

**DoD/OPM Response to Union Recommendations on Scope of Bargaining
NSPS Meet and Confer
May 11, 2005**

We recognize that our proposed regulation narrows the scope of bargaining, but we believe it strikes the right balance of providing employees and their representatives the ability to bargain over important workplace issues and to have a voice in operational matters, while allowing the Department to act expeditiously to carry out its mission.

We cannot accept your recommendations as written or presented, particularly the conditions that you have attached to them, i.e., that all other aspects of the scope of bargaining under the current Chapter 71 be retained with no change. Your recommendations, as we understand them, and our responses, follow:

1. Emergencies and Post Implementation Bargaining – you offer to allow the Department to take actions “reasonably necessary to carry out the Department’s national security mission” before collective bargaining is completed, in the event of an “exigency.” Although your recommendation, as written, appears to be consistent with case law today concerning acting in an emergency, we recognize that your intent may be to establish a standard for something less than an “emergency” as defined under today’s rules. This suggestion would also provide for prospective post-implementation bargaining on such matters, with remedies if management does not act in good faith.

We, however, believe the proposed regulations as written already provide for the capability to act in the event of an exigency. Your suggestion, as written, would have the effect of limiting the situations in which management could take actions necessary to carry out its “national security mission.” We believe that mission “exigencies” can occur at any DoD activity, such as maintenance depots, shipyards, accounting offices, logistics centers, dependent schools, and personnel offices. That is why the proposed regulations provide for management’s ability to act before meeting collective bargaining obligations.

2. Department-wide or Component-wide Issuances – you expressed concern that local management officials would promulgate issuances that would override provisions of collective bargaining agreements. You offer to allow the Department to promulgate Department-wide or Component-wide issuances “necessary to fulfill the Department of Defense national security mission” that could override collective bargaining agreements, provided that DoD subjects those issuances to national level bargaining, OR the issuances meet criteria similar to today’s “compelling need” standard.

We believe the effect of this suggestion is similar to that of your first recommendation. It establishes a new “compelling need” test that would require the Department to demonstrate that a Department-wide or Component-wide rule or regulation is “essential” to national security; this is too restrictive. We believe that such issuances are, by definition, necessary to carry out the mission of the Department, and thus have a direct relationship to “national security.” Establishing uniform policies and procedures, not subject to local modification, is necessary for the effective and efficient operations of the Department. That is why the proposed regulations exclude such issuances from the collective bargaining process. However, we believe we have

addressed your concerns over *who* in the Department has the authority to promulgate issuances that would impact collective bargaining agreements.

As we indicated on May 9, we will recommend to the Secretary and the Director that the rule be revised to provide that only the Secretary of Defense, the Deputy Secretary of Defense, the Principal Staff Assistants (e.g., Under Secretaries), and the Secretaries of the Military Departments will issue NSPS implementing issuances. Also, with regard to issuances on non-NSPS matters, we would recommend that only issuances promulgated by the Secretary of Defense, the Deputy Secretary of Defense, the Principal Staff Assistants (e.g., Under Secretaries), and the Secretaries of the Military Departments would be exempted from collective bargaining as described above.

This would not restrict the ability of other Component heads (DoD Agencies and Field Activities, Combatant Commands, etc.) to promulgate issuances for their organizations. However, those issuances could be subject to collective bargaining (which could be accomplished through national level bargaining at the Secretary's discretion).

3. National Level and Multi-Unit Bargaining – you offer to accept the provisions for national level bargaining, provided that the third party impasse resolution authority is not the National Security Labor Relations Board (you have proposed using arbitrators to resolve impasses) and that we remove reference to ratification from the proposed regulations.

We find aspects of your recommendations generally acceptable and after further discussion we may be willing to recommend changes to these provisions. However we do not agree that arbitrators should resolve impasses. We believe that the proposed National Security Labor Relations Board would be the appropriate venue for impasse resolution. You have pointed out that because Department-wide and Component-wide issuances are not subject to bargaining, there would be little to bargain over at the national level. Our view is that the prohibition on bargaining over such issuances does not restrict the Secretary from identifying issues that would be appropriate for national level bargaining. We also believe that the multi-unit bargaining aspects of this provision will be widely used.

Other Related Matters

You also asked whether NSPS implementing issuances or issuances on other matters could impact collective bargaining agreements. As we've previously indicated, NSPS implementing issuances would override provisions of collective bargaining agreements where there is a conflict. This is intended to ensure a consistent and uniform implementation of NSPS across the Department. The unions are provided a role in the development of these issuances through the continuing collaboration process. With regard to issuances (involving matters other than NSPS), the content of these issuances are outside the duty to bargain. However, where there is a conflict with an existing collective bargaining agreement, the agreement will prevail until such time as the agreement expires or is renegotiated. At that time, the agreement must be brought into conformance with the issuance. To the extent that management rights are being exercised with these issuances, bargaining may occur with regard to procedures, impact and appropriate arrangements in accordance with the proposed NSPS regulations. Also, these issuances are subject to national consultation with those unions holding national consultation rights.

Finally, it is important to note that an issuance will not be issued for the sole purpose of overriding a collective bargaining agreement. While DoD and Military Department level issuances may impact collective bargaining agreements, there will be mission and business related reasons for these issuances.