VIA COURIER AND E-DOCKETING

March 15, 2005

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

RE: Comments to Federal Register Notice, Vol. 70, No. 29, February 14, 2005
Department of Defense, Office of Personnel Management
National Security Personnel System
5 CFR Chapter XCIX and Part 9901
Docket Number: NSPS-2005-001
RIN: 3206-AK76 or 0790-AH82

Dear Mr. Bunn:

On behalf of the National Federation of Federal Employees, FD-1, IAMAW (NFFE) and our affiliate, the International Association of Machinists and Aerospace Workers (IAMAW), the certified exclusive bargaining representative of 57,000 men and women within the Department of Defense (DoD or Agency), we respectfully submit the following comments in response to the proposed regulations referenced above (Notice), which are aimed at instituting and implementing the National Security Personnel System (NSPS). We understand that the DoD United Worker Coalition (Coalition), an entity to which we have been an active and vocal member, will also be submitting detailed comments and recommendations, which we have also participated in creating. The comments and recommendations of the Coalition are hereby incorporated by reference into these comments.

These comments are not be construed as a waiver or substitution of any rights we may have with respect to "meet and confer', discuss, negotiate or challenge any matter raised in the Notice and proposed regulations in the appropriate forum at the appropriate time. Any section or provision not explicitly addressed in these comments and recommendations shall also be deemed rejected or unsuitable, in order to preserve any and all rights we have during the meet and confer period.

Initial Objections

As an initial matter, we raise two objections. First, we object to the requirement, as stated in the Supplemental Information that all comments submitted must reference the regulatory text by subpart and section number as well as the Supplemental Information by page number. (Supplemental Information or SI at 7552.) We believe that this requirement is inconsistent with the Administrative Procedures Act and rule-making via public comment. We further believe that this requirement will be unduly complicated to the average DoD employee. As a result, we believe that the Agency will not consider any comments which do not meet this requirement, thereby discarding a great number of critical statements from field and headquarters employees on the single ground that DoD's unreasonable requirement is not met. We also find this requirement inconsistent with the Supplemental Information since the Supplemental Information fails to reference the regulation sections and subsections.

Secondly, we object to information conveyed in the Supplemental Information. Although the regulations will ultimately provide the framework for the meet and confer process as well as issuance of the final regulations, the Supplemental Information periodically expands, or detracts from the proposed regulation. For example, the proposed regulations limit the participation of the exclusive representative to discussions concerning any grievance filed under the negotiated grievance procedure. § 9901.914(a)(2)(C)(ii). The Supplemental Information, however, advises us that this requirement resolves any disputes regarding whether union representatives have a legal entitlement to be present in EEO proceedings. (SI at 7571.) (Note, as stated above, while the Notice requires commentators to reference the section and subsection number, the Supplemental Information does neither.) We are confused as to what role the Supplemental Information will play in these regulations and whether such Supplemental Information will have the full force and effect of law and regulation. We believe that if such Supplemental Information is crucial to the interpretation of the proposed regulation, such information should be issued as a regulation, and not buried in expository material.

Subpart A – General Provisions (§§ 9901.101 to 9901.108)

Section 9901.101 states that this part "governs the establishment of a new human resources system within (DoD) as authorized by 5 U.S.C. 9902 . . ." We object to this statement since the proposed regulations do not contain regulations governing a new pay, performance management, classification, and workforce shaping, staffing and employment. Rather, the proposed regulations leave to "implementing issuances" (*see* § 9901.103), developed internally, outside the public comment period and the statutory collaboration process, to create the actual details of the new system. According to the law authorizing the development of a new human resources management system within DoD, such development must be in collaboration with the employee representatives in order to meet the letter and the spirit of the National Defense Authorization Act of 2004,

which granted Congressional authority for DoD to amend its current system. Absent any understanding of the administration and the detail of any new system, we do not believe that we, as employee representatives, can intelligently, practically, and meaningfully exercise our rights under § 9902(f) of the National Defense Authorization Act of 2004.

We further object to the process which the proposed regulations define as "continuing collaboration" under § 9901.106(2)(ii), which allows the Secretary, in his/her sole discretion, without any articulated guidance or criteria, choose which employee representatives will participate in any continuing collaboration. We believe that this subsection grants DoD license to pick and choose which employee representatives will "go along" with future plans while allowing the Secretary to exclude employee representatives which may be significantly and adversely impacted by such future issuances or plans. We recommend that this subsection be deleted in its entirety along with references to this section in 9901.106(2)(iii).

Subpart B – Classification (§§ 9901.201 to 9901.9901.231)

The Supplemental Information dictates that the new classification authority will be a "streamlined method . . . that no longer relies on lengthy classification standards and position descriptions." (SI at 7559.) The stated goal, consistent with the guiding principles of the proposal is to gain "greater flexibility to adapt (DoD)'s job and pay structure to meet present and future mission requirements." *Id.* Other than general provisions and authority, the proposed regulations offer no detail.

We are concerned that rather than 'streamline' the current system, the proposed regulations give DoD license to complicate classification. Stated another way, and taking the example of the authority granted to the Internal Revenue Service, in lieu of reducing job categories and positions, greater complexity will be created. We are further concerned that the purpose of this Subpart, as stated in § 9901.201, only requires that positions are classified according to duties, responsibilities, and qualification requirements without guarantees that positions are uniformly grouped throughout DoD, as fairness would dictate. Since the proposed regulations only allow DoD the discretion to choose from a list of factors for any single career group (*see* § 9901.211) we are concerned that DoD has forsaken the objective criteria in 5 U.S.C., Chapter 51, § 5106, in favor of the total, indeterminate "flexibility" required to meet today's national security demands. Indeed, nothing in this Subpart supports the total abandonment of objective criteria in position classification in favor of the broad, undefined concept of national security.

At a minimum, we recommend that any new pay schedules and pay bands be reviewed and approved by Office of Personnel Management (OPM) before going into effect. *See* § 9901.212. We further recommend that any authority exercised under this section be executed in conjunction and in full collaboration with the exclusive bargaining

representatives at DoD. To this effect, we recommend that DoD engage its labor unions to develop any new classification system collectively as the Federal Aviation Administration once joined with its labor organizations to overhaul classification system for air traffic controllers nationwide. With the participation of the employee representatives, DoD will be able to meet its guiding principle that any system designed will be flexible, understandable, credible, responsive, and executable. Further, joint development of a new classification system will ensure the credibility and transparency, as required by the Key Performance Parameters established by the Supplemental Information.

Subpart C – Pay and Pay Administration (§§ 9901.301 to 9901.373)

According to the Supplemental Information, DoD's "guiding principles" place the DoD mission first (which is in turn defined as supporting national security goals and strategic objectives). (SI at 7555.) Subordinate to the mission, the Agency hopes to respect individual rights guaranteed by law, value talent, performance, leadership and commitment while maintaining flexibility, credibility, responsiveness (presumably to the mission). Against this background, these proposed rules profess that any Human Resource Management System will ensure accountability "at all levels", balance human resource "interoperability" with the DoD mission, remain competitive and cost effective. In our "post 9/11"world, these guiding principles are compelling, indeed.

With respect to pay, we understand that DoD will consider classifying jobs to accommodate the dynamic needs and technology changes that will provide 'agility' and 'flexibility' to assign work. (SI at 7555.) We understand that DoD will consider pay banding with 'occupational clusters', define career paths within each cluster, simplify requirements for assigning employees to bands within occupational clusters as well as simplify position descriptions to ensure satisfaction of the DoD goal of flexibility. §§ 9901.311 through 313. In order to reward performance in competitive areas, we understand that pay in certain occupational clusters will reflect market conditions. We understand that DoD believes that current GS system does not satisfy its evolving needs. We disagree.

The current GS system has ample opportunities for DoD to structure pay, create exceptions, attract, recruit and retain talented employees, and adjust for geographic hiring needs. As this concept provides us with little detail on how the pay banding and occupational clusters will be defined and implemented, we believe that any discussion in this arena is premature absent a complete and thoughtful plan regarding how this concept will materialize. We are also concerned that this concept, as ambitious as it is, lacks the appropriate funding to truly meet the DoD guiding principles. Stated another way, if DoD's goal is to tailor occupational clusters to labor market conditions, any funding for this concept must also be market based. We understand however, in the world of Congressionally appropriated funding, in which DoD exists, funding is driven by

budgetary concerns, not the market. For these reasons, we believe the underlying premise of this concept is deeply flawed.

With respect to pay for performance, we understand that DoD desires to reward 'high performing' employees rather than guarantee annual increases across the board. *See* §§ 9901.341-345, DoD/OPM, through these concepts, desire to make employee performance the cornerstone in pay progression, thereby replacing the current system of longevity pay. We understand that one of the concepts is to create 'pay pools', which in turn, tie pay increases to an employee's rating. These "pools" will be 'shared' for purposes of employee pay increases and bonuses. *See* §§ 9901.341 to 9901.344. Again, the proposed rules provide no specifics and no explanation regarding this concept. Further, as we stated above, any pay system, based on a 'share pool' that anticipates greater reward for high performers but is simultaneously dependent on budget allocation, risks frustration of the DoD goal to guarantee that high performers will be valued for their "talent, performance, leadership and commitment to public service" as the DoD guiding principles require. The proposed regulations are "murky" in that these rules under the proposed regulations provide no formula for calculating the overall amount for compensating employees after FY 2008.

NFFE and the IAM recommend that DoD/OPM withdraw these proposals until such time as it can intelligently, practically, and meaningfully articulate a pay system which satisfies DoD's guiding principles of being "flexible, understandable, credible, responsive, and executable." We also recommend that these proposals be withdraw until such time as DoD/OPM can provide such detail where we can exercise our rights under § 9902(f) of the National Defense Authorization Act of 2004. As with our recommendation on Classification, we encourage DoD/OPM to jointly develop, with its employee representatives, a pay system that will ensure both credibility and transparency, as required by the Key Performance Parameters established by the Supplemental Information. We further recommend that any pay system developed be collectively bargained for with DoD's exclusive bargaining representatives.

Subpart D – Performance Management (§§ 9901.401 to 9901.409)

We understand that DoD will strive towards on-going communications and feedback to employees. We presume that communication and feedback are components of DoD's *current* system and we applaud the DoD for retaining this practice. We also understand that DoD desires to "minimize and simplify requirements for positions descriptions". This option, standing alone, is not objectionable absent the fact that current position descriptions already provide this option to DoD through generic "other duties as assigned" provision. Additionally, we expect and demand that any performance evaluation option maintain objective, identifiable criteria for employee evaluation as well as a meaningful process for an employee to challenge the evaluation if the employee deems the rating unjustified and/or unsupported by fact and law. The proposed

regulations leave to future "implementing issuances" to the sole process by which a performance rating may be challenged.

When performance is deficient, we understand that DoD will consider "using a progressive approach to correct performance problems", including written notices of marginal performance as soon as the performance is identified. Again, assuming that position descriptions contain objective, identifiable criteria and that the employee can challenge these actions if the action is unjustified and/or unsupported by fact and/or law, this option is not precluded under current regulations and practice. Since DoD has provided no other details or explanation, nor has it defined what is "progressive", and we will not presume to define terms, we are unable to fully exercise our rights under § 9901 (f) of the National Defense Authorization Act of 2004.

Similar to the Pay/Pay Administration and Classification Subparts, the proposed regulations, specifically, 9901.405, 9901.408, and 9901.409, reserve authority for DoD to issue future regulations but provide little to no detail in this area, which makes it difficult for the public, not to mention the employee representatives, to provide any meaningful comment.

NFFE and the IAMAW believe that the proposed regulations give individual supervisors and managers unfettered discretion to exercise subjective determinations of an employee's performance appraisal. What are standards of "professionalism and appropriate conduct, such as civility and respect for others"? § 9901.406(b). Do such standards vary from occupation to occupation, from geographical region to geographical region? The proposed regulations presumably exempt supervisors and managers from communicating to employees such standards by holding employees accountable to these unspoken benchmarks. We recommend that DoD remove these subsections until such time as DoD/OPM can fully disclose its intentions through regulation in such detail where we can exercise our rights under § 9902(f) of the National Defense Authorization Act of 2004.

We cannot agree that a record of rating cannot be grieved under a negotiated grievance process. § 9901.409(g). Rather, the proposed regulations reserve to some future implementing issuance the process for challenging an employee's performance appraisal. We recommend that this subsection be stricken in its entirely and replaced with appropriate language that reflects the option which allows an employee to utilize his/her negotiated grievance procedure.

Subpart E – Staffing and Employment (§§ 9901.501 to 9901.516)

Similar to the Pay/Pay Administration, Classification, and Performance Management Subparts, the proposed regulations reserve authority for DoD to issue future implementing issuances but provide little or no detail in this area, which makes it difficult

for the public, not to mention the employee representatives, to provide any meaningful comment.

We recommend that DoD remove this Subpart until such time as DoD/OPM can fully disclose its intentions through regulation in such detail where we can exercise our rights under § 9902(f) of the National Defense Authorization Act of 2004.

Subpart F – Workforce Shaping (§§ 9901.601 to 9901.611)

The vital role performance plays in reduction of force (RIF) retention list, displacing the current regulations which relegate performance to the final criteria in RIF, underscores the need for an employee rating system which is objective, impartial, and according to the proposed regulations, "fair, credible, and transparent". *See* §§ 9901.607(a) and 9901.401(b)(2).

We understand that the proposed regulations give DoD the authority to create competitive groups using various criteria when conducting a RIF. §§ 9901.603 through 9901.608. This authority, we believe, will allow DoD, in the name of "flexibility", to customize RIF actions without regard to civil service rules. Employees with extensive time, and consequently experience, could be displaced by new employees with higher performance ratings. However, the proposed regulations leave to undefined future "implementing ordinances" the explanation of how this new system will be administered. § 9901.602.

Although not expressly stated in the Supplemental Information or the proposed regulations, but as we understand application of veteran's preference in our briefing by OPM/DoD on February 10, 2005, Veterans preference only plays a role when employees are similarly rated. We do not believe that this reading of Veterans preference is consistent with the law.

NFFE and the IAMAW recommend that DoD remove this Subpart until such time as DoD/OPM can fully disclose its intentions through regulation in such detail where we can exercise our rights under § 9902(f) of the National Defense Authorization Act of 2004 and until such time DoD can issue regulations which accommodate the civil service rules with regard to RIF.

Subparts G and H – Adverse Actions and Appeals – General Comments

NFFE and the IAMAW acknowledge that the law allows DoD certain discretion with respect to appeals by waiving Chapter 43 and Chapter 75. The law, however, does not permit the Agency to waive fairness and due process.

During our meetings last year, DoD revealed key concerns which we assume are prerequisites to any new system. Those concerns focus on a complex, legalistic, slow appeals process which fails to defer to the guiding principles by honoring DoD's mission

when reducing or overturning discipline. DoD voiced concerns, which are apparent undercurrents in the proposed regulations and include the perceived burden of keeping an employee on payroll while a case is pending and apprehension about interim relief granted by a third party. DoD worried about too many forums for the same issue, which it alleges creates confusion and lack of confidence in the system. These forums, according to DoD, generated the potential of differing results. The result of this complexity, deters DoD managers from initiating needed and appropriate action, which consequently undermines public confidence in DoD's ability to deal with employee misconduct and poor performance.

To address these concerns, the proposed regulations appear to remove the possibility of addressing the traditional adverse actions through any grievance procedure. These proposed regulations also provide for the Secretary's authority to create "Mandatory Removal Offenses," which are currently undefined but we can surmise that these offenses are so egregious that they mandate jail time in addition to employee removal. The proposed regulations require that the integrity of the DoD's mission serve as the focus of any third party's review of whether such actions for removal can be sustained. This system cannot be consistent with the protections of due process from which NSPS is not exempt.

Nothing currently in the law precludes DoD from acting with expedience to discipline an employee. The current definition of management's rights gives DoD the unfettered right to discipline and expel an employee. Any table of penalties, currently, gives managers wide discretion and latitude to act swiftly with respect to employee discipline including the ability to mandate removal of the first offense. The Douglas factors, under the current law, gives ample consideration to the Agency's mission, as well as the public's confidence in DoD's ability to perform its mission.

Nevertheless, we agree that the processing and the redress of adverse actions should be expedited. Keeping an employee in limbo serves no one's interests. We further agree that time limits should be imposed on third parties so that appeals can be quickly and promptly addressed. We believe that expedited procedures, both pre and post decision, may be appropriate in the processing of cases but we do not believe that reducing the notice and employee reply period serves the Agency's purpose in any meaningful fashion other than diminish the limited rights of employees. We cannot agree to an internal board selected by DoD to adjudicate DoD actions, but we recommend that DoD recognize, in these regulations, a mutual selection process for an *independent* third party neutral.

Subpart G – Adverse Actions (§§ 9901.701 to 9901.721)

We recommend that the purpose and definitions subsections, §§ 9901.701 and 9901.703 respectively, should be rewritten so as to allow the procedural protections of this Subpart (Notice period and Reply period) for any suspension and/or loss of pay. This amendment

would allow proper notice and opportunity to reply for suspensions of 14 days or less as well as reduction of pay band or other similar reduction. We believe that due process, which is required by the law, must be provided to any employee who faces loss of pay or position.

We further recommend retention of the current time frames for notice and opportunity to reply be kept the same (30 days written notice and not less than 7 days to answer serious adverse actions and advance written notice and a reasonable time to answer proposed suspensions of 14 days of less). *See* §§ 9901.714 and 9901.715. This modest acceleration of the disciplinary process is outweighed by the harm done to employees who would well use the additional time to defend themselves fully and fairly, by acquiring information and representation as well as to prepare a written response.

Specifically with regard to representation, we recommend that any restrictions placed on representatives by the proposed regulations be deleted. Restricting representation to such broad, undefined occasions 'when work assignments allow' such representation would allow DoD to pick and choose an employee's representative, not to mention preclude proper representation altogether.

We object to the establishment of yet undefined Mandatory Removal Offenses (MROs) and with a penalty that is not subject to mitigation by anyone other than the Secretary. *See* § 9901.712. Surely, due process is not served by when the institution initiating the offense sits in judgment as to whether penalty is appropriate. We further believe that the establishment of MRO exceeds DoD's authority under the law. As the Supplemental Information acknowledges, the concept of MRO arose from law passed in 1998 regarding the Internal Revenue Service. (SI at 7565.) Since DoD has no such authority under the P.L. 108-136, we believe that DoD is attempting to "legislate" through regulation what it did not obtain through the statute. As such, we recommend that this subsection be deleted in its entirety.

Subpart H – Appeals (§§ 9901.801 to 9901.810)

With exception of the subsection on alternative dispute resolution (§ 9901.806), which we endorse but recommend that DoD collectively bargain over the process with employee representatives, we object to this Subpart in its entirety as it does not conform to due process, as the law requires.

The proposed regulations incorporation of the Merit Systems Protection Board (MSPB) is inconsistent with the statute which establishes MSPB jurisdiction. *See* § 9901.807. Title 5, Chapter 12 sets for the authority, procedures, and processes for a covered employee to invoke MSPB review. It is not clear from the statute, the regulations, or the MSPB, which is not a party to these regulations, whether the time restrictions and processes in these proposals may be legally or practically imposed by another independent body whose authority derives from another title and section of the law. For these reasons,

NFFE and the IAMAW recommend that this provision be withdrawn until such time as DoD/OPM can legally demonstrate that it has the authority to promulgate and impose such rules on another judicial entity operating under a separate and distinct section of the law.

We are appalled that the proposed regulations give either party the ability to disqualify a party's representative "at any time during the proceedings" under no articulatable standard. § 9901.807(k)(2). We know of no such practice or procedure under any law, rule, regulation, or precedent, not mention the statute itself, which supports this proposal. This subsection clearly overreaches the authority granted by P.L. 108-136.

We are also disturbed by the discovery standard imposed by § 9901.807((k)(3), which seeks to deny discovery when the burden or expense of production outweighs the benefit of production. We know of no such discovery standard under MSPB law or any other law and the proposed regulations cite not such law. We believe that this subsection will allow DoD to refuse reasonable discovery requests by making this simple allegation. Every discovery request requires some burden or expense, no matter how small or insignificant.

We are disturbed that contrary to case law and precedent, DoD's determination regarding penalty will be accorded "great deference" and that an administrative law judge will be precluded from modifying the penalty unless "such penalty is so disproportionate to the basis for the action as to be wholly without justification." § 9901.807(k)(6). We believe that DoD seeks this standard for the sole reason that it intends to eliminate the concept of fairness from the review of penalty. And as stated above, we further believe that these regulations cannot and should not eliminate the vast and current body of MSPB case law on mitigation of penalties.

We are greatly concerned that these proposed regulations now give DoD the ability to "cherry pick" which cases will have precedential value. 9901.807(k)(8)(ii)(A). The language in the proposal is confusing and well beyond the authority granted to DoD/OPM by the statute. Fairness and transparency of any appeals system, as required by the law, are cornerstones of due process.

Finally, the proposed regulations give DoD "two bites" at the apple with respect to MRO actions which have been overturned by an MSPB administrative law judge. § 9901.808 (d). While we object to the entire concept of MROs, we further do not believe that the DoD should be allowed a second chance to remove or otherwise discipline an employee on the same set of facts and events when it has failed to succeed in proving its MRO case. This subsection cannot be consistent with due process and the law.

Subpart I – Labor Relations – Procedural Deficiencies

As a procedural matter, and consistent with the lawsuit we filed in the United States District Court for the District of Columbia, the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 139 (2003), which includes 5 U.S.C. § 9902(m), became law on November 24, 2003. In § 9902(m)(1), Congress authorized "the Secretary, together with the Director," to "establish and from time to time adjust a labor relations system for the Department of Defense." In § 9902(m)(3) therein, Congress directed that the Secretary and the Director "ensure that the authority of this section is exercised in collaboration with, and in a manner that ensures the participation of, employee representatives in the development and implementation of the labor management relations system. . . ." Congress specified that the "process for collaborating with employee representatives . . . shall begin no later than 60 calendar days after the date of this subsection." 5 U.S.C. § 9902(m)(3)(D). In § 9902(m)(3)(A), Congress specified additional requirements of the collaboration process requires the DoD Secretary and the OPM Director to

> (i) afford employee representatives and management the opportunity to have meaningful discussions concerning the development of the new system;
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> (ii) give such representatives at least 30 calendar days (unless extraordinary circumstances require earlier action) to review the proposal for the system and make recommendations with respect to it; and
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> (iii) give any recommendations received from such representatives under clause (ii) full and fair consideration.

After enactment of the law, DoD, over the course of more than a year developed their proposed labor relations system—to the point of publication in the Federal Register—using secret working groups. During this time, despite repeated requests by NFFE, the IAMAW, and the Coalition members, DoD and OPM denied us the opportunity to collaborate with, participate in, or have discussions with the secret groups, and refused to reveal to NFFE, the IAMAW, and the Coalition its instructions to the groups, or any of the groups' preliminary draft proposals or other work products.

Both DoD and OPM have failed to ensure that the authority of § 9902(m) was exercised in collaboration with, and in a manner that ensured the participation of, employee representatives in the development of the labor management relations system for the DoD, in violation of 5 U.S.C. § 9902(m)(3). In particular, defendants have breached their § 9902(m)(3) duty not to develop a "labor relations system" without "afford[ing] employee representatives . . . the opportunity to have meaningful discussions concerning [its] development." Congress required that "collaboration with, and . . . participation of,

employee representatives in the development . . . of the labor management relations system," including "meaningful discussions," start "no later than 60 calendar days after the date of enactment." In imposing this requirement, Congress required collaboration with, participation of, and meaningful discussions with employee representatives in the *early* development of the system. DoD/OPM's use of secret working groups over the course of more than a year to develop to the point of publication in the Federal Register DoD's proposed labor relations system; its denial of the opportunity for NFFE, the IAMAW, and other employee representatives to collaborate with, participate in, or have discussions with the secret groups; and DoD/OPM's refusal to reveal to NFFE, the IAMAW, and other employee representatives any instructions to the groups, any of the groups' preliminary draft proposals or other work products, or the final proposed regulation, before publication in the Federal Register violated our rights under § 9902(m)(3).

NFFE and the IAMAW recommend that DoD/OPM withdraw Subpart I – Labor-Management Relations until such time as the Agencies comply with § 9902(m)(3) of the law.

Subpart I – Labor Relations – Proposed Regulations (§§ 9901.901 to 9901.928)

Without waiving our claim as stated above, NFFE and the IAMAW believe that NSPS preserves the right to collectively bargain, consistent with definitions in NSPS. We believe that legally, any redefinition of collective bargaining which eliminates the protections and privileges of Chapter 71 is contrary to the letter and the spirit of the law as NSPS preserves the protections and processes in Chapter 71. At a minimum, any proposed regulations under NSPS must start with the current scope of bargaining as it presently exists in Chapter 71. This includes retaining the mandatory subjects of bargaining, as well as the permissive scope of bargaining, which we have rarely, if ever, seen any agency use in this administration. Neither DoD, nor OPM, have statutory authority to deviate from 5 U.S.C. §§ 7101 though 7135 other than by providing for national level bargaining or independent review of decision under National Defense Authorization Act.

In the Supplemental Information, DoD states that is goal is to act without delay on bargaining issues, length of bargaining, furnishing information to unions, as well as the ability to implement these issues without delay while quickly resolving labor disputes. (SI at 7568.) NFFE and the IAMAW believe that the current law gives DoD the right to address all these concerns adequately without having to spend the considerable resources, in both manpower and money, to address new structures or processes to end run Chapter 71. Nothing currently precludes DoD from acting in an emergency or in a manner that is necessary to the functioning of your agency. During the last year of "pre-statutory" discussions with the Coalition, DoD has not cited a situation or example which cannot be adequately addressed under the current law but cherry picked cases, some which do not even involve the DoD, in which DoD received an adverse result. And further, and most

significantly, DoD has repeatedly declined to address the issue of any legal authority, which would allow DoD to address its concerns by deviating from the current law which incorporates Chapter 71. There is nothing to preclude the unions for negotiating with DoD, under the parameters set forth in Chapter 71 and NSPS, to an expedited means to alleviate Agency concerns while preserving our protections as well.

Instead of acting within the boundaries of the law, which protects the right of employees to organize, bargain collectively, and to participate through labor organizations of their own choosing in decisions that affect them, and as we stated to you in our Coalition Comments, dated January 13, 2005, received January 21, 2005, and restated again in the Coalition Comments submitting during the public comment period, we object to any proposed system which will:

1. Eliminate bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of core operational management rights. §§ 9901.913 and 917.

2. Eliminate bargaining over otherwise negotiable matters that do not significantly affect a substantial portion of the bargaining unit.

3. Eliminate a union's right to participate in formal discussions between bargaining unit employees and managers.

4. Drastically restrict the situations during which an employee may request the presence of a union representative during an investigatory examination.

5. Eliminate mid-term impasse resolution procedures, which would allow agencies to unilaterally implement changes to conditions of employment.

6. Set and change conditions of employment and void collectively bargained provisions and entire agreements through the issuance of non-negotiable departmental regulations.

7. Assign authority for resolving many labor-management disputes to an internal National Security Labor Relations Board, composed exclusively of members appointed by the Secretary, with a yet undefined opportunity for judicial review of certain Board actions. (Indeed, the title of the Board itself inappropriately contorts its purported purpose since the vast majority of issues that could potentially face this self-appointed board have nothing to do with national security, unless DoD can successfully argue that every employee issue involves national security.) §§ 9901.907 and 926.

8. Mandate non-reviewable national level bargaining without consideration of the hundreds of local and regional certifications by the Federal Labor Relations Authority. § 9901.919.

The Supplemental Information and the proposed regulations dictate that any collective bargaining agreement that conflicts with the proposed regulations or any implementing issuances are "unenforceable as of the date this part and/or such issuances." (SI at 7569.) Disputes of whether a conflict exists will presumably be submitted to the National Security Labor Relations Board. Since the National Security Labor Relations Board will not likely exist on the effective date of these proposed regulations, hundreds of union contracts could go out of existence without remedy, review, or redress. Unilateral extinction of collective bargaining agreements cannot be what Congress intended when it mandated that DoD any new personnel system ensure that employees may organize and bargain collectively.

Chapter 71 should be the "floor" of any labor relations system DoD/OPM designs. The apparent design of the proposed regulations minimizes the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. When it enacted provisions to preserve collective bargaining rights, Congress could not have intended those rights to be swallowed in this manner. NFFE and the IAMAW recommend that DoD withdraw this proposed Subpart in its entirety since we strongly believe that this proposal is unfounded in the legislation and the law.

Conclusion

The fundamental bases for the proposed system are unacceptably flawed, and we object to the proposed system in its entirety. Accordingly, we do not acquiesce to the implementation of <u>any</u> part of the system and DoD/OPM should consider any individual proposal not expressly accepted in these comments and recommendations to have been rejected. We recommend that all current provisions of law be retained until such time as all of the numerous defects of this proposal can be cured.

Protecting our nation's security from the unscrupulous acts of mercenaries and terrorists is a vital and continuous effort that we pledge our freedom and lives to support. Such worthy endeavors should not be made at the expense of civilian employees who have struggled hard and long to achieve basic career progression and job security. Many of our members, including NFFE President Richard N. Brown, served this country with pride during the Gulf War. Many serve in the current effort in Iraq today. During times of national crisis or in every day employment at DoD, the civil service rules and our union rights and protections never infringed upon responsibilities to the job, obligations to the employer, and our duty to our country. Proposing to change the personnel and pay rules that we honorably and diligently developed and protected at NFFE and the IAMAW

for over a century disrespects the noble men and women in organized labor as well as NFFE, the IAMAW, and the labor movement itself.

Respectfully submitted,

Susan Tsui Grundmann
NFFE General Counsel