
Supplemental information, page 7561, col 1, Developmental positions: When an employee is hired into a developmental position, their pay is expected to increase as they acquire skills and abilities. But, under the new regulation, these increases MUST come out of the pool that is to be used to recognize other employee's performance. This creates a gross inequity to the detriment of existing staff whose pay raises are reduced in order to bring the new hire to a journeyman pay level.

1. Comment: DoD should require that funding for foreseeable pay raises to employees in developmental positions be taken from sources other than that group's pay pool.
2. Comment: For a similar, but attenuated reason, DoD might consider requiring that funding for extraordinary pay increases come from sources other than that group's pay pool.

Supplemental information, page 7562, Resolution of employment difficulties must use appropriate methodologies before considering an adverse action. This could be read to create a new right for employees and a new burden for the agency on appeal, and it seems to restrict what penalties a supervisor may impose for first or second offenses. These seem inconsistent with the appeal procedures discussed in the regulation.

3. Comment: DoD should clarify whether it limits a supervisor's authority to select a penalty from the table of remedies.
4. Comment: DoD should clarify what rights the employee has to challenge the progression of penalties through which the supervisor moved before taking the adverse action on appeal.

Supplemental information, page 7563, col 3: The Secretary may establish procedures to convert employees from time-limited positions to career service positions without further competition.

5. Comment: DoD should clarify whether a converted employee may credit the period in the time-limited position towards the probationary period.

Supplemental information, page 7563, col 3: DoD will provide public notice for all vacancies in the career service and accept applications from all sources." This eliminates agencies present ability to restrict announcements.

6. Comment: DoD should clarify whether it prohibits all restrictions on who may apply for a position.

Supplemental information, page 7564, col 2, two tenure groups. The Secretary can establish procedures to convert, without competition, from time-limited positions to career positions; employees remaining in a time-limited position during a RIF will have lower tenure.

7. Comment: DoD should clarify whether a manager contemplating a RIF may convert time-limited employees without competition and, thereby, provide them higher tenure status.

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§ 9901.102(f)(2), Employees will convert in directly from their current pay system: At least one existing demonstration project, NRL (which will eventually come under NSPS), went through its employee consultation assuring the employees that, upon termination of the project, they would be out converted by an expressly identified process.

8. Comment: Unless it is clear that no employee could be disadvantaged by direct conversion, DoD should allow employees in existing demonstration projects the option to apply that project's existing out-conversion process before converting into the NSPS.

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§ 9901.107(a)(2), Interpret this regulation recognizing "the critical national security mission of the Department." § 9901.101(b): Guiding principle to "put mission first." Supplemental information, p 7553, col 2: "The Department sometimes uses military personnel or contractors when civilian employees could have and should have been the right answer." Id. at col 1: "civilians must be an integrated, flexible, and responsive part of the team." Id. "Civilians are being asked to assume new and different responsibilities, take more risk. . ." Id. at p 7570, col 1, ¶ 7: "The Department must have the authority to . . . develop and rapidly deploy resources to confront threats . . ."

"Deploy" is often associated with an involuntary, overseas assignment, frequently in a conflict. If civilian mechanics maintain equipment that military units take with them to a conflict, may DoD involuntarily transfer the civilians with the equipment? If a US city suffers a biologic attack, may DoD involuntarily reassign civilians with relevant expertise to treat or remediate that city?

9. Comment: DoD should clarify whether it is requesting authority to "deploy" civilians into conflicts or hazardous conditions and, if so, the consequences for an employee who refuses, and the authorities for that result.

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§ 9901.212(b), "Each pay schedule *may* include two or more pay bands.": This is permissive, it allows more than one pay band, but it does not prohibit one pay band.

10. Comment: DoD should clarify whether a career group may include only a single pay band.

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11. Comment: § 9901.212(d): Should the cite to § 9901.514 be to 513?

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§ 9901.222(a), The employee may request reconsideration "at any time;" (c) asserts that the determination is final and not subject to further review or appeal. Stating that the decision is final and not subject to further review, appeal, or reconsideration would expressly cut off requests to loop through the process.

12. Comment: DoD should clarify whether an employee may request a second reconsideration of a position's classification.

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§ 9901.303(c), "DoD may not make [student] loan payments for . . . any employee occupying a position that is excepted . . . because of its confidential . . . character.": This would exclude all attorneys, some of whom are difficult to recruit. It's not clear why the nature of an employees' positions should exclude them from this discretionary benefit.

13. Comment: DoD should clarify why some employees are not eligible for student loan repayments because of the nature of their positions.

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§ 9901.304, payout, shares, and values: No Comment: The earlier proposal also contained a process using these terms, and that process created a likelihood that the process would systematically transfer pay from lower paid positions to higher paid positions. Hopefully, that was removed because DoD is restructuring its approach to avoid that result.

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§ 9901.323 RIFs: Retained pay employees still get a pay raise even if their performance is unacceptable. § 9901.355 does not set a duration on pay retention. This could create a perverse, unintended consequence where a poor performing employee would actually benefit by being released but then securing a vulnerable position – his pay raises could not, thereafter, be withheld. This whole paragraph runs counter to the declared intent of streamlining and making the personnel system rational. Why will unacceptable performers (rather than marginal performers) be around long enough for this to be an issue? If they are, take action against the supervisor.

14. Comment: DoD should clarify the rationale and benefit for allowing unacceptable performers on retained pay to receive pay raises when no other unacceptable performers do.

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§ 9901.332(c), listing the only things that local market supplements will count for: The draft instruction is awkward in that it unexpectedly includes the locality pay in base pay and then creates a new section to limit its affect. This creates the opportunity for easy misinterpretation.

15. Comment: DoD should remove the local market supplement from the definition of basic pay and then identify those additional areas where the supplement will be considered.

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§ 9901.341, The intent is to foster a "high-performance culture;" § 9901.342, Payouts will be made on the basis of "contribution.": I have heard of employees being asked to take accrued leave and come back to work while on leave because the unit's budget was expended. This places an unconscionable pressure on that employee and on the unit's other employees: You cannot "contribute" as much unless you "voluntarily" agree. This abuse essentially forces employees into a bidding war for their pay raises. The draft regulation does not contain any mechanism to restrict such "requests."

16. Comment: DoD should add an express mechanism to ensure that its system only considers "contributions" that are based on paid efforts.

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§ 9901.342, A supervisor can create a new rating of record if the employee's present performance is not consistent with that rating. § 9901.409(b) limits subsequent ratings to occurrences when there is a "substantial and sustained change" in the employee's performance; (h) establishes that, if that substantial-sustained standard is not met, the new rating is not the rating of record. The rest of 409 then has the employee's payout based on the rating of record. This could create a difficulty with a marginal employee who is

just barely acceptable; a slight decline and they become unacceptable. But, because their performance has not substantially changed, the supervisor cannot issue a new rating of record. Even when the change is substantial, this limitation creates an additional issue at a hearing or appeal.

17. Comment: DoD should simplify § 9901.409 to allow the supervisor to issue an updated rating of record at any time an employee's existing rating of record no longer reflects the employee's present performance.

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§ 9901.342, An "appropriate rating official" can issue a new rating: It's unclear who this individual is, which is unfair to the employee and unfair to the supervisor. If the intent is to encourage rational, efficient management, why require the supervisor to go to a higher authority to rate a subordinate unacceptable? Give the supervisors the authority and, if they don't perform, replace them just as you would replace the subordinate. What justification does DoD have for amending the payout based on performance that is, by definition, outside the evaluation period?

18. Comment: DoD should clarify who can issue a new rating of record, what – if any – approval process is required, and when an employee's performance after the evaluation period ends can be considered for payout decisions.

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§ 9901.356, Except when a pay raise is withheld, "an employee's rate of basic pay may not be less than the minimum rate of the employee's pay band.": This means that there is no effective minimum for the pay bands. How is this consistent with the explanation given at page 7561 that "pay may not be set lower than the minimum of the pay band level. . ."? (Is DoD splitting hairs here by making "set" the operative word so that allowing the band's pay to grow past the level "set" is consistent?) If the employee is still considered to be in that higher band, that means that they have the right, without competition or promotion, to pay raises to the top of that band. This means that a great performer at the top of the next lower band is in a worse position than this unacceptable performer.

19. Comment: DoD should clarify when an employee's pay may be lower than the minimum pay level for that band.
20. Comment: DoD should require that an employee whose pay drops below the minimum pay for the band is automatically, and administratively converted to the next lower pay band *without* an adverse action.

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§ 9901.401(b)(6), The performance management system must include a feedback process. § 9901.408, An improvement period is not required. § 9901.407, Supervisors

will give regular and timely feedback with one or more interim reviews: Under the existing government system, a PIP is not required, but DoN requires one. With a PIP, a supervisor's failure to give a timely performance evaluation was not fatal to a subsequent performance based action because the notice of unacceptable performance gave the notice and the PIP gave an opportunity to improve. The proposed regulation creates an increased likelihood that a supervisor will take a performance based action without giving the employee performance expectations, notice, or an opportunity to demonstrate acceptable performance; this will force the Department to rely on its general performance directions for the position. What happens on appeal if the supervisor failed to give the required feedback, does the supervisor's poor performance let the subordinate slide? What resources (and sanity checks) will be available to the supervisor in taking an adverse action; is DoD willing to require that the supervisor use those resources? I like what's attempted here but fear that it creates risks. This issue is significantly aggravated by the new preponderance of the evidence standard for performance based actions. Can DoD establish a minimum content and format for an adverse action that requires the proposing official to document how the employee was on notice and what opportunity they had to demonstrate acceptable performance?

21. Comment: DoD should establish a mechanism to ensure that its requirements are met before a performance based adverse action is initiated.

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§ 9001.406(b), Performance expectations will be communicated before holding the employee accountable. But (d)(1) makes most anything into a "performance expectation." These sections would allow a supervisor to remove an employee with no further notice of either expectations or performance if the SOPs, etc., are "generally available" to the employee. This places an unusually high demand on the quality, maintenance, and distribution of these documents.

22. Comment: DoD should clarify how the supervisor will verify that performance expectations were, in fact, communicated before taking an action.

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§ 9001.406(c), Personal opinion -- DoD's real problem is that its managers and supervisors are unwilling to use the existing regulations to effectively manage their staff. 405 is a good start because it begins to link what DoD expects its managers to do. DoD should weld that link shut by requiring that its managers actually do these tasks.

23. Comment: DoD should recast this section more strongly by expressly requiring that its organizations MUST evaluate their supervisors on the expectations established in section 405.

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§ 9001.406(d), Goals can be set for teams or organizational levels.

24. Comment: DoD should clarify whether, when goals or performance expectations are set for groups rather than individuals, all individuals within that group must receive the same evaluation for that expectation.

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§ 9901.511(b)(4), DoD must publish the current appointing authorities; subparagraph (d)(3) allows DoD to terminate an appointing authority at any time. This could allow DoD to apply an authority, cancel it, and not include it in that year's list because it is no longer current. DoD could identify the current authorities and separately identify those authorities that were cancelled during the last year.

25. Comment: The annual list should include currently effective authorities and authorities that, although not currently effective, were applied or canceled since the previous report was published.

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§ 9901.512, The Secretary "may" establish probationary periods: This section nearly guarantees that a future appeal will assert that, because no probationary period was stated on the hiring SF-50, the newly hired employee instantly vested.

26. Comment: DoD should establish a default, 1-year probationary period for all positions for which the Secretary has not established a different period.

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§ 9901.515, DoD can hire a non-citizen "in the absence of a qualified U.S. citizen": This will place a heroic administrative and financial burden on DoD. As written, DoD must show that no citizen is qualified for the position -- how many DoD positions are there that no citizen could perform?

27. Comment: DoD should change the exception to read "In the absence of a qualified applicant who is a U.S. citizen. . ."

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§ 9901.515, DoD will provide public notice of all vacancies in accordance with 5 C.F.R. § 330 and will accept applications *from all sources*. But 5 C.F.R. § 330 allows agencies to restrict announcements to existing employees:

28. Comment: DoD should clarify whether it is expressly prohibiting restrictions on who may apply for positions.

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§ 9901.516, DoD will prescribe probationary periods and the conditions under which employees will complete such periods: The existing probationary system creates a recurring problem when supervisors fail to act before a probationary period ends and, thereafter, they are saddled with poor performers. This paragraph could eliminate that issue by requiring an affirmative decision to retain a probationary employee. If the employee reaches the end of the probationary period and does not receive a decision, there should be the right to grieve or request the decision.

29. Comment: DoD should establish a mechanism to ensure that supervisors affirmatively consider whether to retain a probationary employee, and DoD should automatically extend a probationary period to the date of that decision.

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§ 9901.605(a)(4), "Organizational units" could be interpreted as somewhat synonymous with "Command" or as meaning individual work units within a Command. See the definition in 9901.903, where – for labor considerations – "Component" is defined to be an "organizational unit" prescribed by the Secretary.

30. Comment: DoD should clarify the intended interpretation of "organizational unit" as it applies to RIFs.
31. Comment: DoD should clarify whether it intends to permit *competitive areas* that include only one, single position.

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§ 9901.605(e), the Department cannot target an "individual employee . . . on the basis of nonmerit factors." If the intent is to imply that the Department *can* target an individual employee on the basis of merit factors, DoD should expressly state that. It would seem consistent with existing practice and the rest of the draft regulation to allow DoD to target an individual *position*, it's not clear why DoD should be allowed to target an individual employee.

32. Comment: DoD should justify its requested RIF authority to target individuals rather than positions.

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§ 9901.607(3), "The (singular) rating of record (singular)" will be considered in RIFs: There is nothing wrong with this, but it is a significant change from the current practice of evaluating an employee on a multi-year performance record.

33. Comment: DoD should clarify whether it intends to limit a RIF's performance consideration to only the most recent rating of record.

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§ 9901.704(b)(1) and (b)(3) seem redundant. They both seem unnecessary given (d)(1).

34. Comment: DoD should clarify the intended differences among 9901.704(b)(1), (b)(3), and (d)(1).

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§ 9901.704(b)(9)(ii)(A)&(B): Excluding employees who have completed one year (A) or a probationary period (B) "under a term appointment." Does this exclude an employee who completed a probationary period, was separated, and then acquired a time-limited position; does it exclude a preference eligible employee who similarly completed a year of service before taking a time-limited position?

35. Comment: DoD should clarify whether 9901.704(b)(9)(ii) excludes employees who completed their probation or year of service outside of a time-limited appointment.

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§ 9901.704(d)(3), The "covered employees" excludes an employee terminated "in accordance with terms specified as conditions of employment at the time the appointment was made.": Agencies can remove employees based on their failure to maintain a condition of employment. This section appears to exclude such an action from the definition of an included employee – the employee would not seem to have any appeal rights. Thus, if an employee is hired into a sensitive position (one that requires a clearance) and subsequently loses eligibility for a clearance, a removal for that "failure to maintain" converts that employee from a covered employee to an employee who is not covered by the regulation. But this result does not apply to an employee who was transferred into that sensitive position and then removed – the condition of employment was not specified at the time of appointment. It's not clear what happens if the employee's original PD had a virtually identical condition, because the specific condition that was not maintained was one under a subsequent PD and, therefore, was not the actual condition of employment specified at the time of appointment. But Subpart H – appeals –is inconsistent. 9901.805 covers employees in DoD units under the NSPS "who appeal removals. . ., which constitute appealable adverse actions for the purpose of this subpart. . ." Note that the "which constitute" text is not restrictive – it does not limit the preceding actions to only appealable actions; rather, it clarifies that those preceding actions are appealable for the purposes of this subpart. Consider two employees hired a day apart 20 years ago; one had a condition specified when he was appointed and the other had his condition applied the day after he was appointed. They are now doing exactly the same work in the same unit, they report to the same supervisor, they have the same Position

Descriptions, and they have identical unacceptable performance, both work under identical conditions of employment that were applied on the same date. There does not seem to be any rationale to giving one appeal rights but not the other based on when identical conditions of employment were applied to them 20 years ago.

36. Comment: DoD should clarify the coverage of appealable actions in 9901.805.
37. Comment: DoD should clarify that it intends to deny appeal rights to employees removed for failure to maintain a condition of employment specified at the time of appointment.
38. Comment: DoD should clarify that it intends to grant appeal rights to employees removed for failure to maintain a condition of employment imposed after their appointment.
39. Comment: DoD should clarify whether it intends to grant appeal rights to employees removed for failure to maintain a condition of employment similar to a condition specified in their appointment.
40. Comment: DoD should articulate the benefit in giving different appeal rights based solely on when a condition of employment was applied.

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§ 9901.713: This appears to weaken an employee's right to representation because that right is now subordinate to the right to reply under 715.

41. Comment: DoD should individually identify an employee's right to representation by listing it in 9901.713.

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§ 9901.714(a) and 715(a), A shorter notice period is allowed if the Department reasonably believes that the employee committed an offense that might allow a prison sentence to be imposed.

42. Comment: DoD should clarify whether it may apply a shorter notice period to actions that are not based on the crime for which a prison sentence could be imposed.

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§ 9901.714(c)(3), DoD can place an employee in a paid, non-duty status for the time necessary to effect an action.

43. Comment: DoD should clarify whether it limits the duration for the non-duty status or the individual who may decide to place the employee in the non-duty status.

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§ 9901.801, This section establishes appeal procedures for "certain" adverse actions; but it does not expressly state either (1) that it is the exclusive procedure or (2) that existing Board procedures cannot be used for the remaining actions.

44. Comment: DoD should expressly state whether excluded employees and employees suffering excluded actions may use the existing Board procedures.

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§ 9901.807(d)(1) and page 7567, ¶ 5, col. 3: Both conduct and performance based actions will be reviewed on a preponderance standard because that "assures consistency." Conduct and performance based actions are different, the draft regulation attempts to create an unnecessary and counter productive consistency. In a conduct based action, the fundamental question is factual: Did the employee commit the charged offense. Before removing the employee, the Department should be able to convince a neutral observer that the employee did, in fact, commit the offense – a preponderance standard is appropriate. A performance based action is different and more closely aligned to a labor-relations concept of management discretion than it is to a conduct discharge. DoD's managers should have the discretion to determine how their units are run and managed. Inherent in that discretion is the need to determine whether an employee's performance justifies their retention. This is, by its very nature, a question of *opinion* rather than fact. Forcing a manager to prove that his opinion is correct – using the same preponderance standard that is applied to a fact – will, inevitably, cause managers not to use performance based actions. That standard is NOT appropriate to this element. The question is whether the manager's opinion is reasonable; the substantial evidence standard is appropriate to that question.

If it doesn't work now, why will a more difficult standard streamline the process? If the intent is to kill Chapter 43, do so cleanly. If the intent is to make it work as Congress intended, then get rid of the existing problems (which the draft attempts elsewhere) without applying a new, insurmountable standard.

45. Comment: DoD should retain the existing Chapter 43 standard of substantial evidence.

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§ 9901.807(h), Attorney fees. DoD is willing to be liable for attorney fees if it litigates and loses in a case involving a prohibited personnel practice. (Can DoD extend this standard so that it also applies in judicial review?) The regulation should mirror that risk for the employee: If the employee litigates a prohibited personnel practice and loses, they should be liable for the government's attorney fees unless the employee can show a reasonable basis to have believed that the issue had merit.

46. Comment: DoD should require the employee and the employee's representative to pay the Department's attorney fees if they litigate a prohibited personnel practice issue and the issue was clearly without merit.

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§ 9901.807(f), An initial decision is final unless a party files a PFR:

47. Comment: DoD should clarify whether this eliminates the Board's right to reopen an appeal on its own motion.

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§ 9901.807(i), Settlements. There is no real place to put this issue, so I'm tacking it here: Existing case law denies parties the right to cure a breach of a settlement agreement. And, there is no bright line test for timely filing an enforcement petition; nor is there any need to inform the Department of the allegations and the basis for the petition. The regulation should recognize that a primary benefit for settlement is an end to litigation; unnecessary enforcement petitions eliminate that benefit. DoD should expand the draft regulation to establish that:

- both parties have the right to cure a settlement breach;
- a party wishing to initiate an enforcement petition must inform the other party of the nature of the alleged breach, the settlement terms creating the obligation that was breached, the facts supporting that breach, and the injury suffered;
- notice should be served within 30 days of the date the party learned of, or could have reasonably learned of, the breach;
- the breaching party shall have 30 days to cure the breach;
- if the breach is not successfully cured, any petition to enforce the settlement should be limited to the remaining, unmitigated injury suffered after the attempt to cure;
- any petition to enforce should be limited to the facts and duty stated in the notice to the breaching party;
- a breach should NOT automatically allow the other party the election of resuming the settled appeal.

48. Comment: DoD should establish standards and processes for resolving breaches of settlement agreements.

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§ 9901.807(k)(1), Either party may move to disqualify the other's representative: The EEOC took the position that an attorney who advised the EEO Counselor during informal counseling should not become the agency representative, nor should others in the same office. This proposed, open-ended authority to move to disqualify could result in similar theories in this forum.

49. Comment: DoD should limit the basis upon which a party may move to disqualify the other's representative, and DoD should list any actions that are inadequate to justify disqualification.

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§ 9901.807(k)(2), A party may move to limit discovery: The existing process allows a party to refuse to answer a discovery request and then allows the discovering party to move to compel.

50. Comment: DoD should clarify whether this motion to limit discovery replaces or augments the existing motion to compel process.

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§ 9901.807(k)(1), These discovery requirements differ from the normal Board procedures. In the past, I have seen a Board AJ permit the employee's representative to abuse the F.R.C.P. "guidance" (by requiring 19 depositions) by shifting the burden to the agency to prove an undue burden. What, if any, recourse will the agency representative have if the AJ fails to follow these procedures? There is no realistic remedy after the fact, but the violation would not seem to satisfy the requirements for an interlocutory appeal. Would there be a way to have the senior judge at the relevant regional office vet such a decision if it were challenged? Applying a "reasonable basis" standard to the party requesting review and a payment-of-attorney-fees penalty would prevent abuse of such a review channel.

51. Comment: DoD should identify some mechanism by which a party could obtain prompt review of an Administrative Judge's discovery decisions under these unique procedures. In the alternative, DoD should establish that not responding to discovery requests beyond these limits cannot support sanctions or adverse inferences absent a formal, written motion and decision process permitting the requested discovery.

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§ 9901.807(k)(6), If less than all of the charges are sustained, the AJ may mitigate the penalty. If the Deciding Official expressly identifies how the individual charges would have been penalized, the AJ should be required to evaluate that decision on the same "so disproportionate" basis as a single charge would have been evaluated.

52. Comment: DoD should clarify the basis for mitigating a penalty if less than all of the charges were sustained but the Deciding Official identified what penalty would have been assigned to the sustained charges.

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§ 9901.807(l), The MSPB's failure to meet the PFR deadlines "will not form the basis for any legal action by any party.": The existing regulations and statute provide a constructive exhaustion of administrative remedies after 120 or 180 days. After that time, the employee may go to federal court. But that civil action is not "based on" the failure to satisfy the deadlines, its based on the underlying adverse action. The failure to meet the deadline is merely a precondition to suit. This section seems to clarify that the employee could not sue the Board for failure to meet the deadlines – that's not very useful. If the intent is to eliminate the constructive exhaustion access to court, the regulation should be clarified.

53. Comment: DoD should clarify its intent regarding the effect of the Board's failure to meet the scheduling deadlines.

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§ 9901.903 "Labor Organization" excludes an organization that denies membership based on a handicapping condition. What if the denial is based on a legitimate qualification for the position? For example, police and firefighter units might not be able to employ individuals in wheelchairs. That could, in turn, "otherwise deny" membership to those handicapped individuals.

54. Comment: DoD should limit the excluded labor organizations to those that deny membership on bases that are not legitimate qualification factors.

SubSection H, appeals, § 9901.805/7: § 9901.713(b) establishes that an employee is entitled to an opportunity to reply to a proposed adverse action. § 9901.805 establishes what adverse actions may be appealed to the MSPB. § 9901.807 establishes the procedures on appeal. The agency should not have to respond on appeal to allegations and argument that were not presented to the Deciding Official to consider. Similar to the concept of exhaustion of administrative remedies, the Department should require that an employee exhaust the available organic remedies.

55. Comment: DoD should limit §9901.805(a) to adverse actions to which the employee replied orally or in writing.
56. Comment: DoD should limit 9901.807(d)(1) (the employee's evidence in defense), to legal theories and allegations raised in the employee's reply to the proposed action under appeal.

Very Respectfully,
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