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March 16, 2005

Honorable Donald Rumsfeld
Secretary
Department of Defense and
Honorable Dan Blair
Acting Director
Office of Personnel Management
National Security Personnel System
1400 Key Boulevard
Arlington, VA 22209-5144

RE: Federal Register Docket Number NSPS-2005-001 and/or RIN 3206-AK76 or 0790-AH82

Dear Secretary Rumsfeld and Acting Director Blair:

I am writing to express my views on the regulations proposed by the Department of Defense (DOD) and the Office of Personnel Management (OPM) to establish a new human resources system at DOD called the National Security Personnel System (NSPS).[1] While I applaud the effort and the cooperative nature in which the regulations were developed in light of the method used to create the initial proposal in February of 2004, I am concerned with several provisions affecting the rights, benefits, and protections of federal employees.

The federal civil service is responsible for implementing and managing government programs in an effective and responsive manner. However, defining the proper relationship between the career civil service and elected and appointed officials has always been a critical issue, and we must ensure that all employees are able to do their job without undue influence.

As you know, the Civil Service Reform Act (CSRA)[2] was passed in 1978 to address the various conflicting responsibilities of the Civil Service Commission, which was charged with providing equal employment opportunity, ethics oversight, protecting the merit system, overseeing labor relations, and personnel management. Congress divided the responsibilities of

by ensuring that federal employees who are charged with protecting the interests of the American people have real and meaningful protections.

The NSPS[3] was intended to provide managers with workforce flexibility, not reduce the rights and protections of the civil service. The National Defense Authorization Act of 2004 required the new human resources system to be based on federal merit principles and provide for collective bargaining.[4] To recombine the responsibilities of employee protections and program management in the Department and place limitations on the power of independent agencies which oversee the Department's activities, suggests that the Department's policies are in direct conflict with the fundamental principles of the federal civil service and could substantially erode the rights and protections of federal employees. As the Ranking Member of the Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, which has jurisdiction over laws governing the federal workforce, I will focus my comments on how the proposed NSPS adversely affects DOD employee rights, benefits, and protections.

Pay, Performance Management, and Staffing

It is well known that today's organizations recruit and retain employees by using both rewards and benefits, and implementing policies affecting work-life conditions. One of the most important benefits to all employees is pay. Congress has been active over the years to make the federal government an employer of choice and passed the Federal Employees' Pay Comparability Act (FEPCA)[5] in 1990 to ensure that pay for civilian federal employees is adjusted each year to keep the salaries of federal workers competitive with comparable occupations in the private sector. However, FEPCA has never been implemented as originally enacted. Federal employees did not receive annual pay adjustment in 1994, and in 1995, 1996, and 1998, reduced amounts of the annual adjustment were provided. For 1995 through 2005, reduced amounts of the locality payments were provided.

As the current pay system has not lived up to its potential, it is understandable that employees may feel wary about a new agency-wide pay system, especially given the new role managers will play in deciding how employees are to be paid. Understanding this anxiety in the pay system, I am troubled by the relative little detail given in the proposed regulations to the new

Too many of the key features of the new system have yet to be determined. The regulations make clear that the Department will be providing details in implementing "issuances" on such features as the grouping of jobs into occupational clusters, the establishment of pay bands for each cluster, the establishment of how market surveys will be used to set pay within bands, how market-based pay will be set for each locality and occupation, and how different rates of performance-based pay will be determined for the varying levels of performance.

When DOD first proposed the NSPS to Congress, both the House Committee on Government Reform and the Senate Committee on Homeland Security and Governmental Affairs held hearings on the proposal. When testifying before the House, David Chu, Under Secretary of Defense for Personnel and Readiness, noted, "It is often said that the devil is in the details, that best intentions may be overcome by wrongheaded implementation. We welcome scrutiny of the details of our implementation. That is why we think it is particularly useful that we have recently published the Best Practices in the Federal Register."[6] I agree with Secretary Chu's statement that the devil is in the details and that is why I support publishing additional details of the new pay for performance system in the Federal Register.

Because the proposed compensation system has relatively few details, I will limit my comments on it. However, I offer the following suggestions for the Department in issuing final regulations:

- Provide additional details on the pay system as discussed above.

- Assure employees that upon conversion to the new system they will be made whole and given pro-rated amounts towards their next step increase or career ladder promotion. The proposed regulations state that employees will not face a reduction in pay upon conversion to the NSPS system, but no similar assurances are made for payment towards the next step increase.[7]

- Assure employees and Congress that before any changes are made to link employee pay to performance ratings, DOD will implement, evaluate, and possibly modify a fair and effective performance system.

- Ensure that any pay for performance system has adequate funding. A zero-sum reallocation of salaries and salary adjustments will guarantee failure by rewarding a select few at the expense of the majority of employees who do good work, thereby creating an atmosphere of distrust among the workforce and lowering morale.

- Provide for transparency, accountability, and fairness in the system. The proposed regulations provide for an internal process to challenge a performance evaluation and no process for challenging a performance pay decision.[8] Given the wide flexibility granted to the Department to establish this new system, it imperative that DOD uses this authority responsibly. Providing fair and transparent systems to make pay and performance decision-makers accountable is necessary.

I am also concerned by the lack of details in the new hiring authorities that may be created by DOD and OPM. The lack of specificity provides opportunities to undermine the principles of merit and fitness. The merit system principles requires that recruitment be from qualified individuals from appropriate sources to achieve a workforce from all segments of society. Furthermore, selection and advancement should only be made on the basis of knowledge, skills, and ability after a fair and open competition which assures that all receive equal opportunity.[9] Moreover, employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes.[10]

The proposed regulations permit DOD to consider applications from narrow groups of employees which may eliminate highly qualified workers from various segments of society.[11] In addition, the proposed regulations permit DOD and OPM to create new competitive or excepted service appointing authorities which could allow noncompetitive appointments to transfer to the competitive service which could create a backdoor patronage system at DOD.[12] The proposed regulations also fail to provide a limit to the amount of time an employee may serve in a probationary period which would limit his or her protections and appeal rights.[13] Together these

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[8] *Id.* at 7586 (See § 9901.409(g)).

changes provide opportunities for arbitrary action, personal favoritism, and coercion for partisan political purposes. I recommend these procedures be modified to eliminate the possibility of such violations occurring.

I am also concerned about the potential impact the changes to the reduction in force (RIF) procedures will have on veterans. Under the proposed regulations, veterans would retain their place in the RIF retention order.[14] However, the regulations limit the bump and retreat rights of employees that could adversely affect their ability to utilize their veterans' preference status.

Under current law,[15] an eligible employee with an acceptable performance rating has excellent standing to be retained over other employees. An employee with veterans' preference also retains assignment rights to bump and retreat. The employee may bump in the same competitive area to a position lower than the position from which the employee is released and that is held by an employee in a lower group or subgroup.[16] And, a covered employee may retreat in the same competitive area to a position held by an employee with lower retention standing in the same tenure group (or subgroup) that is essentially identical to one previously held by the retreating employee.[17] Additionally, special rights are conveyed to a preference eligible with a compensable service-connected disability rated at thirty percent or higher.[18]

However, DOD's proposed regulations do not guarantee veterans' preference rights in regard to bump and retreat. They state that a higher standing employee may displace a lower standing employee if: 1) qualified for the position and 2) no undue interruption would result from the displacement.[19] There is no outright mention of veterans' preference. Furthermore, while an employee released from DOD's retention list[20] may be offered a temporary position with the Department, it is not guaranteed.[21] If a temporary position is not offered to the preference

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[14] *Id.* at 7589 (See § 9901.607).

[15] 5 U.S.C. § 3502.

[16] *Id.*

[17] *Id.*

[18] 5 U.S.C. § 3504.

[19] Fed. Reg., *supra* note 1, at 7589 (See § 9901.608).

[20] *Id.* (The Department's retention list of competing employees is based upon tenure, veterans preference, rating of record, and creditable civilian and/or civilian service.).

[21] *Id.*

eligible employee, then the Department is authorized to separate the employee through RIF.[22] It is particularly disturbing that these proposed regulations would allow DOD to circumvent a law that has provided preference to those who have served in our Armed Forces since the Civil War.

I will feel much more comfortable with the Department's proposal, as it pertains to veterans preference, when my concerns with the aforementioned bump and retreat situations are addressed in the proposed regulations. Our young people will service in this Nation's all-volunteer military only if they see that the veterans that have come before them are treated with the respect that they have earned through selfless service to this Nation. One arena that this holds especially true is veterans' preference in Federal employment.

I am also interested in how the Department will incorporate employees in the Federal Wage System (FWS) into the new pay and performance system. The proposed regulation state that FWS employees will be covered by the new system starting in spiral two.[23] However, the regulations are silent on the application of the Monroney Amendment.[24] The Monroney Amendment is a statutory provision affecting the pay of FWS workers that may cause their rates of pay to increase when the Government has large numbers of employees in specialized industries, such as aircraft maintenance, but there are insufficient private sector employees involved locally in similar work. Under the amendment, local wage surveys must use wage data from the nearest similar wage area that has sufficient specialized industry when the FWS wage area has insufficient comparable private sector specialized workers. The importation of wage data on the specialized industry from other locations is necessary when the local labor market cannot provide an accurate picture of prevailing rates for specialized work and to ensure that FWS employees in different federal agencies doing the same job in the same area receive the same pay. Understanding the impact this provision will have on the FWS workforce, the majority of who work for DOD, I urge you to provide more details on the pay and performance system for FWS workers under NSPS and the application of the Monroney Amendment.

Labor Relations

As I stated earlier, NSPS was intended to provide managers with workforce flexibility, not reduce the rights and protections of the civil service. NSPS is required to be based on federal

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[22] *Id.*

[23] Fed. Reg., *supra* note 1, at 7573.

[24] 5 U.S.C. § 5343(d).

merit principles and provide for collective bargaining.[25] Recombining the responsibilities of employee protections and program management in the Department and placing limitations on the power of independent agencies which oversee the Department's activities are in direct conflict with the fundamental principles of the federal civil service and substantially erode the rights and protections of DOD employees.

History demonstrates the dangers of an all-powerful government without adequate external independent oversight. For example, the Founding Fathers believed that power must never be concentrated in any one branch of government. Such consolidated power could eventually lead to the tyranny from which the Founders sought to escape. Moreover, they wished to ensure governmental accountability. A sufficiently powerful, yet limited, government was their objective, which was realized by the creation of three branches of government, each branch being limited by the other two. However, the need for checks and balances does not rest among the different branches. It extends to disagreements between managers and employees in the Executive Branch due to the public interest in having a transparent and accountable system of hiring and firing professional civil service employees who are to carry out their work free from political interference and discrimination.

It is for this reason that the CSRA separated the adjudication of labor-management disputes from the entity charged with managing the federal workforce through the creation of the Federal Labor Relations Authority (FLRA). Stripping this independent panel of meaningful oversight and creating an internal board to adjudicate the majority of labor-management disputes at DOD undermines the principles of the CSRA as well as labor rights.

I firmly believe that for any adjudicatory system to be credible, the system must be both procedurally fair and perceived as fair by the parties. The proposed system for adjudicating labor-management disputes fails this test.

The proposed regulations create a National Security Labor Relations Board (NSLRB) to have jurisdiction over unfair labor practices, the scope of bargaining, information requests, exceptions to arbitration awards, and negotiation impasses.[26] The NSLRB is to be composed of at least three members and all of the members except one is to be appointed by the Secretary. One member is to be appointed by the Secretary from a list proposed by OPM.[27] The composition of the NSLRB is in stark contrast to the FLRA. Congress ensured the independence

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[25] P.L. 108-136, *supra* note 3, at § 1101 (See §§ 9902 (b)(3), (b)(4), and (d)(2)).

[26] Fed. Reg., *supra* note 1, at 7596-7597 (See § 9901.908).

[27] *Id.* at 7596 (See § 9901.907).

of the FLRA by requiring that each of its three members are to be appointed by the President and confirmed by the Senate.[28] In addition, no more than two of the three members may be of the same political party.[29] The lack of different views on the NSLRB and employee involvement in the selection of NSLRB members demonstrates the lack of actual and perceived fairness of the system. Although the regulations include certain requirements to make the NSLRB appear independent and credible, the absence of balance on the NSLRB overshadows those efforts.

I am also concerned by the limited review the FLRA has on DOD labor management decisions. The independent and credible FLRA will only retain jurisdiction over the appropriateness of bargaining units, elections, and determinations over exclusive representative.[30] The FLRA will be able to review all NSLRB decisions, but the ability to overturn these cases is severely restricted, once again undermining the perception of fairness of the labor-management system at DOD.[31]

In addition, I question the need for the NSLRB to issue binding advisory opinions on matters within its jurisdiction upon the request of either DOD or an employee union that would not be subject to a hearing on the record.[32] For example, the proposed regulations grant the NSLRB jurisdiction over unfair labor practices.[33] Conceivably, the Department could request the NSLRB to issue an advisory opinion as to whether an action is an unfair labor practice and the unions would not be able to present its side of the case. The NSLRB advisory opinion on the unfair labor practice would then be final and have only limited review by the FLRA and federal courts. Such a system further eliminates the perception of fairness of the labor management system.

While Congress explicitly stated that DOD could define what decisions are reviewable, including who would conduct the review and the standards for reviewing cases arising out of the labor-management system,[34] I am troubled by the other changes proposed by the Department that

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[28] 5 U.S.C. § 7104.

[29] *Id.*

[30] Fed. Reg., *supra* note 1, at 7597 (See § 9901.909).

[31] *Id.* at 7596 (See § 9901.907).

[32] *Id.* at 7597 (See § 9901.908(b)).

[33] *Id.* at 7596 (See § 9901.908(a)).

[34] P.L. 108-136, *supra* note 3, at § 1101 (See § 9902(m)(6)).

severely limit the union rights of DOD employees. For example, the proposed regulations prohibit attorneys and employees engaged in personnel work from joining a union.[35] I know of no reason why attorneys should not be permitted to join a labor union nor how an attorney's participation in a union would adversely impact national security – the Department's main reason for requesting these personnel flexibilities. Similarly, I am concerned over the exclusion of any employees engaged in personnel work. The scope of this exception is too broad and would prohibit clerical and support staff from unionizing without any justification. I ask that these two exceptions be removed from the final regulations.

One of the most troubling aspects of the proposed regulations is the limitations on the scope of bargaining. The regulations prohibit bargaining over such things as numbers, types, pay schedules, pay bands and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work.[36] However, managers will have to bargain over appropriate arrangements for employees adversely affected by the exercise the aforementioned authorities, provided that the effects of the exercise are foreseeable, substantial, and significant in terms of both impact and implementation.[37] In addition, the regulations permit DOD to issue implementing issuances which trump provisions in existing collective bargaining agreements[38] and eliminates the prohibition on enforcing a rule or regulation that is inconsistent with a collective bargaining agreement.[39]

Congress permitted DOD to set up a new labor system to address the unique role that the Department's civilian workforce plays in supporting the Department's national security mission, while retaining the labor-management provisions in chapter 71 of title 5, United States Code.[40] However, this proposal is not consistent with chapter 71 and effectively eliminates collective bargaining by restricting bargaining over approximately 75 percent of current bargaining issues. Furthermore, the conditions of "forseeable, substantial, and significant," are undefined leading to further erosion of labor rights. These bargaining restrictions open the door to possible retaliatory actions against a select group of employees and could even undermine the Department's mission

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[35] Fed. Reg., *supra* note 1, at 7598 (See § 9901.912).

[36] *Id.* at 7597 (See § 9901.910).

[37] *Id.* (See § 9901.910(e)).

[38] *Id.*, at 7596 (See § 9901.905).

[39] *Id.* at 7600 (See § 9901.916).

[40] P.L. 108-136, *supra* note 3, at §1101 (See § 9902(d)).

by eliminating opportunities for engaging in meaningful discussions on DOD activities with employee representatives. A well-managed organization understands the need for employee input in management decisions early and often. It is useful for managers to fully vet proposed changes to working conditions with affected employees to understand the practical impact on the employee's ability to do his or her job and on workforce morale in general. By restricting the ability of employees to bring their concerns to the table and practically eliminating collective bargaining at the Department, I believe these changes will undermine agency missions, lower employee morale, and make the Department an employer of last resort rather than of choice.

Adverse Actions and Appeals

According to the proposed regulations, the civilian employees of DOD would retain appeal rights to the Merit Systems Protection Board (MSPB).[41] While I am pleased that DOD has wisely decided against creating a separate internal appeals panel, I have several concerns with modifications to MSPB's authority and practice and the strengthened role DOD will play in the proposed appeal process.

DOD's expansion of its power in its employees' appeals process calls into question whether its employees will receive fair due process under NSPS. These new powers and reforms casts doubt on whether DOD's employees receive a meaningful decision from a neutral tribunal as required by law. In a June 2003 hearing before the Senate Committee on Homeland Security and Governmental Affairs, Secretary of the Department of Defense, Donald Rumsfeld, said that a new DOD appeals system must be both fair and perceived as fair by employees.[42] I agree that actual and perceived fairness is necessary to give credibility to any appeals system. However, the proposed appeals system is neither fair nor would it be perceived as fair by employees.

Under both the current employee appeal process and NSPS, MSPB administrative judges (AJs) are the initial adjudicators of employee appeals of adverse actions. This is a particularly important aspect of an employee appeal system because the AJs act as the neutral decision maker required by due process of law.[43] However, I am very concerned about the AJ's ability to make neutral decisions and the effectiveness of their decisions, in light of the proposed regulations.

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[41] Fed. Reg., *supra* note 1, at 7592-7594, (Sec § 9901.807).

[42] *Transforming the Department of Defense Personnel System: Finding the Right Approach Before the Senate Committee on Homeland Security and Governmental Affairs*, 108th Cong. (2003) (statement of Secretary Donald Rumsfeld, United States Department of Defense).

[43] *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 517-18 (10th Cir. 1998); *Walker v. City of Berkeley*, 951 F.2d 182, 184-185 (9th Cir. 1991).

Under NSPS, the power of AJs are severely limited. In fact, DOD has wide discretion to review and reverse an AJ's initial findings.[44] DOD may reverse an AJ's decision when it determines that the AJ has misinterpreted the law or based its decision on a material error of fact. DOD can even reverse an AJ's decision when the Department determines the AJ's findings have a "direct and substantial adverse impact on DOD's national security mission."[45] This is contrary to Secretary Rumsfeld's comments to the Committee in June 2003 where he said that the NSPS would have an independent review entity "with full authority to overturn agency personnel actions... in appropriate cases."[46] Further, under the proposed regulations, AJs are no longer able to order interim relief.[47] Only the full MSPB may order interim relief measures. Finally, DOD has the power to choose and determine precedent that the AJ's are required to follow for future decisions.[48]

DOD's ability to review and reverse an AJ's finding of fact is particularly unsettling because the full MSPB panel has limited power to review findings of facts. Under NSPS, the full MSPB panel has the power to reverse a finding of fact if it is unsupported by substantial evidence. This standard is similar to the standard of review for appellate courts in our judicial system. However, unlike our judicial system, DOD has the power to reverse the AJ's finding of fact. Therefore, NSPS is analogous to a system that would allow a prosecutor to overturn the factual findings of a jury or a district court, replace it with his or her determination of facts, and require the appellate courts to be deferential to the prosecutor's determination of fact.

The proposed changes undermine an AJ's effectiveness for serving as a neutral decision maker. Because of these changes, I am doubtful about the legality of the NSPS' human resources system due to the procedural due process requirements imposed by the Supreme Court. However, putting the legality of the system aside, how credible can a system be that allows the employee's agency to reverse the findings of a neutral decision maker?

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[44] Fed. Reg., *supra* note 1, at 7594 (See § 9901.807(k)(8)(iii)).

[45] *Id.*

[46] *Transforming the Department of Defense Personnel System: Finding the Right Approach Before the Senate Committee on Homeland Security and Governmental Affairs*, 108th Cong. (2003) (statement of Secretary Donald Rumsfeld, United States Department of Defense).

[47] Fed. Reg., *supra* note 1, at 7593 (See § 9901.807(c)).

[48] *Id.* at 7594 (See 9901.807(k)(8)(iii)).

Moreover, the specific changes to MSPB procedure, such as shortening the case processing time;[49] limits on discovery;[50] increasing the standards for awarding attorney fees;[51] and removing the ability of MSPB to mitigate penalties[52] makes it extremely difficult for DOD employees to enforce their rights by making it virtually impossible for employees to hire attorneys and win appeals. This places DOD employees at a distinct disadvantage compared to the rights and protections afforded to non-DOD employees. In addition, limiting the discretion of MSPB to award attorney fees and mitigate penalties ties the hands of the MSPB, thus making its independent review essentially meaningless.

The proposed regulations impose deadlines for MSPB to reach decisions on the DOD employee appeals. Currently, MSPB takes, on average, 92 days to render an initial decision and 198 days for decisions appealed to the three-member Board, for a total of 290 days.[53] There is no required time frame in current law. However, the regulations would require initial MSPB decisions to be made within 90 days.[54] The DOD would then have 30 days to review the decision.[55] The three-member Board at MSPB would have an additional 90 days to decide appeals.[56] As a result, MSPB would be required to decide DOD employee cases within 180 days. In addition, the proposed regulations allow OPM to petition MSPB to reconsider a final MSPB decision. If OPM seeks reconsideration of a decision the full MSPB must render its decision no later than 60 days.[57] I am concerned about the impact these streamlined procedures would have on non-DOD cases before MSPB. In particular, I fear that giving preference to DOD cases is unfair to non-DOD employees and could worsen the perception in other federal agencies that it takes too long to remove a federal employee. I am also concerned that expediting the appeals process may actually deny justice to DOD employees by forcing MSPB to act in haste. MSPB is

[49] *Id.* at 7594 (See §§ 9901.807(k)(7) and (k)(10)).

[50] *Id.* at 7593 (See § 9901.807(k)(3)).

[51] *Id.* at 7593 (See § 9901.807(h)).

[52] *Id.* at 7593-7594 (See § 9901.807(k)(6)).

[53] *Transforming the Department of Defense: Finding the Right Approach, Before the Senate Committee on Governmental Affairs,* 108th Cong. 146 (2003) (average of information documented by Susanne Marshall, Chairman, Merit Systems Protection Board).

[54] Fed. Reg., *supra* note 1, at 7594 (See § 9901.807(k)(7)).

[55] *Id.* at 7594 (See § 9901.807(k)(8)(ii)).

[56] *Id.* at 7594 (See § 9901.807(k)(10)).

[57] *Id.* at 7594 (See § 9901.807(k)(11)).

widely considered a model of speed and efficiency. In a letter submitted for the record at a hearing on personnel flexibilities at DOD before the Homeland Security and Governmental Affairs Committee in June of 2003, the Senior Executives Association stated that they know of no government judicial or administrative operation that issues initial decisions faster than MSPB.[58] As such, I do not see the need to expedite the appeals process for DOD employees.

I am similarly concerned by the proposed changes for discovery. Under the NSPS, a party may seek limits on discovery because that party believes that the discovery is not relevant, unreasonably cumulative, or that the information can be secured from some other source that is more convenient, less burdensome, or less expensive.[59] Additionally, arbitrary limits are imposed on the number of interrogatories, production requests, requests to admit, and depositions.[60] Because in hearings before the MSPB an employee is always appealing decisions of his or her former manager(s), the limitations on discovery will limit the ability of an employee to learn the facts of the case rather than limit the ability of DOD.

Likewise, the proposed regulations diminish the full MSPB's power to review DOD's decisions by limiting MSPB's ability to mitigate the imposed penalties. In cases involving mandatory removal offenses, MSPB is categorically prohibited from reducing a penalty selected by DOD. Only the Secretary of Defense may mitigate the imposed penalties in these instances. In cases not involving a mandatory removal offense, MSPB must give deference to the DOD's determinations and may only mitigate DOD's penalty when it is so disproportionate to the basis for the action as to be wholly without justification.[61] I believe that this process undermines the effectiveness of MSPB and eliminates the discretion of this independent agency. The President appoints and the Senate confirms the members of MSPB to protect the federal merit system against partisan political and other prohibited personnel practices and to ensure adequate protection for employees against abuses by agency management. By tying the hands of MSPB, DOD and OPM are once again constraining the ability of DOD employees to enforce their rights and protect themselves from abuse by DOD management.

The Supreme Court has held that due process requires an impartial and disinterested adjudicator. According to the Court, the requirement of an impartial and disinterested

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[58] *Transforming the Department of Defense: Finding the Right Approach, Before the Senate Committee on Governmental Affairs,* 108th Cong. 134 (2003) (letter from Carol Bonosaro, President, Senior Executives Association).

[59] Fed. Reg., *supra* note 1, at 7593 (See § 9901.807(k)(3)).

[60] *Id.*

[61] *Id.* at 7593-7594 (See § 9901.807(k)(6)).

adjudicator is based, in part, to prevent mistaken deprivations such as terminating an employee based on facts that are later found to be untrue.[62]

The proposed regulations fail to safeguard against the prevention of mistaken deprivations. This is evident in the proposed modification to the standard for recovering attorney fees. Under the standard currently in effect, DOD is required to pay attorney fees based on facts that were not known to DOD's management when the action was taken.[63] This is a wise policy. However, under the proposed regulations, a prevailing appellant may recover attorney fees only if the Department's actions were clearly without merit based upon facts known to management when the action was taken.[64]

I am particularly concerned about this provision because it encourages managers within DOD to take actions before conducting a full investigation. In fact, under the proposed system, attorney fees would not be awarded even if a manager deliberately ignored a lead that could have resulted in information showing that the termination of an employee would be inappropriate. Fairness and due process require a manager to learn the facts before taking action.

In general, the powers granted by the proposed regulations to DOD over the employee appeal process represent a break with our Nation's past practices regarding the protection of federal employees. The Supreme Court has noted that in order for there to be adequate protection of federal employees, the reviewing tribunal must prevent the probability of unfairness by removing substantial risks of bias.[65] Moreover, Congress, as well as the Supreme Court, have recognized that the combination of investigatory and adjudicative functions within a single agency could create such a bias.[66] In fact, when Congress passed the Civil Service Reform Act, the Senate Report noted that it was more effective to maintain the neutrality of the independent decision makers if the managers were completely removed from the tribunal's entity.[67] This rationale accounted for the creation of the Office of Personnel Management to manage federal employees and MSPB to handle employee appeals.

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[62] *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 545-46 (1985).

[63] Fed. Reg., *supra* note 1, at 7568.

[64] *Id.* at 7593 (See §9901.807(h)(1)).

[65] *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975).

[66] *Id.*

[67] S. Rep. No. 95-969 at 5 (1978).

DOD's influence over the appeals system proposed in NSPS fails to prevent the probability of unfairness or remove the risk of bias. DOD's power to reverse the findings of the AJs and its power to mitigate penalties effectively brings the investigatory and adjudicative functions back within one agency – DOD. Additionally, the proposed regulations expands OPM influence over the appeals process. Under the proposed regulations, OPM now has the power to intervene in a MSPB proceeding or to petition MSPB for review of a decision if OPM believes that an erroneous decision will have substantial impact on civil service law. NSPS allows OPM to intervene even if the law, rule, or regulation is one that does not fall under OPM's jurisdiction. These changes to the appeals process will undermine the credibility of DOD's appeals system.

I am also concerned that DOD and OPM, two Executive Branch agencies, would dictate to MSPB, an independent agency which reviews cases from both DOD and OPM, the rules and regulations that MSPB will apply. I believe that, while technically legal, the issuance of regulations by an Executive Branch agency mandating an independent agency to issue certain procedural regulations decreases the credibility of the independent agency and subjects it to the authority of the executive branch agency. The more appropriate path would be for DOD and MSBP to enter into a Memorandum of Understanding specifying the actions each agency will take to implement the employee appeals system at DOD. I urge you to work with MSPB to propose changes to the MSPB process in a more collaborative manner.

On a positive note, I am pleased that the Department is considering the use of ombudsmen as one method of employing alternative dispute resolution (ADR) techniques.[68] I have long been a supporter of the use of ombudsmen to help resolve employee disputes and alert management to systemic problems within an agency. Ombudsmen, if used appropriately, can be an integral part of an organization's human capital management strategy to create a fair, equitable, and nondiscriminatory workplace. In a 2001 General Accounting Office (GAO) report issued at my request, GAO estimated that ombudsmen resolved between 60 and 70 percent of their cases.[69] GAO also found that in establishing a successful ombudsman office, agencies must (1) provide top-level support including funding, (2) collaborate with employees and other stakeholders on ombudsman program design and operation, (3) ensure that the ombudsman is trained and skilled and has credibility with both management and staff alike, (4) have a diverse ombudsman staff, and (5) publicize the services of the ombudsman office. I encourage the establishment of an ombudsman office at DOD and follow the best practices noted by GAO.

Thank you for your consideration of my comments on the proposed regulations. While I recognize the efforts both DOD and OPM have made to produce these regulations, I believe that

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[68] Fed. Reg., *supra* note 1, at 7592 (See § 9901.806).

[69] General Accounting Office, Human Capital: The Role of Ombudsmen in Dispute Resolution, GAO-01-466 (April 2001).

they fall far short of the goal to provide a flexible yet fair human resources system. In addition to not providing enough details on the pay for performance system– and issue that is at the heart of the federal government's ability to recruit and retain employees, these regulations repeatedly diminish the oversight role played by independent agencies regarding labor disputes and appeals of adverse actions. Congress granted DOD flexibility to meet its national security mission, but it is important to understand that with increased flexibility comes the need for greater accountability. In every way, the regulations fail to hold the Department accountable under any objective standard. In doing so, these regulations eliminate employee protections and simply revert to the failed human resource systems of the past.

I look forward to reviewing the final regulations with the hope that it will contain additional protections for those who protect this great country.

Aloha pumehana,

Daniel K. Akaka

Daniel K. Akaka
U.S. Senator