

NATIONAL SECURITY PERSONNEL SYSTEM: NSPS

DECEIVING CONGRESS: WHAT A TANGLED WEB THEY WEAVE . . .

DoD's UNLAWFUL EVISCERATION OF COLLECTIVE BARGAINING AND EMPLOYEE APPEAL RIGHTS *

NSPS: Legislative History and DoD's Promises - -

On November 11, 2003, Senator Susan Collins spoke regarding the House/Senate Conference Committee report on the National Defense Authorization Act for FY 2004, which contained the NSPS statute. Senator Collins informed the Senate that the Committee had agreed that “the bill before the Senate specifically states the Department does not have the authority to waive the chapter of title 5 that governs labor-management relations. Thus, I fully expect that the labor relations system developed by the Department will abide by the principles enumerated in chapter 71.”

- Testifying June 4, 2003, before the Senate Committee on Governmental Affairs, Secretary of Defense Donald H. Rumsfeld said:

[T]he National Security Personnel System we are proposing ...will not end collective bargaining... To the contrary, the right of defense employees to bargain collectively would be continued. What it would do is bring collective bargaining to the national level so that the Department could negotiate with national unions instead of dealing with more than 1,300 different union locals, a process that is inefficient. [p.21.]

- The Department's NSPS legislative proposal, passed by the House, waived Chapter 71. However, as explained by Senator Collins, the House/Senate Conference Committee stripped the authority to waive Chapter 71 from the NSPS legislation. Instead, the Department was only authorized to make two specific modifications to Chapter 71: to provide for National Level Bargaining and the use of **independent** third party review of labor relations decisions by the Department.

DoD's Regulations do not Match Their Promises - -

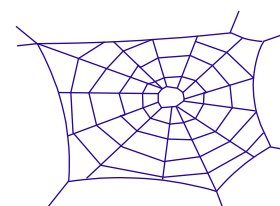
- Contrary to the statute, the NSPS regulations assert Secretarial authority to waive Chapter 71 in its entirety. The NSPS regulations totally eliminate the statutory right to collective bargaining by providing the Secretary unlimited power to remove ANY subject from bargaining by unilateral “issuance.”
- Under Chapter 71, unions may negotiate appropriate arrangements for employees adversely affected by exercise of management rights; but the NSPS regulations expressly ban negotiated arrangements with respect to routine work assignments and render all negotiated arrangements illusory by giving management sole and exclusive discretion to determine whether any arrangement ever or never will be implemented.

* “Further discussion and legal citation supporting the points in this paper can be found in United DoD Workers Coalition *Contrasting Plans for the Department of Defense: Labor's Proposals for Positive Change versus Management's Unlawful Return to the 19th Century* (June 15, 2005), available at www.uniteddodworkerscoalition.org.

- The NSPS regulations also create a new, unlimited management right to take, without collective bargaining, “whatever actions may be necessary.”
- Under Chapter 71, unions may negotiate on the procedures for the exercise of management rights. However, the NSPS regulations ban bargaining over these procedures whenever management exercises the “whatever actions” rights, as well as ban bargaining over all but three of the other twenty management rights.
 - This leaves only procedures for layoffs, hiring and discipline as negotiable procedures. However, since these are addressed, in detail, in other portions of the NSPS regulations, they are also effectively removed from bargaining. Also, the Secretary can unilaterally implement them through “issuances,” thereby banning any further bargaining on them.

OPM's Major Role in the Deception of Congress - -

The NSPS statute requires that the NSPS personnel system, as well as any adjustments to it, to be established jointly with unions through a “meet and confer” process, as well as requiring union participation in any further planning or development of the NSPS system. The statute also preserves the negotiability of working conditions through collective bargaining. However, the Department has implemented a different framework developed by Former OPM Director Kay Coles James in a letter to Secretary Rumsfeld dated March 9, 2004. The letter and attachments provided the Secretary a blueprint on evading both collective bargaining and the full scope of the “meet and confer” obligation in NSPS.



- Based on Director James' advice, major portions of the NSPS regulations are incomplete and vague. The Department intends to define significant parts of the NSPS system through unilateral DoD “implementing issuances,” rather than through bargaining and the statutory “meet and confer” process. The James letter is available in its entirety on the website at www.uniteddodworkerscoalition.org.
- Senator Collins informed Navy Secretary Gordon England and Acting OPM Director Dan Blair in a Senate Armed Services Committee hearing on April 14, 2005 that the NSPS plan to use “implementing issuances” was “inconsistent with the intent and letter of the (NSPS) law.”

The New DoD Employee Appeals System “Heads We Win, Tails You Lose” - -

The NSPS statute mandates that the Department ensure and protect due process rights and that the procedures are “fair” in adverse actions taken against employees. The statute authorizes the Department to create a “streamlined” procedure for employee appeals.

- The NSPS regulations do **NOT** streamline the process, but actually **ADD** steps to the process. Under Chapter 71, arbitrator decisions in discipline cases are subject to immediate judicial review. However, the NSPS regulations subject arbitrator decisions, as well as MSPB Administrative Judge (AJ) decisions (in cases where employees do not elect arbitration), to **TWO** layers of administrative review. The first review is by the Department itself. The NSPS regulations allow the Department the unilateral right to overturn the decision of the independent AJ/arbitrator **BEFORE** the case can even be appealed to the full MSPB.
 - The Department overlooks the fact that it is the prosecuting party in the case. There is no “fairness” in allowing one party to overturn an adverse decision before the case can even be appealed, while the other party has no rights to fight this action.



- This is the equivalent of the prosecution telling a judge that the prosecution does not agree with the verdict, so the prosecution will unilaterally overturn the verdict!
- Furthermore, the NSPS regulations **prohibit** an AJ/ arbitrator from mitigating the Department's penalty unless the penalty is “wholly without justification.” Even then, the NSPS regulations **require** the AJ/ arbitrator to impose “the maximum justifiable penalty.”
- As explained above, the Department can unilaterally overturn a decision mitigating the penalty **BEFORE** an appeal to the full MSPB can even be filed! This means that the employee **MUST** go to the MSPB just to get a “fair” hearing! This will dramatically increase the MSPB workload, causing inefficiency in the system.
 - Accordingly, arbitrators and AJ's **MUST** have the same authority to mitigate penalties as the full MSPB, to prevent over-use of the Board.
The illegal “review” of decisions by the Department before an appeal can even be filed must also be eliminated, as it violates fundamental Due Process and fairness to the employee.
- Finally, the NSPS regulations create “Mandatory Removal Offenses,” even though the statute does not authorize them. The regulations state no one but the Secretary can mitigate the penalty in these cases. This also violates the MSPB's express authority to take whatever corrective action that the Board determines is appropriate.

Union Proposals for a Modern and Flexible Workforce

The United Department of Defense Workers Coalition has put forward numerous proposals to create a flexible and modern personnel system: These proposals include:

- Pay and Personnel Management Systems - -
 - Across the board pay increases equivalent to military pay increases in accordance with the NSPS Statute.
 - Market-based pay, with safeguards to ensure validity and protect employees from inequities and abuse.
 - Where reductions in force are required: procedures that blend performance and years of service as retention criteria, while protecting veterans preference.
 - Streamlined hiring authorities.

Appeals Process - -

- A single standard of proof.
- Speedier and more efficient processes.
- Preserve immediate judicial review of arbitration decisions.
- Full authority of AJs, arbitrators and MSPB to determine adequacy of proof and mitigate penalties.

Labor Relations System - -

- National-level bargaining.
- Speed the process for bargaining and dispute resolution.

- Allow management to implement and conduct bargaining post implementation in certain sensitive situations.
- A “one-stop,” independent dispute resolution process.

The United DoD Workers Coalition has been very pro-active and participated with the Department in the meet and confer process in good faith. The Coalition proposals would modernize pay, give the Department flexibility in hiring, and balance the Department's proposal on reductions in force with the need to preserve some level of seniority and veterans preference. In the area of Appeals, the Coalition has proposed simplification with a single standard of proof and a speedier process with specific time limits to reduce delays. The Coalition's proposal fully accepts the Department's stated desire for National level bargaining and even accepted greater areas for post implementation bargaining where a real necessity requires it. Additionally, the Coalition has made proposals to make the bargaining process more modern and efficient.

Sadly, the Department has failed to collaborate with the Coalition as the NSPS requires. It has abused the NSPS process and ignored Coalition proposals. The Department has made clear they simply want unlimited authority with no effective review. DoD's proposals are unilateral and arbitrary and go well beyond the original intent of NSP

