



# Federal Register

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**Monday,  
February 14, 2005**

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**Part II**

**Department of  
Defense  
Office of Personnel  
Management**

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**5 CFR Chapter XCIX and Part 9901  
National Security Personnel System;  
Proposed Rule**

**DEPARTMENT OF DEFENSE****OFFICE OF PERSONNEL  
MANAGEMENT****5 CFR Chapter XCIX and Part 9901**

RIN 3206-AK76/0790-AH82

**National Security Personnel System****AGENCY:** Department of Defense; Office of Personnel Management.**ACTION:** Proposed rule.

**SUMMARY:** The Department of Defense (DoD) and the Office of Personnel Management (OPM) are issuing proposed regulations to establish the National Security Personnel System (NSPS), a human resources management system for the DoD, as authorized by the National Defense Authorization Act (Pub. L. 108-136, November 24, 2003). NSPS governs basic pay, staffing, classification, performance management, labor relations, adverse actions, and employee appeals. NSPS aligns DoD's human resources management system with the Department's critical mission requirements and protects the civil service rights of its employees.

**DATES:** Comments must be received on or before March 16, 2005.

**ADDRESSES:** You may submit comments, identified by docket number NSPS-2005-001 and/or Regulatory Information Number (RIN) 3206-AK76 or 0790-AH82. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. There are multiple methods for submitting comments. Please submit only one set of comments via one of the methods described.

*Preferred Method for Comments:* The preferred method for submitting comments is through the NSPS Web site at:

- <http://www.cpms.osd.mil/nsps>.

*Alternative Methods:* If you are unable to submit comments via the NSPS Web site, you may submit comments in one of the following ways.

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail to: Program Executive Office, National Security Personnel System, Attn: Bradley B. Bunn, 1400 Key Boulevard, Suite B-200, Arlington, VA 22209-5144.

- E-mail to: [nspscomments@cpms.osd.mil](mailto:nspscomments@cpms.osd.mil). Please put the following in the subject line:

“Comments on Proposed NSPS Regulations—RIN 3206-AK76/0790-AH82.”

- Hand delivery/courier to: Program Executive Office, National Security Personnel System, Attn: Bradley B. Bunn, 1400 Key Boulevard, Suite B-200, Arlington, VA 22209-5144. Delivery must be made between 8 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* All submissions must include the agency name and docket number or RIN for this rulemaking. Mailed or hand-delivered comments must be in paper form. No mailed or hand-delivered comments in electronic form (CDs, floppy disk, or other media) will be accepted. The official Web site (<http://www.cpms.osd.mil/nsps>) will contain any public comments received, without change, as DoD and OPM receive them, unless the comment contains security-sensitive material, confidential business information, or other information whose public disclosure is restricted by statute. If such material is received, we will provide a reference to that material in the version of the comment that is placed in the docket. The system is an “anonymous access” system, which means that DoD and OPM will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. Unless a comment is submitted anonymously, the names of all commenters will be public information.

Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked “late,” and DoD and OPM are not required to consider them in formulating a final decision.

Before acting on this proposal, DoD and OPM will consider all comments we receive on or before the closing date for comments. Comments filed late will be considered only if it is possible to do so without incurring expense or delay. Changes to this proposal may be made in light of the comments we receive.

**FOR FURTHER INFORMATION CONTACT:** For DoD, Bradley B. Bunn, (703) 696-4664; for OPM, Ronald P. Sanders, (202) 606-6500.

**SUPPLEMENTARY INFORMATION:** The Department of Defense (DoD or “the Department”) and the Office of Personnel Management (OPM) are proposing to establish the National Security Personnel System (NSPS), a human resources (HR) management system for DoD under 5 U.S.C. 9902, as enacted by section 1101 of the National Defense Authorization Act (Pub. L. 108-

136, November 24, 2003). The following information is intended to provide interested parties with relevant background material about (1) the establishment of the National Security Personnel System, (2) the process used to design the NSPS, (3) a description of the proposed NSPS regulations, and (4) an analysis of the costs and benefits of those proposed regulations.

**The Case for Action**

“\* \* \* a future force that is defined less by size and more by mobility and swiftness, one that is easier to deploy and sustain, one that relies more heavily on stealth, precision weaponry, and information technologies.”

With that statement on May 25, 2001, President Bush set a new direction for defense strategy and defense management—one toward transformation. On January 31, 2002, Secretary of Defense Donald Rumsfeld echoed the sentiments expressed by President Bush, stating that “All the high-tech weapons in the world will not transform the U.S. armed forces unless we also transform the way we think, the way we train, the way we exercise, and the way we fight.”

Transformation is more than acquiring new equipment and embracing new technology—it is the process of working and managing creatively to achieve real results. To transform the way DoD achieves its mission, it must transform the way it leads and manages the people who develop, acquire, and maintain our Nation's defense capability. Those responsible for defense transformation—including DoD civilian employees—must anticipate the future and wherever possible help create it. The Department must seek to develop new capabilities to meet tomorrow's threats as well as those of today. NSPS is a key pillar in the Department of Defense's transformation—a new way to manage its civilian workforce. NSPS is essential to the Department's efforts to create an environment in which the total force, uniformed personnel and civilians, thinks and operates as one cohesive unit.

DoD civilians are unique in government: they are an integral part of an organization that has a military function. DoD civilians must complement and support the military around the world in every time zone, every day. Just as new threats, new missions, new technology, and new tactics are changing the work of the military, they are changing the work of our 700,000 civilians. To support the interests of the United States in today's national security environment—where unpredictability is the norm and greater

agility the imperative—civilians must be an integrated, flexible, and responsive part of the team.

At best, the current personnel system is based on 20th century assumptions about the nature of public service and cannot adequately address the 21st century national security environment. Although the current Federal personnel management system is based on important core principles, those principles are operationalized in an inflexible, one-size-fits-all system of defining work, hiring staff, managing people, assessing and rewarding performance, and advancing personnel. These inherent weaknesses make support of DoD's mission complex, costly, and ultimately, risky. Currently, pay and the movement of personnel are pegged to outdated, narrowly defined work definitions, hiring processes are cumbersome, high performers and low performers are paid alike, and the labor system encourages a dispute-oriented, adversarial relationship between management and labor. These systemic inefficiencies detract from the potential effectiveness of the total force. A more flexible, mission-driven system of human resources management that retains those core principles will provide a more cohesive total force. The Department's 20 years of experience with transformational personnel demonstration projects, covering nearly 30,000 DoD employees, has shown that fundamental change in personnel management has positive results on individual career growth and opportunities, workforce responsiveness, and innovation; all these things multiply mission effectiveness.

The immense challenges facing DoD today require a civilian workforce transformation: civilians are being asked to assume new and different responsibilities, take more risk, and be more innovative, agile, and accountable than ever before. It is critical that DoD supports the entire civilian workforce with modern systems; particularly a human resources management system that supports and protects their critical role in DoD's total force effectiveness. Public Law 108-136 provides the Department of Defense with the authority to meet this transformation challenge through development and deployment of the NSPS.

More specifically, the law provides the Department and OPM—in collaboration with employee representatives—authority to establish a flexible and contemporary system of civilian human resources management for DoD civilians. The attacks of September 11 made it clear that

flexibility is not a policy preference. It is nothing less than an absolute requirement and it must become the foundation of DoD civilian human resources management.

NSPS is designed to promote a performance culture in which the performance and contributions of the DoD civilian workforce are more fully recognized and rewarded. The system will offer the civilian workforce a contemporary pay banding construct, which will include performance-based pay. As the Department moves away from the General Schedule system, it will become more competitive in setting salaries and it will be able to adjust salaries based on various factors, including labor market conditions, performance, and changes in duties. The HR management system will be the foundation for a leaner, more flexible support structure and will help attract skilled, talented, and motivated people, while also retaining and improving the skills of the existing workforce.

Despite the professionalism and dedication of DoD civilian employees, the limitations imposed by the current personnel system often prevent managers from using civilian employees effectively. The Department sometimes uses military personnel or contractors when civilian employees could have and should have been the right answer. The current system limits opportunities for civilians at a time when the role of DoD's civilian workforce is expanding to include more significant participation in total force effectiveness. NSPS will generate more opportunities for DoD civilians by easing the administrative burden routinely required by the current system and providing an incentive for managers to turn to them first when certain vital tasks need doing. This will free uniformed men and women to focus on matters unique to the military.

The law requires the Department to establish a contemporary and flexible system of human resources management. DoD and OPM are crafting NSPS through a collaborative process involving management, employees, and employee representatives, and are inviting comments from a broader community of other interested parties. DoD leadership will ensure that supervisors and employees understand the new system and can function effectively within it. The system will retain the core values of the civil service and allow employees to be paid and rewarded based on performance, innovation, and results. In addition, the system will provide employees with greater opportunities for career growth and mobility within the Department.

### **Relationship to the Department of Homeland Security**

In developing the National Security Personnel System, the Department of Defense has benefited greatly from the efforts of the Department of Homeland Security (DHS). After more than 2 years of work, DHS and OPM have recently issued final regulations establishing Homeland Security's new human resources (HR) system, and the Secretary and the Director were extensively informed by the DHS experience, in terms of both process and results, in designing, developing, and drafting these proposed regulations. In this regard, the DHS regulations were analyzed by staff-level working groups, as well as senior leadership, and where it made sense—that is, where it was consistent with and supported DoD's national security mission, operations, and statutory authorities—we adopted many of the concepts and approaches, and even much of the specific language set forth in the DHS regulations. For example, both regulations provide flexibilities in pay, performance management, labor relations, adverse actions, and appeals, while preserving the important core merit principles required by law. Similarly, both regulations provide essential management flexibilities to respond to mission and operational exigencies. At the same time, where there are differences between DHS and DoD—in terms of scope, mission, organizational culture, and human capital challenges, as well as the statutes that authorize the respective HR systems—DoD and OPM have broken new ground, and these proposed regulations are intended to stand on their own in that regard. Accordingly, this proposed regulation should not be viewed (or judged) in comparison to DHS, but rather as an independent effort, informed by the DHS experience, yet focused on DoD's mission and requirements.

### **Authority To Establish a New HR System**

The authority for NSPS is 5 U.S.C. 9902(a) through (h) and (k) through (m), which provide authority to establish a new human resources management system, appeals system, and labor relations system for the Department of Defense. NSPS allows the Department of Defense to establish a more flexible civilian personnel management system that is consistent with its overall human capital management strategy. NSPS will make the Department a more competitive and progressive employer at a time when the country's national security demands a highly responsive

civilian workforce. The NSPS is a transformation lever to enhance the Department's ability to execute its national security mission.

Subsection (a) of section 9902 provides that the Secretary of Defense may establish a human resources management system, known as the "National Security Personnel System" (NSPS), in regulations jointly prescribed with the Director of OPM. The system established under subsection (a) may differ from the traditional civil service system established under title 5, U.S. Code, in certain respects. It is also subject to certain requirements and limitations that are specified in subsections (b) through (h) and (l) of section 9902. For example, NSPS must be flexible, contemporary, and consistent with statutory merit system principles and prohibitions against prohibited personnel practices (in 5 U.S.C. 2301 and 2302, respectively). The system must ensure that employees may organize and bargain collectively, subject to the provisions of chapter 99 of title 5 and other statutory requirements. The system must include a performance management system that incorporates certain elements listed in the law. Also, in establishing the system, only certain provisions of title 5 may be waived or modified by DoD and OPM:

- Chapter 31, 33, and 35 (dealing with staffing, employment, and workforce shaping, as authorized by 5 U.S.C. 9902(k));
- Chapter 43 (dealing with performance appraisal systems);
- Chapter 51 (dealing with General Schedule job classification);
- Chapter 53 (dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees);
- Subchapter V of chapter 55 (dealing with premium pay), except section 5545b (dealing with firefighter pay);
- Chapter 75 (dealing with adverse actions); and
- Chapter 77 (dealing with appeal of adverse actions and certain other actions).

In planning, developing, implementing, and adjusting NSPS established under subsection (a), DoD and OPM must use procedures that provide employee representatives with an opportunity to participate and collaborate in the process. This collaboration requirement is set forth in subsection (f) and is further described later in this Supplementary Information. The law provides that the collaboration procedures in subsection (f) are the "exclusive procedures" for the

participation of employee representatives, provided in lieu of any collective bargaining requirements.

Subsection (h) of section 9902 provides authority to establish an appeals process for DoD employees covered by NSPS. This process must ensure that all affected DoD employees are afforded the protection of due process. Subsection (h) authorizes new standards and procedures for personnel actions based on either misconduct or performance that fails to meet expectations. The procedures may include a revised process for hearing appeals of adverse actions. Finally, subsection (h) provides that an employee against whom an adverse action is taken may seek review of the record of the case by the Merit Systems Protection Board. The Board may dismiss cases that do not raise substantial questions of fact or law. The Board may only order corrective action if it determines that the DoD decision was—

- Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- Obtained without procedures required by law, rule or regulation having been followed; or
- Unsupported by substantial evidence.

Subsection (k) of section 9902 provides that, in establishing and implementing the NSPS under subsection (a), DoD and OPM are not limited by any provision of title 5 or implementing regulations relating to—

- The methods of establishing qualification requirements for, recruitment for, and appointments to positions;
- The methods of assigning, reassigning, detailing, transferring, or promoting employees; and
- The methods of reducing overall agency staff and grade levels, except that performance, veterans' preference, tenure of employment, length of service, and such other factors as the Secretary considers necessary and appropriate must be considered in decisions to realign or reorganize the Department's workforce.

Thus, subsection (k) authorizes the modification of chapters 31, 33, and 35 of title 5, U.S. Code (dealing with staffing, employment, and workforce shaping). However, in implementing subsection (k), DoD must comply with veterans' preference requirements in 5 U.S.C. 2302(b)(11).

Subsection (m) provides a separate authority (independent of subsection (a) and notwithstanding subsection (d)) for the Secretary of Defense and the Director of OPM to establish a DoD labor

relations system. Subsection (m) establishes collaboration requirements to give employee representatives the opportunity to participate in developing, implementing, and adjusting the labor relations system. Subsection (m) provides authority to modify chapter 71. By law, the subsection (m) authority may not be used to expand the scope of bargaining. Also, by law, the DoD labor relations system supersedes all collective bargaining agreements for covered DoD bargaining units, except as otherwise determined by the Secretary. Finally, the law provides that the DoD labor relations system established under subsection (m) will expire 6 years after the date of enactment (*i.e.*, November 24, 2009), unless extended by statute. If subsection (m) expires, the provisions of chapter 71 of title 5, U.S. Code, would again apply.

Subsections (i) and (j) in section 9902 establish separate authorities that are not held jointly with OPM and are not addressed in these proposed regulations.

## Process

### Leadership

In April 2004, senior DoD leadership approved the collaborative process that the Department is using to design and implement NSPS. This process was crafted over a period of about 3 weeks by a group of 25 to 30 senior experts representing various elements within DoD, OPM, and the Office of Management and Budget. The senior leaders used the Defense Acquisition Management model as a way to establish the requirements for the design and implementation of NSPS. The senior leaders recommended Guiding Principles and Key Performance Parameters (KPPs), which defined the minimum requirements for NSPS. They also recommended establishing a Senior Executive and Program Executive Office (PEO), modeled after the Department's acquisition process. Subsequently, the Honorable Gordon England, was appointed by the Secretary of Defense as the NSPS Senior Executive, in addition to his duties as Secretary of the Navy, to design, develop, establish, implement, and adjust the NSPS on his behalf. As the NSPS Senior Executive, Secretary England established the NSPS PEO as the central DoD policy and program office to conduct the design, planning and development, deployment, assessment, and full implementation of NSPS. The PEO provides direction to and oversight of the Component program managers who

are dual-hatted under their parent Component and the PEO.

At OPM, the Director designated the Senior Advisor on the Department of Defense to lead agency activities in the joint development of the NSPS. The Director received frequent and regular briefings on the progress of NSPS and on the status of key policy options across the spectrum of authorities granted in the NSPS statute. Subsequently, in periodic reviews the Director exercised policy options, thereby providing guidance to the OPM team. Policy and regulatory development for NSPS are specifically vested in the Division for Strategic Human Resources Policy, and OPM's work teams and leadership cadres were drawn largely from this Division. In addition, a Senior Level Review Group reviewed NSPS decision documents to ensure consistency with the Director's priorities.

An integrated executive management team composed of senior DoD and OPM leaders provides overall policy and strategic advice to the PEO and serves as staff to the Senior Executive. The PEO meets with and consults with this team, the Overarching Integrated Product Team (OIPT), 8 to 10 times a month. The Senior Executive convenes meetings with the PEO and OIPT at least twice a month to monitor and direct the process.

#### *Guiding Principles and Key Performance Parameters*

In setting up the process for the design of the system, senior leadership adopted a set of Guiding Principles as a compass to direct efforts throughout all phases of NSPS development. They translate and communicate the broad requirements and priorities outlined in the legislation into concise, understandable requirements that underscore the Department's purpose and intent in creating NSPS. The Guiding Principles are:

- Put mission first—support National Security goals and strategic objectives;
- Respect the individual—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 HR interoperability with unique mission requirements; and
- Be competitive and cost effective.

In addition, senior leadership approved a set of Key Performance Parameters (KPPs), which define the minimum requirements and/or

attributes of the system. Those KPPs are summarized below:

- High Performing: Employees/supervisors are compensated/retained based on performance/contribution to mission;
- Agile and Responsive: Workforce can be easily sized, shaped, and deployed to meet changing mission requirements;
- Credible and Trusted: System assures openness, clarity, accountability and merit principles;
- Fiscally Sound: Aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance, and managers will have flexibility to manage to budget;
- Supporting Infrastructure: Information technology support and training and change management plans are available and funded; and
- Schedule: NSPS will be operational and demonstrate success prior to November 2009.

#### *Working Groups*

In July 2004, the PEO established Working Groups to begin the NSPS design process. Over 120 employees representing the Military Departments (Army, Navy, Air Force), the other DoD Components, and OPM began the process of identifying and developing options and alternatives for consideration in the design of NSPS. The Working Group members included representatives from the DoD human resources community, DoD military and civilian line managers, representatives from OPM, the legal community, and subject matter experts in equal employment opportunity, information technology, and financial management. In addition, other subject matter experts participated.

The Working Groups were functionally aligned to cover the following human resources program areas: (1) Compensation (classification and pay banding); (2) performance management; (3) hiring, assignment, pay setting, and workforce shaping; (4) employee engagement; (5) adverse action and appeals; and (6) labor relations. Each group was co-chaired by an OPM and DoD subject matter expert. The Working Groups' review and analysis included a compilation of pertinent laws, rules, regulations, and other related documents that were forwarded to them for advance preparation. Working Groups were also provided with available information and input from NSPS focus groups and town hall sessions held at strategic locations worldwide, union consultation meetings, data review and analysis from alternative personnel systems and

laboratory and acquisition demonstration projects, the NSPS statute, Guiding Principles, as well as a review of earlier studies and working groups. In addition, subject matter experts briefed the Working Groups on a variety of topics, such as pay-for-performance systems, alternative personnel systems, pay pool management, and market sensitive compensation systems.

#### *Option Development Process*

In developing options for the NSPS, the Working Groups benefited from the Government's experience under demonstration project authorities and alternative personnel systems, the DoD "Best Practices" initiative (68 FR 16120, April 2, 2003), and the compilation of research materials from the Department of Homeland Security HR Systems Design process. The Working Groups also received and considered input from employees and their representatives. The resulting product was a set of options that covered a broad range of variations on the six areas of focus. Each option was evaluated against the Guiding Principles and Key Performance Parameters (KPPs).

To ensure that the options reflected the wide range of views and concerns expressed by various entities, the NSPS Working Groups did not attempt to reach consensus regarding the merits of the options. Consequently, none of the options necessarily represented a consensus view of the Working Groups. Some of the options integrate approaches to developing new HR systems across two or more of the six subject matter areas under consideration. This is especially true of the compensation architecture and pay-for-performance options, which were intended to illustrate how various classification, compensation, and performance system elements might work in combination. The performance and compensation/classification options also tended to cluster around several distinct themes, such as "function/occupation-focused," "performance-focused," and "contribution/mission-focused." The initial draft options were reviewed by the PEO and Senior Advisory Group (SAG) to capture feedback prior to finalizing them for submission to the Overarching Integrated Product Team (OIPT) for review.

#### **Outreach**

A comprehensive outreach and communications strategy is essential for designing and implementing a new HR system. Outreach facilitates employee awareness and understanding of NSPS;

it's the primary strategy for sharing the NSPS vision. In April 2004, the PEO developed and implemented a communications strategy. The objectives of DoD's communications strategy are to (1) demonstrate the rationale for and benefits of NSPS; (2) demonstrate openness and transparency in the design and process of converting to NSPS; (3) express DoD's commitment to ensuring NSPS is applied fairly and equitably; and (4) address potential criticism of NSPS.

The PEO identified channels for disseminating relevant, timely, and consistent information, including a wide variety of print and electronic media, e-mail, town hall meetings, focus groups, speeches, and briefings, and developed an action plan for communicating with each stakeholder. The PEO also developed key messages to include in stakeholder communications to reinforce the Guiding Principles of the NSPS HR systems design process. A website was developed and launched to serve as a primary, two-way communications tool for the workforce, other stakeholders, and the general public. PEO updates the website regularly with new information concerning the design, development, and implementation of NSPS. Further, the website includes the capability for visitors to submit questions and comments. To date, PEO has responded to thousands of questions and comments.

#### *Outreach to Employee Representatives*

Beginning in the spring of 2004 and continuing over the course of several months, the PEO sponsored a series of meetings with union leadership to discuss design elements of NSPS. Officials from DoD and OPM met throughout the summer and fall with union officials representing many of the DoD civilians who are bargaining unit employees. These sessions provided the opportunity to discuss the design elements, options, and proposals under consideration for NSPS and solicit union feedback.

To date, DoD and OPM have conducted 10 joint meetings with officials of the 41 unions that represent DoD employees, including the 9 unions that currently have national consultation rights. These union officials represent some 1,500 separate bargaining units covering about 445,000 employees. These meetings involved as many as 80 union leaders from the national and local level at any one time, and addressed a variety of topics, including: the reasons change is needed and the Department's interests; the results of Department-wide focus group

sessions held with a broad cross-section of DoD employees; the proposed NSPS implementation schedule; employee communications; and proposed design options in the areas of labor relations and collective bargaining, adverse actions and appeals, and pay and performance management.

#### *Outreach to Employees*

In keeping with DoD's commitment to provide employees and managers an opportunity to participate in the development of NSPS, the PEO sponsored a number of Focus Group sessions and town hall meetings at various sites across DoD. Focus Group sessions began in mid-July 2004, and continued for approximately 3 weeks. A total of 106 focus groups were held throughout DoD, including overseas locations. Separate focus groups were held for employees, civilian and military supervisors, and managers and practitioners from HR, legal and EEO communities. Bargaining unit employees and union leaders were invited to participate. Each focus group was conducted by a trained facilitator. For the major system design elements, focus group participants were asked what they thought worked well in the current HR systems and what they thought should be changed. Over 10,000 comments, ideas and suggestions received during the Focus Group sessions were summarized and provided to NSPS Working Groups for use in developing options for the labor relations, appeals, adverse actions, and human resources design elements of NSPS.

In addition, town hall meetings were held in DoD facilities around the world during the summer of 2004, providing an opportunity to communicate with the workforce, provide the status of the design and development of NSPS, and solicit thoughts and ideas. The NSPS Senior Executive, Secretary Gordon England, conducted the first town hall meeting at the Pentagon on July 7, 2004. The format for town hall meetings included an introductory presentation by a senior leader followed by a question and answer session where anyone in the audience was free to ask a question or make a comment. Some of the town hall meetings were broadcast live, as well as videotaped and rebroadcast on military television channels and Web sites to facilitate the widest possible dissemination.

The focus group sessions and town hall meetings, as well as the Working Groups and union consultation sessions, underscore the Department's commitment to ensuring an open, transparent design process. The sessions

assured that civilian employees, managers, supervisors, union leadership, and other key stakeholders were involved in the design and implementation of NSPS and had ample opportunity to provide input.

#### *Outreach to Other Stakeholders*

In addition to reaching out to DoD employees and labor organizations, DoD and OPM met with other groups who were thought to be interested in the design of a new HR system for DoD. DoD and OPM invited selected stakeholders to participate in briefings held at OPM in August and September 2004.

The first stakeholder briefing was for public interest groups, such as the National Association of Public Administrators (NAPA), Coalition for Effective Change, and Partnership for Public Service. The second stakeholder briefing was for veterans' service organizations. A third stakeholder briefing was conducted with non-union employee advocacy groups. Attendees at all three briefings received background information about NSPS, an update on the PEO work plan, an overview of the NSPS Guiding Principles, and updates on the activities of the team, including town hall meetings and focus groups. Attendees were afforded an opportunity to participate in a question-and-answer session following these presentations.

Both before and after these three stakeholder briefings, DoD and OPM responded to dozens of requests for special briefings. DoD and OPM also met with the Government Accountability Office, Office of Management and Budget, and Department of Homeland Security to keep them up to date on the team's activities.

#### **General Provisions—Subpart A**

Subpart A of the proposed regulations provides the purpose and the establishment of the general provisions governing coverage under the new DoD HR system, and defines terms that are used throughout the new part 9901. Part 9901 applies to employees in DoD organizational and functional units identified under the regulations as eligible for coverage and who are approved for coverage, as of a specified date, by the Secretary of Defense. This enables DoD to phase in coverage of particular groups of employees or Components of the Department. Subpart A also allows DoD to prescribe internal Departmental issuances that further define the design characteristics of the new HR system. (*See* the "Next Steps" section at the end of this **SUPPLEMENTARY INFORMATION.**) Finally,

subpart A clarifies the relationship of the regulations in part 9901 to other provisions of law and regulations outside those that are being waived with respect to DoD.

#### *Purpose*

The purpose of the proposed regulations is to establish a system designed to meet the statutory requirements, the NSPS KPPs and Guiding Principles.

#### *Eligibility and Coverage*

All DoD employees currently covered by the classification and pay systems established under chapter 51 or 53 of title 5, U.S. Code, are eligible for coverage under one or more of subparts B through I of this part, except to the extent specifically prohibited by law (e.g., Executive Schedule officials, who, by law, remain covered by subchapter II of chapter 53). DoD will transition to the NSPS human resources system beginning with its General Schedule (GS) employees (and equivalent). Other categories of employees, including those covered by other systems outside of title 5, will be phased in as appropriate. SES members and certain other similar types of DoD employees will be eligible for coverage under the new DoD pay system. However, the proposed regulations provide that any new pay system covering SES members must be consistent with the performance-based features of the new Governmentwide SES pay-for-performance system authorized by section 1125 of the National Defense Authorization Act (Pub. L. 108–136, November 24, 2003). If DoD wishes to establish an SES pay system that varies substantially from the new Governmentwide SES pay-for-performance system, DoD and OPM will issue joint authorizing regulations consistent with all of the requirements of the National Security Personnel System, as set forth in 5 U.S.C. 9902. In addition, DoD and OPM will involve SES members and other interested parties in the design and implementation of any new pay system for SES members employed by DoD.

#### *Scope of Authority*

Subject to the requirements and limitations in 5 U.S.C. 9902, the provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified:

- The rules governing staffing, employment, and workforce shaping (as permitted by 5 U.S.C. 9902(k)) established under chapters 31, 33, and 35;

- The rules governing performance appraisal systems established under chapter 43;
- The General Schedule classification system established under chapter 51;
- The pay systems for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees, as set forth in chapter 53;
- The premium pay system for employees, as set forth in chapter 55, subsection V, except section 5545(b) relating to pay for firefighters;
- The labor relations system (as authorized by 5 U.S.C. 9902(m)) established under chapter 71;
- The rules governing adverse actions and certain other actions taken under chapter 75; and
- The rules governing the appeal of adverse actions and certain other actions under chapter 77.

#### *Coordination Between DoD and OPM*

In implementing the intent of Congress that the Secretary and the Director jointly prescribe regulations for NSPS, DoD and OPM recognize that both agencies have significant legitimate interests that must be taken into account. DoD requires an agile and responsive civilian personnel system to support its Total Force and execute its national security mission. At the same time, OPM is responsible for providing guidance and assistance to DoD in developing a new human resources management system while simultaneously protecting Governmentwide institutional interests regarding the civil service system.

Section 9901.105 of the proposed regulations provides that the Secretary will advise and/or coordinate with OPM in advance, as applicable, regarding the proposed promulgation of certain DoD implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. The Secretary and the Director fully expect their staffs to work closely together on the matters specified in this section, before such matters are submitted for official OPM coordination and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

When a matter requiring OPM coordination pursuant to the coordination requirements established in these regulations, is to be submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's

normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/nonconcurrence into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of its effective date. Thereafter, the Secretary and the Director may take such action(s) as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

#### *Continuing Collaboration*

The NSPS law requires that the implementation of a new HR system for DoD will be carried out with the participation of, and in collaboration with, employee representatives. The law spells out the specific process for involvement of employee representatives in the establishment of the system, known generally as the "30/30/30" process. These proposed regulations will be subject to that statutory process, which includes a comment period of 30 days, a minimum of 30 days for DoD and OPM to "meet and confer" with employee representatives on their recommendations, and a final 30 days for congressional notification prior to implementation.

The NSPS law also provides that the Secretary and the Director develop a process to involve employee representatives in the further planning, development, and/or adjustment of the system. To that end, § 9901.106 establishes a process by which employee representatives will be provided an opportunity to review, comment, and participate in discussions regarding proposals for further adjustments to the system, including DoD implementing issuances. This process is called "continuing collaboration" and is a separate and distinct process from the provisions found in subpart I, Labor-Management Relations. While the proposed NSPS regulations establish the overall NSPS human resources management system, there are several areas that will require DoD to promulgate implementing directives, instructions, manuals, and other issuances that provide the detailed procedures needed to implement the system. For example, the proposed regulations provide for an administrative process in which employees may seek reconsideration of their performance ratings; this is to ensure transparency in the performance management system. The specific procedures for that reconsideration process are not spelled out in these

proposed regulations; rather, they will be established in internal DoD issuances. In order to ensure that the views and concerns of employee representatives are considered in the development of those procedures, DoD will engage in the “continuing collaboration” process.

Under continuing collaboration, employee representatives (for those employees affected by the proposed issuance) will be provided a draft proposal and given a timeframe to review and submit written comments on the proposal, and they will be afforded the opportunity to discuss their views and concerns with DoD officials prior to finalization of the issuance. At the Secretary’s discretion, this collaboration may also be initiated prior to the drafting of proposed issuances (*e.g.*, at the conceptual stage of the process). The proposed regulations guarantee that any written comments submitted within the timeframes will become part of the official record and be considered before final decisions are made. While this process does not affect the right of the Secretary to make the final determination as to the content of implementing issuances, it offers the opportunity for employee representatives to participate meaningfully in the process and influence the further development and refinement of NSPS.

#### *Relationship to Other Provisions of the Law*

Paragraph (a)(2) of § 9901.107 establishes a rule of construction requiring all provisions of this part be interpreted in a way that recognizes the critical national security mission of the Department. Each provision must be construed to promote the swift, flexible, and effective day-to-day accomplishment of that mission, as defined by the Secretary. DoD’s and OPM’s interpretation of these regulations must be accorded great deference.

Paragraph (b) of § 9901.107 describes the relationship between the proposed part 9901 and laws that are not waivable or modifiable under the NSPS law. For

the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under the waivable or modifiable chapters (*i.e.*, chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 of title 5, U.S. Code), the referenced provisions are not waived but are modified consistent with the corresponding regulations in part 9901, except as otherwise provided in that part or in DoD implementing issuances. For example, physicians’ comparability allowances under 5 U.S.C. 5948 are limited to physicians in certain listed pay systems, including the General Schedule. To ensure that DoD physicians continue to be eligible for physicians’ comparability allowances when they convert from the General Schedule to the NSPS pay system, they will be deemed to be covered by the General Schedule for the purpose of applying section 5948. In addition, in applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart H of these proposed regulations (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9901.807(h).

#### **Classification—Subpart B**

Subpart B provides DoD with the authority to replace the current GS and FWS classification and qualifications systems and other current classification systems with a new method of evaluating and classifying jobs by grouping them into occupational categories and levels of work for pay and other related purposes. Under this new system, DoD (in coordination with OPM) will have the authority to establish qualifications for positions and to assign occupations and positions to broad occupational career groups and pay bands (or levels).

DoD (in coordination with OPM) will establish broad occupational career groups by grouping occupations and positions that are similar in types of work, mission, developmental/career paths, and/or competencies. The

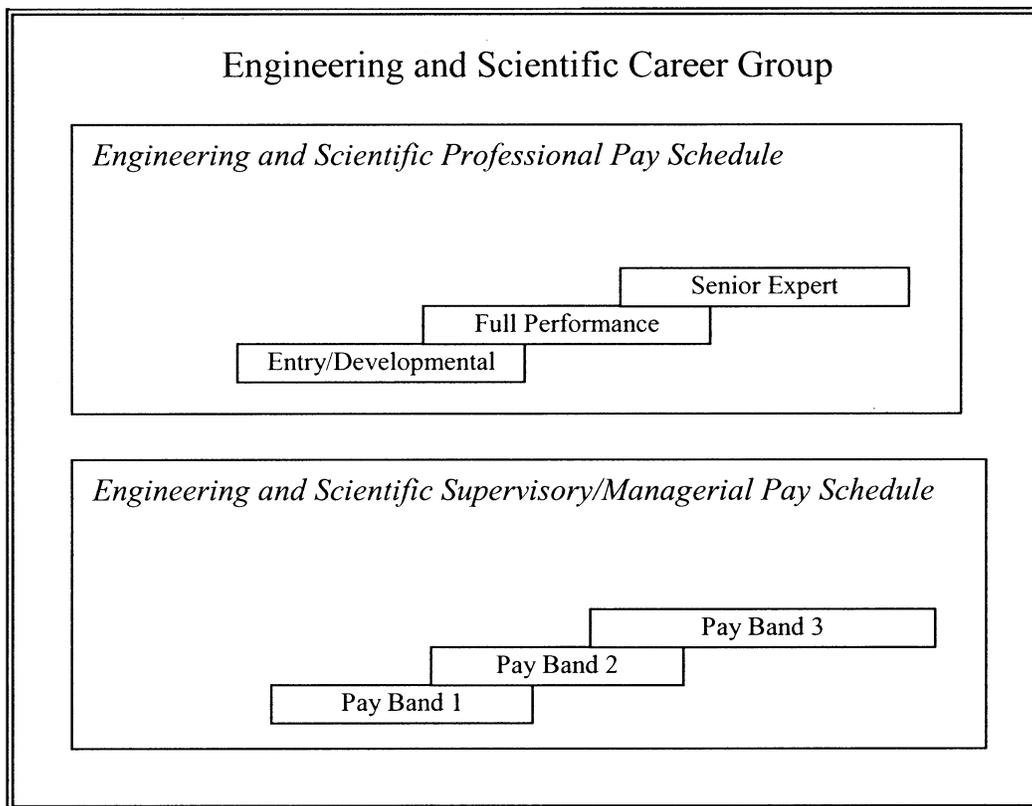
occupational career groups will serve as the basic framework for the NSPS classification and pay system. Within career groups, DoD may establish pay schedules that apply to subgroupings of related occupations. Within each pay schedule, DoD (in coordination with OPM) will establish broad salary ranges, commonly referred to as pay bands. The pay bands within a pay schedule represent progressively higher levels of work with correspondingly higher pay ranges.

DoD may elect to phase in the coverage of specific categories of employees or occupations under the new classification and pay system established under these proposed regulations. DoD may use OPM-approved occupational series and titles to identify and assign positions to a particular career group and pay schedule. Pay schedules typically will include most or all of the following levels of work:

- Entry/developmental work that involves a combination of formal training and/or on-the-job experience designed to provide the employee with the competencies needed to perform successfully at the full performance level.
- Work that involves nonsupervisory duties and responsibilities at the full performance level of the occupation.
- Nonsupervisory expert work that involves a high level of specialized knowledge or technical expertise clearly beyond the requirements for work at the full performance level upon which the employing organization relies for the accomplishment of critical mission goals and objectives.
- Work that involves the supervision of employees at the full performance or expert level.
- Managerial work whose primary purpose is to direct key DoD/Component scientific, medical, legal, administrative, or other programs.

Career groups, pay schedules, and pay bands provide clearly defined career paths for occupations. Table 1 illustrates the career group structure concept.

Table 1 – Sample Classification Structure



The new classification system for DoD will result in a streamlined method of classifying positions that no longer relies on lengthy classification standards and position descriptions. The new system does not require artificial distinctions between closely related levels of work, as currently required under the GS and Federal Wage System (FWS) classification systems. This more fully supports the merit system principle that “equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition \* \* \* for excellence in performance.” Employees will be permitted to request reconsideration of the classification (career group, pay schedule, occupational series, or pay band) of their official positions of record at any time with DoD and/or OPM, as they can today under the GS system. The system described here, together with the new pay system described below, will provide DoD with greater flexibility to adapt the Department’s job and pay structure to meet present and future mission requirements.

#### **Pay and Pay Administration—Subpart C**

This subpart contains proposed regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V. This new system links pay to employees’ performance ratings and is designed to promote a high-performance culture within DoD.

#### *National Security Compensation Comparability*

In accordance with the NSPS law, to the maximum extent practicable, for fiscal years 2004 through 2008, the aggregate amount allocated for compensation of DoD civilian employees under NSPS will not be less than if they had not been converted to the NSPS. This takes into account potential step increases and rates of promotion had employees remained in their previous pay schedule.

In addition, NSPS implementing issuances will provide a formula for calculating the aggregate compensation amount, for fiscal years after fiscal year 2008. The formula will ensure that, to the maximum extent practicable, in the aggregate, employees are not

disadvantaged in the overall amount of pay available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization, changes in the mix of employees performing those functions, and other changed circumstances that might impact pay levels.

#### *Setting and Adjusting Rate Ranges*

*Setting Rate Ranges and Local Market Supplements:* The proposed regulations establish a pay system that governs the setting and adjusting of covered employees’ rates of pay. The system will have a rate range, with a minimum and maximum rate, for each band in each career group based on factors such as labor market rates, recruitment and retention information, mission requirements, operational needs, and overall budgetary constraints. The bands will have open pay ranges, with no fixed step rates. DoD will also set local market supplements (a supplement to basic pay in lieu of locality pay) for rate ranges based on geographic and occupational factors. DoD will coordinate setting and adjusting rate ranges and local market supplements with OPM.

*Adjusting Rate Ranges and Local Market Supplements:* DoD will

determine the rate range adjustments and local market supplements considering mission requirements, labor market conditions, availability of funds, pay adjustments received by employees in other Federal agencies, allowances and differentials under 5 U.S.C. chapter 59, and other relevant factors. Rate range adjustments and local market supplements may differ by career group, pay schedule, or pay band. The minimum and maximum of a range may be adjusted at different rates. DoD may determine local market areas as well as the timing of these pay adjustments.

The proposed regulations provide that employees may receive pay adjustments as a result of a rate range adjustment. Generally, employees will receive an adjustment equal to any increase to the minimum rate of their band and will receive any applicable local market supplement. In keeping with the desire of the Secretary and the Director to achieve and sustain a culture of high performance, the proposed regulations provide that these pay adjustments will not be provided to employees with an unacceptable performance rating.

*Performance-Based Pay*

The NSPS pay system will be a performance-based pay system that will result in a distribution of pay raises and bonuses based upon individual performance, individual contribution, organizational performance, team performance, or a combination of those elements. The NSPS system will use pay pools to manage, control, and distribute performance-based pay increases and bonuses. Under the proposed regulations, the term “pay pool” means the organizational elements/units or other categories of employees that are combined for the purpose of determining performance payouts or the dollar value of the funds set aside for performance payouts for employees covered by a pay pool. The performance payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees.

*Annual Performance-based Payouts:* Employees will receive annual performance-based payouts based on their rating of record and assigned shares. Each rating level will have a share or range of shares associated with it.

*Rating Methodology:* DoD implementing issuances will define the specific methodologies and practices that will be used in the Department. DoD expects to use a methodology that includes at least three rating levels and identifies a range of performance shares that can be assigned for rating levels. An

example of a possible rating methodology is provided by Table 2. This example illustrates a five-level rating methodology with associated share ranges in which level five signifies the highest level of performance. The rater will prepare and recommend the rating, number of shares, and the distribution of the payout between basic pay increase and bonus, as applicable, for each employee. These recommendations will then be reviewed by the pay pool panel to ensure equitable rating criteria and methodology have been applied to all pay pool employees. The final determination of the rating, number of shares, and payout distribution will be a function of the pay pool panel process and will be approved by the pay pool manager. The criteria used to determine the number of shares to assign an employee may include assessment of the employee’s contribution to the mission, the employee’s type and level of work, consideration of specific achievements, or other job-related significant accomplishments or contributions.

TABLE 2.—SAMPLE RATING METHODOLOGY

Rating level	Share range
5 .....	6–8
4 .....	3–6
3 .....	1–2
2 .....	0
1 .....	N/A

*Performance Pay Pools:* Performance pay pools will be established by combining organizational elements, functional groupings, or other categories of employees. Distinctions may also be made using criteria such as location or mission. Each pay pool will be managed by a pay pool manager in concert with appropriate management officials. The pay pool manager is the individual charged with the overall responsibility for rating determinations and distribution of the payout funds in a given pay pool. The funding of a performance pay pool consists of the money allocated for performance-based payouts for a defined group of employees. The amount of money available within a pay pool is normally based on the money that would have been available for within-grade increases, quality step increases, promotions between grades that have been banded in the NSPS pay system, and applicable across-the-board pay increases. Funds previously used for end-of-rating cycle performance awards or incentive awards may also be used to

fund the pay pool. Note that the provisions of 5 U.S.C. chapter 45, “Incentive Awards,” remain in place and provide a valuable means to recognize employee achievements throughout the rating cycle.

*Performance Payout:* The performance payout is composed of an increase to basic pay, a bonus, or a combination of these. A bonus is a one-time lump-sum payment that is not paid as basic pay. Subject to DoD guidelines, pay pool managers will have the discretion to determine the proportion of an employee’s total performance payout paid as an increase to basic pay or as a bonus. Increases to basic pay may not cause the basic pay of an employee to exceed the maximum of his or her pay band. In such situations, the amount of the payout that exceeds the maximum of the pay band will be paid in the form of a bonus.

*Example:* If the maximum of a pay band is \$30,000, and an employee earning \$28,750 is awarded a payout of \$3,000, then the employee may receive an increase in basic pay of not more than \$1,250 (\$28,750 + \$1,250 = \$30,000) with the remainder (at least \$1,750) paid as a bonus.

In addition, the proposed regulations allow DoD to establish “control points” or other mechanisms within a band, beyond which basic pay increases may be granted only for meeting criteria established by DoD. An example of such a control point is a requirement for the employee to have achieved the highest performance rating.

*Other Performance Payouts:* Extraordinary pay increases (EPI), organizational achievement recognition, or other special payments may be paid to employees in accordance with implementing issuances. The amount of such payments may not cause the employee’s basic pay to exceed the maximum rate of the employee’s assigned pay band.

- *Extraordinary Pay Increase:* An extraordinary pay increase (EPI) is a basic pay increase to reward employees when the payout formula does not adequately compensate them for their extraordinary performance. It is to be used sparingly and only to reward exceptionally high-performing employees whose performance and contributions to the organization are of an exceedingly high value. The performance must be expected to continue at an extraordinarily high level in the future.

- *Organizational Achievement Recognition:* This type of recognition may take the form of additional compensation paid to employees of a team, unit, branch, or organization

whose performance and contributions have successfully and directly advanced organizational goal(s).

*Developmental Positions:* Employees in developmental positions may receive pay adjustments as they acquire the competencies, skills, and knowledge necessary to advance to the full performance level.

#### *Pay Administration*

The new DoD pay system provides the Department with an enhanced ability to establish and adjust overall pay levels in keeping with changes in national and local labor markets. It is designed to adjust individual pay levels based on the acquisition and assessment of competencies, skills, and knowledge and on the basis of performance or contributions to mission. The new system is capable of adapting to changing circumstances and mission requirements.

*Initial Conversion:* Upon implementation of the new system, employees will be converted based on their official position of record. Initial entry into NSPS will ensure that each employee is placed in the appropriate pay band without loss of pay.

*New Appointments/Reinstatements:* When an employee is newly appointed or reinstated to a position in NSPS, management may establish pay at any rate up to the maximum of the pay band in accordance with implementing issuances. The hiring official will determine starting pay based on available labor market considerations; specific qualification requirements; scarcity of qualified applicants; program needs; education or experience of the candidate; and other criteria as appropriate. When an employee moves to a pay band with a higher earning potential, pay will be set in accordance with implementing issuances.

*Temporary Promotion:* Employees on temporary promotions will be returned to their official position of record prior to conversion. GS employees will be converted at their current rate of basic pay, including any locality payment, adjusted on a one-time, pro-rata basis, for the time spent towards their next within-grade increase.

*Career-ladder Positions:* Employees in career-ladder positions below the full performance level will be placed in the appropriate career group, pay schedule, and entry or developmental band.

*Promotion:* Promotion pay increases (from a lower band to a higher band in the same cluster or to a higher band in a different cluster) generally will be a fixed percent of the employee's rate of basic pay or the amount necessary to reach the minimum rate of the higher

band, whichever is greater. This amount is roughly equivalent to the value of a promotion to a higher grade within the GS system.

*Reassignment:* An employee who moves to a position in a comparable pay band will have pay set depending on whether the move is voluntary or involuntary as a result of unacceptable performance and/or conduct. If the move is voluntary or involuntary and not due to unacceptable performance and/or conduct, pay will generally be set at the existing rate of pay; however, pay may be set at a higher rate within limitations specified in DoD implementing issuances. If the move is involuntary due to unacceptable performance and/or conduct, there may be a reduction in basic pay of up to 10 percent as provided in these proposed regulations and in DoD implementing issuances. Pay may not be set lower than the minimum of the pay band level or exceed the maximum of the pay band level.

*Reduction in Band:* When an employee moves to a lower pay band, pay will be set depending on whether the move is voluntary or involuntary. If the move is voluntary, pay may generally be set anywhere within the pay band within limits specified in the implementing issuances. If the move is involuntary due to an adverse action based on unacceptable performance and/or conduct, there may be a reduction in basic pay within the limits specified in these proposed regulations and in DoD implementing issuances (not to exceed 10 percent, unless a larger reduction is needed to place the employee at the maximum rate of the lower band). For other involuntary moves, any reduction in pay will be limited in accordance with DoD implementing issuances. Where pay retention is applicable (e.g., following a reduction in force), the employee's pay will be protected under conditions and parameters to be identified in the implementing issuances.

#### *Premium Pay*

Section 9901.361 of the proposed regulations addresses DoD's authority to waive and replace the premium pay provisions in 5 U.S.C. chapter 55, subchapter V (except section 5545b), in whole or in part for employees in a category approved by the Secretary. DoD (in coordination with OPM) will establish any NSPS premium payments through implementing issuances.

#### **Performance Management—Subpart D**

The current performance management system is burdensome because of its actual and/or perceived inflexibility and

strict adherence to written elements and standards established at the beginning of a rating cycle. Supervisors feel restricted in making any mid-course corrections or modifications to a performance plan, resulting in a final assessment that does not meet their needs. These static standards make it difficult for managers to adjust performance requirements and expectations in response to the Department's rapidly changing work environment, hold individual employees accountable for those general and/or assignment-specific work requirements and expectations, and make meaningful distinctions in employee performance as they accomplish those assignments. The proposed regulations are designed to address these deficiencies.

DoD has decided to waive the provisions of chapter 43 of title 5, U.S. Code, in order to design a performance management system that will complement and support the Department's proposed performance-based pay system described above. The proposed system will also ensure greater employee and supervisor accountability with respect to individual performance expectations, as well as organizational results.

The proposed system builds in the flexibility to modify, amend, and change performance and behavioral expectations during the course of a performance year, subject to employees being advised of, and involved in to the maximum feasible extent, the adjusted expectations. For example, supervisors have the option of establishing and communicating performance expectations during the course of the appraisal period through specific work assignments or other means. These other means may include standard operating procedures, organizational directives, manuals, and other generally established job requirements that apply to employees in a particular occupation and/or unit.

#### *Coverage*

Generally, DoD employees who are currently covered by chapter 43 of title 5, U.S. Code, are eligible for coverage under the new performance management provisions in subpart D of the proposed regulations. Employees who are currently excluded by chapter 43 of title 5, such as administrative law judges and presidential appointees, will not be eligible for coverage. Certain categories of employees are currently excluded from chapter 43 by OPM administrative action, as authorized by 5 CFR 430.202(d). Such employees are eligible for coverage under the new DoD

performance management provisions. DoD will decide which of those categories of otherwise eligible employees are covered by the Department's new performance management system or systems. The proposed regulations also allow DoD to develop, implement, and administer systems tailored to specific organizations and/or categories of employees.

#### *Performance and Behavior Accountability*

Typically, poor behavior or misconduct has been addressed only through the disciplinary process. Little attention has been paid to the impact of behavior, good or bad, on performance outcomes of the employee and the organization. DoD has determined that conduct and behavior affecting performance outcomes (actions, attitude, manner of completion, and/or conduct or professional demeanor) should be a tracked and measured aspect of an employee's performance. The NSPS regulations provide for consideration of employee behavior as a performance factor, element, or objective, such as "teamwork/cooperation."

When an employee's behavior enhances or impairs task/job accomplishment, it should affect the employee's performance appraisal. Behavior that significantly enhances the mission should also be noted. This does not change a supervisor's responsibility to take prompt corrective action in the event of actionable misconduct; it merely recognizes the fact that behavior can and does affect an employee's overall performance and should be recognized. For example, an employee may receive corrective action at the time of misconduct. The nature of that misconduct has an impact on the successful execution of duties and should therefore impact the employee's performance assessment at the conclusion of the performance rating period. The impact of misconduct on the employee's performance rating will depend on its seriousness, evidence of correction, and any other relevant factors.

Though behavior must be addressed in the performance management system, it need not be a separate factor, element, or objective, if sufficiently covered by a more general factor, element, or objective, such as "teamwork/cooperation." Whether constructed as a separate or combined factor, element, or as an objective, the behavioral expectations must be set by the supervisor at the beginning of an appraisal period, and as with other

performance expectations, modified or reinforced throughout the appraisal cycle. These expectations normally would include the general behavioral expectations for all employees as stated in the Standards of Ethical Conduct for Employees in the Executive Branch and the DoD Joint Ethics Regulations, as well as any behavioral expectations specifically related to the local organization.

By providing supervisors and managers realistic alternatives for setting employee expectations, and assessing behavior and performance against those expectations, DoD will be better able to hold its employees accountable and recognize and reward those who excel. As part of the performance management system, supervisors and employees should stay aware of the status of performance and behavior and be better able to anticipate and address difficulties. The performance management system is intended to assist in employee performance and behavior development, recognize and reward exemplary performance and behaviors, and identify and remedy shortfalls. Employees share the responsibility of identifying and communicating difficulties, whether due to problems in understanding, communication, or accomplishment of expectations.

By the same token, supervisors and managers will be held accountable for clearly and effectively communicating expectations and providing timely feedback regarding behavior and performance. Supervisors and managers must make meaningful behavior and performance distinctions in support of DoD's new performance-based pay system, as well as identifying and addressing unacceptable performance and misconduct.

Further, supervisors and managers will have a broad range of options for dealing with unacceptable performance. These include but are not limited to remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action defined in subpart G of these proposed regulations, including a reduction in rate of basic pay or pay band. Resolution of employment difficulties must utilize appropriate methodologies, using remedial and corrective actions, when appropriate, prior to consideration of taking an adverse action. The range of adverse actions will include the involuntary movement of an employee to a lower pay band, giving supervisors and managers another means of dealing with unacceptable performance.

These proposed regulations lay the foundation for a performance management system that is fair, credible, and transparent, and that holds employees, supervisors, and managers accountable for results. However, a performance management system is only as effective as its implementation and administration. To that end, DoD is committed to providing its employees, supervisors, and managers with extensive training on the new performance management system and its relationship to other HR policies and programs.

#### *Setting and Communicating Performance Expectations*

Supervisors and managers must establish performance expectations and communicate them to employees. Performance expectations must align with and support the DoD mission and goals. Performance expectations may take the form of goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level, and may include observable or verifiable descriptions of manner, quality, quantity, timeliness, and cost effectiveness. Performance expectations will be communicated to the employee prior to holding the employee accountable and promptly adjusted as changes occur.

Supervisors will involve employees in the planning process to the maximum extent practicable. In so doing employees will better understand the goals of the organization, what needs to be done, why it needs to be done, and how well it should be done. Final determinations in setting expectations, however, are within the authority of the supervisor.

#### *Monitoring Performance and Providing Feedback*

One of the main objectives of the pay-for-performance system is to replace the culture of pay-for-longevity with pay-for-results-driven performance. Over time, there should be individual distinctions based on performance, and high performers should receive more pay than average or low performers. Performance-based pay requires improved communication of expectations and performance feedback on the part of supervisors, since employees must understand what they have to do in order to receive higher ratings and increased pay. To achieve that objective, the proposed regulations require ongoing feedback with at least one interim performance review during each appraisal period.

### *Performance Rating Challenges*

The NSPS performance management system, even with its greater emphasis on communication and clarity of purpose, will result in questions and challenges, at least in the beginning. To be effective and allow for appropriate and reasonable rating adjustments, a process needs to be established for challenge purposes. Such a process will allow for the timely determination of rating adjustments, so that final pay adjustment determinations can be made.

As provided in subpart C of the proposed regulations, performance ratings of record will be used to make individual pay adjustments under the new DoD pay system. In recognition of this impact on pay, the regulations permit employees to request timely reconsideration of their ratings of record. Because of the unique nature of such challenges, the implementing issuances will prescribe a separate reconsideration process that will afford every employee an opportunity to seek appropriate redress.

### **Staffing and Employment—Subpart E**

In order to meet its critical mission requirements in a dynamic national security environment, the Department needs greater flexibility to attract, recruit, shape, and retain a high quality workforce. While preserving merit principles and veterans' preference requirements, subpart E of the proposed regulations provides DoD with an expanded set of flexible hiring tools to respond effectively to continuing mission changes and priorities. DoD managers will have greater flexibility in acquiring, advancing, and shaping a workforce tailored to the Department's needs. The new flexibilities provide DoD managers with a greater range of options to adapt their recruitment and hiring strategies to meet changing mission and organizational needs, including consideration of the nature and duration of work. The proposed regulations also address the need to compete for the best talent available by providing the Department with the ability to streamline and accelerate the recruitment process.

### *Definitions*

The proposed regulations simplify the categories of employment. Under NSPS, employees will be defined as either career or time-limited. Career employees serve without time limit in competitive or excepted service positions. Time-limited employees serve either for a specified duration (term) or for an unspecified, but limited duration (temporary). The proposed regulations

eliminate the category of "career-conditional employment;" under NSPS, those employees may be hired directly into the career service.

The proposed regulations redefine the terms "promotion" and "reassignment" to fit the NSPS pay banding environment. In addition, the regulations introduce a new term—"reduction in band"—that replaces "change to lower grade." Under pay banding, the GS grade structure is collapsed into fewer, broader salary ranges. Employees progress through those ranges based primarily on performance and job duties. Under NSPS, employees can also receive increased pay as a result of a reassignment within a pay band or promotion to a higher pay band, as provided in subpart C of these proposed regulations.

### *Appointing Authorities*

*Governmentwide Appointing Authorities.* Under the proposed regulations, the Department will continue to use excepted and competitive appointing authorities and entitlements under chapters 31 and 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes. Individuals hired under those authorities will be designated as career or time-limited employees, as appropriate.

*Additional NSPS Appointing Authorities.* Under the proposed regulations, the Secretary and the Director may establish new excepted and competitive appointing authorities for positions covered by NSPS. For any appointing authority that may result in entry into the competitive service, including excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service, DoD and OPM will jointly publish advance notice in the **Federal Register** and provide for a public comment period prior to establishing the authority. However, where DoD determines that it has a critical mission requirement, the Department and OPM may establish such an authority, upon notice in the **Federal Register** but without a preceding comment period. In addition, DoD and OPM may establish excepted appointing authorities for positions that are not in the competitive service without specific notice in the **Federal Register**. The proposed regulations require DoD to publish annually a list of appointing authorities created under this authority and remain in effect. DoD will prescribe appropriate implementing issuances to administer a new authority.

*Direct Hire Authority.* The proposed regulations authorize DoD to exercise direct hire authority, subject to existing legal and regulatory standards. DoD will prescribe implementing issuances to administer this authority, provide public notice in accordance with 5 U.S.C. 3304(a)(3)(A), inform OPM of all determinations made with respect to the exercise of this authority, and maintain appropriate records and documentation.

*Time-limited Appointing Authorities.* DoD may continue to use existing time-limited appointing authorities; however, the proposed regulations provide the Secretary (in coordination with OPM) with the authority to prescribe the duration of such appointments, advertising requirements, examining procedures, and the appropriate uses of time-limited employees. The Secretary may also establish procedures under which a time-limited employee who competed for and is serving in a competitive service position may be converted without further competition to the career service, but under the conditions specified in the proposed regulations.

### *Recruitment and Competitive Examining*

In order to increase the efficiency of the recruiting and hiring process without compromising merit principles, the proposed regulations allow DoD to target its recruiting strategy. DoD will provide public notice for all vacancies in the career service and accept applications from all sources; however, applicants from the local commuting area and other targeted sources may be considered first. If there are insufficient qualified candidates in the local commuting area, DoD may consider applicants from outside that area. The proposed regulations also extend examining authority to DoD, to be exercised in accordance with chapters 31 and 33 of title 5, U.S. Code. To exercise this authority, DoD will develop and coordinate examining procedures which will remain subject to OPM oversight. Examining procedures will adhere to the merit system principles in 5 U.S.C. 2301 and veterans' preference requirements set forth in 5 U.S.C. 3309 through 3320, as applicable, and will be available in writing for applicants to review.

### *Probationary Periods*

NSPS is a performance-based system; therefore, a critical first step is the ability to assess employees' performance during their initial entry into the Federal service and as they move to positions requiring markedly new skill sets. Employees' performance during

this time period usually serves as a good indication of how well they will perform throughout their career or as a supervisor. During this period, supervisors should provide assistance to help new employees improve their performance and, at the same time, determine whether or not the employee is suited for the position.

Under the proposed regulations, the Department may prescribe implementing issuances to establish probationary periods as deemed appropriate for certain categories of employees newly appointed to career service positions covered by NSPS. DoD will prescribe the conditions for such periods, including duration and creditable service, in implementing issuances. Employees who are separated during their initial probationary period receive limited appeal rights under subpart H of these proposed regulations; however, a preference eligible who has completed 1 year of creditable service has full appeal rights as provided by subparts G and H of these proposed regulations.

DoD may also prescribe in-service probationary periods for current Federal career employees who move into certain categories of positions. An employee who fails to complete the in-service probationary period will be returned to a position and rate of pay comparable to the position and rate of pay he or she held before the probationary period.

#### Workforce Shaping—Subpart F

Subpart F provides the Department with the authority to reduce, realign, and reorganize the Department's workforce in a manner consistent with a performance-based HR system. The proposed regulations retain existing veterans' preference protections in reduction in force (RIF). However, the proposed regulations do provide the Department with additional flexibilities to minimize disruption resulting from any reduction in force actions that take place.

For example, under current regulations, the minimum RIF competitive area (*i.e.*, the organizational and geographic boundaries in which employees compete for retention) is an organization with separate personnel administrative authority in a local commuting area. Under the proposed regulations the Department may establish a minimum RIF competitive area on the basis of one or more of the following factors: geographical location(s), line(s) of business, product line(s), organizational unit(s), and funding line(s). These factors provide the Department with additional flexibility to limit the impact of a

reduction in force upon its employees (*e.g.*, confining reduction in force actions only to positions directly impacted by a decision to realign the work of those positions to another facility). However, the proposed regulations prohibit the use of competitive areas to target an individual employee for RIF based on nonmerit factors.

The proposed regulations also simplify the RIF process. The first step in determining employees' retention rights under that process is to place employees in the appropriate tenure group (*i.e.*, a group of employees with a given appointment type). Current regulations provide for three tenure groups, including a tenure group comprised of employees serving on career-conditional appointments. The proposed regulations eliminate that tenure group and place all employees in one of two tenure groups: (1) career employees (including employees serving an initial probationary period) and (2) employees on term and comparable non-permanent appointments in a separate, lower tenure group.

The regulations also provide for "competitive groups" as a way of identifying those employees who will compete against one another for retention in a RIF, based on their ranking on a retention list (similar to a "retention register" under the present reduction in force regulations). Consistent with current regulations, the Department will continue to establish separate competitive groups for employees (1) in the excepted and competitive service, (2) under different excepted service appointment authorities, and (3) with different work schedules. The proposed regulations provide the Department with the flexibility to further define competitive groups on the basis of career group, pay schedule, occupational series or specialty, pay band, and/or trainee status. This new flexibility provides the Department with additional options to minimize disruption if a reduction in force is necessary.

Finally, the proposed regulations give greater emphasis to performance in RIF retention by placing performance ahead of length of service. Under current regulations performance is the least important factor. Under the proposed regulations, employees are placed on a competitive group's retention list in the following order: (1) Tenure group, (2) veterans' preference, (3) individual performance rating, and (4) length of service. As provided by current law, within each tenure group, the Department will list employees with a

compensable service-connected disability of 30 percent or more ahead of all other preference eligibles, and will list all other preference eligibles ahead of non-preference eligibles. Within a particular retention list, a qualified higher-standing employee may displace a lower-standing employee; when there are no lower-standing employees, the displaced employee may be released from the retention list and separated by reduction in force. Employees who are separated by reduction in force will continue to be eligible for the existing programs that provide hiring preferences and assistance for obtaining other employment.

#### Adverse Actions—Subpart G

The regulations propose several revisions and additions to the current adverse actions system. These changes are directed at the cumbersome and restrictive requirements for addressing and resolving unacceptable performance and misconduct. The proposed changes streamline the rules and procedures for taking adverse actions, to better support the mission of the Department while ensuring that employees receive due process and fair treatment guaranteed by the law authorizing the establishment of NSPS.

The following sections identify the major changes proposed by this subpart and briefly describe the purpose of each change.

##### 1. Actions and Employees Covered

Adverse actions include removals, suspensions of any length, furloughs of 30 days or less, reductions in pay, and reductions in pay band (or comparable reduction). Additionally, all actions currently excluded from coverage remain excluded. Subject to § 9901.102(b)(2), all DoD employees are eligible for coverage under subpart G, except where specifically excluded by law or regulation. Members of the National Security Labor Relations Board established in § 9901.907 are also excluded from coverage.

Employees who are serving a probationary period, as established under subpart E, are not covered by this subpart. However, employees who are removed during a probationary period are covered by the termination procedures found in 5 CFR 315.804 or 315.805. Preference eligible employees who are removed after completing 1 year of a probationary period are covered by the adverse action procedures of this subpart.

##### 2. Mandatory Removal Offenses

This subpart permits the Secretary to identify offenses that have a direct and

substantial adverse impact on the Department's national security mission. These offenses would carry a mandatory penalty of removal from Federal service. This proposed change allows management to act swiftly to address and resolve misconduct or unacceptable performance that would be most harmful to the Department's critical mission. These proposed mandatory removal offenses would be identified in advance and made known to all employees. Employees alleged to have committed these offenses will have the same MSPB appeal rights as provided other employees against whom appealable adverse actions are taken. However, only the Secretary may mitigate the penalty for committing a mandatory removal offense (MRO). The proposed MRO procedures include a requirement that a proposed notice of mandatory removal be issued only after approval by the Secretary. DoD has not yet identified a proposed list of such offenses. However, it is important to preserve the Secretary's flexibility to carefully and narrowly determine the offenses that will fall into this category and to make changes over time. The absence of this flexibility has been problematic at the Internal Revenue Service (IRS), where the IRS Restructuring Act codified mandatory disciplinary offenses in law and limited the agency's ability to make needed changes. The Department will identify and publish mandatory removal offenses through implementing issuances in advance of their application.

### 3. Adverse Action Procedures

This subpart retains an employee's right to representation and a written decision but provides shorter advance notice periods and reply periods than are currently required for appealable adverse actions. Employees are entitled to a minimum of 15 days advance notice and a minimum of 10 days to reply, which run concurrently. However, if there is a reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department will provide a minimum 5 days advance notice and opportunity to reply, which will run concurrently. These proposed changes facilitate timely resolution of adverse actions while preserving employee rights.

### 4. Single Process and Standard for Action for Unacceptable Performance and Misconduct

This subpart establishes a single system for taking adverse actions based on misconduct and/or unacceptable

performance. This proposed change represents a return to a simplified approach that existed prior to the 1978 passage of the Civil Service Reform Act and chapter 43 of title 5, U.S. Code.

Congress enacted chapter 43 in part to create a simple, dedicated process for agencies to use in taking adverse actions based on unacceptable performance. Since that time, however, chapter 43 has not worked as Congress intended. In particular, interpretations of chapter 43 have made it difficult for agencies to take actions against poor performers and to have those actions upheld. As a result, agencies have consistently preferred to use the procedures available under chapter 75 of title 5 rather than chapter 43 when taking actions for unacceptable performance.

The proposed regulations eliminate the requirement for a formal, set period for an employee to improve performance before management may take an adverse action. Management selects employees for their positions because the employees are well qualified. As set forth in proposed subpart D, management must explain to employees what is expected of them when it comes to performance. If an employee fails to perform at an acceptable level, management may use a variety of measures, including training, regular feedback, counseling and, at management's discretion, an improvement period, to address and resolve performance deficiencies. If an employee is still unable or unwilling to perform as expected, it is reasonable for management to take an action against the employee.

The proposed standard for taking an adverse action remains "for such cause as will promote efficiency of the service" as currently in title 5, U.S. Code.

### Appeals—Subpart H

Subpart H of part 9901 covers employee appeals of certain adverse actions taken under subpart G. Appealable actions include removals, suspensions for more than 14 days, furloughs, reductions in pay, or reductions in pay band (or comparable reduction). Suspensions of 14 days or less and other lesser disciplinary measures are not appealable to MSPB, but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable. Also, actions taken under DoD placement programs are not appealable to MSPB. Furthermore, employees who are removed during a probationary period are provided the appeal rights found in 5 CFR 315.806. Preference eligible

employees who are removed after completing 1 year of a probationary period are provided the appeal rights of this subpart.

Section 9902 of title 5, U.S. Code, requires that these appeal regulations provide DoD employees fair treatment, and are afforded the protections of due process. It provides employees the right to petition the full Merit Systems Protection Board for review of the record of a final Department decision. The law also provides that current legal standards and precedents applied by MSPB under 5 U.S.C., chapter 77, continue to apply, unless such standards and precedents are inconsistent with legal standards established under this subpart. These regulations state that in applying existing legal standards and precedents, MSPB is bound by the legal standard set forth in § 9901.107(a)(2), which provides that these regulations must be interpreted in a way that recognizes the critical national security mission of the Department, and each provision must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission as defined by the Secretary.

This subpart establishes procedures and timeframes for filing appeals with MSPB and modifies rules that MSPB will use to process appeals from DoD employees. These regulations are intended to ensure appropriate deference to the adverse actions taken by DoD and to streamline the way MSPB cases are handled while continuing to preserve and safeguard employee due process protections. In addition, they provide for an internal DoD review process of initial decisions issued by MSPB administrative judges.

The Secretary and the Director will conduct an ongoing evaluation of the DoD HR system to ensure that it is achieving its intended purposes. As part of this evaluation, the Department and OPM will pay particular attention to the adverse action and appeal procedures established by these regulations. As noted (and discussed in more detail below), those procedures continue to permit employees to appeal most adverse actions to MSPB, despite the fact that DoD and OPM could have established a separate appellate body for the initial review of all such actions, particularly "mandatory removal offenses."

In proposing these appellate procedures, the Secretary and the Director were especially mindful of 5 U.S.C. 9902(h)(1), which requires that the Secretary consult with MSPB on changes to chapter 77 of title 5. This requirement was met through consultations between members and

staffs of MSPB, DoD, and OPM. During those consultations, DoD and OPM officials described specific concerns with existing procedures and discussed the range of appellate options and alternatives that were under consideration. For their part, MSPB officials were particularly constructive in responding to those concerns, offering numerous suggestions to address them, including several modifications to their own rules and regulations, and expressing the intention to issue conforming regulations.

The appellate procedures below reflect many of those suggestions, as well as the constructive dialogue that gave rise to them. Indeed, the proposal to retain MSPB administrative judges was predicated on the results of that dialogue. However, the cumulative effect of these changes can be assessed only as they are actually implemented and administered by MSPB. Such an assessment will be undertaken by DoD and OPM after the Department has accumulated sufficient experience under NSPS.

### 1. Appeals to MSPB

These regulations retain MSPB administrative judges as the initial adjudicators of employee appeals of adverse actions. At the same time, these regulations propose new substantive standards that MSPB will apply to DoD cases to improve the appeals process and accommodate and support the agency's critical national security mission. These regulations also propose new case-handling procedures that MSPB will apply to facilitate the efficient and expeditious resolution of appeals.

We gave serious consideration to establishing a DoD internal appeals board to replace MSPB administrative judges. However, we concluded that the potential advantages of creating an internal DoD appeals board—greater efficiency of decision-making and deference to agency mission and operations, among them—could be achieved if MSPB administrative judges were retained as the initial adjudicators for adverse actions but with substantive and significant procedural modifications. In accordance with 5 U.S.C., section 9902, employees retain the right to petition the full Merit Systems Protection Board for review of the record of a final Department decision.

### 2. Department Review of Initial MSPB Administrative Judge Decisions

This subpart authorizes the Department to review initial decisions

of MSPB administrative judges (AJ). The authority provides that DoD may reconsider and affirm, remand, modify, or reverse an initial MSPB AJ decision for which a request for review (RFR) has been filed by either party concurrently with the full MSPB and the Department. DoD will promulgate implementing issuances that establish procedures for the submission of an RFR and review of an initial decision. The Department's review authority includes:

- Affirming an initial MSPB AJ decision where the Department determines that such decision shall serve as precedent.
- Remanding an initial MSPB AJ decision to the assigned AJ for further adjudication where the Department believes that there has been a material error of fact, or that there is new evidence material to the case.
- Modifying or reversing an initial MSPB AJ decision or an MSPB AJ decision on remand where the Department determines that (1) the decision has a direct and substantial adverse impact on the Department's national security mission, (2) the decision is based on an erroneous interpretation of law, this subpart, or Governmentwide rule or regulation, (3) the decision is based on a material error of fact, or (4) there is new evidence material to the case.

Either party who wishes to file a request for review (RFR) must file the RFR with the Department (and concurrently with the full MSPB) no later than 30 days after issuance of an initial MSPB AJ decision. If the Department intends to review an initial MSPB AJ decision, the Department must provide notice of its intent no later than 30 days after receipt of a timely filed RFR.

Any initial MSPB AJ decision for which an RFR has been filed (or any remand decision) that DoD affirms, modifies, or reverses will become the final Department decision. In such cases, the final Department decision is precedential unless otherwise determined by the Department or reversed or modified by the full MSPB. An employee or OPM may file a petition for review (PFR) to the full MSPB, and must file such petition within 30 days after issuance of the final Department decision.

Any initial MSPB AJ decision for which an RFR has been filed that DoD does not affirm, remand, modify, or reverse shall become the final Department decision. In such cases, the final Department decision is not precedential. The RFR will be processed as a PFR by the full MSPB.

Any initial MSPB AJ decision for which no RFR has been filed shall become the final Department decision. That decision is not precedential and may not be appealed to the full MSPB.

In authorizing establishment of a human resources management system under the National Security Personnel System Act (NSPS), Congress specifically required that the full MSPB may order corrective action as it considers appropriate only if MSPB determines that the final Department decision was: (a) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) obtained without procedures required by law, rule, or regulation having been followed; or (c) unsupported by substantial evidence. These standards are an adoption of the standards for judicial review of a final MSPB decision currently provided under 5 U.S.C. 7703. Although these standards are appropriate for judicial review, we believe they are too high for an administrative review of adverse actions. That is, such standards would significantly weaken the opportunity to correct an erroneous MSPB AJ decision, whether the employee or the Department petitions the correction. These regulations provide that the Department may review an initial MSPB AJ decision, and correct such decision as appropriate by applying a standard that provides for meaningful corrective action and preserves statutory requirements of fairness and due process.

The Department needs the authority to review initial MSPB AJ decisions to ensure that MSPB interprets NSPS and these regulations in a way that recognizes the critical mission of the Department; and to ensure that MSPB gives proper deference to such interpretation.

Notwithstanding the Department's need for review authority, that authority should not be unlimited. Therefore, as previously described, these regulations limit the Department's review to those initial MSPB AJ decisions for which either party has timely filed a request for review, and the authority to issue a final Department decision that modifies or reverses an initial MSPB AJ decision is limited by specific criteria set forth in these regulations.

### 3. Appeals of Mandatory Removal Offenses

An employee will be able to appeal a removal action to MSPB based on an MRO in substantially the same manner he or she will be able to appeal an adverse action, including removal, based on a non-MRO.

#### 4. MSPB Appellate Procedure Improvements

MSPB will have the authority to review and adjudicate actions covered by this subpart as prescribed in 5 U.S.C. 9902. These regulations propose to modify certain case processing rules, legal standards, and precedents. Current title 5 provisions and MSPB regulations will govern the initial review and adjudication of adverse action appeals, unless inconsistent with the modifications identified in this section. The modifications being made to current MSPB requirements will further the mission of DoD without impairing fair treatment and due process protections. Key procedural modifications include the following:

- When some or all material facts are not in genuine dispute, the AJ may limit the scope of the hearing, or issue a decision without a hearing.

- The appeal filing deadline, including the deadline for class appeals, is decreased from 30 days to 20 days.

- The administrative judge's initial decision must be made no later than 90 days after the date on which the appeal is filed.

- If the full MSPB reviews a final Department decision, either through an employee's petition for review or OPM intervention, the full MSPB must render its final decision no later than 90 days after the close of record. If OPM seeks reconsideration of a final MSPB decision or order, MSPB must render its decision no later than 60 days after receipt of the opposition to OPM's petition in support of such reconsideration.

- Currently, the parties to an appeal may submit unilateral requests for additional time to pursue discovery or settlement. The ability of the parties to unilaterally submit a request for case suspension is eliminated.

- The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion to MSPB, either party can seek to limit any discovery being sought because it is privileged; not relevant; unreasonably cumulative or duplicative; or can be secured from some other source that is more convenient, less burdensome, or less expensive. Discovery can also be limited through such a motion if the burden or expense of providing a response outweighs its benefit. Prior to filing such a motion with MSPB, the parties must confer and attempt to resolve any pending objections. When engaging in discovery, either party can submit only one set of interrogatories, requests for production, and requests for

admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts, and neither party may conduct/compel more than 2 depositions. However, either party may file a motion requesting additional discovery. Such a motion will be granted only if MSPB determines that necessity and good cause has been shown to justify additional discovery.

- An administrative judge may not grant interim relief or grant a stay of an action taken against an employee. Only the full MSPB may order interim relief or stay an adverse action following the final Department decision regarding the adverse action.

- Any response to a petition for review or a cross petition for review must be filed within 30 days after the date of service of the petition or cross petition.

All of these modifications will expedite and streamline the appeals process so that both employees and the Department will be able to resolve appeals more quickly and efficiently than is possible today. These regulations also retain due process protections—notice, an opportunity to respond, and a third-party review, either in person or on the record—for removal actions. These regulations provide the same procedural protections for all actions covered in subpart G. These regulations retain the statutory requirement that the appealability of a removal be unaffected by the individual's status under any retirement system.

Section 7701 of title 5, U.S. Code, currently authorizes the Director of OPM to intervene in an MSPB proceeding or to petition MSPB for review of a decision if the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, or regulation under OPM's jurisdiction. Given OPM's responsibility for Governmentwide personnel management, these regulations authorize OPM to intervene in such situations regardless of whether the law, rule or regulation is one that falls under OPM jurisdiction. These regulations provide that the Director may exercise this intervention authority after consultation with the Secretary.

#### 5. Standard of Proof

Currently, actions taken under chapter 75 are sustained if supported by a preponderance of the evidence, and performance actions taken under chapter 43 are sustained if supported by substantial evidence, a lower standard of proof than preponderance. In all cases arising under this subpart, dealing

either with performance or conduct, the Department's decision will be sustained if it is supported by a preponderance of the evidence. Changing the standard of proof to the single, higher standard regardless of the nature of the action simplifies the appeal process, and assures consistency without compromising fairness.

#### 6. Affirmative Defenses

Consistent with current law, the Department's action will not be sustained if MSPB determines that (1) a harmful procedural error occurred; (2) the decision was based on any prohibited personnel practice; or (3) the decision was not otherwise in accordance with law.

These regulations require the Department to prove by a preponderance of the evidence that an action taken against an employee promotes the efficiency of the service, but these regulations do not permit MSPB to reverse the action based on the way in which the charge is labeled or the misconduct is characterized. This will eliminate excessively technical pleading requirements in adverse action proceedings imposed by MSPB and the U.S. Court of Appeals for the Federal Circuit in *King v. Nazelrod*, 43 F.3d 663, and similar cases. As long as the employee is on notice of the facts sufficient to respond to the factual allegations of a charge, the Department will have complied with the notice and due process requirements of these regulations.

Moreover, MSPB may not reverse the Department's action based on the way a performance expectation is expressed, as long as the expectation would be clear to a reasonable person.

#### 7. Penalty Review

In cases involving a mandatory removal offense, the penalty selected by the Department may not be reduced or otherwise modified by MSPB. Only the Secretary may mitigate the penalty under these regulations.

In all other cases arising under this subpart, MSPB (as well as arbitrators) may mitigate penalties, but only under very limited circumstances. Because the Department bears full accountability for national security, it is in the best position to determine the most appropriate adverse action for unacceptable performance or misconduct. The Department's judgment in regard to penalty should be given deference. These regulations preclude mitigation of the penalty selected by DoD except where, after granting deference to the Department, a determination is made that the penalty

is so disproportionate to the basis for the action as to be wholly without justification.

This authority is significantly more limited than MSPB's current mitigation authority under the standard first enunciated in *Douglas v. Veterans Administration* (5 M.S.P.R. 280 (1981)). Under that decision, MSPB stated that it would evaluate agency penalties to determine not only whether they were too harsh or otherwise arbitrary but also whether they were unreasonable under all the circumstances. In practice, this has meant that MSPB has exercised considerable latitude in modifying agency penalties.

With this new, substantially more limited standard for MSPB mitigation of penalties selected by DoD, the intent is to explicitly restrict the authority of MSPB to modify those penalties to situations where there is simply no justification for the penalty. MSPB may not modify the penalty imposed by the Department unless such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, MSPB or an arbitrator may mitigate a penalty where not all of the charges are sustained. The third party's judgment is based on the justification for the penalty as it relates to the sustained charge(s). These regulations are intended to ensure that when a penalty is mitigated, the maximum justifiable penalty must be applied.

Nothing in these regulations would limit the Secretary's sole and exclusive authority to mitigate any penalty imposed on, or rescind any action taken against a DoD employee pursuant to subpart G.

#### 8. Attorney Fees

OPM and DoD have modified the current standard for recovering attorney fees. Under the current standard, the Department may be required to pay attorney fees based on facts that were not known to management when the action was taken. This is an unreasonable standard that can deter the Department from taking action in appropriate cases and has a chilling effect on the Department's ability to carry out its mission. Accordingly, the proposed regulations provide that a prevailing appellant may recover attorney fees if the Department's action was clearly without merit based upon facts known to management when the action was taken. The proposed regulations also continue to require attorney fees if a prohibited personnel practice was committed by the Department.

#### 9. Alternative Dispute Resolution

These regulations encourage the use of alternative dispute resolution (ADR) procedures and provide that ADR will be subject to collective bargaining to the extent permitted by subpart I, Labor-Management Relations. However, because ADR and settlement efforts are most successful when voluntary, these regulations prohibit MSPB from requiring ADR or settlement in connection with any action taken under this subpart. Once either party decides that settlement is not desirable, the matter will proceed to adjudication. Eliminating settlement efforts that are contrary to the expressed wishes of one or both of the parties will speed up the adjudication process and strengthen management decisionmaking authority.

Where the parties agree to engage in settlement discussions, the case will be assigned to an official specifically designated for that sole purpose, rather than the official responsible for adjudication. This is necessary to avoid actual or perceived conflicts of interest on the part of MSPB adjudicating officials.

#### 10. Discrimination Allegations

The proposed regulations do not alter the substance of existing law regarding actions involving discrimination. They preserve the rights of employees to obtain review of their discrimination claims by EEOC in "mixed cases," *i.e.*, cases that are appealable to MSPB involving allegations of discrimination, and they also preserve judicial review in such cases.

#### 11. Judicial Review

Decisions of MSPB are subject to review by the U.S. Court of Appeals for the Federal Circuit based on the same standard currently provided for in 5 U.S.C. 7703. As provided by 5 U.S.C. 9902(h)(6), the Secretary, after notifying the Director, may obtain judicial review of any final order or decision of the full MSPB under the same terms and conditions as provided an employee. Before seeking judicial review, the Secretary may seek reconsideration of a final MSPB decision.

#### 12. Savings Provision

These regulations clarify that this subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

### Labor-Management Relations—Subpart I

Congress recognized DoD's need for enhanced flexibilities to ensure mission accomplishment when it passed the

National Defense Authorization Act providing for the creation of the National Security Personnel System (NSPS). Such a system must be "flexible" and "contemporary," enabling a swift response to ever-changing national security threats. The labor-management relations regulations in this part are designed to meet these compelling concerns.

#### 1. Purpose

DoD's ability to carry out its mission swiftly and authoritatively is of paramount importance to national security. The DoD civilian workforce plays a critical role in the successful accomplishment of that mission. In authorizing the creation of the NSPS, Congress recognized that maintaining the status quo with respect to labor-management relations would not provide DoD with a workforce that is sufficiently agile and flexible to execute the current and future national security mission. Thus, it authorized the Secretary of Defense and the Director of the Office of Personnel Management to establish a labor-management relations system that addresses the unique role that the Department's civilian workforce has in supporting the Department's national security mission. See 5 U.S.C. 9902(m).

These regulations modify the provisions of 5 U.S.C. 7101 through 7135, unless noted otherwise in this subpart, and define the purpose of the labor-management relations system. They implement the requirements of 5 U.S.C. 9902 by ensuring the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, subject to the provisions of chapter 99 and any exclusion from coverage or limitation on negotiability established pursuant to law, rule, DoD issuance and any other legal authority, including the authority granted to DoD and OPM to promulgate these regulations.

#### 2. Definitions

These regulations keep intact a number of definitions provided for in chapter 71 of title 5, but those definitions have been edited where applicable to reflect references to the proposed regulations. For example, as a general matter, the term "agency," which is used throughout the definition section of chapter 71, has been replaced by the term "Department" and refers to the Department of Defense. The regulations adopt the following terms and their associated definitions from that chapter and apply them to DoD:

“Authority,” “dues,” “person,” and “professional employee.” To better fit the Department’s labor-management relations system, the regulations make substantive modifications to the following terms:

- *Collective bargaining* is modified to specifically identify the Department instead of the term agency in chapter 71 and to remove the term “consult” because consultation, under the proposed regulations, as well as under chapter 71, does not require that the parties reach an agreement;

- *Conditions of employment* is modified to exclude determinations regarding pay and pay adjustments, in addition to classification determinations;

- *Confidential employee* is modified to include those employees providing confidential support to an individual who formulates or effectuates management policies, not just those employees providing support to an individual who formulates or effectuates labor-management relations policies;

- *Grievance* is modified to limit grievances solely to those issues defined as conditions of employment.

Grievances regarding the application of laws, rules, regulations, and DoD issuances are limited to those issued for the purpose of affecting the working conditions of employees—not those that may do so indirectly or incidentally. To this extent, DoD and OPM adopt the D.C. Circuit’s interpretation in *U.S. Dep’t of Treasury, U.S. Customs Service v. FLRA*, 43 F.3d 682 (1994), of what constitutes a “grievance;”

- *Management official* is modified to include individuals who have the authority to recommend actions, if the exercise of the authority is not merely routine or clerical in nature; and

- *Supervisor* is modified to include employees who supervise military members of the armed services.

The following terms have been added because of their significance to the NSPS system:

- *Board* refers to the newly established National Security Labor Relations Board (NSLRB);

- *Component* was added to clarify that the Secretary determines which organizations within DoD are considered components for purposes of this subpart;

- *Consult* was added as a distinct and separate method for considering the interests, opinions, and recommendations of a recognized labor organization. Consultation can be accomplished in face-to-face meetings or through other means such as teleconferencing or written communications;

- *DoD issuance or issuances* identifies the types of documents that are considered issuances; and

- *Grade* is defined to clarify its usage under various job grading and position classification systems.

### 3. Coverage

Employees, who would otherwise be covered by chapter 71, except as modified by this subpart, are covered under the NSPS labor-management relations system.

### 4. Impact on Existing Agreements

In order to ensure consistent application of DoD issuances, as well as this part and its implementing issuances, provisions of collective bargaining agreements that conflict with this part and/or such issuances are unenforceable as of the effective date of this part or such issuances. If the union believes that management has inappropriately found contract provisions unenforceable, it may appeal such decisions to the National Security Labor Relations Board. While as a general matter, contract provisions that conflict with the provisions of these regulations and their implementing issuances are unenforceable, the Secretary may allow for the continuance of all or part of such provisions. Where contract provisions conflict with these regulations or their implementing issuances, the parties, upon request by the exclusive representative, will have 60 days to bring the remaining negotiable terms directly affected by the regulations into conformance.

### 5. Employee Rights

This section of the regulations parallels the provisions contained in 5 U.S.C. 7102. Covered employees, as defined in the regulations, will have the right to form, join, or assist any labor organization, or to refrain from such activity. Each employee will be protected in the exercise of any rights under the regulations through procedures established in this subpart.

### 6. National Security Labor Relations Board

The Department will create a National Security Labor Relations Board (NSLRB) composed of at least three members appointed to fixed terms. The Secretary will appoint the members, with one member appointed from a list developed in consultation with the Director of OPM. Members will be independent, distinguished citizens known for their integrity, impartiality and expertise in labor relations and/or the DoD mission, and/or relevant national security matters. The NSLRB must interpret the

regulations in subpart I and related decisions and policies in a way that recognizes the critical mission of the Department and the need for flexibility.

The NSLRB’s decisions are subject to limited review by the Authority, and subsequent judicial review under the rules established in 5 U.S.C. 7123. Excluded from NSLRB review are arbitration exceptions involving adverse actions appealable under subpart H of this part or 5 U.S.C. chapters 43 and 75. While the Department may issue interim rules for the NSLRB, the NSLRB will ultimately prescribe its own rules and publish them in the **Federal Register**.

In evaluating the merits of a separate National Security Labor Relations Board that would largely replace FLRA, with its Governmentwide responsibilities, DoD and OPM put a high premium on the opportunity to establish an NSLRB whose members would have a deep understanding of and appreciation for the unique challenges the Department faces in carrying out its national security mission. To ensure independence and impartiality, the DoD NSLRB members will be appointed to fixed terms and be subject to the same criteria for removing members of the Authority and MSPB, *i.e.*, inefficiency, neglect of duty, or malfeasance.

DoD and OPM considered splitting jurisdiction for adjudicating certain labor disputes between FLRA and the NSLRB. The proposed regulations give the NSLRB jurisdiction for all such disputes, except those involving questions of representation, to ensure consistent application of the NSPS labor relations system as well as to minimize various forums for addressing matters stemming from a single incident. Thus, the NSLRB will issue decisions on unfair labor practices, to include scope of bargaining, duty to bargain in good faith, and information requests; certain arbitration exceptions; negotiation impasses; and questions regarding national consultation rights. However, DoD and OPM specifically solicit comments on other alternatives, such as requiring (or entering into a service level agreement with) FLRA or some other organization to provide investigative and other services, subject to these regulations.

Both the NSLRB and FLRA must interpret the regulations in subpart I in a way that promotes the swift, flexible and effective, day-to-day accomplishment of the Department’s mission as defined by the Secretary. The NSLRB is authorized to issue advisory opinions on important issues of law that are binding on the parties. These opinions will help both labor and management understand how key

provisions of the regulations will be interpreted without the time and expense of years of litigation.

Matters that come before the NSLRB may be reviewed *de novo*, which means that the NSLRB will have the discretion to reevaluate the evidence presented by the record and reach its own independent conclusions with respect to the matters at issue. Under chapter 71, FLRA reviews issues of law *de novo*. The Board will have the same authority, but it may also employ a *de novo* review to factual findings and contract interpretation. Given the inherently executive branch nature of decisions relating to national security and the Department's unique responsibilities in this area, the Board is authorized to conduct a thorough review of all matters, including factual determinations by its adjudicators or arbitrators, to safeguard the Department's national security mission.

#### 7. Management Rights

To carry out its national security mission, the Department must have the authority to take actions quickly when circumstances demand; it must be able to develop and rapidly deploy resources to confront threats in an ever-changing national security environment; and it must be able to act without unnecessary delay.

Actions such as these involve the exercise of management's reserved rights and lie at the very core of how DoD carries out its mission. Under chapter 71 of title 5, the obligation to notify the union well ahead of any changes in the workplace and complete all negotiations *before* making any changes can seriously impede the Department's ability to meet mission demands. To ensure that the Department has the flexibility it needs, the Department and OPM propose to revise the management rights provisions of chapter 71. Expanding the list of nonnegotiable subjects in section 7106 to include what are now permissive subjects of bargaining—the numbers, types, and grades of employees and the technology, methods, and means of performing work—is proposed. The proposed regulations prohibit bargaining over the exercise of these rights and over other rights enumerated in chapter 71, including the right to determine mission, budget, organization, and internal security practices, and the right to hire, assign and direct employees, and contract out.

In addition, the proposed regulations prohibit bargaining over the procedures management will follow in the exercise of certain of its rights—to determine the mission, budget, organization, number

of employees, and internal security practices of the Department; to hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, pay schedules, pay bands and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission. The Department can take action in any of these areas without advance notice to the union.

The Department will bargain over procedures and appropriate arrangements management will follow in the exercise of certain other rights—to lay off and retain employees, or to suspend; remove; reduce in pay, pay band, or grade; or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source—as provided for in these regulations. This bargaining may be prospective, that is, after management has exercised such right. Where management is not required to negotiate over procedures stemming from the exercise of its rights, the proposed regulations provide a mechanism for obtaining an exclusive representative's views and recommendations regarding such procedures.

#### 8. Exclusive Recognition of Labor Organizations

Election procedures for determining exclusive representatives have not changed from the requirements of chapter 71.

#### 9. Determination of Appropriate Units for Labor Organization Representation

In determining appropriate bargaining units, FLRA will continue to apply the same factors set forth under chapter 71. However, in applying these criteria, the proposed regulations require FLRA to apply them consistent with the Department's mission, organizational structure, and the requirements of § 9901.107(a). Using this standard will help align the Department's bargaining units as closely as possible with the agency's mission and organizational structure.

Besides requiring consideration of the Department's mission and organizational structure in determining appropriate units, the proposed regulations exclude additional categories of employees from coverage. Supervisors of military members of the armed services are excluded from coverage because they engage in supervisory functions and their inclusion in bargaining units creates a conflict of interest. The tasks associated with supervision do not change based on the type of person supervised. Employees engaged in all types of personnel work are also excluded from the unit. This is a change from the current law, which allows employees engaged in personnel work of a purely clerical capacity to be included in a bargaining unit. The regionalization of DoD's personnel functions has made the clerical nature of personnel work a false distinction for bargaining unit membership. Those individuals are now, and will continue to be, frequently called upon to provide advice and guidance to management officials on personnel functions. Additionally, these individuals have direct access to all confidential personnel records and discussions. By including these individuals in bargaining units, a conflict of interest exists such that management officials risk compromising confidential management information when seeking or accepting guidance from personnelists within the personnel office. Further, inclusion of clerical personnelists in the bargaining unit prohibits the personnel officer from using his or her full staff in areas that are vital to the efficient accomplishment of the mission. The removal of these positions will eliminate unnecessary administrative disputes. Finally, this section removes attorney positions from bargaining unit coverage. Supervisors and managers must be assured that communications with attorneys are confidential and unbiased. These communications often go to the heart of the managerial function and thus inclusion of attorneys in the bargaining unit creates at a minimum the perception of a conflict of interest.

#### 10. National Consultation

The Department and Components will conduct national consultation over substantive changes in conditions of employment generated by the Department or the Component with those unions holding national consultation rights. National consultation is not required where national level bargaining has occurred or where the continuing collaboration procedures of 9901.105 apply. Nothing

in this section precludes management from seeking the views of other labor organizations not holding national consultation rights, nor does the conduct of national consultation eliminate any local labor relations obligations.

#### 11. Representation Rights and Duties

As in chapter 71, these proposed regulations provide that recognized unions are the exclusive representatives of the employees in the unit and act for and negotiate on their behalf, consistent with law and regulation.

Under current law, a union has the right to send a representative to a formal discussion ("formal meetings") called by management to discuss general working conditions with employees. Determining what is and is not a formal discussion, as FLRA and courts have interpreted that term, requires managers to balance numerous factors concerning the relative formality of the meeting and the precise subject matter discussed. Because of the complicated and confusing criteria, front-line managers and supervisors are often reluctant to hold discussions with employees concerning everyday workplace issues, which can affect work unit effectiveness and efficiency and inhibit communication and problem solving.

The proposed language redefines formal discussions as discussions or announcements of new or substantially changed personnel policies, practices, or working conditions. It specifically excludes discussions on operational matters where discussions do not involve the establishment of new policies or practices.

An exclusive representative is entitled to attend discussions regarding grievances filed under its negotiated grievance procedure. Moreover, these proposed regulations resolve any uncertainty resulting from litigation about whether unions have an institutional right to be present during EEO proceedings, to include mediation efforts, after a formal EEO complaint has been filed or other matters appealed by employees. Under these proposed regulations, unions do not have such a right unless the complainant raises the matter in the negotiated grievance procedures.

Where an employee elects to use a procedure outside the negotiated grievance procedure (such as EEO), the employee has the choice of personal representatives (including, at the employee's option, a union official acting as personal representative). However, the union has no institutional right to represent the employee or attend meetings related to the resolution

of the employee's issues. Where a resolution impacts the bargaining unit as a whole, the union will be fully advised and afforded the opportunity to exercise applicable rights. This change strikes an appropriate balance between the union's institutional rights and employee privacy and, with regard to complaint processes other than negotiated grievance procedures.

The proposed regulations also preserve what has come to be known as the "Weingarten" right, which permits union representation at the employee's request when management examines an employee during an investigation and the employee reasonably believes that discipline will follow. However, the proposed regulations exclude investigations conducted by the Offices of the Inspectors General and other independent Department or Component investigatory organizations, such as U.S. Army Criminal Investigation Command and the Air Force Office of Special Investigations; "Weingarten" representation rights do not apply in such investigations. These exclusions were identified to ensure that independent bodies can conduct truly independent investigations. Further, this change ensures that investigations involving criminal matters are not affected by unnecessary delay, harm to the integrity of the investigation, or issues of confidentiality.

Under these regulations, the Department will hold employee representatives to the same conduct requirements as any other DoD employees. The proposed regulations clarify that the Department may address the misconduct of any employee, including employees acting as union representatives, as long as the agency does not treat employees more severely because they are engaging in union activity. The Department will no longer be bound by FLRA's "flagrant misconduct" standard or any other test developed through case decisions which may immunize union representatives engaged in otherwise actionable misconduct. However, the proposed regulation is not intended to target the content of ideas.

This section also retains the requirement that the parties are to negotiate in good faith and approach negotiations with a sincere resolve to reach a collective bargaining agreement. Such agreements will be subject to agency head review as currently provided in chapter 71.

Under chapter 71, a union has the right to information maintained by the agency if the information is necessary and relevant to the union's representational responsibilities. This

right is maintained with some modifications in these regulations. Under these regulations, disclosure of information is not required if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without recourse to the information. This change also relieves management of the unnecessary administrative burden of producing information that can readily be obtained some other way and recognizes technological advances in information access and sharing. The proposed regulations further provide that information may not be disclosed if an authorized official determines that disclosure would compromise the Department's mission, security, or employee safety.

The regulations specify that sensitive information such as personal addresses, personal telephone numbers, personal e-mail addresses, or any other information not related to an employee's work, may not be disclosed. While this is not a change in existing statutory interpretation, it is necessary to specify these limitations in the proposed regulations, given the extremely sensitive nature of the Department's mission and the serious consequences if such information were deliberately or inadvertently disclosed to an inappropriate source.

In recognition of the foregoing duties of the union, the regulations preserve the official time provisions in chapter 71. In so doing, we have clarified that, consistent with current law, official time is not permitted for representational duties outside the exclusive representative's bargaining unit. However, we have provided an exception for multi-unit bargaining and bargaining above the level of exclusive recognition, subject to mutual agreement of the parties. Current chapter 71 authorizations and requirements concerning allotments also are retained in this section.

#### 12. Unfair Labor Practices

Management's unfair labor practices (ULPs) remain almost identical to those contained in chapter 71. One major difference is the elimination of 7116(a)(7), which provided that it is a ULP to enforce a rule or regulation, which is in conflict with a collective bargaining agreement if the agreement was in effect prior to the issuance of the rule or regulation. Such action is no longer a ULP because the proposed regulations provide that law, Governmentwide rules and regulations,

Presidential issuances, and DoD issuances will supersede current collective bargaining agreements where the terms conflict. This includes Department issuances in existence prior to the effective date of these regulations. There is no significant change to the union ULPs contained in chapter 71.

### 13. Duty To Bargain and Consult

In order to ensure a consistent approach to managing the Department within a multi-union, multi-bargaining unit environment, the proposed regulations specify that there is no duty to bargain over DoD issuances (which includes Component issuances). In addition, management has no obligation to bargain over changes to conditions of employment unless the change is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change. Typically, where a change in conditions of employment is of duration shorter than the bargaining process associated with that change, or where it affects a minimal number of employees, there is no bargaining obligation associated with that change. This regulatory change will focus bargaining on those matters that are of significant concern and impact and relieve the parties of potentially lengthy negotiations over matters that are limited in scope and effect.

If parties bargain over an initial term agreement or its successor and do not reach agreement within 90 days, the parties may agree to continue bargaining after the 90-day period or either party may refer the matter to the NSLRB for impasse resolution. Mid-term bargaining over proposed changes in conditions of employment must be completed within 30 days or management will be able to implement the change after notifying the union. Either party may refer the matter to the NSLRB for impasse resolution after the 30-day period. The obligation to bargain, however, does not prevent management from exercising its management rights identified in § 9901.910.

### 14. Multi-Unit Bargaining

A number of installations and organizations within the Department of Defense have multiple bargaining units. When a change is needed affecting the entire installation, management must engage in as many negotiations as there are units. This is unnecessarily time consuming and frequently results in numerous variations to a single policy. In order to expedite negotiations and ensure consistent application of the policy, management may require multi-

unit bargaining over particular issues. Such negotiations will be binding on all parties requested to participate in the negotiations and supersede any conflicting provisions in current negotiated agreements or past practices. Such agreements will not be subject to ratification as such efforts contradict the basis for such negotiations: Timely, uniform application of policies. These negotiations are subject to the impasse resolution procedures of the NSLRB. Additional instructions and requirements associated with multi-unit bargaining will be issued in Department implementing issuances. Unions may request to negotiate multi-unit agreements; however, the Department has sole and exclusive authority to grant the labor organizations' requests.

### 15. Collective Bargaining Above the Level of Recognition

This section describes procedures associated with negotiations above the level of exclusive recognition. The decision to negotiate at this level rests with the Secretary and is not subject to review or statutory third-party dispute resolution procedures. Such negotiations are subject to impasse resolution by the NSLRB and any agreement reached will be binding on all subordinate bargaining units and Components of the Department. Such agreements supersede conflicting provisions of existing collective bargaining agreements. Any agreement reached will not be subject to ratification as this unnecessarily delays implementation. Representatives participating in these negotiations are expected to come to the table with authority to bind their respective parties. These agreements, however, are subject to agency head review to ensure compliance with applicable law, rule, and regulation. Unions may request to negotiate at a level above recognition; however, the Department has sole and exclusive discretion to grant the labor organizations' requests.

Negotiations above the level of recognition will not apply to the National Guard Bureau and the Army and Air Force National Guard. Where these organizations are impacted by an agreement negotiated above the level of recognition, they may negotiate at the level of recognition, as provided in this subchapter.

### 16. Grievance Procedures

As a result of the decision of the Federal Circuit Court of Appeals in *Mudge v. U.S.*, 308 F.3d 1220 (Fed. Cir. 2002), DoD and OPM propose to modify 5 U.S.C. 7121(a)(1) by removing the term "administrative" from the second

sentence of that subsection. In so doing, the proposed regulations make it clear that the negotiated grievance procedure is the only authorized procedure for resolving issues under its exclusive coverage. This modification is consistent with the Federal Circuit's decision in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), interpreting 5 U.S.C. 7121(a)(1) prior to its amendment in 1994. Under the regulations, matters excluded from the grievance procedure under 5 U.S.C. 7121(c) will remain excluded from coverage. The regulations codify the well-established interpretation that classification determinations are excluded from coverage. In addition, given the changes to the HR system, the proposed regulations exclude three additional matters from the negotiated grievance procedure—pay, ratings of record issued under subpart D of these regulations, and mandatory removal actions.

The Department recognizes that employees covered by subpart D should have a way to challenge ratings of record to ensure such ratings are accurate reflections of employees' performance and the performance management system is credible and transparent. Therefore, in subpart D of these proposed regulations, the Department and OPM have provided for the development of a formal process whereby employees covered by subpart D may seek reconsideration of their ratings of record issued under this system. Similarly, subpart H provides a procedure for seeking redress of removals based on mandatory removal offenses for employees covered by that subpart.

The proposed regulations continue to provide for arbitration of adverse actions that are otherwise appealable to MSPB. However, where a party covered by subpart H seeks review of an arbitrator's award involving an appealable matter, the arbitrator's award will be treated in the same manner as an initial decision by an MSPB AJ under procedures provided in that subpart; this allows an arbitrator's decision to be appealed to the full MSPB for review, rather than to the Federal Circuit directly.

### 17. Exceptions to Arbitration Awards

Exceptions to arbitrators' awards, except those involving appealable actions under subpart G, are filed with the NSLRB. As noted, exceptions involving appealable actions are filed either with the Federal Circuit or MSPB, as applicable, according to coverage under subpart H. In addition to bases contained in 5 U.S.C. 7122, exceptions may also be filed based on the

arbitrator's failure to properly consider the Department's national security mission or to comply with applicable NSPS regulations and DoD issuances. In reviewing exceptions, the NSLRB may determine its own jurisdiction without regard to whether any party has raised a jurisdictional issue.

#### 18. Savings Provisions

Where a grievance or other administrative proceeding was already pending on the date of coverage of this subpart, the grievance or proceeding will continue to be processed in accordance with the rules under which it was initially filed. However, any remedy issued must be in compliance with the applicable provisions of this part.

#### Next Steps

The National Defense Authorization Act for Fiscal Year 2004 provides that the development and implementation of a new HR system for DoD will be carried out with the participation of, and in collaboration with, employee representatives. The Secretary and the Director must provide employee representatives with a written description of the proposed new or modified HR system. The description contained in this **Federal Register** notice satisfies this requirement. The Act further provides that employee representatives must be given 30 calendar days to review and make recommendations regarding the proposal. Any recommendations must be given full and fair consideration. If the Secretary and Director do not accept one or more recommendations, they must notify Congress of the disagreement and then meet and confer with employee representatives for at least 30 calendar days in an effort to reach agreement. The Federal Mediation and Conciliation Service may provide assistance at the Secretary's option, or if requested by a majority of employee representatives who have made recommendations.

If there is no objection to or recommendation on a proposal, it may be implemented immediately. Similarly, when the Secretary and the Director accept any recommendation from employee representatives, the revised proposal may be implemented immediately. If the Secretary and the Director do not fully accept a recommendation, the Secretary may implement the proposal (including any modifications made in response to the recommendations) at any time after 30 calendar days have elapsed since the initiation of congressional notification, consultation, and mediation procedures.

To proceed with implementation in this circumstance, the Secretary must determine (in his/her sole and unreviewable discretion) that further consultation and mediation are unlikely to produce agreement. The Secretary must notify Congress promptly of the implementation of any such contested proposal.

The Secretary and the Director must develop a method under which each employee representative may participate in any further planning or development in connection with implementation of a proposal. Also, the Secretary and the Director must give each employee or representative adequate access to information to make that participation productive.

DoD plans to make the new labor relations provisions effective 30 days after the issuance of final regulations, and notification to Congress as required by the law. At this time, DoD intends to implement the new HR system in phases, or spirals. The tentative schedule for implementing the spirals is outlined as follows:

- In the first spiral, up to 300,000 General Schedule (GS and GM), Acquisition Demonstration Project, and certain alternative personnel system employees will be brought into the system through incremental deployments.
- After the assessment cycle and certification of the performance management system are completed, the second spiral will be deployed.
- Spiral two will consist of Federal Wage System employees, overseas employees, and all other eligible employees.

#### E.O. 12866, Regulatory Review

DoD and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is a significant public interest in revisions of the Federal employment system. DoD and OPM have analyzed the expected costs and benefits of the proposed HR system to be adopted for DoD, and that analysis is presented below.

Among the NSPS design requirements is to build a system that is competitive, cost effective, and fiscally sound, while also being flexible, credible, and trusted. NSPS will bring many flexibilities and modern HR practices, including a movement towards market sensitive pay, pay increases based on performance rather than the passage of time, and the flexibility to offer competitive salaries. This requires striking a balance among the values of pay flexibility, valuing high performance, fiscal constraint, and

credibility. While these flexibilities will improve DoD's ability to attract and retain a high-performing workforce, it is expected that actual payroll costs under this system will be constrained by the amount budgeted for overall DoD payroll expenditures, as is the case with the present GS pay system. DoD anticipates that accessions, separations, and promotions will net out and, as with the present system, not add to the overall cost of administering the system.

The implementation of NSPS will, however, result in some initial implementation costs, which can be expressed in two basic categories: (1) Program implementation costs and (2) NSLRB startup costs. The program implementation category refers to the costs associated with designing and implementing the system. This includes establishing and funding the operations of the Program Executive Office, executing the system design process, developing and delivering new training specifically for NSPS, conducting outreach to employees and other parties, engaging in collaboration activities with employee representatives, and modifying automated human resources information systems, including personnel and payroll transaction processing systems. In the areas of training and HR automated systems, the costs associated with implementing NSPS will not be extensive, since DoD has significant training and IT infrastructures in place for current operations. DoD will not have to build new systems or delivery mechanisms, but rather will modify existing systems and approaches to accommodate changes brought about by NSPS. The other cost category refers to the cost to establish the proposed National Security Labor Relations Board. This includes typical organizational stand-up costs, as well as staffing the NSLRB with members and a professional staff. It is expected that the NSLRB will develop streamlined processes and procedures and leverage existing infrastructures and technology to minimize startup and sustainment costs.

As has been the practice with implementing other alternative personnel systems, DoD expects to incur an initial payroll cost related to the conversion of employees to the pay banding system. This is often referred to as a within-grade increase (WGI) "buyout," in which an employee's basic pay, upon conversion, is adjusted by the amount of the WGI earned to date. While this increase is paid earlier than scheduled, it represents a cost that would have been incurred under the current system at some point. However, under the NSPS proposed regulations,

WGIs no longer exist; once under NSPS, such pay increases will be based on performance. Accordingly, the total cost of the accelerated WGI “buyout” should not be treated as a “new” cost attributed to implementation of NSPS, since it is a cost that DoD would bear under the current HR system in the absence of NSPS authority and implementing regulations. The portion of the WGI buyout cost attributable to NSPS implementation is the marginal difference between paying out the earned portion of a WGI upon conversion and the cost of paying the same WGI according to the current schedule. In the absence of NSPS, WGIs would be spread out over time instead of being paid “up front.” The marginal cost of the accelerated payment of earned WGIs is difficult to estimate, but is not a significant factor in the benefit cost analysis for regulatory review purposes.

DoD estimates the overall costs associated with implementing the new DoD HR system—including the development and implementation of a new human resources management system and the creation of the NSLRB—will be approximately \$158M through FY 2008. Less than \$100 million will be spent in any 12-month period.

The primary benefit to the public of this new system resides in the HR flexibilities that will enable DoD to attract, build, and retain a high-performing workforce focused on effective and efficient mission accomplishment. A performance-based pay system that rewards excellent performance will result in a more qualified and proficient workforce and will generate a greater return on investment in terms of productivity and effectiveness. It is also expected that new flexibilities and improved processes in labor management relations, adverse actions, and appeals will result in more efficient and faster resolution of workplace and labor disputes, timelier and less costly bargaining processes, and quicker implementation of workplace changes needed to carry out the national security mission of the Department, while preserving basic employee rights. Taken as a whole, the changes included in these proposed regulations will result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and supports the primary mission of DoD.

#### **Regulatory Flexibility Act**

DoD and OPM have determined that these regulations would not have a significant economic impact on a substantial number of small entities

because they would apply only to Federal agencies and employees.

#### **Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)**

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### **E.O. 12988, Civil Justice Reform**

This proposed regulation is consistent with the requirements of E.O. 12988. The regulation clearly specifies the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

#### **E.O. 13132, Federalism**

DoD and OPM have determined these proposed regulations would not have federalism implications because they would apply only to Federal agencies and employees. The proposed regulations would not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

#### **Unfunded Mandates**

These proposed regulations would not result in the expenditure by State, local, or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

#### **List of Subjects in 5 CFR Part 9901**

Administrative practice and procedure, Government employees, Labor management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Department of Defense.

#### **Donald Rumsfeld,**

*Secretary.*

Office of Personnel Management.

#### **Kay Coles James,**

*Director.*

Accordingly, under the authority of section 9902 of title 5, United States Code, the Department of Defense and the Office of Personnel Management are proposing to amend title 5, Code of Federal Regulations, by establishing chapter XCIX consisting of part 9901 as follows:

## **CHAPTER XCIX—DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL SYSTEM (DEPARTMENT OF DEFENSE—OFFICE OF PERSONNEL MANAGEMENT)**

### **PART 9901—DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL SYSTEM**

#### **Subpart A—General Provisions**

Sec.

- 9901.101 Purpose.
- 9901.102 Eligibility and coverage.
- 9901.103 Definitions.
- 9901.104 Scope of authority.
- 9901.105 Coordination with OPM.
- 9901.106 Continuing collaboration.
- 9901.107 Relationship to other provisions.
- 9901.108 Program evaluation.

#### **Subpart B—Classification**

##### **General**

- 9901.201 Purpose.
- 9901.202 Coverage.
- 9901.203 Waivers.
- 9901.204 Definitions.

##### **Classification Structure**

- 9901.211 Career groups.
- 9901.212 Pay schedules and pay bands.

##### **Classification Process**

- 9901.221 Classification requirements.
- 9901.222 Reconsideration of classification decisions.

##### **Transitional Provisions**

- 9901.231 Conversion of positions and employees to the NSPS classification system.

#### **Subpart C—Pay and Pay Administration**

##### **General**

- 9901.301 Purpose.
- 9901.302 Coverage.
- 9901.303 Waivers.
- 9901.304 Definitions.

##### **Overview of Pay System**

- 9901.311 Major features.
- 9901.312 Maximum rates.
- 9901.313 National security compensation comparability.

##### **Setting and Adjusting Rate Ranges**

- 9901.321 Structure.
- 9901.322 Setting and adjusting rate ranges.
- 9901.323 Eligibility for pay increase associated with a rate range adjustment.

##### **Local Market Supplements**

- 9901.331 General.
- 9901.332 Local market supplements.
- 9901.333 Setting and adjusting local market supplements.
- 9901.334 Eligibility for pay increase associated with a supplement adjustment.

##### **Performance-Based Pay**

- 9901.341 General.
- 9901.342 Performance payouts.
- 9901.343 Pay reduction based on unacceptable performance and/or conduct.

- 9901.344 Other performance payments.  
9901.345 Treatment of developmental positions.

#### Pay Administration

- 9901.351 Setting an employee's starting pay.  
9901.352 Setting pay upon reassignment.  
9901.353 Setting pay upon promotion.  
9901.354 Setting pay upon reduction in band.  
9901.355 Pay retention.  
9901.356 Miscellaneous.

#### Premium Pay

- 9901.361 General.

#### Conversion Provisions

- 9901.371 General.  
9901.372 Creating initial pay ranges.  
9901.373 Conversion of employees to the NSPS pay system.

#### Subpart D—Performance Management

- 9901.401 Purpose.  
9901.402 Coverage.  
9901.403 Waivers.  
9901.404 Definitions.  
9901.405 Performance management system requirements.  
9901.406 Setting and communicating performance expectations.  
9901.407 Monitoring performance and providing feedback.  
9901.408 Developing performance and addressing poor performance.  
9901.409 Rating and rewarding performance.

#### Subpart E—Staffing and Employment

##### General

- 9901.501 Purpose.  
9901.502 Scope of authority.  
9901.503 Coverage.  
9901.504 Definitions.

##### External Recruitment and Internal Placement

- 9901.511 Appointing authorities.  
9901.512 Probationary periods.  
9901.513 Qualification standards.  
9901.514 Non-citizen hiring.  
9901.515 Competitive examining procedures.  
9901.516 Internal placement.

#### Subpart F—Workforce Shaping

- 9901.601 Purpose and applicability.  
9901.602 Scope of authority.  
9901.603 Definitions.  
9901.604 Coverage.  
9901.605 Competitive area.  
9901.606 Competitive group.  
9901.607 Retention standing.  
9901.608 Displacement, release, and position offers.  
9901.609 Reduction in force notices.  
9901.610 Voluntary separation.  
9901.611 Reduction in force appeals.

#### Subpart G—Adverse Actions

##### General

- 9901.701 Purpose.  
9901.702 Waivers.  
9901.703 Definitions.  
9901.704 Coverage.

#### Requirements for Removal, Suspension, Furlough of 30 Days or Less, Reduction in Pay, or Reduction in Band (or Comparable Reduction)

- 9901.711 Standard for action.  
9901.712 Mandatory removal offenses.  
9901.713 Procedures.  
9901.714 Proposal notice.  
9901.715 Opportunity to reply.  
9901.716 Decision notice.  
9901.717 Departmental record.

#### Savings Provision

- 9901.721 Savings provision.

#### Subpart H—Appeals

- 9901.801 Purpose.  
9901.802 Applicable legal standards and precedents.  
9901.803 Waivers.  
9901.804 Definitions.  
9901.805 Coverage.  
9901.806 Alternative dispute resolution.  
9901.807 Appellate procedures.  
9901.808 Appeals of mandatory removal actions.  
9901.809 Actions involving discrimination.  
9901.810 Savings provision.

#### Subpart I—Labor-Management Relations

- 9901.901 Purpose.  
9901.902 Scope of authority.  
9901.903 Definitions.  
9901.904 Coverage.  
9901.905 Impact on existing agreements.  
9901.906 Employee rights.  
9901.907 National Security Labor Relations Board.  
9901.908 Powers and duties of the Board.  
9901.909 Powers and duties of the Federal Labor Relations Authority.  
9901.910 Management rights.  
9901.911 Exclusive recognition of labor organizations.  
9901.912 Determination of appropriate units for labor organization representation.  
9901.913 National consultation.  
9901.914 Representation rights and duties.  
9901.915 Allotments to representatives.  
9901.916 Unfair labor practices.  
9901.917 Duty to bargain and consult.  
9901.918 Multi-unit bargaining.  
9901.919 Collective bargaining above the level of recognition.  
9901.920 Negotiation impasses.  
9901.921 Standards of conduct for labor organizations.  
9901.922 Grievance procedures.  
9901.923 Exceptions to arbitration awards.  
9901.924 Official time.  
9901.925 Compilation and publication of data.  
9901.926 Regulations of the Board.  
9901.927 Continuation of existing laws, recognitions, agreements, and procedures.  
9901.928 Savings provisions.

Authority: 5 U.S.C. 9902.

#### Subpart A—General Provisions

##### § 9901.101 Purpose.

(a) This part contains regulations governing the establishment of a new human resources management system

within the Department of Defense (DoD), as authorized by 5 U.S.C. 9902. These regulations waive or modify various statutory provisions that would otherwise be applicable to affected DoD employees. These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM).

(b) The system established under this part is designed to meet a number of essential requirements for the implementation of a new human resources management system for DoD. The guiding principles for establishing these requirements are to put mission first; respect the individual; protect rights guaranteed by law, including the statutory merit system principles; value talent, performance, leadership, and commitment to public service; be flexible, understandable, credible, responsive, and executable; ensure accountability at all levels; balance human resources system interoperability with unique mission requirements; and be competitive and cost effective. The key operational characteristics and requirements of NSPS, which these regulations are designed to facilitate, are as follows: *High Performing Workforce and Management*—employees and supervisors are compensated and retained based on their performance and contribution to mission; *Agile and Responsive Workforce and Management*—workforce can be easily sized, shaped, and deployed to meet changing mission requirements; *Credible and Trusted*—system assures openness, clarity, accountability, and adherence to the public employment principles of merit and fitness; *Fiscally Sound*—aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance; *Supporting Infrastructure*—information technology support, and training and change management plans are available and funded; and *Schedule*—NSPS will be operational and demonstrate success prior to November 2009.

##### § 9901.102 Eligibility and coverage.

(a) Pursuant to the provisions of 5 U.S.C. 9902, all civilian employees of DoD are eligible for coverage under one or more of subparts B through I of this part, except to the extent specifically prohibited by law.

(b) At his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(b)—

(1) Establish the effective date for applying subpart I of this part to all eligible employees in accordance with 5 U.S.C. 9902(m); and

(2) With respect to subparts B through H of this part, apply these subparts to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902. However, no category of employees may be covered by subparts B, C, E, F, G, or H of this part unless that category is also covered by subpart D of this part.

(c) Until the Secretary makes a determination under paragraph (b) of this section to apply the provisions of one or more subparts of this part to a particular category or categories of eligible employees in organizations and functional units, those employees, will continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DoD employees will be based on the Federal laws and regulations applicable to them on the effective date of the action.

(d) Any new NSPS classification, pay, or performance management system covering Senior Executive Service (SES) members will be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance framework authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable implementing regulations issued by OPM. If the Secretary determines that SES members employed by DoD should be covered by classification, pay, or performance management provisions that differ substantially from the Governmentwide SES pay-for-performance framework, the Secretary and the Director will issue joint regulations consistent with all of the requirements of 5 U.S.C. 9902.

(e) At his or her sole and exclusive discretion, the Secretary may rescind the application under paragraph (b) of this section of one or more subparts of this part to a particular category of employees and prescribe implementing issuances for converting that category of employees to coverage under applicable title 5 or other applicable provisions. DoD will notify affected employees and labor organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f)(1) Notwithstanding any other provision of this part, but subject to the following conditions, the Secretary may, at his or her sole and exclusive discretion, apply one or more subparts of this part as of a specific effective date to a category of employees in organizations and functional units not currently eligible for coverage because of coverage under a system established

by a provision of law outside the waivable or modifiable chapters of title 5, U.S. Code, if the provision of law outside those waivable or modifiable title 5 chapters provides discretionary authority to cover employees under a given waivable or modifiable title 5 chapter or to cover them under a separate system established by the Department.

(2) In applying paragraph (f)(1) of this section with respect to coverage under subparts B and C of this part, the affected employees will be converted directly to the DoD NSPS pay system from their current pay system. The Secretary may establish conversion rules for these employees similar to the conversion rules established under § 9901.373.

#### § 9901.103 Definitions.

In this part:

*Band* means *pay band*.

*Basic pay* means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by law or regulation. For the specific purposes prescribed in § 9901.332(c), basic pay includes any local market supplement.

*Career group* means a grouping of one or more associated or related occupations. A career group may include one or more pay schedules.

*Competencies* means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics that an individual needs to perform a particular job or job function successfully.

*Contribution* means a work product, service, output, or result provided or produced by an employee or group of employees that supports the Departmental or organizational mission, goals, or objectives.

*Day* means a calendar day.

*Department or DoD* means the Department of Defense.

*Director* means the Director of the Office of Personnel Management.

*Employee* means an employee within the meaning of that term in 5 U.S.C. 2105.

*Furlough* means the placement of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

*General Schedule or GS* means the General Schedule classification and pay system established under chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code.

*Implementing issuances* means documents issued at the Departmental level by the Secretary to carry out any policy or procedure established in

accordance with this part. These issuances may apply Department-wide or to any part of DoD as determined by the Secretary at his or her sole and exclusive discretion.

*Mandatory removal offense (MRO)* means an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department's national security mission.

*National Security Personnel System (NSPS)* means the human resources management system authorized by 5 U.S.C. 9902(a). It may also refer to the labor relations system authorized by 5 U.S.C. 9902(m).

*Occupational series* means a group or family of positions performing similar types of work. Occupational series are assigned a number for workforce information purposes (for example: 0110, Economist Series; 1410, Librarian Series).

*OPM* means the Office of Personnel Management.

*Pay band or band* means a work level and associated pay range within a pay schedule.

*Pay schedule* means a set of related pay bands for a specified category of employees within a career group.

*Performance* means accomplishment of work assignments or responsibilities and contribution to achieving organizational goals, including an employee's behavior and professional demeanor (actions, attitude, and manner of performance), as demonstrated by his or her approach to completing work assignments.

*Promotion* means the movement of an employee from one pay band to a higher pay band under DoD implementing issuances. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a higher level of work in NSPS.

*Rating of record* means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) As needed to reflect a substantial and sustained change in the employee's performance since the last rating of record as provided in DoD implementing issuances.

*Reassignment* means the movement of an employee from his or her position of record to a different position or set of duties in the same or a comparable pay band under DoD implementing issuances on a permanent or temporary/time-limited basis. This includes the movement of an employee between

positions at a comparable level of work in NSPS and a non-NSPS Federal personnel system.

*Reduction in band* means the voluntary or involuntary movement of an employee from one pay band to a lower pay band under DoD implementing issuances. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a lower level of work in NSPS.

*Secretary* means the Secretary of Defense.

*SES* means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

*SL/ST* refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term "SL" identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term "ST" identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

*Unacceptable performance* means the failure to meet one or more performance expectations.

#### **§ 9901.104 Scope of authority.**

The authority for this part is 5 U.S.C. 9902. The provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9902:

(a) Chapters 31, 33, and 35, dealing with staffing, employment, and workforce shaping (as authorized by 5 U.S.C. 9902(k));

(b) Chapter 43, dealing with performance appraisal systems;

(c) Chapter 51, dealing with General Schedule job classification;

(d) Chapter 53, dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees;

(e) Chapter 55, subchapter V, dealing with premium pay, except section 5545b;

(f) Chapter 71, dealing with labor relations (as authorized by 5 U.S.C. 9902(m));

(g) Chapter 75, dealing with adverse actions and certain other actions; and

(h) Chapter 77, dealing with the appeal of adverse actions and certain other actions.

#### **§ 9901.105 Coordination with OPM.**

(a) As specified in paragraphs (b) through (e) of this section, the Secretary will advise and/or coordinate with OPM in advance, as applicable, regarding the

proposed promulgation of certain DoD implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Such pre-decisional coordination is intended as an internal DoD/OPM matter to recognize the Secretary's special authority to direct the operations of the Department of Defense pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system pursuant to 5 U.S.C. chapter 11.

(b) DoD will advise OPM in advance regarding the extension of specific subparts of this part to specific categories of DoD employees under § 9901.102(b).

(c) Subpart B of this part authorizes DoD to establish and administer a position classification system and classify positions covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing or substantially revising career groups, occupational pay schedules, and pay bands under §§ 9901.211 and 9901.212(a);

(2) Establishing alternative or additional qualification standards for a particular occupational series, career group, occupational pay schedule, and/or pay band under § 9901.212(d) or 9901.513 that significantly differ from Governmentwide standards;

(3) Establishing alternative or additional occupational series for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide series and/or standards;

(4) Establishing alternative or additional classification standards for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide classification standards; and

(5) Establishing the process by which DoD employees may request reconsideration of DoD classification decisions by the Department under § 9901.222, to ensure compatibility between DoD and OPM procedures.

(d) Subpart C of this part authorizes DoD to establish and administer a compensation system for employees of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing maximum rates of basic pay and aggregate pay under § 9901.312 that exceed those established under 5 U.S.C. chapter 53;

(2) Establishing and adjusting pay ranges for occupational pay schedules

and pay bands under §§ 9901.321(a), 9901.322(a) and (b), and 9901.372;

(3) Establishing and adjusting local market supplements under §§ 9901.332(a) and 9901.333;

(4) Establishing alternative or additional local market areas under § 9901.332(b) that differ from those established for General Schedule employees under 5 CFR 531.603;

(5) Establishing policies regarding starting rates of pay for newly appointed or transferred employees under §§ 9901.351 through 9901.354 and pay retention under § 9901.355;

(6) Establishing policies regarding premium pay under § 9901.361 that differ from those that exist in Governmentwide regulations; and

(7) Establishing policies regarding the student loan repayment program under § 9901.303(c) that differ from Governmentwide policies with respect to repayment amounts, service commitments, and reimbursement.

(e) Subpart E of this part authorizes DoD to establish and administer authorities for the examination and appointment of employees to certain organizational elements of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to establishing alternative or additional examining procedures under § 9901.515 that differ from those applicable to the examination of applicants for appointment to the competitive and excepted service under 5 U.S.C. chapters 31 and 33, except as otherwise provided by subpart E of this part.

(f) When a matter requiring OPM coordination is submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/nonconcurrency into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of its effective date. Thereafter, the Secretary and the Director may take such action(s) as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

(g) The Secretary and the Director fully expect their staffs to work closely together on the matters specified in this section, before such matters are submitted for official OPM coordination and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

**§ 9901.106 Continuing collaboration.**

(a) *Continuing collaboration with employee representatives.* (1) In accordance with 5 U.S.C. 9902, this section provides employee representatives with an opportunity to participate in the development of Department-level implementing issuances that carry out the provisions of this part. This process is not subject to the requirements established by subpart I of this part, including but not limited to §§ 9901.910 (regarding the exercise of management rights), 9901.916(a)(5) (regarding enforcement of the duty to consult or negotiate), 9901.917 (regarding the duty to bargain and consult), and 9901.920 (regarding impasse procedures).

(2)(i) For the purpose of this section, the term “employee representatives” includes representatives of labor organizations with exclusive recognition rights for units of DoD employees, as determined pursuant to subpart I of this part.

(ii) The Secretary, at his or her sole and exclusive discretion, may determine the number of employee representatives to be engaged in the continuing collaboration process.

(iii) Each national labor organization with multiple collective bargaining units accorded exclusive recognition will determine how its units will be represented within the limitations imposed by the Secretary under paragraph (a)(2)(ii) of this section.

(3)(i) Within timeframes specified by the Secretary, employee representatives will be provided with an opportunity to submit written comments to, and to discuss their views with, DoD officials on any proposed final draft implementing issuances.

(ii) To the extent that the Secretary determines necessary, employee representatives will be provided with an opportunity to discuss their views with DoD officials and/or to submit written comments, at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives.

(4) Employee representatives will be provided with access to information to make their participation in the continuing collaboration process productive.

(5) Any written comments submitted by employee representatives regarding proposed final draft implementing issuances will become part of the record and will be considered before a final decision is made.

(6) Nothing in the continuing collaboration process will affect the right of the Secretary to determine the

content of implementing issuances and to make them effective at any time.

(b) *Continuing collaboration with other interested organizations.* The Secretary may also establish procedures for continuing collaboration with appropriate organizations that represent the interests of a substantial number of nonbargaining unit employees.

**§ 9901.107 Relationship to other provisions.**

(a)(1) The provisions of title 5, U.S. Code, are waived, modified, or replaced to the extent authorized by 5 U.S.C. 9902 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical national security mission of the Department. Each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary. The interpretation of the regulations in this part by DoD and OPM must be accorded great deference.

(b) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this section) or in DoD implementing issuances. Applications of this rule include, but are not limited to, the following:

(1) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (*i.e.*, chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 of title 5, U.S. Code), DoD employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DoD employees (notwithstanding coverage under subparts B through I of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521 through 4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b;

(iii) Recruitment, relocation, and retention payments under 5 U.S.C. 5753 through 5754; and

(iv) Physicians' comparability allowances under 5 U.S.C. 5948.

(2) In applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart H of this part (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9901.807(h).

(3) In applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart I of this part (dealing with labor relations), the reference in section 5596(b)(5) to section 7116 (dealing with unfair labor practices) is considered to be a reference to a modified section 7116 that is consistent with § 9901.916.

(c) Law enforcement officer special rates and geographic adjustments under sections 403 and 404 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101–509) do not apply to employees who are covered by an NSPS classification and pay system established under subparts B and C of this part.

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d). Employees and applicants for employment in DoD will continue to be covered by EEOC's Federal sector regulations found at 29 CFR part 1614.

**§ 9901.108 Program evaluation.**

(a) DoD will establish procedures for evaluating the regulations in this part and their implementation. DoD will provide designated employee representatives with an opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluations.

(b) Involvement in the evaluation process does not waive the rights of any party under applicable law or regulations.

**Subpart B—Classification****General****§ 9901.201 Purpose.**

(a) This subpart contains regulations establishing a classification structure and rules for covered DoD employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51 and the job grading system in 5 U.S.C. chapter 53, subchapter IV, in accordance with the merit principle that equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and

appropriate incentives and recognition should be provided for excellence in performance.

(b) Any classification system prescribed under this subpart will be established in conjunction with the pay system described in subpart C of this part.

#### **§ 9901.202 Coverage.**

(a) This subpart applies to eligible DoD employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(5) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

#### **§ 9901.203 Waivers.**

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 and 5 U.S.C. 5346 are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §§ 9901.107, and 9901.222(d) (with respect to OPM's authority under 5 U.S.C. 5112(b) and 5346(c) to act on requests for review of classification decisions).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS-15, is not waived for the purpose of defining and allocating senior executive service positions under 5 U.S.C. 3132 and 3133 or applying provisions of law outside the waivable and modifiable chapters of title 5, U.S. Code—*e.g.*, 5 U.S.C. 4507 and 4507a (regarding Presidential rank awards) and 5 U.S.C. 6303(f) (regarding annual leave accrual for members of the SES and employees in SL/ST positions).

#### **§ 9901.204 Definitions.**

In this subpart:

*Band* means *pay band*.

*Basic pay* has the meaning given that term in § 9901.103.

*Career group* has the meaning given that term in § 9901.103.

*Classification*, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, career group, pay schedule, and pay band for pay and other related purposes.

*Competencies* has the meaning given that term in § 9901.103.

*Occupational series* has the meaning given that term in § 9901.103.

*Pay band* or *band* has the meaning given that term in § 9901.103.

*Pay schedule* has the meaning given that term in § 9901.103.

*Position* or *job* means the duties, responsibilities, and related competency requirements that are assigned to an employee whom the Secretary approves for coverage under § 9901.202(a).

#### **Classification Structure**

##### **§ 9901.211 Career groups.**

For the purpose of classifying positions, DoD may establish career groups based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. DoD will document in implementing issuances the criteria and rationale for grouping occupations or positions into career groups.

##### **§ 9901.212 Pay schedules and pay bands.**

(a) For purposes of identifying relative levels of work and corresponding pay ranges, DoD may establish one or more pay schedules within each career group.

(b) Each pay schedule may include two or more pay bands.

(c) DoD will document in implementing issuances the definitions for each pay band which specify the type and range of difficulty and responsibility; qualifications or competencies; or other characteristics of the work encompassed by the pay band.

(d) DoD will designate qualification standards and requirements for each career group, occupational series, pay schedule, and/or pay band, as provided in § 9901.514.

#### **Classification Process**

##### **§ 9901.221 Classification requirements.**

(a) DoD will develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and DoD will make such descriptions and documentation available to affected employees.

(b) DoD will—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105 and 5346, or by DoD; and

(2) Apply the criteria and definitions required by §§ 9901.211 and 9901.212 to assign jobs to an appropriate career group, pay schedule, and pay band.

(c) DoD will establish procedures for classifying jobs and may make such inquiries of the duties, responsibilities, and qualification requirements of jobs as it considers necessary for the purpose of this section.

(d) Classification decisions become effective on the date an authorized official approves the classification. Except as provided for in § 9901.222(b), such decisions will be applied prospectively and do not convey any retroactive entitlements.

##### **§ 9901.222 Reconsideration of classification decisions.**

(a) An individual employee may request that DoD or OPM reconsider the classification (*i.e.*, pay system, career group, occupational series, pay schedule, or pay band) of his or her official position of record at any time.

(b) DoD will establish implementing issuances for reviewing requests for reconsideration. Such issuances will include a provision stating that a retroactive effective date may be required only if the employee is wrongfully reduced in band.

(c) An employee may request OPM to review a DoD determination made under paragraph (a) of this section. If an employee does not request an OPM reconsideration decision, DoD's classification determination is final and not subject to further review or appeal.

(d) OPM's final determination on a request made under this section is not subject to further review or appeal.

(e) Any determination made under this section will be based on criteria issued by DoD or, where DoD has adopted an OPM classification standard, criteria issued by OPM.

#### **Transitional Provisions**

##### **§ 9901.231 Conversion of positions and employees to the NSPS classification system.**

(a) This section describes the transitional provisions that apply when DoD positions and employees are converted to a classification system established under this subpart. Affected positions and employees may convert from the GS system, a prevailing rate system, the SL/ST system, the SES system, or such other DoD systems as may be designated by the Secretary, as provided in § 9901.202. For the purpose

of this section, the terms “convert,” “converted,” “converting,” and “conversion” refer to positions and employees that become covered by the NSPS classification system as a result of a coverage determination made under § 9901.102(b)(2) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the DoD system.

(b) DoD will issue implementing issuances prescribing policies and procedures for converting DoD employees to a pay band upon initial implementation of the NSPS classification system. Such procedures will include provisions for converting an employee who is retaining a grade under 5 U.S.C. chapter 53, subchapter VI, immediately prior to conversion. As provided in § 9901.373, DoD will convert employees to the system without a reduction in their rate of pay (including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, or local market supplement under § 9901.332).

### Subpart C—Pay and Pay Administration

#### General

#### § 9901.301 Purpose.

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902. Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DoD.

(b) Any pay system prescribed under this subpart will be established in conjunction with the classification system described in subpart B of this part.

(c) Any pay system prescribed under this subpart will be established in conjunction with the performance management system described in subpart D of this part.

#### § 9901.302 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by the

General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III;

(2) Employees and positions who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(5) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) This section does not apply in determining coverage under § 9901.361 (dealing with premium pay).

#### § 9901.303 Waivers.

(a) When a specified category of employees is covered under this subpart—

(1) The provisions of 5 U.S.C. chapter 53 are waived with respect to that category of employees, except as provided in § 9901.107 and paragraphs (b) through (c) of this section; and

(2) The provisions of 5 U.S.C. chapter 55, subchapter V (except section 5545b), are waived with respect to that category of employees to the extent provided by the Secretary when approving coverage under § 9901.361.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived:

(1) Sections 5311 through 5318, dealing with Executive Schedule positions;

(2) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. chapter 74 to DoD employees in health care positions covered by section 5371 in lieu of any NSPS pay system established under this subpart or the following provisions of title 5, U.S. Code: chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to “chapter 51” in section 5371 is deemed to include a classification system established under subpart B of this part; and

(3) Section 5377, dealing with the critical pay authority.

(c) Section 5379 is modified. DoD may establish and administer a student loan repayment program for DoD employees, except that DoD may not make loan payments for any noncareer appointee in the SES (as defined in 5 U.S.C. 3132(a)(7)) or for any employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating

character. Notwithstanding § 9901.302(a), any DoD employee otherwise covered by section 5379 is eligible for coverage under the provisions established under this paragraph, subject to a determination by the Secretary under § 9901.102(b)(2).

#### § 9901.304 Definitions.

In this part:

*Band* means *pay band*.

*Band rate range* means the range of rates of basic pay (excluding any local market supplements) applicable to employees in a particular pay band, as described in § 9901.321. Each band rate range is defined by a minimum and maximum rate.

*Basic pay* has the meaning given that term in § 9901.103.

*Bonus* means an element of the performance payout that consists of a one-time lump-sum payment made to employees. It is not part of basic pay.

*Career group* has the meaning given that term in § 9901.103.

*Competencies* has the meaning given that term in § 9901.103.

*Contribution* has the meaning given that term in § 9901.103.

*Contribution assessment* means the determination made by the pay pool manager as to the impact, extent, and scope of contribution that the employee's performance made to the accomplishment of the organization's mission and goals.

*CONUS* or *Continental United States* means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

*Extraordinary pay increase* or *EPI* means a discretionary basic pay increase to reward an employee at the highest performance level who has been assigned the maximum number of shares available under the rating and contribution scheme when the payout formula does not adequately compensate them for the employee's extraordinary performance and contribution, as described in § 9901.344(b).

*Local market supplement* means a geographic- and occupation-based supplement to basic pay, as described in § 9901.332.

*Modal rating* means the rating of record that occurs most frequently in a particular pay pool level.

*Pay band* or *band* has the meaning given that term in § 9901.103.

*Pay pool* means the organizational elements/units or other categories of employees that are combined for the purpose of determining performance payouts. Each employee is in only one pay pool at a time. *Pay pool* also means the dollar value of the funds set aside

for performance payouts for employees covered by a pay pool.

*Pay schedule* has the meaning given that term in § 9901.103.

*Performance* has the meaning given that term in § 9901.103.

*Performance payout* means the total monetary value of performance pay increase and bonus resulting from the performance appraisal process and contribution assessment.

*Performance share* means a unit of performance payout awarded to an employee based on performance. Performance shares may be awarded in multiples commensurate with the employee's performance and contribution rating level.

*Performance share value* means a calculated value for each performance share based on pay pool funds available and the distribution of performance shares across employees within a pay pool, expressed as a percentage or fixed dollar amount.

*Promotion* has the meaning given that term in § 9901.103.

*Rating of record* has the meaning given that term in § 9901.103.

*Reassignment* has the meaning given that term in § 9901.103.

*Reduction in band* has the meaning given that term in § 9901.103.

*Unacceptable performance* has the meaning given that term in § 9901.103.

## Overview of Pay System

### § 9901.311 Major features.

Through the issuance of implementing issuances, DoD will establish a pay system that governs the setting and adjusting of covered employees' rates of pay and the setting of covered employees' rates of premium pay. The NSPS pay system will include the following features:

(a) A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322;

(c) Policies regarding the setting and adjusting of local market supplements to basic pay based on local labor market conditions and other factors, as described in §§ 9901.331 through 9901.333;

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§ 9901.323 and 9901.334;

(e) Policies regarding performance-based pay, as described in §§ 9901.341 through 9901.345;

(f) Policies on basic pay administration, including movement between career groups; positions, pay schedules, and pay bands, as described in §§ 9901.351 through 9901.356;

(g) Linkages to employees' performance ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in § 9901.361.

### § 9901.312 Maximum rates.

The Secretary will establish limitations on maximum rates of basic pay and aggregate pay for covered employees.

### § 9901.313 National security compensation comparability.

(a) To the maximum extent practicable, for fiscal years 2004 through 2008, the overall amount allocated for compensation of the DoD civilian employees who are included in the NSPS may not be less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS, based on a minimum—

(1) The number and mix of employees in such organizational or functional units prior to conversion of such employees to the NSPS; and

(2) Adjustments for normal step increases and rates of promotion that would have been expected, had such employees remained in their previous pay schedule.

(b) To the maximum extent practicable, DoD implementing issuances for the NSPS will provide a formula for calculating the overall amount to be allocated for fiscal years beyond fiscal year 2008 for compensation of the civilian employees included in the NSPS. The formula will ensure that in the aggregate employees are not disadvantaged in terms of the overall amount of pay available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization and other changed circumstances that might impact pay levels.

(c) For the purpose of this section, "compensation" for civilian employees means basic pay and any geographic-based payments that are basic pay for retirement purposes (e.g., NSPS local market supplements).

## Setting and Adjusting Rate Ranges

### § 9901.321 Structure.

(a) DoD may establish ranges of basic pay for pay bands, with minimum and maximum rates set and adjusted as provided in § 9901.322.

(b) For each pay band within a career group, DoD will establish a common rate range that applies in all locations.

### § 9901.322 Setting and adjusting rate ranges.

(a) Within its sole and exclusive discretion, DoD may, subject to § 9901.105(d)(2), set and adjust the rate ranges established under § 9901.321. In determining the rate ranges, DoD may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) DoD may determine the effective date of newly set or adjusted band rate ranges.

(c) DoD may establish different rate ranges and provide different rate range adjustments for different pay bands.

(d) DoD may adjust the minimum and maximum rates of a pay band by different percentages.

### § 9901.323 Eligibility for pay increase associated with a rate range adjustment.

(a) Except for employees receiving a retained rate under § 9901.355, employees with a current rating of record above "unacceptable" will receive a percentage increase in basic pay equal to the percentage by which the minimum of their rate range is increased.

(b) Employees with a current rating of record of "unacceptable" will not receive a pay increase under this section.

(c) For employees who do not have a current rating of record, DoD will determine the amount of any pay increase associated with a rate range adjustment in accordance with implementing issuances.

## Local Market Supplements

### § 9901.331 General.

The basic pay ranges established under §§ 9901.321 through 9901.323 may be supplemented in appropriate circumstances by local market supplements, as described in §§ 9901.332, 9901.333, and 9901.334. These supplements are expressed as a percentage of basic pay and are set and adjusted as described in § 9901.333. As authorized by § 9901.355, DoD implementing issuances will determine the extent to which §§ 9901.332 through 9901.334 apply to employees receiving a retained rate.

**§ 9901.332 Local market supplements.**

(a) For each band rate range, DoD may establish local market supplements that apply in specified local market areas. Local market supplements apply to employees whose official duty station is located in the given area. DoD may provide different local market supplements for different career groups or for different occupations and/or pay bands within the same career group in the same local market area.

(b) For the purpose of establishing and modifying local market areas, 5 U.S.C. 5304 is not waived. A DoD decision to use the local market area boundaries based on locality pay rates established under 5 U.S.C. 5304 does not require separate DoD regulations. DoD may, in accordance with 5 U.S.C. 553, issue regulations that establish and adjust different local market areas within CONUS or establish and adjust new local market areas outside CONUS. As provided by 5 U.S.C. 5304(f)(2)(B), judicial review of any DoD regulation regarding the establishment or adjustment of local market areas is limited to whether or not the regulation was promulgated in accordance with 5 U.S.C. 553.

(c) Local market supplements are considered basic pay for only the following purposes:

(1) Retirement under 5 U.S.C. chapter 83 or 84;

(2) Life insurance under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority, including this subpart;

(4) Severance pay under 5 U.S.C. 5595;

(5) Cost-of-living allowances and post differentials under 5 U.S.C. 5941;

(6) Overseas allowances and differentials under 5 U.S.C. chapter 59, subchapter III, to the extent authorized by the Department of State;

(7) Other payments and adjustments authorized under this subpart as specified by DoD implementing issuances;

(8) Other payments and adjustments under other statutory or regulatory authority that are basic pay for the purpose of locality-based comparability payments under 5 U.S.C. 5304;

(9) Determining the rate of basic pay upon conversion to the NSPS pay system as provided in § 9901.373(b); and

(10) Any provisions for which DoD local market supplements are treated as basic pay by law.

**§ 9901.333 Setting and adjusting local market supplements.**

(a) Within its sole and exclusive discretion, DoD may, subject to § 9901.105(d)(3), set and adjust local market supplements. In determining the amounts of the supplements, DoD will consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C. chapter 59, and any other relevant factors.

(b) DoD may determine the effective date of newly set or adjusted local market supplements. Established supplements will be reviewed for possible adjustment at least annually in conjunction with rate range adjustments under § 9901.322.

**§ 9901.334 Eligibility for pay increase associated with a supplement adjustment.**

(a) When a local market supplement is adjusted under § 9901.333, employees to whom the supplement applies with a current rating of record above "unacceptable" will receive any pay increase resulting from that adjustment.

(b) Employees with a current rating of record of "unacceptable" will not receive a pay increase under this section.

(c) For employees who do not have a current rating of record, DoD will determine the amount of any pay increase under this section in accordance with implementing issuances.

**Performance-Based Pay****§ 9901.341 General.**

Sections 9901.342 through 9901.345 describe the performance-based pay that is part of the pay system established under this subpart. These provisions are designed to provide DoD with the flexibility to allocate available funds to employees based on individual, team, or organizational performance as a means of fostering a high-performance culture that supports mission accomplishment.

**§ 9901.342 Performance payouts.**

(a) *Overview.* (1) The NSPS pay system will be a pay-for-performance system and, when implemented, will result in a distribution of available performance pay funds based upon individual performance, individual contribution, organizational performance, or a combination of those elements. The NSPS pay system will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The performance payout is a function of the amount of money in the performance pay pool and

the number of shares assigned to individual employees.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period, except that if an appropriate rating official determines that an employee's current performance is inconsistent with that rating, that rating official may prepare a more current rating of record, consistent with § 9901.409(b). Unless otherwise provided in implementing issuances, if an employee is not eligible to have a rating of record for the current rating cycle for reasons other than those identified in paragraphs (f) and (g), such employee will not be eligible for a pay increase or bonus payment under this part.

(b) *Performance pay pools.* (1) DoD will issue implementing issuances for the establishment and management of pay pools for performance payouts.

(2) DoD may determine a percentage of pay to be included in pay pools and paid out in accordance with accompanying DoD implementing issuances as—

- (i) A performance-based pay increase;
- (ii) A performance-based bonus; or
- (iii) A combination of a performance-based pay increase and a performance-based bonus.

(c) *Performance shares.* (1) DoD will issue implementing issuances regarding the assignment of a number or range of shares for each rating of record level, subject to paragraph (c)(2) of this section. Performance shares will be used to determine performance pay increases and/or bonuses.

(2) Employees with unacceptable ratings of record will be assigned zero shares.

(d) *Performance payout.* (1) DoD will establish a methodology that authorized officials will use to determine the value of a performance share. A performance share may be expressed as a percentage of an employee's rate of basic pay (exclusive of local market supplements under § 9901.332) or as a fixed dollar amount, or both.

(2) To determine an individual employee's performance payout, DoD will multiply the share value determined under paragraph (d)(1) of this section by the number of performance shares assigned to the employee.

(3) DoD may provide for the establishment of control points within a band that limit increases in the rate of basic pay. DoD may require that certain criteria be met for increases above a control point.

(4) A performance payout may be an increase in basic pay, a bonus, or a

combination of the two. However, an increase in basic pay may not cause the employee's rate of basic pay to exceed the maximum rate or applicable control point of the employee's band rate range. Implementing issuances will provide guidance for determining the payout amount and the appropriate distribution between basic pay and bonus.

(5) DoD will determine the effective date(s) of increases in basic pay made under this section.

(6) Notwithstanding any other provision of this section, DoD will issue implementing issuances to address the circumstances under which an employee receiving a retained rate under § 9901.355 may receive a lump-sum performance payout.

(e) *Proration of performance payouts.* DoD will issue implementing issuances regarding the proration of performance payouts for employees who, during the period between performance payouts, are—

(1) Hired, transferred, reassigned, or promoted;

(2) In a leave-without-pay status (except as provided in paragraphs (f) and (g) of this section); or

(3) In other circumstances where proration is considered appropriate.

(f) *Adjustments for employees returning after performing honorable service in the uniformed services.* DoD will issue implementing issuances regarding how it sets the rate of basic pay prospectively for an employee who leaves a DoD position to perform service in the uniformed services (in accordance with 38 U.S.C. 4303 and 5 CFR 353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (e.g., 38 U.S.C. 4316). DoD will credit the employee with increases under § 9901.323 and increases to basic pay under this section based on the employee's last DoD rating of record or the average percentage basic pay increases granted to employees in the same pay pool, pay schedule, and pay band who received the modal rating, whichever is most advantageous to the employee. For employees who have no such rating of record, DoD will use the modal rating received by other employees in the same pay pool, pay schedule, and pay band during the most recent rating cycle.

(g) *Adjustments for employees returning to duty after being in workers' compensation status.* DoD will issue implementing issuances regarding how it sets the rate of basic pay prospectively for an employee who returns to duty after a period of receiving injury

compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee). For the intervening period, DoD will credit the employee with increases under § 9901.323 and increases to basic pay under this section based on the employee's last DoD rating of record or the average percentage basic pay increases granted to employees in the same pay pool, pay schedule, and pay band who received the modal rating, whichever is most advantageous to the employee. For employees who have no such rating of record, DoD will use the modal rating received by other employees covered by the same pay pool, pay schedule, and pay band during the most recent rating cycle.

**§ 9901.343 Pay reduction based on unacceptable performance and/or conduct.**

An employee's rate of basic pay may be reduced based on a determination of unacceptable performance and/or conduct. Such reduction may not exceed 10 percent unless the employee has been changed to a lower pay band and a greater reduction is needed to set the employee's pay at the maximum rate of the pay band. (See also §§ 9901.352 and 9901.354.)

**§ 9901.344 Other performance payments.**

(a) In accordance with implementing issuances authorized officials may make other payments to—

(1) Recognize organizational or team achievement;

(2) Reward extraordinary individual performance through an extraordinary pay increase (EPI), as described in paragraph (b) of this section; and

(3) Provide for other special circumstances.

(b) An EPI is paid in addition to performance payouts under § 9901.342 and will usually be made effective at the time of those payouts. The future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level.

**§ 9901.345 Treatment of developmental positions.**

DoD may issue implementing issuances regarding pay increases for developmental positions. These issuances may require employees to meet certain standardized assessment or certification points as part of a formal training/developmental program.

**Pay Administration**

**§ 9901.351 Setting an employee's starting pay.**

Subject to DoD implementing issuances, DoD may set the starting rate

of pay for individuals who are newly appointed or reappointed to the Federal service anywhere within the assigned pay band.

**§ 9901.352 Setting pay upon reassignment.**

(a) Subject to paragraph (b) of this section, DoD may set pay anywhere within the assigned pay band when an employee is reassigned, either voluntarily or involuntarily, to a position in a comparable pay band.

(b) Subject to the adverse action procedures set forth in subpart G of this part and implementing issuances, DoD may reduce an employee's rate of basic pay within a pay band for unacceptable performance and/or conduct. A reduction in pay under this section may not be more than 10 percent or cause an employee's rate of basic pay to fall below the minimum rate of the employee's pay band. Such a reduction may be made effective at any time.

**§ 9901.353 Setting pay upon promotion.**

Subject to DoD implementing issuances, DoD may set pay anywhere within the assigned pay band when an employee is promoted to a position in a higher pay band.

**§ 9901.354 Setting pay upon reduction in band.**

(a) Subject to paragraph (b) of this section, DoD may set pay anywhere within the assigned pay band when an employee is reduced in band, either voluntarily or involuntarily. As applicable, pay retention provisions established under § 9901.355 will apply.

(b) Subject to the adverse action procedures set forth in subpart G of this part, DoD may assign an employee involuntarily to a position in a lower pay band for unacceptable performance and/or conduct, and may simultaneously reduce the employee's rate of basic pay. A reduction in basic pay under this section may not cause an employee's rate of basic pay to fall below the minimum rate of the employee's new pay band, or be more than 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

(c) If an employee is reduced in band involuntarily, but not through adverse action procedures (e.g., termination of a temporary promotion or failure to successfully complete a supervisory probationary period), DoD will limit any reduction in pay in accordance with implementing issuances.

**§ 9901.355 Pay retention.**

(a) Subject to the requirements of this section, DoD will issue implementing

issuances regarding pay retention. Pay retention prevents a reduction in basic pay that would otherwise occur by preserving the former rate of basic pay within the employee's new pay band or by establishing a retained rate that exceeds the maximum rate of the new pay band.

(b) Pay retention will be based on the employee's rate of basic pay in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate will be compared to the range of rates of basic pay applicable to the employee's position.

**§ 9901.356 Miscellaneous.**

(a) Except in the case of an employee who does not receive a pay increase under §§ 9901.323 because of an unacceptable rating of record, an employee's rate of basic pay may not be less than the minimum rate of the employee's pay band.

(b) Except as provided in § 9901.355, an employee's rate of basic pay may not exceed the maximum rate of the employee's band rate range.

(c) DoD will follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of pay will be converted to hourly rates of pay in computing payments received by covered employees.

(d) DoD may promulgate implementing issuances that provide for a special increase prior to an employee's movement in recognition of the fact that the employee will not be eligible for a promotion increase under the GS system, if a DoD employee moves from the pay system established under this subpart to a GS position having a higher level of duties and responsibilities.

(e) Subject to DoD implementing issuances, DoD may set the rate of basic pay of an employee upon the expiration of a temporary reassignment or promotion, and any resulting reduction in basic pay is not considered an adverse action under subpart G of this part.

**Premium Pay**

**§ 9901.361 General.**

(a) This section applies to eligible DoD employees and positions which would otherwise be covered by 5 U.S.C. chapter 55, subchapter V, subject to a determination by the Secretary under § 9901.102(b)(2). In making such a determination, the Secretary may waive the provisions of 5 U.S.C. chapter 55, subchapter V (except section 5545b), in whole or in part with respect to any category of employees approved for coverage.

(b) DoD will issue implementing issuances regarding additional payments which include, but are not limited to:

(1) Overtime pay (excluding overtime pay under the Fair Labor Standards Act);

(2) Compensatory time off;

(3) Sunday, holiday, and night pay;

(4) Annual premium pay for standby duty and administratively uncontrollable overtime;

(5) Criminal investigator availability pay; and

(6) Hazardous duty differentials.

(c) DoD will determine the conditions of eligibility for the amounts of and limitations on payments made under the authority of this section.

**Conversion Provisions**

**§ 9901.371 General.**

(a) This section and §§ 9901.372 and 9901.373 describe the provisions that apply when DoD employees are converted to the NSPS pay system established under this subpart. An affected employee may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system (or such other systems designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902), as provided in § 9901.302. For the purpose of this section and §§ 9901.372 and 9901.373, the terms "convert," "converted," "converting," and "conversion" refer to employees who become covered by the pay system without a change in position (as a result of a coverage determination made under § 9901.102(b)(2)) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the NSPS pay system.

(b) DoD will issue implementing issuances prescribing the policies and procedures necessary to implement these transitional provisions.

**§ 9901.372 Creating initial pay ranges.**

DoD will set the initial band rate ranges for the NSPS pay system established under this subpart. The initial ranges may link to the ranges that apply to converted employees in their previously applicable pay system (taking into account any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, or local market supplement under § 9901.332).

**§ 9901.373 Conversion of employees to the NSPS pay system.**

(a) When the NSPS pay system is established under this subpart and applied to a category of employees, DoD

will convert employees to the system without a reduction in their rate of pay (including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, or local market supplement under § 9901.332).

(b) When an employee receiving a special rate under 5 U.S.C. 5305 before conversion is converted to an equal rate of pay under the NSPS pay system that consists of a basic rate and a local market supplement, the conversion will not be considered as resulting in a reduction in basic pay for the purpose of applying subpart G of this part.

(c) If another personnel action (e.g., promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, DoD will process the other action under the rules pertaining to the employee's former system before processing the conversion action.

(d) An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion. If the employee is temporarily promoted immediately after the conversion, pay will be set under the rules for promotion increases under the NSPS pay system.

(e) The Secretary has discretion to make one-time pay adjustments for GS and prevailing rate employees when they are converted to the NSPS pay system. DoD will issue implementing issuances governing any such pay adjustment, including rules governing employee eligibility, pay computations, and the timing of any such pay adjustment.

**Subpart D—Performance Management**

**§ 9901.401 Purpose.**

(a) This subpart provides for the establishment in DoD of a performance management system as authorized by 5 U.S.C. 9902.

(b) The performance management system established under this subpart is designed to promote and sustain a high-performance culture by incorporating the following elements:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between the performance management system and DoD's strategic plan;

(4) A means for ensuring employee involvement in the design and implementation of the system;

(5) Adequate training and retraining for supervisors, managers, and

employees in the implementation and operation of the performance management system;

(6) A process for ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance;

(8) A means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and

(9) A pay-for-performance evaluation system to better link individual pay to performance, and provide an equitable method for appraising and compensating employees.

#### **§ 9901.402 Coverage.**

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b)(2), except as provided in paragraph (c) of this section.

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 43;

(2) Employees and positions who were excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart; and

(3) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) This subpart does not apply to employees who have not been, and are not expected to be, employed in an NSPS position for longer than a minimum period (as defined in § 9901.404) during a single 12-month period.

#### **§ 9901.403 Waivers.**

When a specified category or group of employees is covered by the performance management system(s) established under this subpart, the provisions of 5 U.S.C. chapter 43 are waived with respect to that category of employees.

#### **§ 9901.404 Definitions.**

In this subpart—

*Appraisal* means the review and evaluation of an employee's performance.

*Appraisal period* means the period of time established under a performance

management system for reviewing employee performance.

*Competencies* has the meaning given that term in § 9901.103.

*Contribution* has the meaning given that term in § 9901.103.

*Minimum period* means the period of time established by DoD during which an employee will perform under applicable performance expectations before receiving a rating of record.

*Pay-for-performance evaluation system* means the performance management system established under this subpart to link individual pay to performance and provide an equitable method for appraising and compensating employees.

*Performance* has the meaning given that term in § 9901.103.

*Performance expectations* means that which an employee is required to do, as described in § 9901.406, and may include observable or verifiable descriptions of manner, quality, quantity, timeliness, and cost effectiveness.

*Performance management* means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

*Performance management system* means the policies and requirements established under this subpart, as supplemented by DoD implementing issuances, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance. It incorporates the elements set forth in § 9901.401(b).

*Rating of record* has the meaning given that term in § 9901.103.

*Unacceptable performance* has the meaning given that term in § 9901.103.

#### **§ 9901.405 Performance management system requirements.**

(a) DoD will issue implementing issuances that establish a performance management system for DoD employees, subject to the requirements set forth in this subpart.

(b) The NSPS performance management system will—

(1) Specify the employees covered by the system(s);

(2) Provide for the periodic appraisal of the performance of each employee, generally once a year, based on performance expectations;

(3) Specify the minimum period during which an employee will perform

before being eligible to receive a rating of record;

(4) Hold supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(5) Specify procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance; and

(6) Specify the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers are responsible for—

(1) Clearly communicating performance expectations and holding employees responsible for accomplishing them;

(2) Making meaningful distinctions among employees based on performance and contribution;

(3) Fostering and rewarding excellent performance;

(4) Addressing poor performance; and

(5) Assuring that employees are assigned a rating of record when required by DoD implementing issuances.

#### **§ 9901.406 Setting and communicating performance expectations.**

(a) Performance expectations will support and align with the DoD mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Supervisors and managers will communicate performance expectations, including those that may affect an employee's retention in the job.

Performance expectations will be communicated to the employee prior to holding the employee accountable for them. However, notwithstanding this requirement, employees are always accountable for demonstrating professionalism and standards of appropriate conduct and behavior, such as civility and respect for others.

(c) Performance expectations for supervisors and managers will include assessment and measurement of how well supervisors and managers plan, monitor, develop, correct, and assess subordinate employees' performance.

(d) Performance expectations may take the form of—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee;

(3) A particular work assignment, including expectations regarding the quality, quantity, accuracy, timeliness, and/or other expected characteristics of the completed assignment;

(4) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make; or

(5) Any other means, provided that the expectation would be clear to a reasonable person.

(e) Supervisors will involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

#### **§ 9901.407 Monitoring performance and providing feedback.**

In applying the requirements of the performance management system and its implementing issuances and policies, supervisors will—

(a) Monitor the performance of their employees and their contribution to the organization; and

(b) Provide ongoing (*i.e.*, regular and timely) feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period.

#### **§ 9901.408 Developing performance and addressing poor performance.**

(a) DoD implementing issuances will prescribe procedures that supervisors will use to develop employee performance and to address poor performance.

(b) If during the appraisal period a supervisor determines that an employee's performance is unacceptable, the supervisor will—

(1) Consider the range of options available to address the performance deficiency, which include, but are not limited to, remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action defined in subpart G of this part, including a reduction in rate of basic pay or pay band; and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(c) As specified in subpart H of this part, employees may appeal adverse actions (*e.g.*, suspensions of more than 14 days, reductions in pay and pay band, and removal) based on unacceptable performance.

#### **§ 9901.409 Rating and rewarding performance.**

(a) The NSPS performance management system will establish a multi-level rating system as described in the DoD implementing issuances.

(b) An appropriate rating official will prepare and issue a rating of record after the completion of the appraisal period. An additional rating of record may be issued to reflect a substantial and sustained change in the employee's performance since the last rating of record. A rating of record will be used as a basis for—

(1) A pay determination under any applicable pay rules;

(2) Determining reduction-in-force retention standing; and

(3) Such other action that DoD considers appropriate, as specified in DoD implementing issuances.

(c) A rating of record will assess an employee's performance with respect to his or her performance expectations and/or relative contributions and is considered final when issued to the employee with all appropriate reviews and signatures.

(d) An appropriate rating official will communicate the rating of record and number of shares to the employee prior to payout.

(e) A rating of record issued under this subpart is an official rating of record for the purpose of any provision of title 5, Code of Federal Regulations, for which an official rating of record is required. DoD will transfer ratings of record between subordinate organizations and to other Federal departments or agencies in accordance with DoD implementing issuances.

(f) DoD may not lower the rating of record of an employee on an approved absence from work, including the absence of a disabled veteran to seek medical treatment, as provided in Executive Order 5396.

(g) A rating of record may be challenged by an employee only through a reconsideration procedure as provided in DoD implementing issuances. This procedure will be the sole and exclusive method for all employees to challenge a rating of record. A payout determination will not be subject to reconsideration procedures.

(h) A supervisor or other rating official may prepare an additional performance appraisal for the purposes

specified in the applicable performance management system (*e.g.*, transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

(i) DoD implementing issuances will establish policies and procedures for crediting performance in a reduction in force in accordance with subpart F of this part.

### **Subpart E—Staffing and Employment**

#### **General**

##### **§ 9901.501 Purpose.**

(a) This subpart sets forth policies and procedures for the establishment of qualification requirements; recruitment for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (k).

(b) DoD will comply with merit principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302 (dealing with prohibited personnel practices).

(c) DoD will adhere to veterans' preference principles set forth in 5 U.S.C. 2302(b)(11), consistent with 5 U.S.C. 9902(a) and (k).

##### **§ 9901.502 Scope of authority.**

When a specified category of employees, applicants, and positions is covered by the system established under this subpart, the provisions of 5 U.S.C. 3301, 3302, 3304, 3317(a), 3318 and 3319 (except with respect to veterans' preference), 3321, 3324, 3325, 3327, 3330, 3341, and 5112(a) are modified and replaced with respect to that category, except as otherwise specified in this subpart. In accordance with § 9901.105, DoD will prescribe implementing issuances to carry out the provisions of this subpart.

##### **§ 9901.503 Coverage.**

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b).

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapters 31 and 33 (excluding members of the Senior Executive Service); and

(2) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

##### **§ 9901.504 Definitions.**

In this subpart—

*Career employee* means an individual appointed without time limit to a

competitive or excepted service position in the Federal career service.

*Promotion* has the meaning given that term in § 9901.103.

*Reassignment* has the meaning given that term in § 9901.103.

*Reduction in band* has the meaning given that term in § 9901.103.

*Temporary employee* means an individual not on a career appointment who is employed for a limited but unspecified period of time, up to a maximum established by implementing issuances, to perform the work of a position that does not require an additional permanent employee.

*Term employee* means an individual not on a career appointment who is employed for a specified period of time up to a maximum established by implementing issuances, to perform the work of a temporary or permanent position.

*Time-limited employee* means an individual appointed to a position for a period of limited duration, either specified or unspecified (e.g., term or temporary) in either the competitive or excepted service.

#### External Recruitment and Internal Placement

##### § 9901.511 Appointing authorities.

(a) *Competitive and excepted appointing authorities.* DoD may continue to use excepted and competitive appointing authorities and entitlements under chapters 31 and 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals will be given career or time-limited appointments, as appropriate.

(b) *Additional appointing authorities.* (1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including noncompetitive appointments, and excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service.

(2)(i) DoD and OPM will jointly publish a notice in the **Federal Register** when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive position in the career service. DoD and OPM will issue a notice with a public comment period before establishing such authority, except as provided in paragraph (b)(2)(ii) of this section.

(ii) If DoD determines that a critical mission requirement exists, DoD and

OPM may establish a new appointing authority as described in paragraph (b)(2)(i) of this section effective upon publication of a **Federal Register** notice without a preceding comment period. However, the notice will invite public comments, and DoD and OPM will issue another notice if the authority is revised based on those comments.

(3) DoD will prescribe appropriate implementing issuances to administer a new appointing authority established under paragraph (b) of this section.

(4) At least annually, DoD will publish in the **Federal Register** a consolidated list of all appointing authorities established under this section and currently in effect.

(c) *Severe shortage/critical need hiring authority.* (1) DoD may determine that there is a severe shortage of candidates or a critical hiring need, as defined in 5 U.S.C. 3304(a)(3) and 5 CFR part 337, subpart B, for particular occupations, pay bands, career groups, and/or geographic locations, and establish a specific authority to make appointments without regard to § 9901.515. Public notice will be provided in accordance with 5 U.S.C. 3304(a)(3)(A).

(2) For each specific authority, DoD will document the basis for the severe shortage or critical hiring need, consistent with 5 CFR 337.204(b) or 337.205(b), as applicable.

(3) DoD will terminate or modify a specific authority to make appointments under paragraph (a) of this section when it determines that the severe shortage or critical need upon which the authority was based no longer exists.

(4) DoD will prescribe appropriate implementing issuances to administer this authority and will notify OPM of determinations made under this section.

(d) *Time-limited appointing authorities.* (1) The Secretary may prescribe the procedures for appointing employees, the duration of such appointments, and the appropriate uses of time-limited employees.

(2) The Secretary will prescribe implementing issuances establishing the procedures under which a time-limited employee (e.g., an individual employed on a temporary or term basis) serving in a competitive service position may be converted without further competition to the career service if—

(i) The vacancy announcement met the requirements of § 9901.515(a) and included the possibility of noncompetitive conversion to a competitive position in the career service at a later date;

(ii) The individual was appointed using the competitive examining

procedures set forth in § 9901.515(b) and (c); and

(iii) The employee completed at least 2 years of continuous service at the fully successful level of performance or better.

##### § 9901.512 Probationary periods.

The Secretary may establish probationary periods as deemed appropriate for employees appointed to positions in the competitive and excepted service covered by the National Security Personnel System. DoD will prescribe the conditions for such periods, including creditable service, in implementing issuances. A preference eligible who has completed 1 year of a probationary period is covered by subparts G and H of this part. An employee who fails to complete an in-service probationary period established under § 9901.516 will be returned to a position and rate of pay comparable to the position and rate of pay he or she held before the probationary period.

##### § 9901.513 Qualification standards.

DoD may continue to use qualification standards established or approved by OPM. DoD also may establish qualification standards for positions covered by the National Security Personnel System.

##### § 9901.514 Non-citizen hiring.

DoD may establish procedures for appointing non-citizens to positions within NSPS under the following conditions:

(a) In the absence of a qualified U.S. citizen, DoD may appoint a qualified non-citizen in the excepted service; and

(b) Immigration and security requirements will apply to these appointments.

##### § 9901.515 Competitive examining procedures.

(a) In recruiting applicants for competitive appointments to competitive service positions in NSPS, DoD will provide public notice for all vacancies in the career service in accordance with 5 CFR part 330 and—

(1) Will accept applications for the vacant position from all sources;

(2) Will, at a minimum, consider applicants from the local commuting area;

(3) May concurrently consider applicants from other targeted recruitment areas, as specified in the vacancy announcement, in addition to those applicants from the minimum area of consideration; and

(4) May consider applicants from outside that minimum area(s) of consideration as necessary to provide sufficient qualified candidates.

(b) DoD may establish procedures for the examination of applicants for entry into competitive and excepted service positions in the National Security Personnel System. Such procedures will adhere to the merit system principles in 5 U.S.C. 2301 and veterans' preference requirements as set forth in 5 U.S.C. 3309 through 3320, as applicable, and will be available in writing for applicant review. These procedures will also include provisions for employees entitled to priority consideration as defined in 5 U.S.C. 1302(c) or 8151.

(c) In establishing examining procedures for appointing employees in the competitive service under paragraph (b) of this section, DoD may use traditional numerical rating and ranking or alternative ranking and selection procedures (category rating) in accordance with 5 U.S.C. 3319(b) and (c).

(d) DoD will apply the requirements of paragraphs (a), (b), and (c) of this section to the recruitment of applicants for time-limited positions in the competitive service in order to qualify an appointee for noncompetitive conversion to a competitive position in the career service, in accordance with § 9901.511.

#### § 9901.516 Internal placement.

DoD may prescribe implementing issuances regarding the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS. These issuances may also establish in-service probationary periods and prescribe the conditions under which employees will complete such periods. Such issuances will be made available to applicants and employees. Internal placement actions may be made on a permanent or temporary basis using competitive and noncompetitive procedures. Those exceptions to competitive procedures set forth in 5 CFR part 335 apply to NSPS.

#### Subpart F—Workforce Shaping

##### § 9901.601 Purpose and applicability.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9902(k) concerning the Department's system for realigning, reorganizing, and reshaping its workforce. This subpart applies to categories of positions and employees affected by such actions resulting from the planned elimination, addition, or redistribution of functions, duties, or skills within or among organizational units, including realigning, reshaping, delayering, and similar organizational-based restructuring actions. This subpart does

not apply to actions involving the conduct and/or performance of individual employees, which are covered by subpart G of this part.

##### § 9901.602 Scope of authority.

When a specified category of employees is covered by the system established under this subpart, the provisions of 5 U.S.C. 3501 and 3502 (except with respect to veterans' preference), and 3503 are modified and replaced with respect to that category, except as otherwise specified in this subpart. In accordance with § 9901.105, DoD will prescribe implementing issuances to carry out the provisions of this subpart.

##### § 9901.603 Definitions.

In this subpart:

*Competing employee* means a career employee (including an employee serving an initial probationary period), an employee serving on a term appointment, and other employees as identified in DoD implementing issuances.

*Competitive area* means the boundaries within which employees compete for retention under this subpart, based on factors described in § 9901.605(a).

*Competitive group* means employees within a competitive area who are on a common retention list for the purpose of exercising displacement rights.

*Displacement right* means the right of an employee who is displaced from his or her present position because of position abolishment, or because of displacement resulting from the abolishment of a higher-standing employee on the retention list, to displace a lower-standing employee on the list on the basis of the retention factors.

*Notice* means a written communication from the Department to an individual employee stating that the employee will be displaced from his or her position as a result of a reduction in force action under this subpart.

*Rating of record* has the meaning given that term in § 9901.103.

*Retention factors* means performance, veterans' preference, tenure of employment, length of service, and such other factors as the Secretary considers necessary and appropriate to rank employees within a particular retention list.

*Retention list* means a list of all competing employees occupying positions in the competitive area, who are grouped in the same competitive group on the basis of retention factors. While all positions in the competitive

group are listed, only competing employees have retention standing.

*Tenure group* means a group of employees with a given appointment type. In a reduction in force, employees are first placed in a tenure group and then ranked within that group according to retention factors.

*Undue interruption* means a degree of interruption that would prevent the completion of required work by an employee within 90 days after the employee has been placed in a different position.

##### § 9901.604 Coverage.

(a) *Employees covered.* The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 35 (excluding members of the Senior Executive Service and employees who are excluded from coverage by other statutory authority); and

(2) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(b) *Actions covered.* (1) *Reduction in force.* The Department will apply this subpart when releasing a competing employee from a retention list by separation, reduction in band, or assignment involving displacement, and the release results from an action described in § 9901.601.

(2) *Transfer of function.* The Department will apply 5 CFR part 351, subpart C, when a function transfers from one competitive area to a different competitive area, except as otherwise provided in this subpart.

(3) *Furlough.* The Department will apply the provisions in 5 CFR 351.604 when furloughing a competing employee for more than 30 consecutive days, except as otherwise provided in this subpart.

(c) *Actions excluded.* This subpart does not apply to—

(1) The termination of a temporary promotion or temporary reassignment and the subsequent return of an employee to the position held before the temporary promotion or temporary reassignment (or to a position with comparable pay band, pay, status, and tenure);

(2) A reduction in band based on the reclassification of an employee's position due to the application of new classification standards or the correction of a classification error;

(3) Placement of an employee serving on a seasonal basis in a nonpay, nonduty status in accordance with conditions established at time of appointment;

(4) A change in an employee's work schedule from other-than-full-time to full-time;

(5) A change in an employee's mixed tour work schedule in accordance with conditions established at time of appointment;

(6) A change in the scheduled tour of duty of an other-than-full-time schedule;

(7) A reduction in band based on the reclassification of an employee's position due to erosion of duties, except that this exclusion does not apply to such reclassification actions that will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days; or

(8) Any other personnel action not covered by paragraph (b) of this section.

#### § 9901.605 Competitive area.

(a) *Basis for competitive area.* The Department may establish a competitive area on the basis of one or more of the following considerations:

- (1) Geographical location(s);
- (2) Line(s) of business;
- (3) Product line(s);
- (4) Organizational unit(s); and
- (5) Funding line(s).

(b) *Employees included in competitive area.* A competitive area will include all competing employees holding official positions of record in the defined competitive area.

(c) *Review of competitive area determinations.* The Department will make all competitive area definitions available for review.

(d) *Change of competitive area.* Competitive areas will be established for a minimum of 90 days before the effective date of a reduction in force. In implementing issuances, DoD will establish approval procedure requirements for any competitive area identified less than 90 days before the effective date of a reduction in force.

(e) *Limitations.* The Department will establish a competitive area only on the basis of legitimate organizational reasons, and competitive areas will not be used for the purpose of for targeting an individual employee for reduction in forces on the basis of nonmerit factors.

#### § 9901.606 Competitive group.

(a) The Department will establish separate competitive groups for employees—

- (1) In the excepted and competitive service;
- (2) Under different excepted service appointment authorities; and
- (3) With different work schedules (e.g., full-time, part-time, seasonal, intermittent).

(b) The Department may further define competitive groups on the basis of one or more of the following considerations:

- (1) Career group;
- (2) Pay schedule;
- (3) Occupational series or specialty;
- (4) Pay band; or
- (5) Trainee status.

(c) An employee is placed into a competitive group based on the employee's official position of record. The Department may supplement an employee's official position description by using other applicable records that document the employee's actual duties and responsibilities.

(d) The competitive group includes the official positions of employees on a detail or other nonpermanent assignment to a different position from the competitive group.

#### § 9901.607 Retention standing.

(a) *Retention list.* Within each competitive group, the Department will establish a retention list of competing employees in descending order based on the following:

(1) Tenure, with career employees (including employees serving an initial probationary period) listed first, followed by other employees on term appointments and other employees as identified in DoD implementing issuances.

(2) Veterans' preference, in accordance with the preference requirements in 5 CFR 351.504(c) and (d), including the preference restrictions found in 5 U.S.C. 3501(a);

(3) The rating of record, in accordance with DoD implementing issuances; and

(4) Creditable civilian and/or uniformed service in accordance with 5 CFR 351.503 and 5 U.S.C. 3502(a)(A) and (B). The Department may establish tie-breaking procedures when two or more employees have the same retention standing.

(b) *Active armed forces member not on list.* The retention list does not include the name of an employee who, on the effective date of the reduction in force, is on active duty in the armed forces with a restoration right under 5 CFR part 353.

(c) *Access to retention list.* Both an employee who received a specific reduction in force notice, and the employee's representative, have access to the applicable retention list in accordance with 5 CFR 351.505.

#### § 9901.608 Displacement, release, and position offers.

(a) *Displacement to other positions on the retention list.* (1) An employee who is displaced because of position

abolishment, or because of displacement resulting from the abolishment of the position of a higher-standing employee on the retention list, may displace a lower-standing employee on the list if—

(i) The higher-standing employee is qualified for the position, consistent with 5 CFR 351.702; and

(ii) No undue interruption would result from the displacement.

(2) A displacing employee retains his or her status and tenure.

(b) *Release from the retention list.* (1) The Department selects employees for release from the list on the basis of the ascending order of retention standing set forth in § 9901.607(a).

(2) The Department may not release a competing employee from a retention list that contains a position held by a temporary employee (e.g., a competitive service temporary position).

(3) The Department may temporarily postpone the release of an employee from the retention list when appropriate under 5 CFR 351.506, 351.606, 351.607, and 351.608.

(c) *Placement in vacant positions.* At the Department's option, the Department may offer an employee released from a retention list a vacant position within the competitive area in lieu of reduction in force, based on relative retention standing as specified in § 9901.607(a).

(d) *Actions for employees with no offer.* If a released employee does not receive an offer of another position under paragraph (c) of this section to a position on a different retention list, the Department may—

(1) Separate the employee by reduction in force; or

(2) Furlough the employee under applicable procedures, including the provisions in 5 CFR 351.604.

#### § 9901.609 Reduction in force notices.

The Department will provide a specific written notice to each employee reached for an action in reduction in force competition at least 60 days before the reduction in force becomes effective. DoD will prescribe the content of the notice in implementing issuances.

#### § 9901.610 Voluntary separation.

(a) The Secretary of Defense may—

(1) Separate from the service any employee who volunteers to be separated even though the employee is not otherwise subject to separation due to a reduction in force; and

(2) For each employee voluntarily separated under paragraph (a)(1) of this section, retain an employee in a similar position who would otherwise be separated due to a reduction in force.

(b) The separation of an employee under paragraph (a) of this section will

be treated as an involuntary separation due to a reduction in force.

#### § 9901.611 Reduction in force appeals.

(a) An employee who believes the Department did not properly apply the provisions of this subpart may appeal the reduction in force action to the Merit Systems Protection Board as provided for in 5 CFR 351.901 if the employee was released from the retention list and was—

(1) Separated by reduction in force;

(2) Reduced in band by reduction in force; or

(3) Furloughed by reduction in force for more than 30 consecutive days.

(b) Paragraph (a) of this section does not apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

### Subpart G—Adverse Actions

#### General

#### § 9901.701 Purpose.

This subpart contains regulations prescribing the requirements for employees who are removed, suspended, furloughed for 30 days or less, reduced in pay, or reduced in pay band (or comparable reduction). DoD may prescribe implementing issuances to carry out the provisions of this subpart.

#### § 9901.702 Waivers.

With respect to any category of employees covered by this subpart, subchapters I and II of 5 U.S.C. chapter 75, in addition to those provisions of 5 U.S.C. chapter 43 specified in subpart D of this part, are waived and replaced by this subpart.

#### § 9901.703 Definitions.

In this subpart:

*Adverse action* means a removal, suspension, furlough for 30 days or less, reduction in pay, or reduction in pay band (or comparable reduction).

*Furlough* has the meaning given that term in § 9901.103.

*Indefinite suspension* means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or further Department action. An indefinite suspension continues for an indeterminate period of time and ends with the occurrence of pending conditions set forth in notice of actions which may include the completion of any subsequent administrative action.

*Mandatory removal offense (MRO)* has the meaning given that term in § 9901.103.

*Pay* means the rate of basic pay fixed by law or administrative action for the

position held by an employee before any deductions and exclusive of additional pay of any kind. For the purpose of this subpart, pay does not include locality-based comparability payments under 5 U.S.C. 5304, local market supplements under subpart C of this part, or other similar payments.

*Probationary period* means that period established pursuant to § 9901.512.

*Removal* means the involuntary separation of an employee from the Federal service.

*Suspension* means the temporary placement of an employee, for disciplinary reasons, in a nonduty/nonpay status.

#### § 9901.704 Coverage.

(a) *Actions covered.* This subpart covers removals, suspensions, furloughs of 30 days or less, reductions in pay, or reductions in band (or comparable reductions).

(b) *Actions excluded.* This subpart does not cover—

(1) An action taken against an employee during a probationary period (excluding an in-service or supervisory probationary period);

(2) A reduction in pay or pay band of a supervisor or manager who has not completed a supervisory probationary period, if the supervisory or manager is returned to the pay or pay band held immediately before becoming a supervisor or manager.

(3) A reduction in pay or pay band of an employee who does not satisfactorily complete an in-service probationary period under § 9901.512.

(4) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position in a comparable pay band, if the Department informed the employee that the promotion was to be of limited duration;

(5) A reduction-in-force action under subpart F of this part;

(6) An action imposed by the Merit Systems Protection Board under 5 U.S.C. 1215;

(7) A voluntary action by an employee;

(8) An action taken or directed by OPM based on suitability under 5 CFR part 731;

(9)(i) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(ii) Termination of appointment before the expiration date specified as a basic condition of employment at the time the appointment was made, except when the termination is taken against—

(A) A preference eligible employee who has completed 1 year under a time-limited appointment; or

(B) An employee who has completed a probationary period under a term appointment;

(10) Cancellation of a promotion to a position not classified prior to the promotion;

(11) Placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status in accordance with conditions established at the time of appointment;

(12) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation;

(13) An action taken under a provision of statute, other than one codified in title 5, U.S. Code, which excludes the action from 5 U.S.C. chapter 75 or this subpart;

(14) A classification determination, including a classification determination under subpart B of this part;

(15) Suspension or removal under 5 U.S.C. 7532;

(16) An action to terminate grade retention upon conversion to the NSPS pay system established under subpart C of this part; and

(c) *Employees covered.* Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to DoD employees, except as excluded by paragraph (d) of this section.

(d) *Employees excluded.* This subpart does not apply to—

(1) An employee who is serving a probationary period, except when the employee is a preference eligible who has completed 1 year of that probationary period;

(2) A member of the Senior Executive Service;

(3) An employee who is terminated in accordance with terms specified as conditions of employment at the time the appointment was made;

(4) An employee whose appointment is made by and with the advice and consent of the Senate;

(5) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by—

(i) The President, for a position that the President has excepted from the competitive service;

(ii) OPM, for a position that OPM has excepted from the competitive service; or

(iii) The President or the Secretary for a position excepted from the competitive service by statute;

(6) An employee whose appointment is made by the President;

(7) A reemployed annuitant who is receiving an annuity from the Civil

Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund;

(8) An employee who is an alien or non-citizen occupying a position outside the United States, as described in 5 U.S.C. 5102(c)(11);

(9) A member of the National Security Labor Relations Board;

(10) A non-appropriated fund employee;

(11) A National Guard technician who is employed under 32 U.S.C. 709; and

(12) An employee against whom an adverse personnel action is taken or imposed under any statute or regulation other than this subpart.

**Requirements for Removal, Suspension, Furlough of 30 Days or Less, Reduction in Pay, or Reduction in Band (or Comparable Reduction)**

**§ 9901.711 Standard for action.**

The Department may take an adverse action under this subpart only for such cause as will promote the efficiency of the service.

**§ 9901.712 Mandatory removal offenses.**

(a) The Secretary has the sole, exclusive, and unreviewable discretion to identify offenses that have a direct and substantial adverse impact on the Department's national security mission. Such offenses will be identified in advance as part of departmental regulations, and made known to all employees upon identification.

(b) The procedures in §§ 9901.713 through 9901.716 apply to actions taken under this section. However, a proposed notice required by § 9901.714 may be issued to the employee in question only after the Secretary's review and approval.

(c) The Secretary has the sole, exclusive, and unreviewable discretion to mitigate the removal penalty on his or her own initiative or at the request of the employee in question.

(d) Nothing in this section limits the discretion of the Department to remove employees for offenses other than those identified by the Secretary as an MRO.

**§ 9901.713 Procedures.**

An employee against whom an adverse action is proposed is entitled to the following:

(a) A proposal notice under § 9901.714;

(b) An opportunity to reply under § 9901.715; and

(c) A decision notice under § 9901.716.

**§ 9901.714 Proposal notice.**

(a) *Notice period.* The Department will provide at least 15 days advance

written notice of a proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department will provide at least 5 days advance written notice.

(b) *Contents of notice.* (1) The proposal notice will inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the Department's evidence supporting the proposed action. The Department may not use evidence that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(2) When some but not all employees in a given category and/or organizational unit are being furloughed, the proposal notice will state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough. The notice is not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(c) *Duty status during notice period.* An employee will remain in a duty status in his or her regular position during the notice period. However, when the Department determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, adversely impact the Department's mission, or otherwise jeopardize legitimate Government interests, the Department may elect one or a combination of the following alternatives:

(1) Assign the employee to duties where the Department determines the employee is no longer a threat to the employee or others, the Department's mission, or Government property or interests;

(2) Allow the employee to take leave, or place him or her in an appropriate leave status (annual leave, sick leave, or leave without pay) or absence without leave if the employee has absented himself or herself from the worksite without approved leave; or

(3) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

**§ 9901.715 Opportunity to reply.**

(a) The Department will provide employees at least 10 days, which will run concurrently with the notice period,

to reply orally and/or in writing to a notice of proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department will provide the employee at least 5 days, which will run concurrently with the notice period, to reply orally and/or in writing.

(b) The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses.

(c) During the opportunity to reply period, the Department will provide the employee a reasonable amount of official time to review the Department's supporting evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) The Department will designate an official to receive the employee's written and/or oral response. The official will have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or other representative of the employee's choice and at the employee's expense, subject to paragraph (f) of this section. The employee will provide the Department with a written designation of his or her representative.

(f) The Department may disallow as an employee's representative—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes the Department to consider any medical condition that may be relevant to the proposed adverse action will provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) When considering an employee's medical documentation, the Department may require or offer a medical examination pursuant to 5 CFR part 339, subpart C.

(3) When considering an employee's medical condition, the Department is not required to withdraw or delay a proposed adverse action. However, the Department will—

(i) Allow the employee to provide medical documentation during the opportunity to reply;

(ii) Comply with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules; and

(iii) Comply with 5 CFR 831.1205 or 844.202, as applicable, when issuing a decision to remove.

#### § 9901.716 Decision notice.

(a) In arriving at its decision on a proposed adverse action, the Department may not consider any reasons for the action other than those specified in the proposal notice.

(b) The Department will consider any response from the employee and the employee's representative, if the response is provided to the official designated under § 9901.715(d) during the opportunity to reply period, and any medical documentation furnished under § 9901.715(g).

(c) The decision notice will specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts H or I of this part.

(d) The Department will, to the extent practicable, deliver the notice to the employee on or before the effective date of the action. If unable to deliver the notice to the employee in person, the Department may mail the notice to the employee's last known address of record.

#### § 9901.717 Departmental record.

(a) *Document retention.* The Department will keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record will include the following:

- (1) A copy of the proposal notice;
- (2) The employee's written response, if any, to the proposal;
- (3) A summary of the employee's oral response, if any;
- (4) A copy of the decision notice; and
- (5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department will make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board (MSPB).

#### Savings Provision

##### § 9901.721 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

#### Subpart H—Appeals

##### § 9901.801 Purpose.

This subpart implements the provisions of 5 U.S.C. 9902(h), which establishes the system for Department employees to appeal certain adverse actions covered under subpart G of this part.

##### § 9901.802 Applicable legal standards and precedents.

In accordance with 5 U.S.C. 9902(h)(3), in applying existing legal standards and precedents, MSPB is bound by the legal standard set forth in § 9901.107(a)(2).

##### § 9901.803 Waivers.

When a specified category of employees is covered by an appeals system established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The provisions of 5 U.S.C. 7702 are modified as provided in § 9901.809. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB will follow the provisions in this subpart until it issues conforming regulations, which may not conflict with this part.

##### § 9901.804 Definitions.

In this subpart:

*Administrative judge* or *AJ* means the official, including an administrative law judge, authorized by MSPB to hold a hearing in a matter covered by this subpart and subpart G of this part, or to decide such a matter without a hearing.

*Class appeal* means an appeal brought by a representative(s) of a group of similarly situated employees consistent with the provisions of Federal Rule of Civil Procedure 23.

*Harmful error* means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

*Mandatory removal offense (MRO)* has the meaning given that term in § 9901.103.

*MSPB* means the Merit Systems Protection Board.

*Petition for review (PFR)* means a request for full MSPB review of a final Department decision.

*Preponderance of the evidence* means the degree of relevant evidence that a

reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

*Request for review (RFR)* means a preliminary request for review of an initial decision of an MSPB administrative judge before that decision has become a final Department decision.

##### § 9901.805 Coverage.

(a) Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to employees in DoD organizational and functional units that are included under NSPS who appeal removals; suspensions for more than 14 days, including indefinite suspensions; furloughs of 30 days or less; reductions in pay; or reductions in pay band (or comparable reductions), which constitute appealable adverse actions for the purpose of this subpart, provided such employees are covered by § 9901.704.

(b) This subpart does not apply to a reduction in force action taken under subpart F of this part, nor does it apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

(c) Appeals of suspensions of 14 days or less and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(d) The appeal rights in 5 CFR 315.806 apply to the termination of an employee in the competitive service while serving a probationary period.

(e) Actions taken under 5 U.S.C. 7532 are not appealable to MSPB.

##### § 9901.806 Alternative dispute resolution.

The Department recognizes the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based problem-solving to address employee-employer disputes arising in the workplace, including those which may involve disciplinary or adverse actions. Such methods can result in more efficient and more effective outcomes than traditional, adversarial methods of dispute resolution. The use of alternative dispute resolution is encouraged. Such methods will be subject to collective bargaining to the extent permitted by subpart I of this part.

##### § 9901.807 Appellate procedures.

(a) A covered Department employee may appeal to MSPB an adverse action listed in § 9901.805(a). Such an

employee has a right to be represented by an attorney or other representative of his or her own choosing. However, separate procedures apply when the action is taken under the special national security provisions established by 5 U.S.C. 7532.

(b)(1) This section modifies MSPB's appellate procedures with respect to appeals under this subpart, as applicable.

(2) MSPB will refer appeals to an AJ for adjudication. The AJ must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

(c) Pursuant to 5 U.S.C. 9902(h)(4), employees will not be granted interim relief, nor will an action taken against an employee be stayed, unless specifically ordered by the full MSPB following final decision by the Department.

(1) If the interim relief ordered by the full MSPB provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Department determines, in its sole, exclusive, and unreviewable discretion, that the employee's return to the workplace is impracticable or the presence of the employee is unduly disruptive to the work environment, the employee may be placed in an alternative position, or may be placed on excused absence pending final disposition of the employee's appeal.

(2) Nothing in paragraph (c) of this section may be construed to require that any award of back pay or attorney fees be paid before an award becomes final.

(d)(1) An adverse action taken against an employee will be sustained by the MSPB AJ if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(i) That there was harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(2) Neither the MSPB AJ, nor the full MSPB, may reverse the Department action based on the way in which the charge is labeled or the conduct characterized, provided the employee is on notice of the facts sufficient to respond to the factual allegations of the charge.

(3) Neither the MSPB AJ nor the full MSPB may reverse the Department's action based on the way a performance expectation is expressed, provided that

the expectation would be clear to a reasonable person.

(e) The Director of OPM may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(f) Except as provided in 5 U.S.C. 7702, as modified by § 9901.809, any decision under paragraph (b) of this section is final unless a party to the appeal or the Director of OPM petitions the full MSPB for review within 30 days. The Director, after consultation with the Secretary, may petition the full MSPB for review if the Director believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(g) If the AJ is of the opinion that an appeal could be processed more expeditiously without adversely affecting any party, the AJ may—

(1) Consolidate appeals filed by two or more appellants; or

(2) Join two or more appeals filed by the same appellant and hear and decide them concurrently.

(h)(1) Except as provided in paragraph (h)(2) of this section or as otherwise provided by law, the AJ may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the AJ determines that payment by the Department is warranted in the interest of justice. For the purpose of this subpart, such fees are warranted in the interest of justice only when the Department engaged in a prohibited personnel practice or the Department's action was clearly without merit based upon facts known to management when the action was taken.

(2) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(i)(1) An MSPB AJ may not require any party to engage in settlement discussions in connection with any action appealed under this section. If either party decides that settlement discussions are not appropriate, the matter will proceed to adjudication.

(2) Where the parties agree to engage in formal settlement discussions, these discussions will be conducted by an official other than the AJ assigned to

adjudicate the case. Nothing prohibits the parties from engaging in settlement discussions on their own.

(j) If an employee has been removed under subpart G of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

(k)(1) All appeals, including class appeals, will be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later.

(2) Either party may file a motion to disqualify a party's representative at any time during the proceedings.

(3) The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(i) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(ii) Neither party may submit more than one set of interrogatories, one set of requests for production, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, neither party may conduct/compel more than 2 depositions.

(iii) Either party may file a motion requesting additional discovery. Such motion may be granted only if the party has shown necessity and good cause to warrant such additional discovery.

(4) Requests for case suspensions must be submitted jointly.

(5) If the AJ determines upon his or her own initiative or upon request by either party that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

(6) The Department's determination regarding the penalty imposed will be given great deference. An arbitrator, AJ, or the full MSPB may not modify the penalty imposed by the Department

unless such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When a penalty is mitigated, the maximum justifiable penalty must be applied. The maximum justifiable penalty is the severest penalty that is not so disproportionate to the basis for the action as to be wholly without justification. If the adverse action is based on an MRO, the penalty may only be mitigated as prescribed in § 9901.808.

(7) An initial decision must be made by an AJ no later than 90 days after the date on which the appeal is filed.

(8)(i) The initial AJ decision will become the Department's final decision 30 days after its issuance, unless either party files an RFR with MSPB and the Department concurrently (with service on the other party, as specified by DoD implementing issuances) within that 30-day period in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(ii) Thirty days after the timely filing of an RFR of an initial AJ decision, that initial AJ decision will become the Department's final decision, and that decision is nonprecedential. MSPB will docket and process a party's RFR as a petition for full MSPB review in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart, unless the Department serves notice on the parties and MSPB within that 30-day period that it will act on the RFR and review the initial AJ decision. Any decision issued by the Department after reviewing an initial AJ decision is precedential unless—

(A) The Department determines that the DoD decision is not precedential; or  
(B) The final DoD decision is reversed or modified by the full MSPB.

(iii) Upon notice that it will reconsider the initial AJ decision, the Department will provide the other party to the case 15 days to respond to the RFR. After receipt of a timely response to the RFR, the Department may—

(A) Where it believes that there has been a material error of fact, or that there is new and material evidence available that, despite due diligence, was not available when the record closed, remand the matter to the assigned AJ for further adjudication or issue a final DoD decision modifying or reversing that initial decision or decision after remand. An AJ decision after remand must be made no later than 30 days after the date of receipt of the remand;

(B) Where the Department determines that the initial AJ decision has a direct and substantial adverse impact on the Department's national security mission, or is based on an erroneous interpretation of law, Governmentwide rule or regulation, or this part, issue a final DoD decision modifying or reversing that initial decision; or

(C) Where the Department determines that the initial AJ decision should serve as precedent, issue a final DoD decision affirming that initial decision for such purposes.

(9) Upon receipt of a final DoD decision issued under paragraph (k)(8)(iii) of this section, an employee or OPM may file a PFR with the full MSPB within 30 days in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(10) Upon receipt of a petition for full MSPB review or an RFR that becomes a PFR as a result of the expiration of the Department's reconsideration period in accordance with paragraph (k)(8)(iii) of this section, the other party to the case and/or OPM, as applicable, will have 30 days to file a response to the petition. The full MSPB will act on a PFR within 90 days after receipt of a timely response, or the expiration of the response period, as applicable, in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(11) The Director of OPM, after consultation with the Secretary, may seek reconsideration by MSPB of a final MSPB decision in accordance with 5 U.S.C. 7703(d), which is modified for this purpose. If the Director seeks such reconsideration, the full MSPB must render its decision no later than 60 days after receipt of a response to OPM's petition in support of such reconsideration. The full MSPB must state the reasons for its decision.

(l) Failure of MSPB to meet the deadlines imposed by paragraphs (k)(7), (10), and (11) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party. If the AJ or full MSPB fails to meet the above time limits, the full MSPB will inform the Secretary in writing of the cause of the delay and will recommend future actions to remedy the problem.

(m) The Secretary or an employee adversely affected by a final order or decision of MSPB may seek judicial review under 5 U.S.C. 9902(h)(6). Before seeking judicial review, the Secretary may seek reconsideration by MSPB of a final MSPB decision.

#### **§ 9901.808 Appeals of mandatory removal actions.**

(a) Procedures for appeals of adverse actions to MSPB based on MROs will be the same as for other offenses except as otherwise provided by this section.

(b) If one or more MROs are sustained, neither the MSPB AJ nor the full MSPB may mitigate the penalty.

(c) Only the Secretary may mitigate the penalty.

(d) If the MSPB AJ or the full MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, the Department is not precluded from subsequently proposing an adverse action (other than an MRO) based in whole or in part on the same or similar evidence.

#### **§ 9901.809 Actions involving discrimination.**

(a) In considering any appeal of an action filed under 5 U.S.C. 7702, the Board will apply the provisions of 5 U.S.C. 9902 and this part.

(b) In any appeal of an action filed under 5 U.S.C. 7702 that results in a decision of the Department, if no petition for review of the Department's decision is filed with the full Board, the Department will refer only the discrimination issue to the full Board for adjudication.

(c) All references in 5 U.S.C. 7702 to 5 U.S.C. 7701 are modified to read 5 CFR part 9901, subpart H.

#### **§ 9901.810 Savings provision.**

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

### **Subpart I—Labor-Management Relations**

#### **§ 9901.901 Purpose.**

This subpart contains the regulations which implement the provisions of 5 U.S.C. 9902(m) relating to the Department's labor-management relations system. This labor management relations system addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission. These regulations recognize the rights of DoD employees to organize and bargain collectively, subject to any exclusion from coverage or limitation on the scope of bargaining pursuant to law, including this subpart and DoD issuances, applicable Presidential issuances (e.g. Executive orders), and any other legal authority.

#### **§ 9901.902 Scope of authority.**

When a specified category of employees is covered by the labor-

management relations system established under this subpart, the provisions of 5 U.S.C. 7101 through 7135 are modified and replaced by the provisions in this subpart with respect to that category, except as otherwise specified in this subpart. DoD may prescribe implementing issuances to carry out the provisions of this subpart.

#### § 9901.903 Definitions.

In this subpart:

*Authority* means the Federal Labor Relations Authority described in 5 U.S.C. 7104(a).

*Board* means the National Security Labor Relations Board established by this subpart.

*Collective bargaining* means the performance of the mutual obligation of a management representative of the Department and an exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

*Collective bargaining agreement* means an agreement entered into as a result of collective bargaining pursuant to the provisions of this subpart.

*Component* means an organizational unit so prescribed and designated by the Secretary in his or her sole and exclusive discretion, such as, for example, the Office of the Secretary of Defense; the Military Departments, or the Defense Logistics Agency.

*Conditions of employment* means personnel policies, practices, and matters affecting working conditions—whether established by rule, regulation, or otherwise—except that such term does not include policies, practices, and matters relating to—

(1) Political activities prohibited under 5 U.S.C. chapter 73, subchapter III;

(2) The classification of any position, including any classification determinations under subpart B of this part;

(3) The pay of any employee or for any position, including any determinations regarding pay or adjustments thereto under subpart C of this part; or

(4) Any matters specifically provided for by Federal statute.

*Confidential employee* means an employee who acts in a confidential

capacity with respect to an individual who formulates or effectuates management policies.

*Consult* means to consider the interests, opinions, and recommendations of a recognized labor organization in rendering decisions. This can be accomplished in face-to-face meetings or through other means, e.g., teleconferencing, e-mail, and written communications.

*DoD issuance or issuances* means a document issued at the DoD or DoD Component level to carry out a policy or procedure of the Department including those issuances implementing this part.

*Dues* means dues, fees, and assessments.

*Exclusive representative* means any labor organization which is recognized as the exclusive representative of employees in an appropriate unit consistent with the Department's organizational structure, pursuant to 5 U.S.C. 7111 or as otherwise provided by § 9901.911.

*FMCS* means Federal Mediation and Conciliation Service.

*Grade* means a level of work under a position classification or job grading system.

*Grievance* means any complaint—

(1) By any employee concerning any matter relating to the conditions of employment of the employee;

(2) By any labor organization concerning any matter relating to the conditions of employment of any employee; or

(3) By any employee, labor organization, or the Department concerning—

(i) The effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, regulation, or DoD issuance issued for the purpose of affecting conditions of employment.

*Labor organization* means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with the Department concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by the Department; or

(4) An organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

*Management official* means an individual employed by the Department in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the Department or who has the authority to recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment.

*Person* has the meaning given that term in 5 U.S.C. 7103(a)(1).

*Professional employee* has the meaning given that term in 5 U.S.C. 7103(a)(15).

*Supervisor* means an individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees; to adjust their grievances; or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment. It also means an individual employed by the Department who exercises supervisory authority over military members of the armed services, such as directing or assigning work or evaluating or recommending evaluations.

#### § 9901.904 Coverage.

(a) *Employees covered.* This subpart applies to eligible DoD employees, subject to a determination by the Secretary under § 9901.102(b)(1), except as provided in paragraph (b) of this section. DoD employees who would otherwise be eligible for bargaining unit membership under 5 U.S.C. chapter 71, as modified by § 9901.912, are eligible for bargaining unit membership under this subpart. In addition, this subpart applies to an employee whose employment in the Department has ceased because of any unfair labor practice under § 9901.916 of this subpart and who has not obtained any other regular and substantially equivalent employment.

(b) *Employees excluded.* This subpart does not apply to—

(1) An alien or noncitizen of the United States who occupies a position outside the United States;

(2) A military member of the armed services;

(3) A supervisor or a management official;

(4) Any person who participates in a strike in violation of 5 U.S.C. 7311; or

(5) Any employee excluded pursuant to § 9901.912 or any other legal authority.

**§ 9901.905 Impact on existing agreements.**

(a) Any provision of a collective bargaining agreement that is inconsistent with this part and/or DoD implementing issuances is unenforceable on the effective date of the applicable subpart(s) or such issuances. The exclusive representative may appeal the Department's determination that a provision is unenforceable to the National Security Labor Relations Board in accordance with the procedures and time limits pursuant to § 9901.908. However, the Secretary, in his or her sole and exclusive discretion, may continue all or part of a particular provision(s) with respect to a specific category or categories of employees and may cancel such continuation at any time; such determinations are not precedential.

(b) Upon request by an exclusive representative, the parties will have 60 days after the effective date of coverage under the applicable subpart and/or implementing issuance to bring into conformance those remaining negotiable terms directly affected by the terms rendered unenforceable by the applicable subpart and/or implementing issuance. If the parties fail to reach agreement by that date, they may utilize the negotiation impasse provisions of § 9901.920 to resolve the matter.

**§ 9901.906 Employee rights.**

Each employee has the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee will be protected in the exercise of such right. Except as otherwise provided under this subpart, such right includes the right—

(a) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and

(b) To engage in collective bargaining with respect to conditions of employment through representatives

chosen by employees under this subpart.

**§ 9901.907 National Security Labor Relations Board.**

(a)(1) The National Security Labor Relations Board is composed of at least three members who are appointed by the Secretary for terms of 3 years, except that the appointments of the initial Board members will be for terms of 1, 2, and 3 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for up to two additional 1-year terms. The Secretary, in his or her sole and exclusive discretion, may appoint additional members to the Board; in so doing, he or she will make such appointments to ensure that the Board consists of an odd number of members.

(2) Members of the Board will be independent, distinguished citizens of the United States who are well known for their integrity, impartiality, and expertise in labor relations, and/or the DoD mission and/or other related national security matters, and will be able to acquire and maintain an appropriate security clearance. Members may be removed by the Secretary only for inefficiency, neglect of duty, or malfeasance in office.

(3) An individual chosen to fill a vacancy on the Board will be appointed for the unexpired term of the member who is replaced and, at the Secretary's option, an additional term or terms.

(b) The Secretary will appoint two members, with one appointed as Chair of the Board. The third member of the Board will be appointed by the Secretary from a list of three to five nominees developed in consultation with the Director of OPM. The Secretary may appoint additional members as long as the total membership of the Board is an odd number.

(c) A Board vacancy will be filled according to the procedure used to appoint the member whose position was vacated.

(d)(1) The Board will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases. To the extent practicable, the Board will use a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. The Board may, pursuant to its regulations, use a combination of mediation, factfinding, and any other appropriate dispute resolution methods to resolve all such disputes at the earliest

practicable time and with a minimum administrative burden.

(2) A vote of the majority of the Board (or a three-person panel of the Board) will be final. A vacancy on the Board does not impair the right of the remaining members to exercise all of the powers of the Board. The vote of the Chair will be dispositive in the event of a tie.

(e) Decisions of the Board are final and binding.

(f)(1) Subject to § 9901.909(c), in order to obtain judicial review of a Board decision, except those involving appealable actions taken under subpart G of this part or 5 U.S.C. chapters 43 or 75, a party will request a review of the record of a Board decision by the Authority by filing such a request in writing within 15 days after the issuance of the decision. A copy of the request will be served on all parties. Within 15 days after service of the request, any response will be filed. The Authority will establish, in conjunction with the Board, standards for the sufficiency of the record and other procedures, including notice to the parties. The Authority will accept the findings of fact and interpretations of this part made by the Board and sustain the Board's decision unless the requesting party shows that the Board's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Caused by harmful error in the application of the Board's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

(2) The Authority will complete its review of the record and issue a final decision within 30 days after receiving the party's response to such request for review. If the Authority does not issue a final decision within the mandatory time limit established by paragraph (f) of this section, the Authority will be considered to have denied the request for review of the Board's decision, which will constitute a final decision of the Authority and is subject to judicial review in accordance with 5 U.S.C. 7123.

**§ 9901.908 Powers and duties of the Board.**

(a) The Board may to the extent provided in this subpart and in accordance with regulations prescribed by the Board—

(1) Conduct hearings and resolve complaints of unfair labor practices, including complaints concerning strikes, work stoppages, slowdowns, and picketing, or condoning such

activity by failing to take action to prevent or stop such activity;

(2) Resolve issues relating to the scope of bargaining and the duty to bargain in good faith under § 9901.917;

(3) Resolve disputes concerning requests for information under § 9901.914(b)(5) and (c);

(4) Resolve exceptions to arbitration awards. In doing so, the Board will conduct any review of an arbitral award in accordance with the same standards set forth in 5 U.S.C. 7122(a) as modified in § 9901.923;

(5) Resolve negotiation impasses in accordance with § 9901.920;

(6) Conduct *de novo* review involving all matters within the Board's jurisdiction;

(7) Have discretion to evaluate the evidence presented in the record and reach its own independent conclusions with respect to the matters at issue, but in no case may the Board issue status quo ante remedies, where such remedies are not intended to cure egregious violations of this subpart or where such an award would impose an economic hardship or interfere with the efficiency or effectiveness of the Department's mission or impact national security; and

(8) Resolve disputes regarding the granting of national consultation rights.

(b) Upon the request of a DoD Component or a labor organization concerned, the Board may issue binding Department-wide opinions for matters within its jurisdiction, which may be appealed as if they were decisions of the Board in accordance with § 9901.907(f).

(c) The Board's decisions will be written and published.

#### **§ 9901.909 Powers and duties of the Federal Labor Relations Authority.**

(a) To the extent provided in this subpart (pursuant to the authority in 5 U.S.C. 9902), the Federal Labor Relations Authority, in accordance with conforming regulations prescribed by the Authority, may—

(1) Determine the appropriateness of bargaining units pursuant to the provisions of § 9901.912; and

(2) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer 5 U.S.C. 7111 (relating to the accord of exclusive recognition to labor organizations), which is not waived for the purpose of this subpart.

(b) In any matter filed with the Authority, if the responding party believes that the Authority lacks jurisdiction, that party will timely raise the issue with the Authority and

simultaneously file a copy of its response with the Board in accordance with regulations established by the Authority. The Authority will promptly transfer the case to the Board, which will determine whether the matter is within the Board's jurisdiction. If the Board determines that the matter is not within its jurisdiction, the Board will return the matter to the Authority for a decision on the merits of the case. The Board's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority. The Authority will promptly decide those cases that the Board has determined are within the jurisdiction of the Authority.

(c) Judicial review of any Authority decision is as prescribed in 5 U.S.C. 7123(a), which is not modified.

#### **§ 9901.910 Management rights.**

(a) Subject to paragraphs (b), (c), and (d) of this section, nothing in this subpart may affect the authority of any management official or supervisor of the Department—

(1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department;

(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, pay schedules, pay bands and/or grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission; and

(3) To lay off and retain employees, or to suspend; remove; reduce in pay, pay band, or grade; or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

(b) Management is prohibited from bargaining over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section.

(c) Notwithstanding paragraph (b) of this section and at the request of an exclusive representative, management will consult as required under

§ 9901.917 over the procedures it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section. Consultation does not require that the parties reach agreement on any covered matter. The parties may, upon mutual agreement, provide for FMCS or another third party to assist in this process. Neither the Board nor the Authority may intervene in this process.

(d) If an obligation exists under § 9901.917 to bargain or consult regarding any authority under paragraph (a) of this section, management will provide notice to the exclusive representative concurrently with the exercise of that authority. However, at its sole, exclusive, and unreviewable discretion, management may provide notice to an exclusive representative of its intention to exercise an authority under paragraph (a) of this section as far in advance as practicable. Further, nothing in paragraph (d) of this section establishes an independent right to bargain or consult.

(e) When an obligation exists under § 9901.913, management will provide the exclusive representative an opportunity to present its views and recommendations regarding the exercise of an authority under paragraph (a) of this section, and the parties will bargain at the level of recognition (unless otherwise delegated below that level, at their mutual agreement) over otherwise negotiable—

(1) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

(2)(i) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraphs (a)(1) and (2) of this section, provided that the effects of such exercise is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change. Appropriate arrangements within the duty to bargain include proposals on matters such as personal hardships and safety measures.

(ii) Appropriate arrangements within the duty to bargain do not include proposals on matters such as—

(A) The routine assignment to specific duties, shifts, or work on a regular or overtime basis; and

(B) Pay or credit for work not actually performed.

(f) Where a proposal falls within the coverage of both paragraph (a)(1) and

(a)(3) of this section or paragraph (a)(2) and (a)(3) of this section, the matter will be determined to be covered by paragraph (a)(1) or (a)(2) of this section for the purpose of collective bargaining.

(g) Nothing in this section will delay or prevent the Department from exercising its authority. Any agreements reached with respect to paragraph (e)(2) of this section will not be precedential or binding on subsequent acts, or retroactively applied, except at the Department's sole, exclusive, and unreviewable discretion.

(h) Nothing in the process established under this section or in § 9901.917, will delay the exercise of a management right under § 9901.910(a)(1), (2) or (3).

(i) Management retains the sole, exclusive, and unreviewable discretion to determine the procedures that it will observe in exercising the authorities set forth in § 9901.910(a)(1) and (2) and to deviate from such procedures, as necessary.

**§ 9901.911 Exclusive recognition of labor organizations.**

The Department will accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees, in an appropriate unit as determined by the Authority, who cast valid ballots in the election.

**§ 9901.912 Determination of appropriate units for labor organization representation.**

(a) The Authority will determine the appropriateness of any unit. The Authority will determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this subpart, the appropriate unit should be established on a Department, plant, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the Department, consistent with the Department's mission and organizational structure and § 9901.107(a).

(b) A unit may not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor may a unit be determined to be appropriate if it includes—

(1) Except as provided under 5 U.S.C. 7135(a)(2), which is not waived for the purpose of this subpart, any management official or supervisor;

(2) A confidential employee;

(3) An employee engaged in personnel work;

(4) An employee in an attorney position;

(5) An employee engaged in administering the provisions of this subpart;

(6) Both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(7) Any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(8) Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by the Department whose duties directly affect the internal security of the Department, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law or this subpart relating to labor-management relations may not be represented by a labor organization—

(1) Which represents other individuals to whom such provision or subpart applies; or

(2) Which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision or subpart applies.

(d) Two or more units in the Department for which a labor organization is the exclusive representative may, upon petition by the Department or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority will certify the labor organization as the exclusive representative of the new larger unit.

**§ 9901.913 National consultation.**

(a) If, in connection with the Department or Component, no labor organization has been accorded exclusive recognition on a Department or Component basis, a labor organization that is the exclusive representative of a substantial number of the employees of the Department or Component, as determined in accordance with criteria prescribed by the Board, will be granted national consultation rights by the Department or Component. National consultation rights will terminate when the labor organization no longer meets the criteria prescribed by the Board. Any issue relating to any labor organization's eligibility for or continuation of, national consultation rights will be subject to determination by the Board.

(b)(1) Any labor organization having national consultation rights in connection with any Department or Component under subsection (a) of this section will—

(i) Be informed of any substantive change in conditions of employment proposed by the Department or Component; and

(ii) Be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (b)(1) of this subsection to the Department or Component by any labor organization—

(i) The Department or Component will consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(ii) The Department or Component will provide the labor organization a written statement of the reasons for taking the final action.

(c) Section 9901.913(b) does not apply where the proposed change is bargained at the national level or where continuing collaboration procedures under § 9901.106 apply.

(d) Nothing in this section precludes the Department or the Component from seeking views and recommendations from labor organizations having exclusive representation within the Department or Component which do not have national consultation rights.

(e) Nothing in this section will be construed to limit the right of the agency or exclusive representative to engage in collective bargaining.

**§ 9901.914 Representation rights and duties.**

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit will be given the opportunity to be represented at—

(i) Any formal discussion between a Department management official(s) and bargaining unit employees, the purpose of which is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. This right does not apply to meetings between a management official(s) and bargaining unit

employees for the purpose of discussing operational matters where any discussion of personnel policies, practices or working conditions—

(A) Constitutes a reiteration or application of existing personnel policies, practices, or working conditions;

(B) Is incidental or otherwise peripheral to the announced purpose of the meeting; or

(C) Does not result in an announcement of a change to, or a promise to change, an existing personnel policy(s), practice(s), or working condition(s);

(ii) Any discussion between one or more Department representatives and one or more bargaining unit employees concerning any grievance filed under the negotiated grievance procedure; or

(iii) Any examination of a bargaining unit employee by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests such representation. Such right will not apply to investigations conducted by the Offices of the Inspectors General and other independent Department or Component organizations whose mission includes the conduct of criminal investigations, such as the Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations.

(3) The Department will annually inform its employees of their rights under paragraph (a)(2)(iii) of this section.

(4) Employee representatives employed by the Department are subject to the same expectations regarding conduct as any other employee, whether they are serving in their representative capacity or not.

(5) Except in the case of grievance procedures negotiated under this subpart, the rights of an exclusive representative under this section may not be construed to preclude an employee from—

(i) Being represented by an attorney or other representative of the employee's own choosing, other than the exclusive representative, in any grievance or appeal action; or

(ii) Exercising grievance or appellate rights established by law, rule, or regulation.

(b) The duty of the Department or appropriate Component(s) of the Department and an exclusive representative to negotiate in good faith

under paragraph (a) of this section includes the obligation—

(1) To approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) To be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) To meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) If agreement is reached, to execute on the request of any party to the negotiation, a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement; and

(5) In the case of the Department or appropriate Component(s) of the Department, to furnish information to an exclusive representative, or its authorized representative, when—

(i) Such information exists, is normally maintained in the regular course of business, and is reasonably available;

(ii) The exclusive representative has requested such information and demonstrated a particularized need for the information in order to perform its representational functions in grievance or appeal proceedings, or in negotiations; and

(iii) Disclosure is not prohibited by law.

(c) Disclosure of information in paragraph (b)(5) of this section does not include the following:

(1) Disclosure prohibited by law or regulations, including, but not limited to, the regulations in this part, Governmentwide rules and regulations, Departmental implementing issuances and other policies and regulations, and Executive orders;

(2) Disclosure of information if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without recourse to the information;

(3) Internal Departmental guidance, counsel, advice, or training for managers and supervisors relating to collective bargaining;

(4) Any disclosures where an authorized official has determined that disclosure would compromise the Department's mission, security, or employee safety; and

(5) Personal addresses, personal telephone numbers, personal email addresses, or any other information not related to an employee's work.

(d)(1) An agreement between the Department or appropriate Component(s) of the Department and the exclusive representative is subject to approval by the Secretary.

(2) The Secretary will approve the agreement within 30 days after the date the agreement is executed if the agreement is in accordance with the provisions of these regulations and any other applicable law, rule, regulation or similar Department or Component issuance.

(3) If the Secretary does not approve or disapprove the agreement within the 30-day period specified in paragraph (d)(2) of this section, the agreement will take effect and is binding on the Department or Component(s), as appropriate, and the exclusive representative, but only to the extent it is consistent with Federal law, Presidential issuance (*e.g.*, Executive order), Governmentwide regulations, DoD issuances (including implementing issuances and Component issuances), or the regulations in this part.

(4) A local agreement subject to a national or other controlling agreement at a higher level may be approved under the procedures of the controlling agreement or, if none, under Departmental regulations. Bargaining will be at the level of recognition except where delegated.

(5) Provisions in existing collective bargaining agreements are unenforceable if an authorized official determines that they are contrary to Federal law, Presidential issuance (*e.g.*, Executive order), Governmentwide regulations, DoD issuances (including implementing issuances and Component issuances), or the regulations in this part.

#### **§ 9901.915 Allotments to representatives.**

(a) If the Department has received from an employee in an appropriate unit a properly executed written or electronic assignment which authorizes the Department to deduct from the pay of the employee amounts for the payment of regular and periodic dues and other financial assessments of the exclusive representative of the unit, the Department will honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment will be made at no cost to the exclusive representative or the employee. Except as provided under paragraph (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under paragraph (a) of this section for the deduction of dues with respect to any employee terminates when—

(1) The agreement between the Department or Department Component and the exclusive representative involved ceases to be applicable to the employee; or

(2) The employee is suspended or expelled from membership by the exclusive representative.

(c)(1) Subject to paragraph (c)(2) of this section, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in the Department have membership in the labor organization, the Authority will investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the Department has a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(i) The provisions of paragraph (c)(1) of this section do not apply in the case of any appropriate unit for which there is an exclusive representative.

(ii) Any agreement under paragraph (c)(1) of this section between a labor organization and the Department or Department Component with respect to an appropriate unit becomes null and void upon the certification of an exclusive representative of the unit.

**§ 9901.916 Unfair labor practices.**

(a) For the purpose of this subpart, it is an unfair labor practice for the Department—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) To sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities on an impartial basis to other labor organizations having equivalent status;

(4) To discipline or otherwise discriminate against an employee because the employee has filed a complaint or petition, or has given any information or testimony under this subpart;

(5) To refuse, as determined by the Board, to negotiate in good faith or to consult with a labor organization, as required by this subpart;

(6) To fail or refuse, as determined by the Board, to cooperate in impasse

procedures and impasse decisions, as required by this subpart; or

(7) To fail or refuse otherwise to comply with any provision of this subpart.

(b) For the purpose of this subpart, it is an unfair labor practice for a labor organization—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To cause or attempt to cause the Department to discriminate against any employee in the exercise by the employee of any right under this subpart;

(3) To coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) To discriminate against an employee with regard to the terms and conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) To refuse, as determined by the Board, to negotiate in good faith or to consult with the Department as required by this subpart;

(6) To fail or refuse, as determined by the Board, to cooperate in impasse procedures and impasse decisions as required by this subpart;

(7)(i) To call, or participate in, a strike, work stoppage, or slowdown, or picketing of the Department in a labor-management dispute if such picketing interferes with an agency's operations; or

(ii) To condone any activity described in paragraph (b)(7)(i) of this section by failing to take action to prevent or stop such activity; or

(8) To otherwise fail or refuse to comply with any provision of this subpart.

(c) Notwithstanding paragraph (b)(7) of this section, informational picketing which does not interfere with the Department's operations will not be considered an unfair labor practice.

(d) For the purpose of this subpart, it is an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by the labor organization, except for failure to meet reasonable occupational standards uniformly required for admission or to tender dues uniformly required as a

condition of acquiring and retaining membership. This does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this subpart.

(e) The Board will not consider any unfair labor practice charge filed more than 90 days after the alleged unfair labor practice occurred, unless the Board determines, pursuant to its regulations, that there is good cause for the late filing.

(f) Unfair labor practice issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except where an employee has an option of using the negotiated grievance procedure or an appeals procedure in connection with an adverse action, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(g) The expression of any personal view, argument, opinion, or the making of any statement which publicizes the fact of a representational election and encourages employees to exercise their right to vote in such an election, corrects the record with respect to any false or misleading statement made by any person, or informs employees of the Government's policy relating to labor-management relations and representation, will not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions—

(1) Constitute an unfair labor practice under any provision of this subpart; or

(2) Constitute grounds for the setting aside of any election conducted under any provision of this subpart.

**§ 9901.917 Duty to bargain and consult.**

(a) The Department or appropriate Component(s) of the Department and any exclusive representative in any appropriate unit in the Department, through appropriate representatives, will meet and negotiate in good faith as provided by this subpart for the purpose of arriving at a collective bargaining agreement. In addition, the Department or appropriate Component(s) of the Department and the exclusive representative may determine appropriate techniques, consistent with the operational rules of the Board, to assist in any negotiation.

(b) If bargaining over an initial collective bargaining agreement or any successor agreement is not completed within 90 days after such bargaining

begins, the parties may mutually agree to continue bargaining, or either party may refer the matter to the Board for resolution in accordance with procedures established by the Board. At any time prior to going to the Board, either party may refer the matter to FMCS for assistance.

(c) If the parties bargain during the term of an existing collective bargaining agreement, or in the absence of a collective bargaining agreement, over a proposed change affecting bargaining unit employees' conditions of employment, and no agreement is reached within 30 days after such bargaining begins, either party may refer the matter to the Board for resolution in accordance with procedures established by the Board. Either party may refer the matter to FMCS for assistance at any time.

(d)(1) Management may not bargain over any matters that are inconsistent with law or the regulations in this part, Governmentwide rules and regulations, Departmental implementing issuances and other Department or Component policies, regulations or similar issuances, or Executive orders.

(2) Except as otherwise provided in § 9901.910(c), management has no obligation to bargain or consult over a change to a condition of employment unless the change is otherwise negotiable pursuant to these regulations and is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(3) Nothing in paragraphs (b) or (c) of this section prevents management from exercising the rights enumerated in § 9901.910.

(e) If a management official involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Board in accordance with procedures established by the Board.

#### **§ 9901.918 Multi-unit bargaining.**

(a) Negotiations can occur at geographical or organizational levels within DoD or a Component with the local exclusive representatives impacted by the proposed change.

(b) Any such negotiations will—

(1) Be binding on all parties afforded the opportunity to bargain with representatives of DoD or the Component;

(2) Supersede all conflicting provisions of applicable collective bargaining agreements of the labor

organization(s) affected by the negotiations;

(3) Not be subject to ratification; and

(4) Be subject to impasse resolution by the Board under procedures prescribed by the Board. In resolving impasses, the Board will ensure that agreement provisions are consistent with regard to all similarly situated employees. The determination as to which organizations are covered under multi-unit bargaining is not subject to review by the Board.

(c) Any party may request the services of FMCS to assist with these negotiations.

(d) Labor organizations may request multi-unit bargaining, as appropriate. The Secretary has sole and exclusive authority to grant the labor organizations' request.

(e) The Department will prescribe implementing issuances on the procedures and constraints associated with multi-unit bargaining.

#### **§ 9901.919 Collective bargaining above the level of recognition.**

(a) Negotiations can occur at the DoD or Component level with labor organization(s) at an organizational level above the level of exclusive recognition. The decision to negotiate at a level above the level of recognition as well as the unions involved, is within the sole and exclusive discretion of the Secretary to determine and will not be subject to review.

(b) Any such agreement reached in these negotiations will—

(1) Be binding on all subordinate bargaining units of the labor organization(s) afforded the opportunity to bargain at the level of recognition and their exclusive representatives, and DoD and its Components, without regard to levels of recognition;

(2) Supersede all conflicting provisions of other collective bargaining agreements of the labor organization(s), including collective bargaining agreements negotiated with an exclusive representative at the level of recognition, except as otherwise determined by the Secretary;

(3) Not be subject to further negotiations with the labor organizations for any purpose, including bargaining at the level of recognition, except as the Secretary may decide, in his or her sole and exclusive discretion;

(4) Be subject to review by the Board only to the extent provided by this subpart;

(5) Not be subject to ratification;

(6) Be subject to impasse resolution by the Board under procedures prescribed by the Board. In resolving impasses, the Board will ensure that agreement provisions are consistent with regard to

all similarly situated employees. The determination as to which organizations are covered under national level bargaining is not subject to review by the Board;

(7) The National Guard Bureau and the Army and Air Force National Guard are excluded from coverage under this section. Where National Guard employees are impacted, negotiations at the level of recognition are authorized; and

(8) Labor organizations may request bargaining above the level of recognition, as appropriate. The Secretary has sole and exclusive authority to grant the labor organizations' request.

#### **§ 9901.920 Negotiation impasses.**

(a) If the Department and exclusive representative are unable to reach an agreement under §§ 9901.914, 9901.917, 9901.918, or 9901.919, either party may submit the disputed issues to the Board for resolution.

(b) The Board may take whatever action is necessary and not inconsistent with this subpart to resolve the impasse, to include use of settlement efforts.

(c) Pursuant to §§ 9901.907 and 9901.926, the Board's regulations will provide for a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses.

(d) Notice of any final action of the Board under this section will be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise. Nothing in this section precludes judicial review of any portion of a decision addressing a negotiability dispute or unfair labor practice charge.

#### **§ 9901.921 Standards of conduct for labor organizations.**

Standards of conduct for labor organizations are those prescribed under 5 U.S.C. 7120, which is not modified.

#### **§ 9901.922 Grievance procedures.**

(a)(1) Except as provided in paragraph (a)(2) of this section, any collective bargaining agreement will provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in paragraphs (d) and (f) of this section, the procedures will be the exclusive procedures for grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in paragraph (a) of this section will be fair and simple, provide for expeditious processing, and include procedures that—

(i) Assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) Assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) Provide that any grievance not satisfactorily settled under the negotiated grievance procedure is subject to binding arbitration, which may be invoked by either the exclusive representative or the Department.

(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (b)(1)(iii) of this section will, to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order a stay of any personnel action in a manner similar to the manner described in 5 U.S.C. 1221(c) with respect to the Merit Systems Protection Board and order the Department to take any disciplinary action identified under 5 U.S.C. 1215(a)(3) that is otherwise within the authority of the Department to take.

(3) Any employee who is the subject of any disciplinary action ordered under paragraph (b)(2) of this section may appeal such action to the same extent and in the same manner as if the Department had taken the disciplinary action absent arbitration.

(c) The preceding paragraphs of this section do not apply with respect to any matter concerning—

(1) Any claimed violation of 5 U.S.C. chapter 73, subchapter III (relating to prohibited political activities);

(2) Retirement, life insurance, or health insurance;

(3) Any examination, certification, or appointment;

(4) A rating of record issued under subpart D of this part;

(5) A removal taken under mandatory removal authority as defined in § 9901.717;

(6) Any subject not within the definition of *grievance* in § 9901.903 (e.g., the classification or pay of any position), except for an adverse action under applicable authority, including subpart G of this part, which is not otherwise excluded by paragraph (c) of this section; or

(7) A suspension or removal taken under 5 U.S.C. 7532.

(d) To the extent not already excluded by existing collective bargaining agreements, the exclusions contained in paragraph (c) of this section apply upon the effective date of this subpart, as determined under § 9901.102(b)(1).

(e)(1) An aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. 2302(b)(1) which also falls under the coverage of the negotiated grievance procedure may raise the matter under the applicable statutory procedures, or the negotiated procedure, but not both.

(2) An employee is deemed to have exercised his or her option under paragraph (e)(1) of this section to raise the matter under the applicable statutory procedures, or the negotiated procedure, at such time as the employee timely initiates an action under the applicable statutory or regulatory procedure or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(f)(1) For appealable matters, except for mandatory removal offenses under § 9901.717, an aggrieved employee may raise the matter under an applicable appellate procedure or under the negotiated grievance procedure, but not both. An employee will be deemed to have exercised his or her option under this section when the employee timely files an appeal under the applicable appellate procedures or a grievance in accordance with the provisions of the parties' negotiated grievance procedure, whichever occurs first.

(2) An arbitrator hearing a matter appealable under subpart H of this part is bound by the applicable provisions of this part.

(g)(1) This paragraph applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which paragraph (e) of this section applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (g)(1) of this section may elect not more than one of the procedures described in paragraph (g)(3) of this section with respect thereto. A determination as to whether a particular procedure for seeking a remedy has been elected will be made as set forth under paragraph (g)(4) of this section.

(3) The procedures for seeking remedies described in this paragraph are as follows:

(i) An appeal under subpart H of this part;

(ii) A negotiated grievance under this section; and

(iii) Corrective action under 5 U.S.C. chapter 12, subchapters II and III.

(4) For the purpose of this paragraph, an employee is considered to have elected one of the following, whichever election occurs first:

(i) The procedure described in paragraph (g)(3)(i) of this section if such employee has timely filed a notice of appeal under the applicable appellate procedures;

(ii) The procedure described in paragraph (g)(3)(ii) of this section if such employee has timely filed a grievance in writing in accordance with the provisions of the parties' negotiated procedure; or

(iii) The procedure described in paragraph (g)(3)(iii) of this section if such employee has sought corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1).

(h) An arbitrator hearing a matter under this subpart is bound by all applicable laws, rules, regulations, and DoD issuances, including applicable provisions of this part.

#### **§ 9901.923 Exceptions to arbitration awards.**

(a) Either party to arbitration under this subpart may file with the Board an exception to any arbitrator's award, except an award issued in connection with an appealable matter under § 9901.922(f) or matters similar to those covered under 5 U.S.C. 4303 and 7512 arising under other personnel systems, which will be adjudicated under procedures described in § 9901.807(k)(8) through (10). Such procedures are adopted in this subpart for these purposes.

(b) In addition to the bases contained in 5 U.S.C. 7122, exceptions may also be filed by the parties based on the arbitrator's failure to properly consider the Department's national security mission or to comply with applicable NSPS regulations and DoD issuances. The Board may take such action concerning the award as is consistent with this subpart.

(c) If no exception to an arbitrator's award is filed under paragraph (a) of this section during the 30-day period beginning on the date of such award, the award is final and binding. Either party will take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided under 5 U.S.C. 5596 and 5 CFR part 550, subpart H).

(d) Nothing in this section prevents the Board from determining its own jurisdiction without regard to whether any party has raised a jurisdictional issue.

**§ 9901.924 Official time.**

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this subpart will be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this section may not exceed the number of individuals designated as representing the Department for such purposes.

(b) Any activities performed by any employee relating to the internal business of the labor organization, including but not limited to the solicitation of membership, elections of labor organization officials, and collection of dues, will be performed during the time the employee is in a nonduty status.

(c) Except as provided in paragraph (a) of this section, the Authority or the Board, as appropriate, will determine whether an employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority or the Board will be authorized official time for such purpose during the time the employee would otherwise be in a duty status.

(d) Except as provided in the preceding paragraphs of this section, any employee representing an exclusive representative or, in connection with any other matter covered by this subpart, any employee in an appropriate unit represented by an exclusive

representative, will be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

(e) Official time for representational activities will not extend to the representation of employees outside the representative's bargaining unit, except for multi-unit bargaining and/or bargaining above the level of recognition, in accordance with §§ 9901.918 and 9901.919 and mutual agreement of the agency and the exclusive representatives involved.

**§ 9901.925 Compilation and publication of data.**

(a) The Board will maintain a file of its proceedings.

(b) All files maintained under paragraph (a) of this section will be open to inspection and reproduction in accordance with 5 U.S.C. 552 and 552a. The Board will establish rules in consultation with the Department for maintaining and making available for inspection sensitive information.

**§ 9901.926 Regulations of the Board.**

The Department may issue initial interim rules for the operation of the Board and will consult with labor organizations granted national consultation rights on the rules. The Board will prescribe and publish rules for its operation in the **Federal Register**.

**§ 9901.927 Continuation of existing laws, recognitions, agreements, and procedures.**

(a) Except as otherwise provided by §§ 9901.905 or 9901.912, nothing

contained in this subpart precludes the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or an agreement that is otherwise consistent with law, the regulations in this part and DoD or Component issuances between the Department or a Component thereof and an exclusive representative of its employees, which is entered into before the effective date of this subpart, as determined under § 9901.102(b)(1).

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838 or any other Executive order, in effect on the effective date of this subpart (as determined under § 9901.102(b)(1)), will remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this subpart or by implementing issuances or decisions issued pursuant to this subpart.

**§ 9901.928 Savings provisions.**

This subpart does not apply to grievances or other administrative proceedings already pending on the date of coverage of this subpart, as determined under § 9901.102(b)(1). Any remedy that applies after the date of coverage under any provision of this part and that is in conflict with applicable provisions of this part is not enforceable.

[FR Doc. 05-2582 Filed 2-11-05; 8:45 am]

BILLING CODE 6325-39-P; 5001-06-P