

Statement of Senator Daniel K. Akaka
From Proposed to Final:
Evaluating Regulations for the National Security Personnel System
Committee on Homeland Security and Governmental Affairs
November 17, 2005

Thank you Madam Chairman. It is a pleasure working with you, Senator Lieberman, and Senator Voinovich on these important human capital issues. I also wish to express my appreciation to Senators Warner and Levin whose leadership on this Committee and the Armed Services Committee has been invaluable.

Today's hearing offers an opportunity to review with the Department of Defense (DoD) and the Office of Personnel Management (OPM) the final regulations they crafted which will serve as the framework for the National Security Personnel System (NSPS). I am pleased that we'll also hear from Comptroller General Walker, two union leaders, and the president of the Federal Managers Association.

This hearing is the third hearing I've attended on NSPS in the past year. Since the enactment of legislation providing for NSPS, it has been my hope that DoD and OPM would engage in meaningful discussions with employee representatives to produce a personnel system that would be mutually agreeable. Although I voted against the creation of NSPS because I believed employee rights and protections would be greatly diminished, I kept open the possibility that I would be wrong.

Sadly, the final regulations do great harm to the civilian DoD workforce. I am extremely disappointed by the failure of DoD to comply with congressional intent and by the Department's disregard for the welfare of its civilian employees. We should never forget that the civilian workforce at DoD is critical to our national security.

The Department has taken the broad flexibility granted by Congress to create a system that:

- Eliminates employee collective bargaining rights;
- Creates an unfair appeals process; and
- Permits DoD to act without accountability.

Because a federal judge has enjoined DHS from implementing the labor-management provisions of MaxHR, I expected to see significant changes from DoD's proposed regulations. However, the introduction to the final NSPS regulations state that there are only 36 written changes from the proposed regulations and 14 clarifications which were a result of the meet and confer process.

One area that saw little change is the labor-management relations provisions. Congress clearly stated that under NSPS collective bargaining would be preserved and that chapter 71 of Title 5 could not be waived. However, the Department has gone out of its way to erode the collective bargaining rights of employees. Under the regulations, collective bargaining is authorized at the discretion of the Secretary and no single issue is immune from being eliminated from collective bargaining.

Moreover, NSPS drastically limits the matters open to collective bargaining - subject to further limits placed on this category by the Secretary - and provides for review of any labor-management issue by an internal board that I believe will not be independent and impartial.

Although employee representatives may make suggestions to improve agency action or recommendations for membership on the National Security Labor Relations Board under NSPS, I fear that employee input will have little impact. The reliance on implementing issuances to flush out the details of this system makes it essential that employees have meaningful collective bargaining rights.

Employees also deserve a fair appeals process. According to the final regulations, it is essential to the success of NSPS to ensure that employees perceive the system as fair. However, DoD is given broad authority to make adverse personnel actions without any accountability. The independent Merit Systems Protection Board (MSPB) has limited review of DoD cases and will only be able to mitigate penalties imposed by the Department when the penalty is totally unwarranted without any justification.

Furthermore, decisions by MSPB administrative judges will be subject to review by certain Department employees, although the regulations fail to identify the employees or list the qualifications of the individuals who will second-guess the findings of the independent administrative judge (AJ). I question how this change strengthens national security and why DoD alone, without a meaningful review by the agency charged with protecting merit system principles, is best able to determine the most appropriate penalty for misconduct or unacceptable performance.

By increasing the mitigation standard to such a high burden and allowing Departmental employees to overturn AJ decisions, the Department is creating an appeals system that is unfair and further erodes any substantive review of its actions for inappropriate conduct.

Lastly, the regulations provide few details as to how DoD will establish its compensation and performance management systems. Although the regulations state that employees will be involved in the design and implementation of the performance management system, it is still unclear how this will be accomplished.

While the current General Schedule (GS) pay system is not perfect, there are clear rules on how employees are paid and under what circumstances pay increases are awarded. Unfortunately, the GS system has not lived up to its potential as envisioned under the Federal Employees Pay Comparability Act. And yet I do not see how a new performance-based pay system will be an improvement given the lack of details on the new system, the lack of meaningful employee involvement in designing the new system, and the limitations on employees' ability to challenge performance reviews and pay decisions.

Training is a key to employee understanding and acceptance. I am further concerned about how the adequacy of training envisioned by DoD for managers and employees on the new pay-for-performance system will ensure fairness when 25 years under a performance-based system, the Civil Service Reform Act, has done nothing in the opinion of DoD to encourage strong performance.

DoD has significant management challenges and has more programs on the Government Accountability Office (GAO) high-risk list than any other federal agency. I am pleased to work with Senator Voinovich on addressing these issues, but I fear that given the limited checks on the Department under the final regulations, NSPS will become just another item on the GAO high-risk list.

Employees throughout the federal government, especially those charged with defending the nation, deserve compensation, appraisal, labor-management, and appeals systems that are fair. NSPS is not fair. It gives the Department significant flexibility and authority without any real accountability. DoD employees deserve better.

Thank you Madam Chairman. I look forward to hearing from our witnesses.