COMMENTS ON FEDERAL REGISTER PROPOSED RULES ON 5 CFR CHAPTER XCIX AND PART 9901 - NATIONAL SECURITY PERSONNEL SYSTEM

Provided below are comments on behalf of the Department of Justice (DOJ) submitted in support of Department of Defense (DoD) efforts reflecting concerns regarding consistency and transparency of application to similar classes of employees at other agencies. Comments follow the general order specified in the Federal register notice.

The Case for Action

We point out that while the need to have greater consistency between military and civilian components of DoD is important, there are a number of non-DoD agencies with significant impact on the national security environment that are tied to the necessary "team" spirit where the ". . . civilians must be an integrated, flexible and responsive part of the team" in the approach to successful accomplishment of an overall national security mission. Inclusion and communications are important aspects of any successful change in this critical arena. There is a need for the agencies to work together under similar systems in occupations supporting these efforts. Oversight is needed to assure consistency in human resource initiatives to help build this interagency team effort. This is supported by the Congressional tasking of the Office of Personnel Management (OPM) for involvement in the ". . . authority to establish a flexible and contemporary system of civilian human resources management for DoD civilians."

We concur with the need for revisions to a system which has gone too long without revision and the need to increase flexibility and to make the systems more mission centered as well as contemporary in nature.

Opening subpart that sets forth general provisions applicable throughout part 990 - Subpart A.

The general provisions define eligibility of coverage and scope of responsibility. In addition to coordination with the OPM, the Department recommends that DoD coordinate and collaborate with appropriate DOJ officials and other agencies (e.g., Department of Homeland Security, Central Intelligence Agency) that have national security components to their missions. This is critical since waiving of certain provisions of Title 5 (as was also done with Section 970 for DHS) will make application of similar flexibilities more difficult without a common framework.

Classification - Subpart B.

The creation of occupational clusters and pay bands fits well with the current DOJ legislation and practices in salary setting for such occupations as Assistant US Attorneys and Assistant US Trustees. The recognition that "one size does not fit all" is a giant step forward in moving the Federal pay and classification system into modern times. A special need to better define the relationships between Senior Level and Senior Executive Service positions was noted in the proposed DHS legislation and is also appropriate here, especially in light of recent changes implemented to these systems' pay and performance provisions in other parts of the Government.

OPM's April 2002 White Paper A FRESH START FOR FEDERAL PAY: THE CASE FOR MODERNIZATION identified a number of problems with the Federal GS classification

and pay systems. Unfortunately, the fact that the system is cumbersome, outmoded and has outlived the time for which it was designed is true. The current system was found by DOJ to be too rigid to be effective and is impairing the hiring process; many of the standards are out of date; and the process to update the standards does not keep up with changes in technology. It is also true that simplification of classification and application of flexibility to meet pay factors such as market needs, geographic differences, availability of candidates and other considerations make an equitable solution more problematic. Delinking classification and a single pay schedule for the General Schedule is a good step. Simplifying classification so that it is easier for employees and management to understand is also critical. The categorization defined in the DoD system is simple and clear. The classes (Entry/Developmental, Nonsupervisory work at the full performance level, Nonsupervisory expert work, Supervision of full performance/expert work, and Managerial) are simple to understand. The Supervisory concept (if limited to primarily first-level supervisors) may be more appropriately linked to senior experts since senior experts should require administrative as opposed to technical supervision. This allows more effort in determining supervisory/managerial definitions above the first level (perhaps allowing first level supervisors/senior experts to serve in more of an interchangeable banding situation). The Department would suggest that efforts to "flatten-out" organizational structures could also be addressed by decreasing the number of supervisory/managerial levels or bands of supervisors/managers above the first-level.

Pay and Pay Administration—Subpart C

The Department firmly supports recognition that occupational clusters require slightly different pay ranges and that movement through pay ranges is a complex issue. Pay progression may need to be declared nonnegotiable if agencies are driven by appropriation funded salary dollars and salary caps. Managers will be forced to make hard decisions about occupational clusters and the need for geographic, market and skill availability factors must drive modifications to salary rates in using rates to attract and retain mission-critical employees. The recognition that part of an individual's pay increase is needed from a cost-of-living and morale standpoint is important to validating management's commitment to "fairness" in the workplace while also trying to reward performance. Development of a valid, easily understood and trusted method of evaluating both group and individual performance is critical to success in implementing this section. A closer link between pay and award systems would increase flexibility and perceptions of equity. DOJ would suggest efforts to ensure awards are integrated with pay for performance.

Performance Management—Subpart D

DOJ has concerns over the current performance management process within federal government, i.e., the current performance management process within which the federal government must operate does not allow for accurate performance measurement and award**.** Accordingly, we support a pay-for-performance system coupled with minimum criteria of what needs to go into an individual employee's performance plan so that employees have a clear understanding of their performance expectations. This would require a major system overhaul with focus on tying organizational, individual and team accomplishments to a Departments' strategic goals and creation of a system that is easily understood by employees and managers

while having credible mechanisms for identifying both individual and group performance indicators that are appropriate for use in setting salary decisions (see above).

Staffing and Employment-Subpart E

Greater flexibility to meet recruitment and retention needs is covered under the NSPS system than under the DHS proposal. The Department looks forward to the use of changes in these areas. They will assist us in moving to the next level of success in molding a modern day workforce.

Workforce Shaping-Subpart F

The Department supports the elevation of workforce management to the same level as classification, pay, staffing, adverse actions, appeals and labor management relations. Recognition of strategic planning and the importance of regular review of workforce structure and changing skill needs are long overdue. More information is needed to adequately comment on provisions of this section.

Adverse Actions-Subpart G and Appeals-Subpart H

Burden of Proof

The proposed rule requires the DoD to support all covered actions, including performance-based ones, by preponderant evidence rather than substantial evidence (§ 9901.706). The lower substantial evidence standard previously available when taking performance-based actions under 5 U.S.C. Chapter 43 has been abandoned. We respectfully submit that a substantial evidence standard applicable to all adverse actions would result in much greater deference to management decisions and would promote more effectively the DoD's goals of a mission-centered and flexible management system for taking necessary actions. However, the provisions limiting mitigation, charge recharacterization, and reversal of performance-based actions based on technical deficiencies (§ 9901.807(d)(2),(3), -.807(k)(6)) do provide DoD with considerably more flexibility than under the current Title 5 system.

Coverage and Procedures Under § 9901.807

The proposed rule addresses a widespread complaint among federal managers by shortening both the notice and reply periods for taking adverse actions. It also shortens the time limit for filing Board appeals, eliminates an unqualified employee right to a hearing before a Board administrative judge, significantly limits discovery, and sets shortened time limits for issuance by the Board of initial decisions and final decisions after petition for review. The NSPS procedures also substantially limit an appellant's entitlement to interim relief and to attorney fees. As a result, these procedures should provide the DoD with greater flexibility in taking and defending covered actions. At the same time, we note that the shortened time periods for issuance of initial and final decisions in DoD cases (as in DHS cases) means that the Board will necessarily give higher priority to processing those cases than to processing cases from other federal agencies. The potential for delayed case processing outside the DHS and DoD systems has already been a topic of discussion at Congressional oversight hearings, and we note that neither the Board nor OPM has addressed the problem of delay created by the DHS and proposed DoD regulations. We would encourage both agencies, working with Congress, to begin addressing this issue as expeditiously as possible through appropriate regulatory changes and an examination of budget and staffing resources that may be required at the Board to handle

expedited case processing of DHS and DoD cases while not (in effect) short-changing processing of cases from other agencies.

Appeal Rights

The proposed rule creates another important level of deference to DoD management decisions by allowing for the creation of a discretionary list of mandatory removal offenses. Employees removed for such offenses would only have a limited right of appeal to the MSPB. By allowing for more circumscribed review of the most important and sensitive misconduct cases, the rule greatly enhances the flexibility that the DoD and the OPM have tried to build into the new system. At the same time, however, we cannot endorse the proposed rule's continuation of the current system in which employees may appeal adverse actions under negotiated grievance procedures. While the comments suggest that arbitrators will be required to adhere to MSPB legal standards in adjudicating these matters, the often unsatisfactory experience of federal agencies in the arbitration forum suggests that the availability of this forum will significantly complicate the DoD's ability to address employee misconduct and poor performance as efficiently and expeditiously as possible.

We note that the appeals process established under § 9901.807(k)(8) means that the Board's initial decision becomes the DoD's final decision unless a party files an RFR of the decision jointly with the Board and the DoD, and the DoD elects to review the decision within the prescribed 30-day period. We understand that this appellate structure was largely dictated by the deferential standard of Board review established by statute under 5 U.S.C. § 9902(h) for a final DoD decision under the new appeals process; clearly, the possibility under 5 U.S.C. § 9902(h) that Board initial decisions would receive greater deference than under current law meant that the DoD should be given the opportunity to modify those decisions. At the same time, we note that joint filing of RFR's and joint consideration of them by the Board and the DoD will create the potential for confusion and will certainly require a high degree of coordination between the Board and the DoD to make this structure function effectively.

From the introductory comments for the NSPS, we understand that § 9901.809 was not meant to change the substance of existing law regarding discrimination. However, we read § 9901.809(b) to dictate a confusing and possibly unintended result - namely, that allegations of discrimination in a mixed case are forwarded to the Board for adjudication even though no petition for review of the Department's final decision has been filed. We respectfully suggest that this provision can therefore lead to potentially unforeseen and unwanted legal and administrative consequences, and we would more closely model this provision along the lines used by the DHS in its comparable provision at 5 C.F.R. § 9701.709. That provision explicitly mirrors the existing process for handling mixed cases and, if used here, would not depart from the substance of existing law on this issue.

Labor-Management Relations-Subpart I

Coverage Matters

The regulations appear confusing at times in that DoD issuances are defined very broadly and can consist of either a document issued at the DoD or DoD Component level.

In reading the regulations, there appear to be inconsistencies between § 9901.901, § 9901.916, § 9901.917 and § 9901.927. To the extent that the regulations limit the duty to bargain on the

exercise of management's rights but do not place limitations on substantially negotiable matters, should DoD promulgate an issuance that covers both the exercise of a management's right and a substantivally negotiable matter, it appears that management could bargain the management right prospectively but would still be required to follow traditional bargaining obligations for the substantively negotiable piece of the issuance.

Determination of Appropriate Unit

Section 9901.912(b)(7) provides for the exclusion from a bargaining unit of "[a]ny employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security[.]" It is recommended that this provision specifically include reference to the fact that mere access to classified information is also grounds for exclusion from a bargaining unit. This position is currently a part of FLRA case law but has never been codified or put into regulations. *See United States Dep't of the Army, Corps of Engineers, United States Army Engineer Research Dev. Center, Vicksburg, Mississippi and AFGE Local 3310, AFL-CIO,* 57 FLRA 834 (2002) and *United States Dep't of Justice,* 52 FLRA 1093 (1997).

National Consultation

Section 9901.913(b)(1)(ii) of the proposed regulations addresses national consultation and provides that the unions who are granted this right be provided "reasonable time" to present its views and recommendation on the proposed change. However the regulation does not define what is meant by "reasonable time." As a suggestion, a time frame could be provided of either 15 or 30 days in order to provide the union with a reasonable amount of time to respond.

Information Disclosure

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. The proposed regulations maintain this right with some modifications. Section 9901.914(b)(5) utilizes the "particularized need" standard set out by the Authority. Currently, the "particularized need" standard requires the union to articulate to management with some specificity why it needs the requested information. *See IRS, Washington, D.C. and IRS, Kansas City Serv. Ctr, Kansas City, Mo.,* 50 FLRA 661 (1995). There has been significant litigation with inconsistent results over the years regarding the particularized need requirement and its interpretation. It is recommended that DoD take this opportunity to better define this standard or to identify a new, more definitive standard for obtaining information.

Agency Head Review

Under § 9901.914(d) the Secretary is allotted 30 days to approve a collective bargaining agreement after it is executed. Agency Head Review can be a time-consuming process that involves reviewing every provision of a contract. It is recommended that the time frame for this process be changed from 30 days to 60 days. This would provide adequate time to review the contract to ensure that it is in accordance with laws, rules and regulations.

Overarching Issue

With the suggested modifications outlined above, the proposed regulations establish a labor-management system that can realistically balance the rights of DoD employees to organize

and bargain collectively and the mission requirements of DoD management regarding homeland protection. As discussed above, moreover, the proposed rule does an effective job for DoD of addressing the major concerns typically faced by federal agencies in taking actions based on conduct and performance. While the effects of implementing the proposed rule merit continuing study and oversight, it has the opportunity to provide an effective human resources management system for DoD and a model for use by other federal agencies.

Conclusion

The Department of Justice is interested in observing these changes. Moreover, the Department expects that these changes would be beneficial beyond the Department of Defense.