

**STATEMENT OF**

**THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO**

**FOR THE RECORD**

**BEFORE THE**

**HOUSE ARMED SERVICES COMMITTEE**

**SUBCOMMITTEE ON READINESS**

**ON**

**THE NATIONAL SECURITY PERSONNEL SYSTEM**

**APRIL 1, 2009**

On behalf of the more than 250,000 civilian employees of the Department of Defense represented by the American Federation of Government Employees, AFL-CIO (AFGE), I thank you for the opportunity to submit testimony on the National Security Personnel System (NSPS). From the outset, NSPS generated anxiety and mistrust among the Defense Department's civilian employees. The events of September 11, 2001 called for putting additional resources and staff, improved training and inter-agency communication, and a heightened sense of morale and purpose into defending our national security. Instead, DoD and OPM used the moment as an opportunity to strip away most collective bargaining rights from civilian employees, severely limit their civil service protections and due process rights, and create a personnel system that was opaque, unfair, confusing and highly controversial. To date, neither OPM nor DoD has been able adequately to explain how NSPS has anything to do with national security or how it might make the American people safer.

When the proposed NSPS regulations were published in the Federal Register on February 14, 2005, over 58,000 DoD employees, their unions and other interested parties sent in responses during the public comment period. DoD admitted that over 90% of the comments were negative. After the Congressionally- mandated "meet and confer" process with AFGE and other unions in the United Defense Workers Coalition (UDWC), DoD published final regulations on September 1, 2005 that made no substantive changes to the widely criticized and unpopular proposed regulations. DoD retained what it called a "collective bargaining" system, but which met no recognized definition of collective bargaining. It allowed the employer to abrogate contracts unilaterally and decide over what it could refuse to negotiate. It placed authority to resolve labor-management disputes in an internal board, controlled by the Department.

The final 2005 regulations stripped civilian employees of many of their workplace rights and due process procedures. The regulations also set out a reduction-in-force (RIF) process, which eroded the rights federal employees have under government-wide RIF policies, and would have allowed DoD to narrowly target employees for layoff. The regulations established, but gave few details of, the pay, performance management and classification systems that would make up NSPS. However, rather than an investment in a high performance culture, NSPS is a cost-containment system that depends on taking money from some good employees in order to pay others more. DoD also decided against trying to make NSPS a transparent system that employees understand and trust; instead, NSPS puts bureaucratic layers and behind-closed doors decision-making between an employee's performance and final pay. In the short time NSPS has actually been implemented, it has already resulted in discriminatory pay and advancement decisions.

In response to widespread complaints and concerns, Congress passed the National Defense Authorization Act of 2008 (NDAA 2008), which made significant changes to NSPS. The Secretary of Defense's ability to put all of the annual

increase given to other federal employees into the performance pay pools for NSPS employees was limited – no less than 60% of this nationwide increase had to be applied to all employees rated higher than “unacceptable.” The rights and protections of the government-wide adverse actions and appeals processes were restored to Department of Defense NSPS civilian employees. And NSPS employees would no longer be under a separate RIF process, but would be back under the process that covers all other federal agencies.

The NDAA 2008 also restored the collective bargaining rights and obligations of 5 U.S.C. Chapter 71, with a few restrictions. DoD has attempted to stretch those restrictions beyond Congress’ intent that full collective bargaining take place. For example, the NDAA 2008 allowed for provisions that met certain criteria to be considered “government-wide” rules for the purpose of limiting collective bargaining. We believe this was intended to be used sparingly, but DoD has tried to make as many details as possible subject to this provision. When NSPS was first being developed, OPM counseled DoD against putting too much detail in its Federal Register Notice because any future changes would then require dealing with the unions and the public. Instead, OPM advised that the details be put into internal “issuances.” In its proposed regulations of February 14, 2005, DoD made “issuances” capable of overriding existing labor contracts and barring future bargaining. When Congress restored Chapter 71 collective bargaining rights in the NDAA 2008, DoD could no longer unilaterally declare that something is not negotiable by simply issuing an issuance. In response, the Department did an about-face and put as many details as possible into its 2008 regulations in an attempt to limit bargaining under the government-wide rule provisions.

In the NDAA 2008, Congress also declared that “rates of pay” would be non-negotiable, but would be subject to bargaining obligations over the procedures to be used and appropriate arrangements for any employees who might be adversely affected by such pay decisions. DoD’s response was to put into its regulations a definition of “rate of pay” that went far beyond Congressional intent and included just about everything that even remotely touches on the amount of pay an employee receives. Time after time, DoD has demonstrated its unwillingness to accept its obligation to negotiate in good faith over NSPS provisions.

The NDAA 2008 required DoD to set up a personnel system that was fair, credible and transparent. Instead, NSPS’ pay and performance systems are opaque, mysterious, confusing and prone to inequities. The problems go well beyond pay-for-performance matters. NSPS allows managers to give employees more money, new jobs, and advancement opportunities without promotions, and without using competitive processes or even giving other employees notice of the opportunities. These are called “reassignments” in NSPS, but they can include a pay raise, unlike most reassignments in most organizations. Managers can move employees ahead in the pay band and give a pay increase, not because of their performance ratings, but because of a change in duties or a new position.

Because many of these opportunities do not need to be advertised to other eligible employees or filled through competition, there are far too many chances for discrimination and favoritism to occur, whether intentional or not.

The pay-for-performance system in NSPS is also highly problematic. At the beginning of the rating period, supervisors give their employees performance plans that include job objectives and so-called “contributing factors,” which can raise or lower the rating on their associated job objective by one point. At the end of the rating period, usually in October, supervisors will submit their recommended ratings, number of shares, and distribution between cash bonus or pay increase to the pay pool panel for each of their subordinate employees. *Because each acceptable or better rating has a range of performance pay pool shares that can be given, employees in the same job, and pay pool can get different performance payout amounts for the same performance rating.* Employees in different pay pools can get widely varying payouts for the same rating because the pay pools can be funded differently.

At the time the supervisor submits the recommendation to the pay pool, he or she is forbidden to tell the employee the recommendation, i.e., what the supervisor actually felt about the performance during the year. Instead, the pay pool panel, made up of managers who may or may not know much about the employee’s performance or job, will decide the ratings and payouts for the subordinates of the several supervisors within their pay pool. But it doesn’t necessarily end there. Many NSPS employees are in what are called “sub-pay pools.” Several of these sub-pay pools are part of an over-arching main pay pool. Each sub-pay pool panel goes through its deliberations to decide whether to change or accept the recommended ratings of supervisors in the sub-pay pool and how many shares to give each employee, and whether to give it in the form of a pay raise, a cash bonus, or a combination of the two. The determinations of the sub-pay pool panels are not decisions, however, but are further recommendations that go to the main pay pool panel. The main pay pool panel is made up of managers who are now several layers removed from the employees they are rating and rewarding. They may know little or nothing about the individual employees and the work they do.

The pay pool panel, whether of a sub-pay pool or the main pay pool, can make decisions about the rating and payout based on a number of factors, some outside the employee’s control. We have heard from managers currently under NSPS, who say that employees who do not work in or near the Pentagon or directly for a major command, are not considered to be doing anything important enough to the mission to warrant a level 5 rating, no matter how good their performance may be. We have heard about a secretary in a pay pool with engineers in a facility whose mission is engineering. That secretary could be absolutely outstanding but not get a high payout because the job is not as directly connected to the mission as the engineers’ jobs are. Employees have told us that they got lower ratings and payouts because the pay pool panel did

not think their supervisors wrote good job objectives that clearly connected their work with the mission of the agency.

Pay pool panels also consider the labor market, recruitment and retention issues, and artificial barriers in the pay bands, called “control points” in determining performance payouts – all factors which are outside the employee’s control and separate from the employee’s job performance. An employee could be in a pay band that goes from \$35,000 to \$80,000. That employee, however, could be in a job that the agency considers to be worth no more than \$60,000 so a “control point” barrier is placed at the \$60,000 point in the band. The grades in the General Schedule (GS) system work well to create pay ranges that fit the market value of the job. An employee in a broad NSPS pay band, however, can work very hard and exceed all job expectations, but never be allowed to get above the \$60,000 point despite the illusion of having greater opportunities for advancement because their band goes to \$80,000. Instead of feeling a direct connection between their performance and their ultimate performance payout, employees tell us how bewildering the whole process is.

From the time supervisors submit their recommended ratings and payouts to the pay pool panel, a good three months go by until the payout decisions are made. Supervisors are allowed to tell their employees their ratings and payouts only shortly before they receive their checks in January. The whole pay pool process takes place behind closed doors and the various participants are required to sign “non-disclosure” agreements. Components instruct their supervisors to go into the performance management system, whether electronic or paper, and change the recommendations they made and any write-ups they did supporting those recommendations, so that they conform to the final decisions of the pay pool panel. At least one agency goes so far as to tell supervisors that no matter what their original recommendations were, what the pay pool panel decided **is** now how they rated their subordinates.

Although DoD has not published data in any regular manner, on August 10, 2008, the *Federal Times* published an article describing the results of its request for data concerning the NSPS performance payouts. What reporter Stephen Losey found was that, “White employees received higher average performance ratings, salary increases and bonuses in January than employees of other races and ethnicities.” In addition, the *Federal Times*’ analysis showed that employees who worked for the Defense agencies, including the Office of the Secretary of Defense, received higher ratings and payouts overall than did their civilian counterparts in the three military service branches. In the article, the Department stated that it did not know the reason for the inequalities in ratings and compensation, but said that the fact that different organizations within the Department can fund their pay pools differently could account for part of it. It is no wonder that employees do not trust NSPS and do not believe it is fair, credible or transparent.

In the February 2009 issue of "Issues of Merit," published by the Merit Systems Protection Board (MSPB), Dr. John Crum, director of the MSPB Office of Policy and Evaluation wrote about pay for performance. Dr. Crum, who is one of the witnesses at this hearing, remarked on the problems that DoD and DHS have had trying to implement their systems. He noted that the GS system was designed as a pay for performance system, but that managers rarely use its performance-based features.<sup>1</sup> Dr. Crum suggests that before agencies create new systems, they should first start "using the options that are currently available to them in an appropriate and transparent manner." Among other things, this can allow supervisors to be "able to demonstrate to employees that they can be trusted to make fair decisions that affect their subordinates' pay..."

DoD has said that it does not intend to convert any bargaining unit employees into NSPS. At this point that is a statement of intent – nothing prevents DoD from changing its mind in the future. But it is not enough to refrain from converting current bargaining unit employees to NSPS. DoD can start hiring most new employees into positions it deems to be NSPS. Employees who are now covered by NSPS can organize and join the approximately 300 AFGE bargaining unit members who became part of the union after they converted to NSPS. Having part of the workforce under NSPS is troubling for many reasons. For one thing, DoD can divert discretionary funds that normally would be available for awards or other economic benefits to GS employees and use them to increase the pay pools for NSPS employees.

DoD recently said that it is delaying converting any employees, whether bargaining unit or not, into NSPS. We are getting troubling reports, however, about employees converted to NSPS after that announcement. Primarily, these are conversions that are being made as the result of BRAC transfers and realignments, but we also suspect that there are other instances. We want to know how many employees have come under NSPS since DoD said that it would not convert any more positions. We would like to know how many of these have

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<sup>1</sup> The General Schedule's flexibilities include: special pay rates for certain occupations, critical pay authority, recruitment and retention flexibilities that allow hiring above the minimum step of any grade, paying recruitment of relocation bonuses, paying retention bonuses of up to 100% of basic pay, paying travel and transportation expenses for new job candidates and new hires, allowing new hires up to two weeks advance pay as a recruitment incentive, allowing time off incentive awards, paying cash awards for performance, allowing "quality step increases" as reward for excellent performance, allowing student loan repayment, paying supervisory differentials to GS supervisors whose salaries were less than certain subordinates covered by non-GS pay systems, waiver of dual compensation restrictions, changes to Law Enforcement pay, special occupational pay systems, pay flexibilities available to Title 5 health care positions, and more.

been new hires and how many have been current employees brought under NSPS.

If left in place, we believe that NSPS would grow considerably. DoD can start making most newly hired employees NSPS and can use BRACs and reorganizations as an excuse to convert employees to NSPS. NSPS is an expensive, complicated system that harms employee morale, obscures rather than illuminates the connection between employees' performance and their pay, and results in discriminatory practices. Congress should repeal the authorities associated with NSPS and direct DoD to immediately convert all civilian DoD employees now under NSPS to the General Schedule