
In Our Nation's Defense:
Taking the Right Steps to Redesign
the Department of Defense (DOD)
Civilian Human Resource System

UNITED DEPARTMENT OF DEFENSE WORKERS COALITION

INTRODUCTION

On November 24, 2003, the National Defense Authorization Act for fiscal year 2004 was signed into law. It directed the Secretary of Defense (the Secretary) to coordinate with the Director of the Office of Personnel Management (the Director or OPM) for the purpose of revising the human resources (HR) management system for some (or all) of the Department of Defense (DOD).

The list of HR modifications under what has been called the National Security Personnel System (NSPS) includes a broad range of significant activities, such as performance management, compensation, staffing, labor relations, and workplace disputes. According to the “concepts” for regulatory change that DOD has presented, existing systems would be adjusted and/or new systems created to address issues by:

- Combining multiple occupations into newly-formed groupings with compensation set along broad pay bands;
- Streamlining the hiring process;
- Linking pay to performance that is mission-related;
- Exercising greater flexibility to deploy civilian human resources according to changing mission requirements;
- Enacting changes in working conditions without conducting collective bargaining with employee representatives (though the law passed by Congress does not allow this change); and,
- Expediting the process for conducting reductions-in-force of DoD employees.

In July of 2005, approximately 60,000 DOD workers will begin to experience the first round of changes (referred to as Spiral One) brought about by NSPS. To date, few details have been made available in order to make an objective assessment as to the extent and the way in which DOD will implement various provisions of NSPS.

This publication offers a preliminary assessment of the myriad of changes to personnel and labor systems nestled within DOD's vision of NSPS, and the potential risks that such changes will have on the hundreds of thousands of DOD civilian workers who perform essential support in our country's efforts to conduct a global war on terrorism while also providing needed assistance ". . . to make our Nation and the world more secure."

DOD's VISION OF NSPS AND CONGRESSIONAL INTENT

Under NSPS, DOD seeks to establish by regulation a more flexible civilian personnel management system that is consistent with its human capital management strategy. DOD says it desires to be a more competitive and progressive employer at a time when the country's national security requires a highly responsive system of civilian personnel management. This is to be achieved under a TOTAL FORCE concept that, DOD says, is consistent with the following guiding principles:

- Put the mission first;
- Respect the individual and protect rights guaranteed by law;
- Value talent, performance, leadership, and commitment to public service;
- Be flexible, understandable, credible, responsive, and executable;
- Ensure accountability at all levels;
- Balance human resource system interoperability with unique mission requirements; and,
- Be competitive and cost effective.

Notwithstanding the above, DOD has presented no evidence of any current lack of competitiveness caused by pre-NSPS law or regulation.

Given the global war on terrorism, the civilian workforce of DOD is being required to play a more significant role in combat support functions. In addition, DOD has an interest in using its civilian workforce to maintain institutional knowledge, because of frequent rotations involving its military personnel.

Over the past decade, however, DOD's civilian workforce has been subjected to various demoralizing personnel actions, such as downsizing, base closures, and competitive sourcing initiatives.

When the 2004 National Defense Authorization Act was under consideration, certain key Members of the Senate discussed various aspects of NSPS. For example, Senator Lieberman made it quite clear that the Secretary may not “. . . alter the statutory rights, duties, and protections established in chapter 71 or to compromise the right of parties to obtain fair and impartial review of decision[s]. The mutual trust required for productive labor-management relations requires a level playing field.”

Senator Collins, the primary sponsor on the Senate side, also made several salient points about DOD instituting its new personnel system.

As the new National Security Personnel System . . . is set in place, the Department must keep faith with its civilian employees and provide for third-party appeals, third-party dispute resolution as part of the collective bargaining process and a credible, transparent performance rating system.

I will be watching closely . . . to ensure that Federal employees' rights are not abrogated and that the highly-skilled civilian defense workforce can continue to stand arm-in-arm with their military counterparts to provide for the security of our Nation.

On December 15, 2004, DOD published a new release announcing its intention to commence with its first phase of the new system beginning as early as July 2005. While DOD has targeted 60,000 employees to be affected by its initial implementation of Spiral One, it has not provided any projections regarding the number of military personnel serving around the globe who may be subjected to the secondary impact caused by NSPS.

While a detailed explanation of NSPS is not available after a year's worth a discussion and intermittent meetings with employee representatives, it is important to conduct an initial examination of the concepts advanced by DOD and OPM. On the pages that follow, a preliminary analysis of key areas affecting personnel and labor relations systems is provided.

Given the enormity of the task that lies ahead to implement NSPS throughout almost all components of DOD, immediate action by Congress would be the most efficient way to avoid a colossal system-wide failure. Neither civilian nor military personnel should be subjected to such a perilous and uncertain environment.

Workforce Staffing

DOD says it envisions a rapid adaptation of its civilian workforce to meet changes in mission requirements. It wants to select the right employee with the right capability to be assigned to the right place.

Neither DOD nor OPM have yet identified which aspects of the existing system are inhibiting the effective management of DOD civilian personnel. No evidence has been presented that any pre-NSPS law or regulation has precluded DOD for deploying its staff to adjust to changing mission requirements. DOD says steps should be taken to allow the hiring process to be completed in a shorter time frame, but ignores delays associated with background security checks and the time it takes to obtain multiple approvals by managers in the chain of command.

Determining the “right size” of a workforce unit can never be made as easy as pressing a button. It requires an analysis of the current and anticipated workload demands, knowledge of the capabilities of those assigned the work, and a best guess as to the correct number of workers to get the job done properly and on time. Certain functions are clearly more predictable than others, but the complexities of DOD’s mission demand a degree of caution and thought versus a simple and spontaneous reaction to changing mission requirements. By its very nature, staffing is a more involved process than obtaining money from a bank ATM.

It is essential that, in order to deploy the right employees to perform emergent mission-related tasks, skills associated with the work to be carried out should be identified as much in advance as possible. Once the qualifications have been established and communicated to the civilian workforce, a process can be devised that links those possessing the appropriate competencies with various categories of assignments.

DOD, like many organizations, experiences a certain degree of workload fluctuation. There has not been any documentation by DOD of the extent to which these demands ebb and flow. Nor has there been any evidence of the frequency with which staffing has been adjusted, despite a bold demand for sufficient flexibility to “right-size” units after the job is done. Absent verifiable indicators warranting reduced staffing and reasonable procedures for exercising such flexibility, the prospect of an arbitrary exercise of authority and adverse consequences to the morale of the workforce will be ongoing.

Reducing the number of occupations that exist service-wide throughout DOD and creating only a few core positions may appear to be an attractive idea. Such personnel flexibility carries an obligation to invest in training. In addition, the inherent dilemma of losing staff with vital specialized skills will occur when other workload demands are placed upon them.

Training is a constant challenge within any organization to ensure that employees have timely knowledge and opportunities to apply what they have learned, especially when fulfilling a wide range of duties and responsibilities. Expecting employees to carry out varied tasks, however, can also turn them into generalists, where few will be able to exhibit high performance in all categories on an ongoing basis.

DOD’s desire to deploy the civilian workforce anywhere around the world on either a temporary or permanent basis reflects a poor understanding of the distinctions between military and non-military personnel. The civilian workforce within DOD is committed to the organization’s mission, but has elected to do so in the civilian rather than the military service. In that regard, they should not be treated like the military, who can be subjected to deployment with little or no notice to meet changing mission requirements. The civilian workforce operates in a more stationary environment with a certain degree of predictability with their work lives. It is because of those reasons that the civilian workforce can provide the necessary support to the military in its global war on terrorism.

Experience has long shown us that, when there is a demonstrated need to send civilian workers to locations around the world, sufficient volunteers come forward without having to disrupt the entire workforce within DOD.

For example, the procedures for assigning workers to “tiger teams” (including combat zones) have been negotiated into various labor-management contracts without causing a negative impact on DOD’s ability to meet its mission.

Pay Rates and Systems

No one would argue with the need to develop, retain, and reward high performing employees. DOD, however, has presented no evidence that any pre-NSPS law or regulation has prevented this from happening in the past. Nonetheless, DOD has been exploring the use of two approaches for evaluating its civilian employees. One method is to assess individuals based on their contributions, and the other is tied to performance. As with the various aspects of NSPS, little detail has been provided to conduct a valid appraisal of whatever new pay rates and systems might be put into place.

The core of any employment relationship is its system of compensation. Once that is put in jeopardy, individual performance is compromised and the ability to achieve the organization’s mission is seriously undermined.

Cost is another factor that should draw close scrutiny. The Federal Employees Comparability Act has never been properly funded in almost 20 years of existence. What makes DOD or OPM think that changes to the pay system can be accomplished within such an enormous organization—and one that will face significant, ongoing budget issues. The country’s security needs will continue to increase given the price of weapons, fuel, ammunition, food, and other aspects of the global war on terrorism

DOD’s limited literature on the topic of pay-for-performance under NSPS makes reference to performance factors that fully recognize the manner in which duties are performed. Moreover, so called “pay outs” would be based on the level of complexity and the market value of work.

Professor Robert D. Behn, a Lecturer in Public Policy at Harvard and Duke University, has studied and written about managing government agencies. In the January 2004 edition of Public Management Report, Professor Behn made the following observations about public sector compensation.

. . . [T]o create a pay-for-performance system that actually motivates—that does not demotivate everyone—you have to get a lot of details very, very right. And with the limitations that we citizens impose on our government—limitations on both expenditures and on perceptions—government has a very hard time getting the pay-for-performance details even close to right.

A repeated refrain by DOD as justification for changing its existing compensation system is to obtain flexibility that is simple and adaptable to varying command missions and structures. As Professor Behn has stated, designing a successful pay-for-performance system requires getting many details right. It, therefore, will not be as simple as desired, and the prospect of putting into place a system that has flexibility and adaptability--especially when coupled with DOD's notions regarding the "market value of the work" and level of complexity--raises serious questions about paying the workforce in a timely and ongoing fashion. If the basic tenet of the employment relationship cannot be satisfied, surely the goals of attracting and retaining high performing talent will not be realized.

A market-sensitive pay strategy can be developed in order to allow DOD to make competitive offers to qualified applicants, but to do so without guidelines and the proper checks and balances will lead to a highly arbitrary system with huge fluctuations in what the civilian workforce is paid. In addition, the resulting disparate treatment between new hires and existing employees will erode the sense of camaraderie that is essential to achieving DOD's mission.

A design option which DOD is also considering would place employees in pay bands. Increases in pay would be based on high performance and valued contributions rather than on longevity. Once again, however, caution must be exercised to ensure that performance and contributions can be meaningfully measured, and that there is a clear relationship between them to pay-setting so decisions are not made on the basis of favoritism or some other form of arbitrariness. Tight internal controls and oversight would need to be part of any systems modifications that affect pay.

Job Classification

Having the ability to classify jobs in a way that recognizes and accommodates changing mission requirements and provides flexibility in assigning work may overcome some of the perceived shortcomings of the existing government-wide grade structure. In concept, DOD would take a myriad of jobs series and condense them into the following major groupings: engineering or scientific; administrative; technical; business or administrative support; and, protective services. To accomplish this stated objective, however, requires no regulatory change or exemption from bargaining.

The asserted need to revise the current system is based on the criticism that there is an undue amount of paperwork associated with drafting complex and detailed job descriptions, and that such “red tape” diminishes an organization’s ability to reshape itself. As the right to classify jobs is completely within an agency’s control and not negotiable with employee representatives, it is unclear why no action has been taken to date to minimize or simplify the requirements for position descriptions.

In addition to reducing the number of job categories, DOD would define the levels of work in broad career path terms, such as entry level, journey level, senior or expert, and supervisory. Compensation would be set according to pay ranges that purportedly are tied to labor market conditions with managers having the sole discretion to offer competitive salaries to “top quality candidates.”

Without proper guidelines and appropriate oversight concerning the manner in which pay is set when candidates are hired, DOD will end up with a system that is fraught with abuse resulting in a wide disparity in how the civilian employees are compensated for performing the same or similar work.

The assumption that reducing the number of occupational categories and associated job descriptions will allow for greater flexibility in how staff is managed may be true, but there is a risk when positions become too generalized and encompass an overabundance of duties and responsibilities. DOD should exercise extreme care to avoid creating a new workforce that possesses some knowledge to perform many tasks, while being a master of none.

Performance Management

DOD makes a claim that, under the existing system, outstanding performers are paid the same as poor performers, and so-called poor performers are not held accountable. To address this perceived problem, DOD seeks to design a system to compensate employees based on their performance and contributions to the organization's mission.

As with other NSPS concepts, DOD makes statements on performance management that are unsupported by any evidence.

No one would argue with the fact that the role, responsibility, authority, and accountability of every member of the workforce must be clearly articulated and understood. These are not breakthrough concepts. When the Civil Service Reform Act became law in 1978, it mandated the establishment of performance standards and the periodic evaluation of performance.

Current law allows for rewarding high performers with monetary bonuses and quality step increases, so it is unclear why existing authorities enacted by Congress have not been effectively utilized.

The same is true with employees who are not performing at an acceptable level of competence. Existing law and OPM regulations establish the process for addressing employees with performance deficiencies.

The perceived performance dilemma involving the civilian workforce reflects a failure within the supervisory chain of command and an apparent unwillingness of DOD executives to hold its managers accountable for the performance of their subordinates. No law or system can establish good management practices or create individuals who possess the necessary leadership skills.

Labor-Management Relations

DOD's criticism of the labor relations structure that has been in place since the passage of the Civil Service Reform Act of 1978 is that it is too cumbersome. It seeks a labor-management relationship that effectively addresses employee concerns without compromising the ability to

accomplish its mission. DOD also says it supports the idea of the right of employees to organize and bargain collectively, but eliminates any obligation to engage in formal negotiations through and including an impasse resolution before a neutral third party. Such a contradiction undermines a basic tenet of NSPS that it be credible and trusted to be successful.

DOD wants the ability to act without delay to accomplish an evolving national security mission. There are concerns that management must bargain over the impact and implementation of its decisions before taking action. Negotiations are viewed as protracted and too much time is spent on trivial matters. DOD also claims that their inability to act without delay diverts resources from mission areas. Lastly, DOD contends that requests for information are overly burdensome, even when documentation can be obtained from other sources, and the time taken to furnish the information delays the bargaining process.

To avoid some of these perceived problems, DOD would convert all matters to reserved management rights and only bargain over changes that have significant impact on unit employees. Managers would be able to act without delay and engage in post-implementation bargaining, over whatever negotiable areas remain. In those situations where bargaining occurs, it would be conducted under strict time limits.

As to problems with access to information, DOD believes it should only provide documentation that is not available from other sources, assuming it is “reasonably available” and in accordance with the “particularized need” standard (where both of these legal principles are clearly defined). When disputes arise, they should be resolved through a quick process.

Consistency and speed in implementing department- and component-wide policies and programs are two interests DOD wants to achieve under NSPS. At present, DOD has over 1,500 command and local bargaining units. Under the existing labor law, the bargaining process is time-consuming and results in different agreements. In addition, such agreements take precedence over regulations and department rules that are issued after bargaining has concluded. Such factors cause delays in implementing

changes and result in the inconsistent application of policies throughout DOD.

Identifying a successful bargaining model (and one which has a fair and credible impasse resolution mechanism) is a challenge, but coming to a consensus on process improvements is something that all parties in the labor-management relationship should agree upon. When employees who serve as representatives are fulfilling legal responsibilities, their time and travel expenses should be authorized as a legitimate government activity. The manner in which the approval and reporting of such activity should occur would best be addressed through a bi-lateral consensus-based approach.

When the parties are unable to reach agreement, the matter can be brought before an outside third party, who is skilled in dispute resolution. A cadre of mediator/arbitrators can be established who have (or can develop) a good understanding of DOD, its mission, and its issues. Such a system can be arranged to provide for expeditiously rulings so agreements and DOD policies can be implemented without undue delay and, where appropriate, in a consistent fashion. Further, the use of a skilled group of specialized mediator/arbitrators would be far preferable than creating an internal review panel within DOD, which would adversely impact on the trust and credibility sought after with NSPS.

The obligation to fulfill national consultation rights with employee representatives is another area under consideration for possible modification or elimination, even though the law Congress passed does not allow DOD to make such a change. Providing an opportunity for input should be continued, because it can help to identify policy pitfalls and erroneous assumptions before a final decision is implemented. This is similar to the process that is used before final regulations are promulgated. While there is a time factor, possessing the unfettered right to act unilaterally will cause more harm than good over the long term.

DOD says it has an interest in promoting open communications between managers and their employees, and claims that employee representatives impede effective communications. In addition, DOD asserts that, in some cases, representatives have hampered investigations of complaints and suspected criminal activity. No evidence has been provided

to support these allegations. Moreover, Congress expressed no need for change in this area.

Representation has been a longstanding right in this country, which has been extended to employment situations, as affirmed by the Supreme Court. A citizen's right to representation ensures that due process is being followed. In addition, often times, employees are not willing to voice their opinions for fear of retaliation. Having a representative in attendance at such meetings can facilitate dialogue and ensure fair treatment.

Discipline and Resolution of Employee Complaints

DOD states that the current appellate system is complex, legalistic, and often too slow. While some of this criticism may be justified, seeking to eliminate it altogether strikes at the heart of a system of justice that was established when our country was founded. Surely, a number of procedural changes can be implemented in a way that will promote a more speedy resolution of discipline and non-disciplinary matters, while still preserving fundamental due process aspects of the existing system. The superior goal of resolving such complaints is justice. While a speedy resolution is important, it must be secondary to a system that ensures justice with the appropriate procedural rights and safeguards.

Obligating a third party to give deference to DOD's mission requirements when considering whether to reduce or overturn a disciplinary action would tip the scales unfairly in favor of the employer. 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. If the procedures were changed to mandate blind deference to the employer regardless of other mitigating factors, it would result in employees being found guilty until proven innocent.

Existing law provides agencies with the opportunity to file appeals when third party decisions are not in accordance with applicable law (including precedential case law decisions) and/or not supported by the facts. Therefore, any concerns about "forum shopping" and disparate results can be addressed by adhering to the appropriate procedures.

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?

Certain aspects of the appeal process could be expedited to provide for a timelier disposition of matters. Yet, the laws prohibiting various forms of discrimination in the workplace cannot be ignored, especially where such issues are raised in the context of disciplinary or discharge cases.

Establishing a single evidentiary standard for both performance and conduct cases may be a change that all parties could support. The “efficiency of the service” standard, however, is somewhat vague when compared to the “just cause” standard used in many private sector disciplinary cases. If DOD were to adopt the “just cause” standard (which carries with it 40 years worth of arbitral case law), the ability of managers to understand the legal requirements and to address disciplinary problems would be enhanced.

The value of creating some form of independent review authority within DOD may aid in securing quicker resolution of appeals, but it will not result in a credible system that employees trust. A panel (or individual) with authority to consider employees appeals must in no way be beholden to DOD or any part of the government. Third party arbitrators and others skilled in dispute resolution would be viewed as impartial and offering a fair review of the facts. There are also other models that can be explored, such as joint panels with independent third parties, to address concerns over the length of time it takes before an action is finalized.

Credibility With The Workforce

For any personnel system to function effectively, it has to be viewed by those it covers as fair, impartial, and evenly enforced. Over the past decade, DOD’s civilian workforce has been subjected to a variety of demoralizing actions, such as downsizing, base closures, the transfer/consolidation of functions, and the outsourcing of jobs.

Now, as DOD moves to institute NSPS, the civilian workforce will experience the largest personnel change ever to occur within a single department of the federal government. With only very limited opportunity for external review of decisions impacting the livelihood of hundreds of thousands of dedicated civilian workers, DOD's version of NSPS will do more harm than good. Such a complex systematic overhaul will not instill credibility with the workforce nor facilitate the attainment of DOD's changing mission requirements.

In order to carry out the intent of Congress--to devise an improved civilian human resource system--DOD must begin by engaging in a collaborative design process with employee representatives. This will necessitate the establishment of reasonable timetables rather than a race to implement NSPS. Moreover, there must be a legitimate labor-management process that results in an enhanced system that properly balances DOD's mission requirements with the interests of its dedicated civilian workforce. Only then can the prospect of achieving credibility with DOD personnel be realized.

If DOD fails to undertake the above course of action, Congress must immediately intercede for the good of the country.