NATIONAL ASSOCIATION OF INDEPENDENT LABOR

GROUND RULE PROPOSALS

1. Meetings be held Tuesday thru Friday on every third week beginning March 29, 2005 (Currently scheduled for FLRA hearing April 7, 2005).

2. Meetings be held from 0800 to 1700 each day with a one (1) hour lunch period.

3. NAIL have two (2) representatives present, with one (1) representative granted travel and per diem by DOD.

4. FMCS Commissioner attend all meetings to facilitate discussions.

5. Federal Service Impasses Panel assistance sought to resolve disputes.

NATIONAL ASSOCIATION OF INDEPENDENT LABOR
COMMENTS / PROPOSALS
NATIONAL SECURITY PERSONNEL SYSTEM
DOCKET NUMBER: NSPS-2005-001

SUBPART A – GENERAL PROVISIONS

Section 9901.103 Definitions.

Mandatory Removal Offense (MRO) should be reviewable, as a minimum by the Merit Systems Protection Board and the Federal Circuit Court. An employee charged with an MRO, even if guilty of the offense, may have mitigating factors that would warrant a lesser penalty than removal.

Performance should be defined as accomplishment of work assignments or responsibilities and contribution to achieving organizational goals. Behavior and professional demeanor (actions, attitude, and manner of performance), as demonstrated by his or her approach to completing work assignments should not be a part of the definition. Including the above as performance factors could deter employees in raising safety concerns or questions involving an assignment. Questioning could mean unacceptable performance.

Section 9901.106 Continuing Collaboration.

(a)(2)(ii) This provision should be modified to insure that all employee representatives will be involved in the continuing collaboration process. To limit the number of employee representatives as currently written could give some representatives an advantage while excluding others. Larger unions could use their involvement in the process as an issue in representation elections over excluded representatives.

Section 9901.107 Relationship to Other Provisions.

(a)(2) "The Interpretation of the Regulations in this Part by DOD and OPM Must be Accorded Great Deference" should be omitted. The section already provides specific criteria in which the part must be interpreted. The last sentence gives an overwhelmingly unfair advantage to DOD and OPM no matter how unreasonable their interpretation may be.

SUBPART B -- CLASSIFICATION.

Section 9901.221 Classification Requirements.

(d) Classification decisions should be retroactive to the date an employee filed a classification appeal. Classification appeals have historically been a slow process. An employee should not be denied equal pay for work performed because of the time it takes to process a classification appeal. The NSPS is suppose to be a pay for performance system.

Section 9901.222 Reconsideration of Classification Decisions.

(b) Reconsideration request decisions should be modified to also include a retroactive effective date for an employee who has filed a classification appeal. Classification decisions should be retroactive to the date an employee filed a classification appeal. An employee should not be denied equal pay for work performed because of the time it takes to process a classification appeal. The NSPS is suppose to be a pay for performance system.

SUBPART C - PAY AND PAY ADMINISTRATION.

Section 9901.322 Setting and Adjusting Rate Ranges.

(b) Adjusted band rate ranges should occur on an established date on an annual basis. The proposed regulation provides no requirement as to how often band rate ranges are adjusted. Employee should receive an annual adjustment for cost of living increases.

Section 9901.342 Performance Payouts.

(a) (2) A rating official should not be permitted to prepare a more current rating of record at the time a performance payout is due. This could lead to playing favorites or for retaliatory and / or punitive motives. The rating of record should be used for all payouts. The only exception should be when an employee has been placed on written notice of unacceptable performance.

Section 9901.343 Pay Reduction Based on Performance and/or Conduct.

Conduct should not be a basis for a pay reduction. Conduct is more appropriately addressed with disciplinary measures such as counseling, reprimands and suspensions.

Section 9901.352 Setting Pay Upon Reassignment.

(b) Conduct should not be a basis for a pay reduction. The proposed provision, "Such a reduction may be effective at any time" is ambiguous. The proposed provision would allow for repetitive ten percent (10%) pay reductions.

Section 9901.354 Setting Pay Upon Reduction in Band.

(b) Conduct should not be a basis to assign an employee involuntarily to a position in a lower pay band or to reduce the employee's rate of basic pay. Conduct is more appropriately addressed with disciplinary measures such as counseling, reprimands and suspensions.

Section 9901.356 Miscellaneous.

(e) Rate of basic pay of an employee upon the expiration of a temporary reassignment or promotion should be no less than what the employee would have received, including increases, had the employee not been temporarily reassigned or promoted. Otherwise, the resulting reduction in basic pay should be considered an adverse action under Subpart G.

SUBPART D – PERFORMANCE MANAGEMENT.

Section 9901.405 Performance Management System Requirements.

(b)(2) Appraisal of performance should be required once a year. Pay, placement, retention and other matters affecting employees are based on an employees rating of record. As a minimum the appraisal of performance should be an annual requirement.

(c)(1) Performance expectations should be clearly communicated to employees in writing. Written expectations remove any doubt as to whether performance expectations were communicated to an employee.

Section 9901.406 Setting and Communicating Performance Expectations.

(b) Performance expectations should be communicated to the employee in writing. Lack of written performance expectations creates doubt as to whether performance expectations were communicated to an employee.

(e) Performance expectations should be fair, objective and attainable. Any final decisions regarding performance expectations and the application of those expectations should be consistent with those criteria.

Section 9901.407 Monitoring Performance and Providing Feedback.

(b) A performance review should be required at the time performance is less than satisfactory or when the level of an employees performance drops.

Section 9901.408 Developing Performance and Addressing Poor Performance.

A structured procedure is needed to address unacceptable performance. Without a structured procedure an employee could be blind sided with allegations of unacceptable performance and an adverse action. The potential for abuse, misuse, discrimination and favoritism would prevail without a structured system for addressing poor performance. As a minimum an employee should be placed on written notice of unacceptable performance and provided a written performance improvement plan (PIP). The PIP should provide a sixty (60) day minimum period to bring performance up to expectations. During the PIP the employee should be provided assistance in understanding and meeting performance expectations.

Section 9901.409 Rating and Rewarding Performance.

(g) A performance appraisal, rating of record and payout determination should be covered by a negotiated grievance and arbitration procedure for those employees represented by an exclusive representative. Employees should have a fair and impartial method to challenge performance and payout determinations. Employee morale and faith in a pay for performance system would be devastated without the check and balance the grievance / arbitration process provides. Any credibility for the performance management system rest with the employees having a right to grieve the actions taken under that system and to obtain third party review (arbitration).

SUBPART E – STAFFING AND EMPLOYMENT.

Section 9901.504 Definitions.

A term employee should not perform work of a permanent position. A term employee should perform duties which will expire at the end of the term.

Section 9901.512 Probationary Periods.

Probationary periods should not exceed one (1) year. A one (1) year probationary period has been the standard for most positions for years. No justification exist to change the current probationary period.

Section 9901.516 Internal Placement.

In-service probationary periods should only apply when promoted to a supervisory position. For non-supervisory positions an employee should only have to serve a probationary period for the initial appointment.

SUBPART F - WORKFORCE SHAPING.

Section 9901.603 Definitions.

An employee serving an initial probationary period should not be competing with a career employee. An employee serving an initial probationary period should be separated prior to adversely affecting a career employee. It would be unconscionable to allow a career employee to be displaced by an employee serving an initial probationary period.

Section 9901.605 Competitive Area.

A competitive area should include all employees within a geographical area that are within the same activity / command. Lesser competitive areas would deprive employees of fair competition and diminish an employees job security and placement opportunities. Lesser competitive areas would foster reduction in force manipulation and employee targeting.

Section 9901.607 Retention Standing.

It would be disastrous to morale and to job security of employees to change the current retention standing process. Retention standing should be determined as set forth in 5 C.F.R. 351.

Section 9901.608 Displacement, Release, and Position Offers.

Displacement, release, and position offers should be in accordance with 5 C.F.R. 351.

SUBPART G - ADVERSE ACTIONS.

Section 9901.712 Mandatory Removal Offenses.

(a) Mandatory removal offense (MRO) should be reviewable, as a minimum by the Merit Systems Protection Board and the Federal Circuit Court. An employee charged with an MRO, even if guilty of the offense, may have mitigating factors that would warrant a lesser penalty than removal.

Section 9901.714 Proposal Notice.

(b) An employee with a proposed notice of an adverse action should be provided a copy of the department's evidence supporting the proposed action. The notice should inform the employee of his or her right to review and receive a copy of the department's evidence supporting the proposed action.

(c)(2) Should be omitted. An employee should be assigned other duties or placed in a paid non-duty status if the department determines that the employees continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to government property, adversely impact the department's mission, or otherwise jeopardize legitimate government interests.

Section 9901.715 Opportunity to Reply.

(e) Should be reworded to read as follows: The employee may be represented by an attorney or other representative of the employee's choice. At the employee's expense should be omitted. This implies that if the employee selects an agency employee (e.g. Union Representative) that the employee would have to pay for the representative's use of time. This would not be fair, reasonable or in the interest of due process and justice.

(f)(2) and (3) Should be omitted. These provisions would deter the employee in having a fair opportunity to reply to a proposed adverse action. An employee should not be denied their choice of representative because of cost, work assignments, or a perception of security compromise. The proposed provisions to deny an employee's choice of representative would only serve as a means to deny an employee due process and the ability to make his or her most effective response to a proposed adverse action.

SUBPART H – APPEALS.

Section 9901.802 Applicable Legal Standards and Precedents.

MSPB should be bound only by existing legal standards and precedents. Section 9901.107 (a)(2) should not be a legal standard. MSPB should not be required to give great deference to the interpretation of the regulations in this part by DOD and OPM. A requirement to give great deference to DOD and OPM interpretation of regulations would deny an employee a fair and impartial decision by MSPB.

Section 9901.805 Coverage.

(b) Should be omitted. It appears to be in conflict with Section 9901.611 which provides for the appeal of reduction in force actions to the MSPB. Adverse actions such as separation, reduction in pay band or furlough resulting from a reduction in force should be appealable to MSPB.

Section 9901.807 Appellate Procedures.

(c) Employees should be granted interim relief upon a favorable decision by an AJ. An employee should not have to continue to suffer loss of pay and benefits pending a DOD appeal. An employee who has a favorable AJ decision would be subjected to unjustified punishment. Total destruction of an individual and their family should not be a DOD goal.

(h)(1) Reasonable attorney fees should be paid in accordance with 5 U.S.C. 5596 and existing case law. Attorney fees should not be granted only when the department's action was clearly without merit based upon facts known to management when the action was taken. This standard is unfair and punishes an employee with absorbing legal fees when the employee has prevailed.

(k)(1) Discovery should be in accordance with current MSPB procedures as set forth in 5 C.F.R. 1201.73 and 5 C.F.R. 1201.74. The DOD proposed procedures are unfair, would hamper due process and would limit the employees defense.

(k)(6) Limiting an arbitrator, AJ, or the Full MSPB from modifying a penalty imposed by the department is unconscionable and goes beyond the bounds of reasonableness. Extensive case law exists on modification of penalties including the Douglas factors. This case law should not be vacated. It appears that DOD desires to toss a long established principle of correcting not punishing an employee who has committed an offense. Existing MSPB and Federal Circuit case law should be followed in modification of a penalty.

(k)(8 - 10) Should be omitted and replaced with current MSPB petition for review of initial decisions procedure as set forth in 5 C.F.R. 1201 Subpart C. Reconsideration, remand, or reversing an initial decision by DOD is inappropriate to a fair, just and impartial review of appeals. A process as proposed by DOD is unfair and unjust on its face.

Section 9901.808 Appeals of Mandatory Removal Actions.

(b and c) Mandatory Removal Offense (MRO) should be reviewable. An employee charged with an MRO, even if guilty of the offense, may have mitigating factors that would warrant a lesser penalty than removal. An outside DOD third party should not only be able to determine guilt but should be able to review and mitigate if appropriate the penalty of removal.

(d) If an employee is found not to have committed an MRO the department should not be permitted to use in whole or part the same or similar evidence to propose another adverse action. This is double jeopardy. DOD mission should not be to punish employees.

SUBPART I - LABOR-MANAGEMENT RELATIONS.

Changes to existing labor-management relations, except for expedited processes, is not warranted. Labor-Management relations should continue under the provisions of 5 U.S.C. Chapter 71 and established case law. It is unconscionable to deprive dedicated DOD employees of the limited rights to form, join and assist a labor organization and to bargain collectively concerning conditions of employment as provided by existing law. The proposed regulation would diminish employee rights and make collective bargaining practically meaningless. Gutting current labor-management relations would be an atrocity. Labor-management relations should continue as set forth in Title 5 United States Code, Chapter 71.

Section 9901.903 Definitions.

The definition of conditions of employment should not exclude, policies, practices, and matters relating to -- (3) the pay of any employee or for any position, including any determinations regarding pay or adjustments thereto under Subpart C of this part.

Such policies, practices, and matters should be subject to collective bargaining and a negotiated grievance / arbitration procedure. Pay and related matters go to the heart of an employees employment. To exclude such matters from conditions of employment would deprive the employee of a means to insure fair and equitable treatment.

The definition of confidential employee should remain as defined in 5 U.S.C. 7103(a)(13). The proposed regulation could be broadly interpreted to exclude employees from representation by a certified representative. The existing definition has sufficed for over twenty-five (25) years.

The definition of grievance should remain as defined in 5 U.S.C. 7103 (a)(9). The proposed regulation would unduly narrow the scope of a negotiated grievance procedure. The existing definition has sufficed for over twenty-five (25) years.

The definition of management official should remain as defined in 5 U.S.C. 7103(a)(11). The proposed regulation could be broadly interpreted to exclude employees from representation by a certified representative. The existing definition has sufficed for over twenty-five (25) years.

The definition of supervisor should remain as defined in 5 U.S.C. 7103(a)(10). The proposed regulation would omit employees from certified units who assign work to military members, but supervise no civilians. This is not warranted. The proposed regulation could also be broadly interpreted when applied to firefighters and nurses to exclude many of them from representation by a certified representative. The existing definition has sufficed for over twenty-five (25) years.

Section 9901.905 Impact on Existing Agreements.

(a) Existing agreements should not be unenforceable upon effecting of subpart(s). Total chaos would occur throughout DOD if existing contracts became unenforceable.

(b) A sixty (60) day time frame to renegotiate agreements is unreasonable. Such a time restricted workload would be an unworkable burden upon the Unions and DOD representatives.

Section 9901.907 National Security Labor Relations Board.

The establishment of a National Security Labor Relations Board is unnecessary and would be a financial burden to the taxpayer and the Department. Such a board would have to have a tremendous staff to handle the department wide volume of cases. Under existing law the Federal Labor Relations Authority (FLRA) and the Federal Service Impasses Panel (FSIP) exist to resolve Labor-Management disputes. Expedited procedures before the FLRA and the FSIP should meet the departments needs without increased cost and staff.

Section 9901.908 Powers and Duties of the Board.

This section should be omitted. See response to Section 9901.907.

Section 9901.909 Powers and Duties of the Federal Labor Relations Authority.

The powers and duties of the Federal Labor Relations Authority should be as set forth in 5 U.S.C. 7105. There is no justifiable reason to dilute the duties and powers of the Authority (i.e. reinvent the wheel). The Labor-Management relations system has evolved over the past twenty-five (25) plus years. Volumes of case law has interpreted the statute. Uncertainty and chaos would exist if the current system is tossed aside.

Section 9901.910 Management Rights.

Management rights should be as set forth in 5 U.S.C. 7106. The proposed regulation would dilute collective bargaining to being meaningless. Collective bargaining agreements throughout the department have covered procedures by which management has exercised their rights. Essentially eliminating the bargaining of procedures and appropriate arrangements would result in a system of favoritism as well as chaos. Dedicated DOD employees should not be

stripped of the limited bargaining rights that they have under Title 5 United States Code Chapter 71.

Section 9901.912 Determination of Appropriate Units for Labor Organization Representation.

(b) Determination of appropriate units should be in accordance with 5 U.S.C. 7112 with definitions as set forth in 5 U.S.C. 7103. There is no justification to change appropriate unit determination by expanding the category of employees to be excluded. The current process for determination of appropriate units has sufficed for over twenty-five (25) years.

Section 9901.913 National Consultation.

(a) The criteria for granting national consultation rights is unclear. The term "Substantial Number of the Employees" is vague.

Section 9901.914 Representation Rights and Duties.

(a)(2)(iii) Investigatory Examinations should be in accordance with 5 U.S.C. 7114(a)(2)(B) and existing case law. The proposed regulation would limit an employees right to a representative during investigations. This limitation is unfair and unjust and is not in the best interest of due process and justice.

(a)(4) Should be omitted. The proposed provision could be interpreted to limit an employees role as a representative by taking away protections under current case law that protects a representative from discipline when in the heat of a labor-management dispute. The provision would limit the expression of views and free speech.

(b)(5) and (c) Release of data and information to the exclusive representative should be in accordance with 5 U.S.C. 7114(b)(4) and existing case law. The proposed regulation limits access to information and data and unjustifiably restricts the ability of the representative to represent an employee.

(d) Review of agreements should be in accordance with 5 U.S.C. 7114(c). The existing review process has sufficed for over twenty-five (25) years.

Section 9901.916 Unfair Labor Practices.

Unfair Labor Practices should be defined as set forth in 5 U.S.C. 7116 and processed by the Federal Labor Relations Authority under Authority Regulations. A ninety (90) day filing period would be appropriate to expedite the process. Expedited processing time requirements would also be appropriate to improve the current processing of unfair labor practice charges and complaints. The current authority process should not be eliminated but improved with expedited procedural requirements.

Section 9901.917 Duty to Bargain and Consult.

The duty to bargain in good faith; compelling need; duty to consult, should be in accordance with 5 U.S.C. 7117. The current bargaining process involving the Federal Labor Relations Authority, the Federal Mediation and Conciliation Service, and the Federal Service Impasses Panel should be maintained. No basis exist to completely overhaul the system that has sufficed for over twenty-five (25) years. Expedited processes, time frames, would be appropriate. The current system should be improved not tossed aside.

Section 9901.919 Collective Bargaining Above the Level of Recognition.

Bargaining impasses resulting from bargaining above the level of recognition should proceed first to the Federal Mediation and Conciliation Service (FMCS), and if unresolved, to the Federal Service Impasses Panel (FSIP) for final resolution. Bargaining above the level of recognition may be appropriate in certain circumstances, but FMCS and FSIP should resolve impasses not the Board. There is no basis to toss aside current collective bargaining processes and to create a new Board.

Section 9901.920 Negotiation Impasses.

Negotiation impasses should be resolved in accordance with 5 U.S.C. 7119. The current process has been proven to work for over twenty-five (25) years. Expedited procedures may by appropriate, but the elimination of this current process is not.

Section 9901.922 Grievance Procedures.

Grievance procedures should be in accordance with 5 U.S.C. 7121. No need exist to change the current grievance process or the scope/coverage of grievance procedures. A fundamental right of all employees should be a fair and broad scope grievance procedure.

Section 9901.923 Exceptions to Arbitration Awards.

Exception to arbitration awards should be in accordance with 5 U.S.C. 7122. No basis exist to change the current procedure for exceptions to arbitration awards or the grounds on which exceptions may be filed. The current process has sufficed for over twenty-five (25) years.

March 14, 2005

Program Executive Office
National Security Personnel System
Attn: Bradley B. Bunn
1400 Key Boulevard, Suite B-200
Arlington, Virginia 22209-5144

Re: Docket Number: NSPS-2005-001

Dear Mr. Bunn:

The enclosed represents the comments / proposals of the National Association of Independent Labor (NAIL) concerning the above-referenced. Please contact the undersigned if you have any questions concerning the comments / proposals.

Thanking you for your attention to this matter, I am

Sincerely,

George L. Reaves, Jr.
National Representative

GLRJr:sjh