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March 13, 2004

Mr. Bradley B. Bunn
1400 Key Boulevard, Ste B-200
Arlington, VA 2209-5144

Dear Mr. Bunn:

Blacks In Government (BIG) is a non-partisan, not for profit organization of government employees at the Federal, State, and Municipal levels. BIG has chapters in all regions of the country and overseas. We speak to the interest of these employees on issues that affect them.

BIG agrees with many of the stakeholders who have already commented that the *DHS/National Security Personnel System* as proposed should not be implemented because it will have a negative impact on positions that are in fact "inherently" governmental.

Further, the proposed regulations, if implemented, will create "at will" employees who would lose their rights, rights that are protected under The Bill of Rights and guaranteed by the Constitution.

Although the current Federal Personnel Management System is not perfect, we do not see the proposed system as necessarily an improvement. Many of our members have been subjected to discrimination and disparate treatment under the current system and various other personnel demonstration projects implemented by DOD.

BIG believes that the discrimination and disparate treatment in all areas of employment, including hiring, pay, promotion, adverse actions, contracting-out civilian positions on the basis of their inability to perform the duties, and retention will only increase. There is nothing in *the "Guiding Principles and Key Performance Parameters"* to suggest any appreciation for equal opportunity and treatment in the agency for workers who have dedicated their lives in working for our nations citizens.

BIG is concerned about the number of issues that are not addressed in the proposed regulations but are to be defined later in DOD issuances. For example, the procedures for requesting reconsideration are to be provided outside the regulatory process where all will have an opportunity to comment; the same access will not be a feature of an internal DOD process.

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Employees will be subject to procedures that will not have had the benefit of public scrutiny or comment.

BIG is concerned about the rating methodology, which is not defined in the proposed regulations but is to be outlined in internal DOD or OPM issuances. In fact, we believe it is even more important that the rating methodology be spelled out in the proposed regulations because of the importance that ratings of record will play in determining pay, movement in bands, promotions, and in retention. ***We emphasize the fact that GAO has identified the ratings arena as an area of concern and challenge for managers at the Department of Homeland Security.***

BIG is concerned about ensuring consistency in new appointments and reinstatements. How will the merit principle of equal pay for the same work be applied and enforced in an environment that has so much flexibility? How can affected employees ensure that there will not be a return to an outlawed “spoils federal system”? Will management information be collected and analyzed to insure that equal opportunity is being provided?

BIG is concerned that the procedures for handling reassignments, demotions, and removals are neither spelled out nor provided in DOD implementing issuances. We believe all procedures should be spelled out in the regulations because this protects against circumvention of merit system principles, thus granting a pay increase that is tantamount to a promotion.

BIG is especially concerned about the proposal to consider what is described as “employee behavior” as an element of performance. How will “attitude” and “cooperative” behavior be defined and, more importantly, measured? In order to measure, we believe that including behavior as an element of performance introduces subjectivity.

BIG believes the proposed regulations on RIF’s procedures, which gives greater emphasis to performance instead of length of service, provides the opportunity for manipulation through the appraisal/rating process. Again, employees will lose rights as management assumes more authority. Are appeal rights to be provided during the RIF process?

BIG strongly objects to the failure of the proposal to define “mandatory removal offense” in the proposed regulations. Again, actions that will result in a mandatory removal should be defined in regulations rather than left to the discretion of the Secretary of DOD. Instead of citing the IRS experience as justification for additional flexibility, these regulations should embrace the idea that individual rights are more important than agency flexibility.

BIG strongly objects to the exclusion of pay, ratings of record and mandatory removal actions from negotiated grievance procedures. We believe to do so provide a lower standard of protection for employees.

National security does not require the demolition of established employee rights; conditions that affect the very fabric of employment should be subject to bargaining.

1. The implementers of the *DHS/National Security Personnel System* reported to Congress that they believe the “Civilian” personnel system is deeply flawed and should not be implemented without comprehensive changes.

BIG also notices that the new personnel system presented no basis or criteria in the proposal that explains how a new system would be more flexible than the system that already exists nor how it would swiftly help *DHS/National Security Personnel System* to achieve the 9/11 mission. The claim of DOD to justify their need to have resources to pay “high performer”, and removing those individuals who are “poor performers”, which have not accomplished the 9/11 objective. Thus, the new personnel system judge’s civilian employees by a military personnel process that is controlled by military officials rather than a civilian workforce who are not a part of the military tactical maneuvers against terrorist.

The *DHS/National Security Personnel System* proposal gives the Secretary of Defense exclusive power to establish a special independent “Personnel Panel” to review misconduct. BIG is concerned with the Secretary of Defense having the inclusive “authority” to make a decision as to those civilian employees who are to be removed from their positions because these individuals are deemed incapable of performing an “inherently military” function that is considered of national security.

BIG is concerned about the *DHS/National Security Personnel System* proposal, which alludes to the claim that the reason for hiring contract employees is because federal employees skills are outdated, maybe federal employees skills are outdated because training was not provided. The fact that government employees were not provided adequate training does not substantiate the claim by DOD to have a new personnel system that allows DOD to pay higher wages to contract employees. This leaves federal employees being forced to train contract employees to perform their duties because these contractors don’t have the “expertise” in corporate/governmental knowledge as it relates to work assignments.

BIG strongly objects to the adoption of a single, lower standard of proof-- "substantial evidence" rather than the current "preponderance of the evidence"-- for disciplinary actions taken against departmental employees. Although the notice states, “this new policy would ensure consistency in the review of adverse actions” there are no definitive guidelines to substantiate this claim.

It is clear in reviewing the newly proposed regulations or what might be considered as “non-defined policies, the implementers of the *DHS/National Security Personnel System* reported to Congress in a hearing that the “Civilian” personnel system is deeply flawed, and it should be restructured with comprehensive changes.

The *DHS/National Security Personnel System* proposed personnel system in fact take away the rights of civilian employees under the premise their work is a military component of the 9/11 mission of DOD. However, the proposed regulations don't differentiate between the duties of a civilian employee versus the enlisted military employee whose personnel systems are incoherently different because of the 9/11 mission. For instance,

The new DHS/National Security Personnel System alludes to the fact that this "Pay-for-performance system...is designed to ensure (civilian) employees have a clear understanding of their expected performance (9/11 mission) and to reinforce and reward high-performing employees, without any clear guidelines as to how the criteria will be provided to employees to help them understand rating factors of "high performers" and "poor performers."

- a. There is no explanation as to what characterizes "high performer" and "poor performer" in the proposed draft policy, so it is subjective and might become biased.

The *DHS/National Security Personnel System* proposal suggested that DOD needed greater management flexibility in collective bargaining and the ability to narrow their obligation to bargain with representatives of government employees because it gets in the way of their core management rights and affects their ability to achieve the overall mission in the wake of the terrorist attack on September 11.

BIG is against the implementation of the newly proposed draft system because there is neither basis nor criteria in the regulations that explains how the current system prevented DOD from achieving its overall national security mission.

The *DHS/National Security Personnel System* proposal gives the Secretary of Defense/or OPM exclusive power to establish a special independent "Personnel Panel" to review misconduct. BIG believes the Secretary of Defense or OPM should not have the exclusive "power" to make decisions as to which civilian employees should be removed from their positions with no definitive criteria for all parties to understand that governs work requirement because their performance is "**non-military**" by the Secretary of Defense.

BIG objects to the adoption of a single, lower standard of proof--"substantial evidence" rather than the current "preponderance of the evidence"--for disciplinary actions taken against department employees, whom the notice said, "would ensure consistency in the review of adverse actions." There are no definitive guidelines to be used by managerial team members within DOD.

BIG states again "that it recommends the proposed rule be withdrawn in its entirety." Most of the problems with the current personnel system at DOD could be fixed with managers following existing personnel policies, and the re-training of management officials so that they will have a clear understanding of personnel policies already in existence.

BIG does not agree that DOD or OPM should have the authority to review/modify/reverse decisions of the Merit System Protection Board (MSPB). It is impractical to conclude that an employee's rights would be protected under such conditions. The Chairman of the MSPB acknowledged as much to the House Government Reform Subcommittee on the Federal Workforce and Agency when he testified on the changes to take place at the Department of Homeland Security. Chairman Neil A.G. McPhie said that the changes would put employee rights at risk and overburden MSPB's judges. The addition of the Department of Defense will only exacerbate that situation.

Thank you for the opportunity to comment on this proposal, which will impact all Federal employees and the people of this country.

Sincerely yours,

/s/

Darlene H. Young
National President
Blacks In Government

CC: Senator George V. Voinovich
Chairman, Subcommittee on Government Management, the Federal
Workforce, and the District of Columbia

Representative Jon Porter
Chairman, Subcommittee on Civil Service and Agency Organization

Representative Thomas M. Davis, III
Chairman, House Government Reform Committee

Representative Melvin Watt
Chairman, Congressional Black Caucus

Honorable Donald Rumsfeld,
Secretary, Department of Defense

John Gage
President, AFGE

ⁱ [Http://www.opm/view](http://www.opm/view) OPM Personnel Experts Brief Unions...Stakeholders on DHS Personnel System Regulations"