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Comments and Recommendations on Proposed Rule

"National Security Personnel System"
(5 CFR Chapter XCIX and Part 9901)
Docket No. NSPS – 2005 - 001
RIN No. 3206 - AK76 / 0790 - AH82

As Published in the *Federal Register*
14 February 2005

On 14 February 2005, the U.S. Department of Defense (DOD) and the Office of Personnel Management (OPM) jointly published in the *Federal Register* the proposed rule, "National Security Personnel System" (NSPS). According to the notice, the purpose of the proposed rule is to establish "a human resources management system for the DoD, as authorized by the National Defense Authorization Act (Pub. L. 108-136, November 24, 2003)."[1] NSPS as proposed governs basic pay, staffing, classification, performance management, labor relations, adverse actions, and employee appeals. The Department and OPM claim that the proposed system "aligns DoD's human resources management system with the Department's critical mission requirements and protects the civil service rights of its employees."[2]

The Fraternal Order of Police is the largest law enforcement labor organization in the nation, with more than 318,000 members in 43 State lodges and approximately 2,100 local lodges. The membership is composed of any regularly appointed or elected and full-time employed law enforcement officer of the United States, any State or political subdivision thereof, or any agency which may be eligible for membership, and includes employees of the Department of Defense. The F.O.P. is also the designated collective bargaining representative for certain police officers at military installations and facilities across the nation. The F.O.P. is providing its written public comments and recommendations on the entirety of the proposed rule, along with a number of specific provisions as requested in the preamble, and is ready to participate in the statutorily required "meet and confer" process to work toward resolution on outstanding issues and concerns.

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[1] Proposed Rule, Department of Defense/Office of Personnel Management, *Federal Register*, Vol. 70, No. 29; 14 February 2005, Page 7552.
[2] *Ibid.*

Introduction/Statement of Position

On 24 November 2003, the "National Defense Authorization Act for Fiscal Year 2004" was enacted into law (Public Law 108-136). Under Section 1101 ("Department of Defense national security personnel system") of Subtitle A of Title XI, the Secretary of Defense is authorized, through regulations jointly issued with the Director of the Office of Personnel Management, to "establish, and from time to time adjust, a human resources management system for some or all of the organizational or functional units of the Department of Defense." In creating the NSPS, the law requires that the system ensure that employees may "organize, bargain collectively…and participate through labor organizations of their own choosing in decisions which affect them;" include a performance management system that incorporates "a means for ensuring employee involvement in the design and implementation of the system;" and ensure to the maximum extent practicable that "the rates of compensation for civilian employees at the Department of Defense shall be adjusted at the same rate, and in the same proportion, as are rates of compensation of the uniformed services." Congress also established a process under 5 U.S.C. 9902(f) for employee involvement "to ensure that the authority of this section is exercised in collaboration with, and in a manner that ensures the participation of, employee representatives in the planning, development, and implementation of the National Security Personnel System."

The provisions of NSPS which fall under 5 USC 9902, subsections (a) through (k)—personnel management, pay for performance, employee appeals, etc.—may be applied to an organizational or functional unit that includes up to 300,000 civilian employees, or to an organizational or functional unit that includes more than 300,000 employees if the Secretary determines that DOD has in place a performance management system that meets criteria covered under Section 9902(b). The labor-management relations system which is authorized under the law is to be binding on all bargaining units within DOD, all employee representatives, and the DOD and its subcomponents, and "shall supersede all other collective bargaining agreements for bargaining units in the Department of Defense, including collective bargaining agreements negotiated with employee representatives at the level of recognition, except as otherwise determined by the Secretary."[3]

As they relate to the Department's law enforcement employees, the Fraternal Order of Police does not believe that DOD or OPM have successfully made their case for the need for a radical departure from the existing systems in the areas covered by the proposed rule and under the authority granted to the Department under the FY 2004 National Defense Authorization Act; including classification, pay and pay administration, performance management, adverse actions, appeals, and labor management relations. Nor is it at all clear that DOD currently possesses the infrastructure which the Government Accountability Office (GAO) and others have identified as necessary for implementing the type of changes which are a part of NSPS. As GAO reported in June 2004, "DOD and the components have not developed results-oriented performance measures to provide a basis for evaluating workforce planning effectiveness. Thus, DOD and the components cannot gauge the extent to which their human capital initiatives

[3] 5 U.S.C. 9902(m)(8).

contribute to achieving their organizations' missions…Without results-oriented measures, it is difficult for an organization to assess the effectiveness of its human capital initiatives in supporting its overarching mission and goals."[4]

The NSPS as proposed also does not take into consideration the unique and distinctive work performed by the Department's law enforcement employees as compared to that performed by those in its other administrative and non-law enforcement positions. Indeed, the system as proposed makes no distinction at all between different types of employees in the majority of the proposals put forward under NSPS. Furthermore, DOD and OPM have not followed the law's requirement to involve employees and their representatives in the design of NSPS, and have developed options through a process which did not include employee representatives. Nor is there any indication in the proposed rule that DOD or OPM responded to the intent of Congress that "in designing the labor relations system the Secretary should take into consideration the unique requirements and contributions of public safety employees in supporting the national security mission of the Department." [5]

Recommendation

As the law does not *require* its application to employees of any system developed under 5 U.S.C. 9902(a) through (k), the F.O.P. urges DOD to exclude by regulation from the provisions contained in Subparts B, C, and D, the law enforcement officers of the Department. Given the potential harm to the Department's employees, we also recommend that Subparts A and E through H not be implemented until such time as the concerns over these proposals can be addressed and corrected. Similarly, the labor relations system created under Subpart I of the proposed rule should not take effect unless and until the Department involves its public safety employees in the design of a system which meets the intent of Congress.

Supplementary Information—Process & Outreach[6]

As the Office of Personnel Management recently noted, if agency-specific human resources systems (such as NSPS) "are to be credible, they must be designed in a way that is open and transparent, as inclusive and collaborative as possible."[7] Notwithstanding DOD's claims to the contrary, the Department and OPM have not followed the law's requirement to involve employees and their representatives in the design of NSPS, and have developed options through a process which did not include employee representatives. Despite nearly identical requirements in both the FY2004 National Defense Authorization Act, and Section 841(a)(2) of the Homeland Security Act of 2002, the Department of Defense and the Department of Homeland Security (DHS)

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[4] "DOD Civilian Personnel: Comprehensive Strategic Workforce Plans Needed (GAO-04-753)," General Accounting Office, June 2004, page 18.
[5] Conference Report on H.R. 1588, the "National Defense Authorization Act for Fiscal Year 2004," H. Rpt. 108-354, page 760.
[6] Proposed Rule, pages 7554 – 7556.
[7] "OPM's Guiding Principles for Civil Service Transformation," U.S. Office of Personnel Management, April 2004, page 5.

have taken drastically different approaches regarding "collaboration with employee representatives" in the design of their respective systems.[8] To its credit, DHS created a process where "80 DHS employees, supervisors, union representatives, and OPM representatives were members of the design team," and which jointly developed 52 options "reflecting a range of alternatives, information and ideas."[9] While there are many who were disappointed with the final regulations published on 1 February, employee representatives were included in the development of options as well as the DHS Senior Review Committee which presented those options to former Secretary Ridge and former Director James. As the Government Accountability Office (GAO) noted in a June 2004 report, DHS's efforts up to that time "in designing its human capital management system and its stated plans for future work on the system are helping to position the department for successful implementation."[10]

If fully involving employee representatives in the design of an HR system is key to a successful implementation, what does that say about the process used to create NSPS? According to the proposed rule, in July 2004, the Program Executive Office established "working groups" to begin the NSPS design process. The members of the groups included "representatives from the DoD human resources community, DoD military and civilian line managers, representatives from OPM, the legal community, and subject matter experts in equal employment opportunity, information technology, and financial management."[11] Noticeably missing from this list is any mention of rank-and-file employee representatives. Although the DOD working groups "benefited from …research materials from the Department of Homeland Security HR Systems Design process" they apparently did not consider it important enough to follow a similar pattern in system design as did DHS.[12] Despite this, the Department claims that the "working groups also received and considered input from employees and their representatives;" a misleading statement since, to our knowledge, no employee representatives were ever afforded the opportunity to meet directly with the working groups.[13] Instead, the Department developed a process whereby the working groups were provided with available information from NSPS focus groups, town hall sessions and union "consultation" meetings, but where no concrete information was provided in return to employee representatives.

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[8] 5 USC 9701(e)—established under Section 841(a)(2) of the Homeland Security Act—created nearly identical requirements on DHS and DOD with respect to notice of proposed system or adjustment; pre-implementation congressional notification, consultation and mediation; implementation; and continuing collaboration.

[9] "Fact Sheet: DHS and OPM Final Human Resource Regulations," DHS website (www.dhs.gov/dhspublic/display?theme+39&content=4314).

[10] "Human Capital: DHS Faces Challenge in Implementing Its New Personnel System," (GAO-04-790), U.S. Government Accountability Office, June 2004, page 4.

[11] Proposed Rule, Page 7555.

[12] *Ibid*

[13] *Ibid.*

Recommendation

Thus, in publishing their proposed rule on 14 February, DOD and OPM are not in compliance with the requirement in the FY 2004 Defense Authorization Act to "provide to the *employee representatives* representing any employees who might be affected a written description" of any proposed system or adjustment developed under the Act.[14] The F.O.P. therefore recommends that the Department not move forward until it has complied fully with 5 USC 9902(f) and 9902(m)(3).

Subpart A—General Provisions
Section 9901.106 Continuing Collaboration[15]

This section includes the parameters of the process to involve employee representatives in the continuing efforts to implement the NSPS. This process is not subject to the requirements established under the Labor Relations provisions of Subpart I, and allows the Secretary to "determine the number of employee representatives to be engaged in the continuing collaboration process."[16]

Recommendation

The F.O.P. is concerned with the potential ability of the Secretary of Defense to exclude certain unions or employee organizations from participation in the continuing collaboration process. Therefore, the organization recommends that Section 9901.106 be amended to remove any concerns regarding the ability of the Secretary to determine which employee unions may or may not be represented during the continuing collaboration process.

In addition, while subsection (a)(3)(i) seems to guarantee that employee representatives will be guaranteed the opportunity to comment and discuss their views with DOD officials regarding "any proposed final draft implementing issuances," there seems to be no similar requirement in subsection (a)(3)(ii) regarding employee representatives' rights during "initial identification of implementation issues or system design" or "review of draft recommendations or alternatives."[17] Given that their opportunity to provide feedback under subsection (a)(3)(ii) is limited to "the extent that the Secretary determines necessary," the F.O.P. recommends that it be amended to require negotiation with employee representatives over the items covered by this subsection.[18]

[14] 5 U.S.C. 9902(f), emphasis added.
[15] Proposed Rule, page 7557, and 7578.
[16] Proposed Rule, Section 9901.106, page 7578
[17] *Ibid.*
[18] *Ibid.*

Subpart B: Classification[19]

Under Subpart B, DOD "will establish broad occupational career groups by grouping occupations and positions that are similar in types of work, mission, developmental/ career paths, and/or competencies."[20] These will serve as "the basis for the NSPS classification and pay system," and will result in a "streamlined method of classifying positions that no longer relies on lengthy classification standards and position descriptions."[21]

The F.O.P. is greatly concerned how such a system will be applied to the various law enforcement entities of the Department of Defense, particularly given the lack of specificity in the entirety of Subpart B, as well as the decentralized nature of law enforcement operations throughout the Department. According to F.O.P.-DOD bargaining unit representatives, there are currently no uniform job standards or requirements for law enforcement employees across the Department of Defense. At the Pentagon Force Protection Agency, the requirements for their law enforcement recruits are very high, while applicants for similar positions at other military installations may only have to meet a set of requirements which would be considered low. In addition, there is currently no standardized training program across the Department, nor is there any centralized office in the Pentagon responsible for the Department's law enforcement personnel. In addition, our members are also greatly concerned with the replacement of the current GS system with an untried pay-banding system which is also expected to be applied to the Department's law enforcement employees. Given the unique mission of DOD's police officers and other law enforcement employees, the current system correlates better to the rank structure of a law enforcement agency, is a much more progressive pay system, and provides a number of special pay enhancements which could be expanded to recognize these employees for proficiency in given areas or specialized skills.

The Department declares that the NSPS classification system, along with the new pay system, "will provide DoD with greater flexibility to adapt the Department's job and pay structure to meet present and future mission requirements," however, there is no indication that the Department and OPM took the unique mission requirements of its police officers into consideration when designing the NSPS classification system.[22] If the above information is correct regarding law enforcement at DOD, then it would appear that the Department already relies more on flexibility than on stability or structure in the oversight of its law enforcement workforce; and that there is no long-term strategy or plan regarding the Department's law enforcement needs. Indeed, as GAO has noted with regard to NSPS, "it is questionable whether DOD's implementation of these reforms will

[19] Proposed Rule, pages 7558-7559 and 7578-7580.
[20] Proposed Rule, page 7558.
[21] *Ibid*, page 7559.
[22] Proposed Rule, page 7559.

result in the maximum effectiveness and value because DOD has not developed comprehensive strategic workforce plans that identify future civilian workforce needs."[23]

Recommendation

As will be discussed in greater detail below with regard to Subpart C, OPM has previously noted that government-wide rather than agency-specific proposals may be the best possible approach for certain occupations where "one size fits all," and that law enforcement is one of those professions. The DOD's proposal, on the other hand, seeks to create a classification system which cannot be tailored to meet the unique needs of its law enforcement employees and which may greatly exacerbate the current disparities which exist within the Federal law enforcement community. Therefore, the F.O.P. recommends that the Department exclude it law enforcement employees by regulation from coverage under this subpart.

Subpart C: Pay and Pay Administration[24]

Under Subpart C, DOD intends to establish a pay for performance system to replace the General Schedule and include "[v]arious features that link pay to employees' performance ratings…to promote a high-performance culture within DoD."[25] Any system developed under Subpart C will be established in conjunction with the classification system established under Subpart B and with the performance management system established under Subpart D. Although the major elements of the pay system will be established in the future through "implementing issuances," NSPS will include a structure of rate ranges linked to various pay bands for each career group; policies regarding the setting and adjusting of band rate ranges and local market supplements based on mission requirements, labor market conditions, and other factors; policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements; and policies regarding performance-based pay and premium payments.[26]

Given the lack of specificity in the proposed rule, the F.O.P. is primarily concerned with how such a system is to be applied to the law enforcement employees of the Department, as well as with its implementation. First and foremost, the Department has not provided any evidence that a "pay for performance" system is appropriate or feasible for law enforcement work in general or, in particular, that such a system as DOD and OPM are contemplating can be successfully applied on the scale which has been proposed. With regard to implementation, there are numerous concerns regarding how to ensure that the system is adequately funded—particularly where agency funding for personnel is fluid and cannot be fully accounted for in the agency's budget. As one senior Department of Homeland Security official recently noted, moving to a pay-for-performance may not

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[23] "DOD Civilian Personnel: Comprehensive Strategic Workforce Plans Needed (GAO-04-753)," General Accounting Office, June 2004, page 21.
[24] Proposed Rule, pages 7559-7561 and 7580-7584.
[25] Proposed Rule, Page 7580.
[26] Ibid, Page 7581.

have been the right decision for that Department because "there's limited money…There are agencies like ICE [Immigration and Customs Enforcement] that are very short of money now, so the likelihood that they would really be able to participate is probably very limited."[27]

Second, even OPM has noted that government-wide rather than agency-specific proposals may be the best possible approach for certain occupations where "one size fits all." For example, "the challenge of modernizing the pay and benefits of our law enforcement personnel and protective occupations may also demand a more uniform approach, particularly given the illogical disparities that exist today."[28] OPM built upon this statement in a July 2004 report to Congress required by Section 2(b) of the Federal Law Enforcement Pay and Benefits Parity Act of 2003 (P.L. 108-196). The report focused on both those employees who qualify as "law enforcement officers"(LEO) under the Federal Employees Retirement System (FERS) and the Civil Service Retirement System (CSRS), and those who have the authority to make arrests under Federal law but do not qualify as LEOs under the retirement laws. In their recommendations, OPM has sought the authority to "establish a Governmentwide framework for law enforcement retirement, classification and basic pay, and premium pay systems…[a] framework …tailored specifically for law enforcement jobs."[29] OPM noted that such a system was particularly necessary in the area of premium pay for Federal law enforcement employees. Citing the fact that there is currently "considerable consistency among law enforcement employees in terms of premium pay entitlements…[and] that such consistency is desirable and appropriate from a public policy standpoint," they argued that "[c]onsistency can only be achieved if there is a common framework that applies to all law enforcement employees."[30]

Third, experts in the human resources field have noted that there are several potential downsides of "pay for performance" systems, ones which could be potentially exacerbated by their application to law enforcement positions. Steven Kelman, a professor at Harvard University's John F. Kennedy School of Government, has noted that one potential problem arises from the effect that providing extra pay for strong performance has on "people who are intrinsically motivated to perform," in that the use of "increased extrinsic rewards might actually produce poorer performance among intrinsically motivated people."[31] Kelman argues that such a system presents a special problem for government agencies where public sector workers are more likely to be intrinsically motivated to perform their work than those in the private sector, and where the size of the rewards available to high-performers in the public sector are likely to be "modest" when compared to those available from private sector companies. In addition, Kelman argues that a second problem with such systems is that "individually based

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[27] "Future of civil service: Reforms empower managers, set course for government," by Tim Kauffman and Eileen Sullivan, *Federal Times*, 31 January 2005 (www.federaltimes.com).
[28] "OPM's Guiding Principles for Civil Service Transformation," U.S. Office of Personnel Management, April 2004, page 7.
[29] "Report to Congress: Federal Law Enforcement Pay and Benefits," U.S. Office of Personnel Management, July 2004, page iii.
[30] *Ibid*, page 56.
[31] "The Right Pay," by Steven Kelman, GovExec.com, May 15, 2003.

reward systems can cause harm when collaboration, teamwork and information sharing in a work group are crucial to good performance."[32] Nowhere are these statements more applicable to the law enforcement profession. The mission carried out by front-line police officers and criminal investigators works best when it works in a team environment, where officers are not expected to compete with one another but to work together to prevent crimes and arrest those who violate the law.

Finally, there are also concerns with adopting a basic pay and "local market supplement" system for law enforcement that is entirely based on performance, and the need to establish "performance appraisal factors" for a position which all too often has no counterpart outside of the Federal government and whose duties, responsibilities, and impact on public safety are extremely difficult to quantify. In addition, the proposal to deny pay increases and local market supplements to employees on the basis of performance does not seem to take into consideration the current difficulties in recruiting and retaining law enforcement officers (particularly in high cost of living areas) and maintaining competitiveness with State and local agencies. In fact, there is no requirement that DOD even provide a local market supplement to its employees, merely that the "basic pay ranges…may be supplemented in appropriate circumstances."[33]

Recommendation

While the F.O.P. believes that it is possible to tie certain aspects of a law enforcement officer's pay to his performance, we object to the implementation of a system for these employees which is entirely performance-based. Law enforcement often works best in a team environment, however, the employees who fill these positions must also be able to work independently and with little supervision on a daily basis. Under 5 USC 9902(f)(1)(B)(ii), the Act requires that in addition to trying to resolve differences over the proposed system, the meet and confer period was also designed by Congress to gauge "whether…to proceed with those parts of the proposal" to which employee representatives have made recommendations. Thus, the F.O.P. recommends that the Department use its authority under the Act to exclude its law enforcement officers from the pay-for-performance system established under this subpart because it is not feasible and would be counterproductive to the law enforcement mission.

Subpart D: Performance Management[34]

Through Subpart D, the Department intends to establish a performance management system, "designed to promote and sustain a high-performance culture," that is also fair, credible, and transparent; provides a link between the system and DOD's strategic plan; includes a process to ensure employee involvement in its design and implementation; and provides safeguards to ensure that the management of the system is fair and equitable.[35]

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[32] *Ibid.*
[33] Proposed Rule, Section 9901.331, page 7581.
[34] Proposed Rule, pages 7561-7563 and 7584-7586.
[35] Proposed Rule, pages 7584-7585.

Under this system, a "multi-level rating system" will be created to provide a rating of record which will be used as the basis for a pay determination, reduction-in-force retention standing, and undefined "other actions" which DOD considers appropriate. The performance management system applies to eligible DOD employees subject to a determination of the Secretary under Section 9901.102(b)(2), which allows but does not require the extension of this Subpart to some or all of the organizational or functional units of the Department.

While, as in the majority of the proposed rule, DOD has provided only the general framework and conceptual outline of the performance management system, the system proposed in Subpart D again raises questions and concerns about how such a system can or will be applied to the Department's law enforcement workforce-- particularly given the scarcity of such systems in other Federal or State or local law enforcement agencies. However, the greatest problem with implementing a pay for performance system for law enforcement officers arises from the need to establish "performance appraisal factors" for a position which all too often has no counterpart outside of the Federal government and whose duties, responsibilities, and impact on public safety are extremely difficult to quantify.

Clearly, basing "performance" on such factors as appearance, initiative or adherence to internal standards cannot be the sole basis for determining pay increases. Nor would it be appropriate or acceptable to determine a law enforcement employee's rating of record on such results-oriented factors as citations issued, number of arrests, or other factors related to the performance of the employee's official duties. A related problem, which has been noted in State and local law enforcement, is "the difficulty faced by police supervisors in evaluating their [officers], which results from the decentralized nature of police work…and the intangible …nature of much of the police 'product,' particularly as it relates to deterrence. These factors, and a bureaucracy organized along quasi-military lines, result in evaluations often being based on conformity to internal bureaucratic standards, which may have little to do with how well the patrolman does his job on the street, or what he does."[36] Finally, there is the concern that military supervisors and managers change quite frequently, and therefore cannot be relied upon to make meaningful distinctions regarding employee performance. As one of our members has noted, "mostly the manager is interested in furthering his/her career and where he/she is going next, rather than an employee's future. I have had 3 military supervisors in the last 3.5 years. By the time a supervisor is trained in this new system and learns how it works, it will be time to move on and thus the employee is penalized."

The goals which the Department and OPM have observed would result from the implementation of a performance management system applicable to its law enforcement employees must necessarily assume that, as a whole, 1) these employees are not performing up to their full potential at present, 2) that the pay which these employees receive is above what they would be earning if their performance was a key factor in their ability to rise within their respective agencies, 3) they would more willingly place their

[36] "Alternative Measures of Police Performance," by Gary T. Marx, in Criminal Justice Research, Lexington Books, 1976.

lives on the line and be more rigorous in their duties if they were provided monetary rewards for their efforts, and 4) that in the context of DOD's law enforcement mission, individual performance is more valuable than cooperation and teamwork. If these are the assumptions upon which this system is or is perceived to be based, then it must necessarily fail.

Recommendation

Given the difficulty, under the regulations as proposed, in developing a performance management system for law enforcement employees that is meaningful, appropriate, and based on more than superficial performance appraisal factors, the F.O.P. strongly recommends that the proposed rule be amended to exclude the Department's law enforcement workforce from the performance management system established under Subpart D.

Subpart E—Staffing and Employment[37]

DOD claims that the provisions contained within this Subpart will give the Department "an expanded set of flexible hiring tools to respond effectively to continuing mission changes and priorities;" "greater flexibility in acquiring, advancing, and shaping a workforce tailored to the Department's needs;" and "address the need to compete for the best talent available by providing the Department with the ability to streamline and accelerate the recruitment process."[38] The individual sections deal with such issues as DOD's appointing authorities, probationary periods for employees, competitive examination procedures, and internal placement.

The F.O.P. has a number of concerns with the provisions contained in this Subpart. Under Section 9901.512, the Secretary may establish probationary periods for NSPS-covered employees appointed to positions in the competitive service, and will prescribe the conditions for these periods through implementing issuances after NSPS takes effect. The problem is that there is no limit to the time period to which the Secretary can hold an employee in probationary status, except that a preference eligible employee who has completed one year of a probationary period will be covered by the adverse action and appeals provisions established under Subparts G & H. Nor is it entirely clear under this Section whether the probationary periods will be per employee, or per position. If the former, than a situation may arise where there are two individuals brought in to fill a law enforcement position at the same time, but who are placed in a probationary status of differing length. Such a possibility again highlights the need for greater standardization among, and coordination of, DOD's various law enforcement units.

A related concern is with Section 9901.516 regarding internal placement. This section allows DOD to "prescribe implementing issuances regarding the assignment, reassignment,…detail,…of employees into or within NSPS," and to establish "in-service

[37] Proposed Rule, pages 7563-7564 and 7586-7588.
[38] Proposed Rule, page 7563.

probationary periods and prescribe the conditions under which employees will complete such periods."[39] While probationary periods may be appropriate for employees who are reinstated with the Department or promoted to a management position, it is difficult to see how requiring current DOD employees to revert to a probationary status simply because their services are needed in a different area of DOD or its components is necessary or warranted. This is particularly true for police officers and other law enforcement employees who are extremely unlikely to be reassigned or detailed to anything other than the same position at a different area or installation.

Recommendation

As in other parts of the proposed rule, the provisions of Subpart E would benefit from greater specificity with regard to Sections 9901.512 and 9901.516, among others. Therefore, the F.O.P. recommends that the Department and OPM work with employee representatives to develop a final rule which accomplishes this goal and will help provide improved credibility for the system as a whole.

Subpart F—Workforce Shaping[40]

The provisions contained under this subpart govern the "Department's system for realigning, reorganizing, and reshaping its workforce," and covers "categories of positions and employees affected by such actions resulting from the planned elimination, addition, or redistribution of functions, duties, or skills within or among organizational units, including realigning, reshaping, delayering, and similar organizational-based restructuring actions."[41] DOD and OPM claim that these provisions allow the Department to "reduce, realign, and reorganize the Department's workforce in a manner consistent with a performance-based HR system."[42]

What is not clear, however, is how such a system will help DOD determine what its workforce needs are, and whether the Department has in fact "put the cart before the horse." As noted above, GAO reported in June 2004 that during its downsizing efforts in the 1990s, DOD did not focus on strategically reshaping its civilian workforce; and similarly, with regard to NSPS and other personnel reforms, the Department DOD has not developed comprehensive strategic workforce plans to identify its future civilian workforce needs. GAO also noted in the same report that

> *DOD and the components have not developed results-oriented performance measures to provide a basis for evaluating workforce planning effectiveness. Thus, DOD and the components cannot gauge the extent to which their human capital initiatives contribute to achieving their organizations' missions…Without results-oriented measures, it is difficult for an organization to assess the effectiveness of its human capital initiatives in supporting its overarching mission*

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[39] Proposed Rule, page 7588.
[40] Proposed Rule, pages 7564 and 7588-7590.
[41] Proposed Rule, page. 7588.
[42] Proposed Rule, page 7564.

and goals.[43]

In addition, the United States Senate recently responded through the FY 2005 Ronald W. Reagan National Defense Authorization Act (P.L. 108-375) to the Department's continuing efforts to delete or modify the requirements contained in 10 U.S.C. 2465, regarding the prohibition on contracts for the performance of firefighting or security guard functions. DOD had argued that such authority was necessary because Federal staffing was insufficient to meet a heightened security posture required by a terrorist threat or other crises. In the FY 2003 National Defense Authorization Act, Congress amended the law to allow DOD to contract for security-guard services to respond to increased security needs following the terrorist attacks of 9/11, but only if the functions otherwise were or would be performed by military personnel, it was determined that the contractor personnel were adequately trained and supervised, and that they could be used without reducing security at the affected installation. The Secretary of Defense was also required to submit a report to Congress within six months after enactment (due in May 2003), explaining the Department's long-term plans for meeting its increased security needs after 9/11. In reporting the fiscal year 2005 legislation in May 2004, the Senate Armed Services Committee noted that it was "disappointed" that the Department had not yet submitted its report and also called into question DOD's claims that meeting these increased security needs "through expanding either civilian or active military workforce is difficult because the end strength of both workforces is constrained and there are many other demands for these personnel."[44] For this reason, the Department's deadline to file the report was extended until December 2005 and it is now required to include more detailed information regarding its installation security needs.[45]

Recommendation

In light of GAO's study and the presumably forthcoming report regarding the long-term security needs of the Department, the F.O.P. believes that it is difficult to design the tools needed to achieve specific goals when there is no well-formed view of what those goals actually are. Thus, we recommend that the Department work with employee representatives regarding its strategic workforce plans, and develop a system which will help accomplish them.

Subpart G—Adverse Actions[46]

Within Subpart G, the Department has proposed revisions and additions to the current adverse action system which it claims "are directed at the cumbersome and restrictive requirements for addressing and resolving unacceptable performance and misconduct," and to "streamline the rules and procedures for taking adverse actions to better support

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[43] "DOD Civilian Personnel: Comprehensive Strategic Workforce Plans Needed (GAO-04-753)," General Accounting Office, June 2004, page 18.
[44] "National Defense Authorization Act for Fiscal Year 2005," Senate Report 108-260, Committee on Armed Services, United States Senate, May 11, 2004, page 298.
[45] See "Conference Report: Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (H.R. 4200)," House Report 108-767, 8 October 2004.
[46] Proposed Rule, pages 7564-7565 and 7590-7592.

the mission of the Department while ensuring that employees receive due process and fair treatment."[47] The provisions of this subpart provide the Secretary with the authority to establish Mandatory Removal Offenses, the types of covered actions and employees, and the procedures to be followed in adverse action cases.

Given the questions which have been raised regarding similar efforts of the Internal Revenue Service (IRS) and the Department of Homeland Security, the F.O.P. is concerned with the proposal in Section 9901.712 regarding Mandatory Removal Offenses. Apparently, DOD has not followed the warning to learn from the experience of the IRS in implementing a similar scheme which even IRS officials "believed…had a negative impact on employee morale and effectiveness and had a 'chilling effect' on IRS frontline enforcement employees who were afraid to take certain appropriate enforcement actions."[48] Instead DOD has developed a system under which the Secretary has the "sole, exclusive and unreviewable discretion" to identify offenses or to mitigate the removal penalty, allows those offenses which are identified at a future time to be developed without the involvement of Congress or employee representatives, and requires that a proposed notice required by Section 9901.714 can only be issued to an employee charged with an offense "after the Secretary's review and approval."[49]

In addition, the F.O.P. is also concerned with the provisions contained in Sections 9901.714 (Proposal Notice) and 9901.715 (Opportunity to Reply). First, the DOD and OPM have not successfully made their case that the proposed reduction in the notice and response periods, while perhaps more convenient for the Department, is appropriate given the potential harm which may result to the due process rights of employees. Second, the proposed rule would further reduce the notice period to at least five days in cases where there is "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed," however, there is no similar requirement that actual proof of a crime or of charges filed against an employee be obtained.[50] Third, the opportunity for an employee to reply is limited to at least ten days, which will run concurrently with a minimum of a fifteen day notice period—which could result in situations where the employee's opportunity to respond would expire before the expiration of the notice period. Finally, the F.O.P. is concerned with the limitation imposed under Section 9901.715(f)(2) and (3), which allows the Department to disallow as an employee's representative, "an employee of the Department…whose work assignments preclude his or her release," or "[a]n individual whose activities as representative could compromise security."[51] Notwithstanding the effect that this provision will have on the right of an employee to a representative of his own choosing, it would seem to have an even greater negative impact on those law enforcement officers who are represented by their fellow officers. Indeed, there are no apparent safeguards built into this section which would, for example, prohibit the Department from declaring

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[47] Proposed Rule, page 7564.
[48] "Human Capital: Observations on Final DHS Human Capital Regulations," Testimony of David Walker, Comptroller General of the United States, before the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, U.S. House of Representatives, 2 March 2005, page 11.
[49] Proposed Rule, Page 7591.
[50] Proposed Rule, Section 9901.714(a), page 7591.
[51] *Ibid.*

that a current GS-083 police officer who also serves as an employee representative was not allowed to represent his bargaining unit member due to the limitations in Subsections (2) and (3).

Recommendation

Given the concerns and questions which are raised above, the F.O.P. recommends substantial changes be considered to this subpart during the "meet and confer" process to fully ensure the due process rights of employees. In addition, we recommend that Section 9901.712 regarding mandatory removal offenses be deleted in its entirety.

Subpart H—Appeals[52]

This subpart establishes the system for Department employees to appeal adverse actions covered under Subpart G of the proposed rule—including removals, suspensions for more than 14 days, furloughs, and reductions in pay or pay band—and modifies the appellate procedures to the Merit Systems Protection Board (MSPB). The Department claims that—by establishing procedures which supersede those of MSPB when they are inconsistent with those of this subpart—"these modifications will expedite and streamline the appeals process so that both employees and the Department will be able to resolve appeals more quickly and efficiently than is possible today."[53]

The F.O.P. is concerned with a number of the new and modified requirements for employee appeals, including:

Section 9901.807(d)(2) and (3)—which provides that neither the Administrative Judge nor the MSPB may (a) "reverse the Department action based on the way in which the charge is labeled or the conduct characterized, provided the employee is on notice of the facts sufficient to respond to the factual allegations of the charge;" or (b) "reverse the Department's action based on the way a performance expectation is expressed, provided that the expectation would be clear to a reasonable person." Given the fact that employees would be responsible for responding to charges which have not been made and that, under previous provisions of this Part, the performance expectations can change numerous times during an appraisal period, there appears to be no accountability for DOD to get these items right before going forward with an adverse action against an employee.

Section 9901.807(h)(1)—which restricts payment by the Department of reasonable attorneys fees where the employee is the prevailing party to cases in which "the Department's action was clearly without merit based upon facts known to management when the action was taken." Thus, attorney fees would not be payable to prevailing employees in cases where DOD's actions are determined to be "clearly without merit" based upon facts which are discovered during the appeal process.

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[52] Proposed Rule, pages 7565-7568 and7592-7594.
[53] Proposed Rule, page 7567.

Section 9901.807(k)(6)—which provides that an arbitrator, AJ or the full MSPB "may not modify the penalty imposed by the Department unless such penalty is so disproportionate to the basis for the action as to be wholly without justification." In addition, the subsection further requires that when a penalty is mitigated by MSPB, "the maximum justifiable penalty must be applied." As the Chairman of the MSPB recently testified before Congress on similar provisions contained in the final DHS regulations, the Board currently "reviews the penalty imposed by an agency in accordance with the standard set in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), to ensure that it is 'within the range of reasonableness,'" and that replacing the current standard of applying the "maximum reasonable penalty" under *Douglas* with the "maximum justifiable penalty" implies that the Department "will have to meet a much lower threshold to sustain the penalty."[54] The Chairman continued that the MSPB believes that

> *this mitigation limitation is based on a perception that the Board's practice is to second guess the reasonableness of an agency's penalty decision without giving deference to the agency's mission or the manager's discretion. In fact, the Board considers a number of relevant factors in determining whether a penalty should be sustained, including whether it is within the range of penalties allowed for the offense in the agency's table of penalties. The MSPB only mitigates a penalty if it finds that the penalty clearly exceeds the maximum reasonable penalty.*[55]

Recommendation

Notwithstanding DOD's claims, it is not at all clear that the procedures which have been proposed in this Subpart will in fact accomplish the goals it seeks—particularly given the testimony of the Chairman of the MSPB with regard to the final DHS regulations (which include provisions similar to those proposed by DOD) that may in fact delay adjudication—and without an unnecessary reduction in employee rights. Therefore, the F.O.P. recommends that the Department engage in a truly collaborative process with employee representatives to design a system which will achieve both of these important goals.

Subpart I—Labor-Management Relations[56]

Through 5 U.S.C. 9902(m), Congress authorized DOD and OPM to establish a new labor-management relations system, which is to be binding on all employees and bargaining units except as otherwise determined by the Secretary. Under this authority, DOD seeks to establish a system that "addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission."[57]

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[54] Written statement of Neil A. G. McPhie, Chairman, U.S. Merit Systems Protection Board, on "The Countdown to Completion: Implementing the New Homeland Security Personnel System," before the Subcommittee on the Federal Workforce and Agency Organization, House Committee on Government Reform, 2 March 2005.
[55] *Ibid.*
[56] Proposed Rule, pages 7568-7573 and 7594-7603.
[57] Proposed Rule, page 7594.

Among other provisions contained in this subpart, the NSPS labor relations system would make unenforceable any provision of a collective bargaining agreement that is inconsistent with the regulations or DOD issuances (unless the Secretary determines otherwise), establish an internal "National Security Labor Relations Board," and expand the list of nonnegotiable subjects to include currently permissive subjects of bargaining. However, in publishing their proposed rule on 14 February, DOD and OPM did not comply with the further requirement contained in the FY 2004 Defense Authorization Act that to ensure collaboration with, and the participation of, "employee representatives in the development …of the labor management relations system or adjustments to such system…the Secretary and the Director shall…afford employee representatives and management the opportunity to have meaningful discussions concerning the development of the new system."[58] Nor is there any indication that the Department has complied with its obligation in designing the labor relations system to "take into consideration the unique requirements and contributions of public safety employees in supporting the national security mission of the Department."[59]

Section 9901.907—National Security Labor Relations Board

The F.O.P. is greatly concerned with the establishment of the National Security Labor Relations Board under Section 9901.907, and would object to any classification of this group as one which will enable an independent review of labor-management disputes. Under this provision, the Board will consist of at least three members appointed by the Secretary of Defense for three year terms. Under subsection (a)(2) there is no requirement that there be even one member of the Board with expertise in the labor relations field—indeed the Secretary could appoint a Board comprised solely of individuals who are familiar only with "the DoD mission and/or other related national security matters."[60]

Recommendation
The F.O.P. therefore recommends that the proposed rule be amended to delete Section 9901.907 in its entirety, and that the current procedures for resolving labor-management disputes be retained.

Labor-Management Relations System Designed for Public Safety Employees

It is also important to underscore the unique nature of public safety work, and the non-traditional nature of the labor-management relationship within this profession. With regard to law enforcement, the goal of the rank-and-file officer and the chief law enforcement officer is to decrease crime and to increase the safety of the facilities which they protect. This is their bottom line: not profits versus wages, but the safety of the public and of the officer. Studies have consistently shown that cooperation between public safety employers and employees enhances overall public safety, as well as the

[58] 5 U.S.C 9902(m)(3)
[59] Conference Report on H.R. 1588, the "National Defense Authorization Act for Fiscal Year 2004," H. Rpt. 108-354, page 760.
[60] Proposed Rule, page 7596.

safety of the individual officer. While the F.O.P.'s bargaining units negotiate with management over such common issues as changes in working conditions and the scheduling of shifts, they also bargain over such critical issues as staffing various police patrols; officer safety equipment such as bulletproof vests, vehicles and firearms—ensuring that front-line officers have the right equipment to conduct their important work; and the types, standards and improvements in the training available to law enforcement employees. And since the public safety service is delivered by rank-and-file officers, it is their observations and experience which will best refine the delivery of that service—a perspective which is extremely necessary in those situations where policies have been designed, or will be implemented by, officials with no law enforcement experience or background in the law enforcement mission. To reduce their ability to have meaningful input relating to their job--particularly when it is their lives that are on the line--is not only unfair to the officers, but also to the public they are sworn to protect.

A prime example of the unique nature of the labor-management relationship in Federal law enforcement is the U.S. Capitol Police following the adoption by the 104th Congress of the Congressional Accountability Act, and which granted its officers the right to bargain collectively. For the first time, Capitol police officers had a voice in matters related to workplace issues. Within one year, a contract was negotiated in a timely fashion without any disruption of law enforcement activities. As a result of the contract, the U.S. Capitol Police is a more effective and more professional police agency. The contract established the Joint Labor-Management Relations Committee to review police practices and procedures, another to review equipment issues and officer safety. An examination of the issues reviewed by the joint committee demonstrates that the overwhelming majority of them relate directly to job performance. Since the bargaining agreement has been in place, the U.S. Capitol Police have increased the acquisition and distribution of soft body armor and upgraded their firearms to .40 caliber. The views of the rank-and-file officers, brought to the Joint Committee by the Capitol Police union, have resulted in more efficient manning of fixed posts throughout the U.S. Capitol complex, making it a safer place to work and visit.

Recommendation

In publishing its proposed rule, DOD and OPM have not complied with the requirement contained in the FY 2004 National Defense Authorization Act to ensure collaboration with, and the participation of, employee representatives in the development of the labor management relations system by affording them the opportunity to have meaningful discussions concerning its development; nor has it complied with its obligation to design a system which recognizes the unique requirements and contributions of its public safety employees. Since 5 U.S.C. 9902(m)(8) allows the Secretary to determine the eventual coverage of the labor relations system, the F.O.P. strongly recommends that the Department amend Subpart I of the proposed rule to exclude public safety employees from these provisions of the proposed rule.[61] This would provide for an opportunity for

[61] "The labor relations system developed or adjusted under this subsection shall be binding on all bargaining units within the Department of Defense, all employee representatives of such units, and the

officials from the Department and OPM to meet with the representatives of DOD's public safety employees, and work together to develop a system which truly recognizes the unique nature of public safety work.

Conclusion

In light of the numerous problems identified and concerns expressed above, the Fraternal Order of Police does not believe that the Department of Defense and the Office of Personnel Management has successfully demonstrated the need for a radical departure from the existing systems in the areas covered by the proposed rule; nor has DOD/OPM complied with the law's requirement to involve employee representatives in the design of the "National Security Personnel System." Notwithstanding our specific recommendations on each of these subparts, we believe that NSPS as proposed should be rejected in its entirety and, if the Department intends to move forward on a new human resources management system, it should do so in a manner which fully involves employee representatives in the design of that system.

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Department of Defense…*except as otherwise determined by the Secretary*." 5 U.S.C 9902(m)(8), emphasis added.