DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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DAJA-LE 16 March 2005

MEMORANDUM FOR Program Executive Office, National Security Personnel System, ATTN: Mr. Bradley B. Bunn, 1400 Key Blvd, Suite B-200, Arlington, Virginia 22209-5144

SUBJECT: Comments on Proposed NSPS Regulations—RIN 3206—AK76/0790—AH82

1. Subpart A – General Provisions.

a. § 9901.107(d). Recommend changing the last sentence to read "Employees and applicants for employment in DoD will continue to be covered by the EEOC's Federal sector complaint processing regulations contained in 29 C.F.R. Part 1614." This clarification is necessary because employees will continue to be covered by the EEOC's "Federal sector regulations" found in numerous parts, not just Part 1614.

2. Subpart C – Pay and Pay Administration.

a. § 9901.342(e)(2) states that performance payouts will be prorated for those employees who were carried in an LWOP status during the performance period. Proration should not penalize those employees who were in an LWOP status due to invocation of Family and Medical Leave Act rights or those absent due to disability. Prorating performance payouts for these individuals may be a prohibited personnel practice under 5 U.S.C. § 2302.

b. § 9901.343. It should be made clear in the preamble that reduction in pay for unacceptable conduct would be subject to adverse action procedures.

3. Subpart D – Performance Management.

§ 9901.409(g) states that a rating of record can only be challenged through the DoD reconsideration process. This provision should state that the limitation does not apply to challenges alleging a violation of 5 U.S.C. § 2302 (prohibited personnel practices).

4. Subpart G – Adverse Actions.

§ 9901.704(b)(8) excludes OPM suitability determinations from the definition of adverse action. Recommend that the section address whether agency suitability determinations are also excluded.

5. Subpart H – Appeals.

a. Due to the statutory restriction against modifying the appellate procedures for mixed cases, the newly created Defense Office of Review (DOR) may have limited use as most appellants will seek EEOC review of final MSPB AJ decisions without passing through the DOR. Those not seeking EEOC review can also seek judicial review without DOR action. Mixed case processing in 5 USC § 7702 also allows the appellant to seek judicial review if no decision is issued within 120 days. As proposed, the AJ will have 90 days to render a decision, the appellant then has 30 days to seek further review, after which the DOR has 30 days to decide if it will take action – possibly totaling 150 days (actually more with service times). Any appellant unhappy with the DOR taking action could sever its jurisdiction and go to court due based on 5 USC § 7702(e).

b. § 9901.806. DoD's current ADR policy is that "[a]ll DoD Components shall use ADR techniques as an alternative to litigation or formal administrative proceedings whenever appropriate. *See* DoDD 5145.5 ¶4.2. The proposed regulations, in contrast, state that "[t]he use of alternative dispute resolution is encouraged." The DoD policy statement is stronger than just encouragement. Recommend that you consider including language in the preamble making it clear that NSPS should not be interpreted as diminishing DoD's commitment to ADR processes.

c. § 9901.807(c) requires a final DoD decision before the MSPB may grant interim relief. No such limitation is contained in NSPS at 5 U.S.C. § 9902(h)(4). Additionally, this provision may conflict with the EEOC's policy of granting interim relief after an AJ decision and create forum shopping by complainants.

d. § 9901.807 does not include the MSPB's right to reopen a decision of its administrative judges.

e. § 9901.807(f). Recommend replacing "petition" with "request" to be consistent with the new RFR and PFR procedures.

f. § 9901.807(h)(1). Changing the standard for awarding attorney's fees to actions which were "clearly without merit based upon facts known to management when the action was taken" almost results in the appellant having to show bad faith, which will effectively limit the award of attorney's fees. This proposal is not supported by the KPPs. Additionally, this will encourage the addition of prohibited personnel practice allegations, which will further complicate and delay the appellate process.

g. § 9901.807(k)(1). Mandating that "all" appeals be filed within 20 days is contrary to 29 CFR Section 1614.302(d)(3) that allows 30 days to file an appeal to the MSPB of a mixed case complaint.

h. § 9901.807(k)(6) limits the MSPB's ability to modify the agency penalty; however, no such limitation is contained in the NSPS statute.

i. § 9901.807(k)(7) fails to provide for the tolling of the AJ's time to issue a decision. Preventing AJ's from suspending processing times will discourage AJ approval of discovery extensions, settlement discussions, and hearing rescheduling – tools relied upon to accommodate commander/witnesses and avoid mission disruption. The 90 day requirement, in conjunction with the requirement to notify the Secretary in writing of any delay, will result in rigid AJ's, which, in most cases, will prejudice government counsel since the burden lies with the government to prove the action.

j. § 9901.807(k)(8)(iii)(A) requires the AJ to issue a decision within 30 days of receipt of a remand.

(1) This period is too restrictive if additional factfinding is required. For example, a decision being remanded may have been decided without a hearing; however, the remand may necessitate a hearing, which could not be convened and a decision issued within 30 days. Additionally, there is no provision for the opposing party to comment on the reasons for the remand to the AJ. Only permitting DoD comments to the AJ on remand would be an *ex parte* communication that may compromise due process. Recommend modeling procedure after Special Panel procedures for mixed cases, which require a decision w/n 45 days.

(2) The remand process contained in § 9901.806(k)(8)(iii)(A) fails to explain the process after the AJ issues the decision after remand. Are new RFRs required? Can the appellant seek judicial review? If a mixed complaint, can the employee now elect EEOC review in lieu of an RFR?

k. § 9901.807(k)(10). Since the legal questions may arguably be the same, it is curious that the rules provide 30 days to respond to the PFR, but only 15 days to respond to the RFR.

l. § 9901.808(b) prohibits MSPB mitigation of MRO's, which is contrary to the rights afforded the Board under the NSPS statute.

m. § 9901.809(b). This provision is unclear. It should be deleted or rewritten.

6. Subpart I – Labor-Management Relations.

a. § 9901.902. Recommend that DoD clarify the relationship between 5 USC chapter 71 and Subpart I. Do provisions in chapter 71 that aren't modified by subpart I and aren't specifically mentioned in subpart I survive?

b. § 9901.907(a)(1) permits the Secretary to make as many additional appointments to the National Security Labor Relations Board as long as the Board is comprised of an odd number of members. This provision may be perceived as undermining neutrality.

c. § 9901.910(a). Add "or 5 U.S.C. Chapter 71" after "this subpart" and before "affect the authority."

d. § 9901.910.

(1) All the rules on appropriate arrangement negotiations are in § 9901.910(e) -- a section tied to national consultation [see reference in § 9901.910(e) to § 9901.913]. The section should be rewritten so that the rules in § 9901.910(e)(1) and (2) also apply to situations that don't involve national consultation.

(2) The definitions of appropriate arrangements that are within the duty to bargain are in § 9901.910(e)(2)(i) and (ii). That means that the definitions and limitations on the duty to bargain don't apply to appropriate arrangements involving (a)(3) management rights. The paragraph should be reorganized so that the definitions of appropriate arrangements that are within the duty to bargain are in a paragraph that covers all management rights, not just those in (a)(1) and (a)(2).

e. § 9901.912.

(1) § 9901.912(b)(3) should define "personnel work." Does the exclusion cover employees who do military personnel work?

(2) § 9901.912(c) needs clarification. Does DoD really mean "any employee who is engaged in administering any provision of law?" The language is very broad. The phrase "any employee engaged in administering the provisions of this subpart" is meaningless because they can't be members of a bargaining unit per section § 9901.912(b)(5).

f. § 9901.914(d)(5). Recommend that DoD delete the phrase "an authorized official determines that." CBA provisions should be unenforceable because of the conflict, not because of the determination.

g. § 9901.922

(1) § 9901.922(a)(1). Change the reference to paragraphs (d) and (f) to (e) and (f).

(2) The NSPS election of remedies provision in section § 9901.922(f)(1) is broader than 5 USC § 7121(e). If this wasn't intended, change "appealable matters" to "appealable matters under subpart H of this part."

h. § 9901.923

(1) The procedures to "appeal" an arbitrator's decision involving an appealable action are not clear. Section 9901.923(a) states that these cases "will be adjudicated under procedures described in section 9901.807(k)(8) through (10)." This suggests that a party challenging an arbitrator's decision involving an appealable action needs to file a request for review with the

MSPB and an employee can eventually file a PFR with the full MSPB. Is this really what DoD wants? It significantly lengthens the process.

(2) What is the process for challenging an arbitrator's decision in a matter involving a discrimination claim that isn't an action appealable under subpart H? We assume the employee may appeal to the EEOC or go to the Board. Is the Board's decision appealable to the EEOC in the same way that an FLRA decision is currently appealable to the EEOC under 29 CFR § 1614. 401? What if the employee appeals the arbitrator's decision to the EEOC under 29 CFR § 1614.401 and the DoD activity files an exception under § 9901.923(a)? The relationship between existing appeal processes and the new processes under NSPS should be clearly stated in the NSPS enabling regulation.

(3) What is the process for challenging an arbitrator's decision in a matter involving a discrimination claim and an action appealable under subpart H?

i. § 9901.924(e). Recommend that the regulation clarify that the official time restriction to representing only those within the bargaining unit does not apply when serving as the personal representative in EEO matters.

7. If you have any questions, please contact me or Mr. James Szymalak at 588-6750.

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