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ON BEHALF OF THE
UNITED DOD WORKERS' COALITION

BEFORE

THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA

SENATE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

REGARDING

THE NATIONAL SECURITY PERSONNEL SYSTEM OF
THE DEPARTMENT OF DEFENSE

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Mr. Chairman and Members of the Subcommittee: On behalf of the more than 600,000 federal employees in the Department of Defense (DoD) represented by the United DoD Workers' Coalition, we thank you for the opportunity to testify today.

We are sorry to report to you that in spite of prodigious efforts on the part of union representatives over the past year to engage with the Department of Defense (DoD) in discussions over how best to implement the authorities Congress granted to establish a new so-called "National Security Personnel System" (NSPS), the proposed regulations published by DoD reflect that we made virtually no progress. At times, the Coalition sensed that many of the concerns we voiced fell on deaf ears as DoD's clear intention was to mirror the system proposed by the Department of Homeland Security. As such, we believe that many of the concepts advanced by DoD fail not only to protect employee and union rights, but also fail to advance the public's interest in protecting national security and defense.

The Union Coalition offered DoD numerous "options" and alternatives during the past year and we have attached to this testimony a copy of the comments we have submitted in response to DoD's Federal Register publication of its proposed regulations. These options would have changed and enhanced current procedures without sacrificing important employee rights that Congress intended to be safeguarded by the law. As a result of our comments on the

proposals and the continued oversight and participation of this Subcommittee, we continue to hope that these options will be included in the final regulations.

For example, the unions repeatedly indicated our willingness to speed up the discipline and adverse action process. While we have very strong concerns about a pay for performance system, we have offered to negotiate over pay and a new pay system that would provide for 1) a nationwide component to keep all employees comparable with the private sector; 2) a locality component to keep all employees comparable with the private sector and living costs; and 3) a performance component with fixed percentages tied to performance levels. We have offered to speed up the timeframes for bargaining, consider the new concept of post-implementation bargaining when necessary to protect national security and defense, and the introduction of quick mediation-arbitration processes by mutually selected independent arbitrators 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.

Labor Relations

Notwithstanding the substantive arguments in our attached comments, our Union Coalition believes that the procedures for generating changes in the Labor Management Relations system have, thus far, been contrary to the statutory scheme proscribed in the National Defense Authorization Act for Fiscal

Year 2004, Section 9902 (m), LABOR MANAGEMENT RELATIONS IN THE DEPARTMENT OF DEFENSE.

This portion of the law describes a very specific manner of statutory collaboration with time lines, which has not been followed. The law requires that employee representatives participate in, not simply be notified of, the development of the system. We ask that the Subcommittee investigate DoD's failure to enforce or observe this aspect of the law.

As you know, Public Law 108-136 protects the right of employees to organize, bargain collectively, and to participate through labor organizations of their own choosing in decisions that affect them. Specifically, the Coalition has reiterated that Congress intended to have the NSPS preserve the protections of Title 5, Chapter 71, which DoD's proposals attempt to eliminate. DoD's position, made manifest in its proposed regulations, is that Chapter 71 rights interfere with the operation of the new human resources management system it envisions and hopes to implement. Despite this Congressional mandate to preserve the protections of Chapter 71, DoD's proposed regulations will:

1. Eliminate bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of core operational management rights.

2. Eliminate bargaining over otherwise negotiable matters that do not significantly affect a substantial portion of the bargaining unit.

3. Eliminate a union's right to participate in formal discussions between bargaining unit employees and managers.

4. Drastically restrict the situations during which an employee may request the presence of a union representative during an investigatory examination.

5. Eliminate mid-term impasse resolution procedures, which would allow agencies to unilaterally implement changes to conditions of employment.

6. Set and change conditions of employment and void collectively bargained provisions through the issuance of non-negotiable departmental or component regulations.

7. Assign authority for resolving many labor-management disputes to an internal Labor Relations Board, composed exclusively of members appointed by the Secretary.

8. Grant broad new authority to establish an entirely new pay system, and to determine each employee's base pay and locality pay, and each employee's annual increase in pay, without requiring any bargaining with the exclusive representative.

9. Mandate non-reviewable national level bargaining without consideration of the hundreds of local and regional certifications by the Federal Labor Relations Authority.

Our unions have expressed strong objections to DoD's total abandonment of Chapter 71, along with the law associated with the statute's interpretation. We ask that the Subcommittee join us in reaffirming to DoD that Congress intended to have Chapter 71 rights upheld so that DoD cannot hide behind its false contention that Congress' intent was unclear. Chapter 71 should be the "floor" of any labor relations system DoD designs. However, the design of DoD's plan is to minimize the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. We know that when Congress enacted provisions to protect collective bargaining rights, it did not intend that those rights be eviscerated in the manner that DoD's proposed regulations envision. Indeed, any regulation reflecting any of the issues listed above will be entirely unacceptable to us, and we strongly believe, unfounded in either the legislation or the law.

Performance Management

The law required any new DoD system to be "contemporary." The labor relations and performance management concepts set forth in DoD's proposed regulations are, however, remarkably regressive. By proposing to silence frontline employees and the unions that represent them, DoD appears to have decided that employees and their unions can make no contribution to the accomplishment of the essential mission of protecting the national security and defense. This approach is at odds with contemporary concepts of labor relations. As the Government Accountability Office (GAO) recognized in Congressional testimony concerning the Department of Homeland Security's proposed regulations:

> [L]eading organizations involve unions and incorporate their input into proposals before finalizing decisions. Engaging employee unions in major changes, such as redesigning work processes, changing work rules, or developing new job descriptions, can help achieve consensus on the planned changes, avoid misunderstandings, speed implementation, and more expeditiously resolve problems that occur. These organizations engaged employee unions by developing and maintaining an ongoing working relationship with the unions, documenting formal agreements, building trust over time, and participating jointly in making decisions.

The proposed DoD performance management system breaks no new ground. Except for the elimination of employee procedural safeguards, the proposed system repeats many of the current system's themes, such as providing on-going employee feedback regarding his/her performance, and consistent and continual acknowledgment and reward of high performance and

good conduct. Federal agencies have been struggling to attain credible performance systems for decades. Nothing in its proposal suggests that DOD will be able to avoid the credibility problems that have plagued other federal agencies and departments. These problems are even more pronounced in view of the proposal to link employee pay to performance ratings.

Employee Appeals

Public Law 108-13 reflects Congress's clear determination that DOD employees be afforded due process and be treated fairly in appeals they bring with respect to their employment. When it mandated that employees be treated fairly and afforded the protections of due process, and authorized only limited changes to current appellate processes, Congress could not have envisioned the drastic reductions in employee rights that DoD's proposed regulations set forth.

No evidence has ever been produced to suggest, let alone demonstrate, that current employee due process protections or the decisions of an arbitrator or the MSPB have ever jeopardized national security and defense in any way. While we believe in an expeditious process for employee appeals, we will never be able to support biasing the process in favor of management or otherwise reducing the likelihood of fair and accurate decisions. DoD has provided absolutely no research that shows that the drastic changes proposed to Chapters 75 and 77 of Title 5 would further the agency mission.

Ideally, a new human resource management system would promote *esprit de corps* so as to enhance the effectiveness of the workforce. DoD's proposed

regulations fall far short of that ideal, and can fairly be described as undermining it for all practical purposes. The system they envision will instead result in a demoralized workforce comprised of employees who know that they have been relegated to second-class citizenship. This system will encourage experienced employees to seek employment elsewhere and will deter qualified candidates from considering a career at DOD. It will put DOD at a competitive disadvantage, with consequent impact on its effectiveness. That is the real tragedy.

Pay and Classification

DoD's proposed regulations indicate its desire for radical change to pay and classification systems, and, as the law requires, creation of a pay-for-performance system "to better link individual pay to performance, and provide an equitable method for appraising and compensating employees." No objective data or reliable information exists to show that such a system will enhance the efficiency of DOD operations or promote national security and defense. As with the proposed system at the Department of Homeland Security, most of the key components of the system have yet to be determined.

One thing, however, is clear. The design, creation and administration of the concept DoD has proposed will be complex and costly. A new level of bureaucracy would have to be created, and given DoD's ideology and proclivities, it is highly likely that this costly new bureaucracy would be outsourced to provide some lucky private consultants with large and lucrative contracts. This private consultant would then make the myriad, and yet-to-be

identified, pay-related decisions that the new system would require. Although the contractors who anticipate obtaining this new "make-work" project are undoubtedly salivating over the prospect, our country would be better served if the resources associated with implementing and administering these regulations were dedicated more directly to protecting national security and defense.

The unions told DoD during our meetings last year that until these and other important details of the new system have been determined and piloted, the undefined changes cannot be evaluated in any meaningful way. Unfortunately, we are now forced to exercise our statutory collaboration rights on vague outlines, with no fair opportunity to consult on the "real" features of the new classifications, pay and performance system. This circumvents the congressional intent for union involvement in the development of any new systems, as expressed in Public Law 108-13.

Accordingly, we have recommended to DoD that the pay, performance, and classification concepts be withdrawn in their entirety and published for comment and recommendations only when: 1) the Agencies are willing to disclose the entire system to DOD employees, affected unions, Congress, and the American public; and 2) the Agencies devise a more reasonable approach to testing any radical new designs before they are implemented on any widespread basis. It is simply wrong to ask us to accept systems that establish so few rules and leave so much to the discretion of current and future officials. As the representatives of DOD employees, it is our responsibility to protect them from vague systems, built on discretionary authority that is subject to abuse.

Regardless of the ultimate configuration of the pay proposal, we believe that any proposed system must contain the transparency and objectivity of the General Schedule. Critical decisions on pay rates for each band, annual adjustments to these bands and locality pay supplements and adjustments must be made in public forums like the U.S. Congress or the Federal Salary Council, where employees and their representatives can witness the process and have the opportunity to influence its outcome through collective bargaining. We are concerned that these decisions would now be made behind closed doors by a group of DOD managers (sometimes in coordination with OPM) and their consultants. Not only will employees be unable to participate in or influence the process, there is not even any guarantee that these decisions will be driven primarily by credible data, or that any data used in the decision-making process will be available for public review and accountability, as the data from the Bureau of Labor Statistics is today.

If the system DOD/OPM has proposed is implemented, employees will have no basis on which to predict their salaries from year to year. They will have no way of knowing how much of an annual increase they will receive, or whether they will receive any annual increase at all, despite having met or exceeded <u>all</u> performance expectations identified by DOD. The "pay-for-performance" element of the proposal will pit employees against one another for *allegedly* performance-based increases.[2] Making DOD employees compete among

[2] This element of the proposal does not really qualify as a "pay for performance" system. Employees performing at an outstanding level could not, under the proposal, ever be certain that they would actually receive pay commensurate with their level of performance.

themselves for pay increases will undermine the spirit of cooperation and teamwork needed to keep our country safe at home and abroad.

It is also unclear from the current state of the deficit that funds will be made available for performance-based increases to become a plausible reality, one of many facts that has DOD employees concerned and skeptical about this proposal. As a practical matter, the Coalition has voiced its concern that DoD's ambitious goal to link pay for occupational clusters to market conditions fails to address the reality that pay for DOD employees is tied to Congressional funding, not market conditions. Indeed the Federal Employees Pay Comparability Act (FEPCA), the law that added a market-based locality component to the market-based General Schedule has never been fully funded, for budgetary reasons. That is, the size of the salary adjustments paid under FEPCA to GS employees has, except for once in 1994, reflected budget politics rather than the market data collected by the Bureau of Labor Statistics (BLS) to support the system.

Conversion

As of this date, the unions have had little or no discussion with the agencies on how DOD will convert from the current pay, performance, appeals and labor relations system into NSPS. It is our contention that with respect to pay and classification, any conversion of GS employees in non-competitive career path must include pay adjustments for time already accrued toward a career ladder promotion or within grade increases. With respect to appeals, any grievances, complaints, cases, etc. already filed in the current system must retain

the protections of the current system until final adjudication under the current system.

Conclusion

The fundamental bases for DoD's proposed system, as described in the proposed regulations, are unacceptably flawed, and we object to it in its entirety. Accordingly, we do not acquiesce to the implementation of any part of the system and DoD should consider any individual proposal not expressly accepted in the comments and recommendations we submitted and which are attached for the Subcommittee's consideration to have been rejected. We recommend that all current provisions of law be retained until such time as all of the numerous defects of DoD's proposal can be cured.

During the statutorily prescribed consultation process, we will attempt, again, to work with DoD to devise a human resource system that meets legitimate management needs without sacrificing important employee rights and union protections. Such a system should, at a minimum, include the following elements:

1. It should provide for collective bargaining over the design of the pay, performance, and classification systems. It should provide for pay, performance, and classification systems that operate through collective bargaining with bargaining unit employees. Such bargaining is common in the public and private sectors, including federal components not covered by the General Schedule pay and classification system. Bargaining would in no way

negatively impact the agency's ability to accomplish its mission. Instead, it would enhance the effectiveness of the system by providing greater fairness, credibility, accountability and transparency.

2. It should ensure that employees are not disadvantaged by the implementation of any new pay system. That is, employees must, at a minimum, be entitled to the same pay increases and advancement potential under a new system that is available under the General Schedule.

3. It should retain the provisions of 5 U.S.C. Chapter 43 and 5 C.F.R. Part 430, governing performance management.

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

5. It should provide for impartial review of labor relations disputes by an independent entity like the Federal Labor Relations Authority.

6. It should protect, as we believe Public Law 108-13 mandates, the right of employees to organize and bargain collectively over workplace decisions that affect them. For example, employees should have the right to bargain over procedures and appropriate arrangements related to the exercise of management's right to assign work, deploy personnel, and use technology.

To require such bargaining would not prevent management from exercising its rights. Instead, it would allow agreements to be reached over such things as fair and objective methods of assigning employees to shifts and work locations. It would allow agreements to be reached over fair and objective

methods of reassigning employees on short notice to new posts of duty that may be thousands of miles from home and family. It would allow agreements to be reached over training and safety issues related to the use of new technology by employees whose jobs put their lives at risk on a daily basis.

7. It should encourage, not suppress, the pre-implementation participation of employees and their unions in mission-related decisions. Frontline employees and their unions want to help DOD accomplish its mission, and they have the expertise to do it. They should not be shut out of mission-related decisions.

8. 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 action 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.

We hope the statutory collaboration process will be a success. We are determined, however, to protect the rights of DOD employees and will use all appropriate means to challenge the implementation of any system that does not comport with law, needlessly reduces employee rights, or amounts to a waste of our nation's resources.