judges (ALJs). Just as an agency's ALJs operate outside the chain of command, so too will NSLRB's members. Just as ALJ decisions are binding on the agency that employs them, so too will NSLRB's decisions be binding – subject to appeal by either party to the Federal Labor Relations Authority

and the Federal courts of appeals. Thus, assertions to the contrary notwithstanding, the proposed regulations make it patently clear that the NSLRB's decisions will be subject to at least *two levels* of outside review.

VIII. Conclusion

If DOD is to be held accountable for national security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM authority to waive and modify the laws governing staffing, classification, pay, performance management, labor relations, adverse actions, and appeals. And that is why we have proposed the changes that we did. In so doing, we believe that we have succeeded in striking a better balance – between union and employee interests on one hand, and the Department's mission imperatives on the other. At the same time we made sure core merit system principles were preserved.

Mr. Chairman this concludes my statement. I would be pleased to respond to any questions you and members of the Subcommittee may have.