I. INTRODUCTION

Introduction to Comments and Recommendations

We are extremely disappointed by the progress of our discussions during the last year. At times, the Coalition sensed that many of the concerns we voiced fell on deaf ears as the Agencies (Department of Defense, hereinafter DOD or the Department and Office of Personnel Management, hereinafter OPM) had a predisposition toward a human resources system that substantially mirrored the system proposed by the Department of Homeland Security. As such, we believe that many of the concepts advanced by the Agencies fail to advance the public's interest in protecting national security and defense.

The Coalition offered several "options" during the past year and here again in these comments. These options will change and enhance current procedures without sacrificing important employee rights intended to be safeguarded by the law. We continue to hope that these options will be included in the final regulations.

For example, we have a mutual interest in improving the discipline and adverse action process. While we have very strong concerns about a pay for performance system, we have offered to negotiate over pay and a new pay system that would provide for 1) a nationwide component to keep all employees comparable with the private sector; 2) a locality component to keep all employees comparable with the private sector and living costs; and 3) a performance component with fixed percentages tied to performance levels and 4) collective bargaining for bargaining unit employees over ongoing decisions that must be made once the system is in place. We have

offered to speed up the timeframes for bargaining, consider the new concept of post-implementation bargaining when necessary to protect national security and defense, and the introduction of quick mediation-arbitration processes by mutually selected independent arbitrators to quickly resolve any bargaining disputes. We believe these changes alone would allow DOD to succeed in implementing new processes that would enhance the mission of the agency.

Through a process which includes collaboration and collective bargaining, employee representatives expect to work with the Agencies to create a personnel system described in the statute. Once the system is developed and implemented, the new personnel system will be subject to the collective bargaining process. In submitting the following recommendations, we do not waive any right(s) concerning procedural and/or substantive violations by the Department and/or OPM in the planning, development, and drafting of the proposed National Security Personnel System (NSPS) Regulations to implement 5 U.S.C. Chapter 99.

A. Labor Relations

In addition to the substantive arguments made in the body of this document, the Coalition believes that the procedures for generating changes in the Labor Management Relations system have, thus far, been contrary to the statutory scheme described in National Defense Authorization Act for Fiscal Year 2004, Section 9902 (m), LABOR MANAGEMENT RELATIONS IN THE DEPARTMENT OF DEFENSE.

This portion of the law describes a very specific manner of statutory collaboration with time lines, which has not been followed. The law requires that employee representatives participate in, not simply be notified of, the development of the system.

Public Law 108-136 protects the right of employees to organize, bargain collectively, and to participate through labor organizations of their own choosing in decisions that affect them. Specifically, the Coalition has reiterated that we believe NSPS preserves the protections of Title 5, Chapter 71, which your proposals attempt to eliminate. Despite this congressional mandate, the proposed regulations will:

1. Restrict bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of core operational management rights.

2. Eliminate bargaining over otherwise negotiable matters that do not significantly affect a substantial portion of the bargaining unit.

3. Unduly restrict a union's right to participate in formal discussions between bargaining unit employees and managers.

4. Unduly restrict the situations during which an employee may request the presence of a union representative during an investigatory examination.

5. Eliminate the requirement to preserve the status quo pending completion of bargaining and impasse resolution.

6. Set and change conditions of employment and void collectively bargained provisions through the issuance of non-negotiable departmental and component wide regulations.

7. Assign authority for resolving many labor-management disputes to an internal Labor Relations Board, composed exclusively of members appointed by the Secretary.

8. Grant broad new authority to establish an entirely new pay system, and to determine each employee's base pay and locality pay, and each employee's annual increase in pay, without requiring any bargaining with the exclusive representative.

9. Mandate non-reviewable national level bargaining without consideration of the hundreds of local and regional certifications by the Federal Labor Relations Authority.

If there is any doubt, we herein restate our objection to your total abandonment of Chapter 71 as well as the law associated with the statute's interpretation. Chapter 71 should be the "floor" of any labor relations system you design. The apparent design of your plan is to minimize the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. When it enacted provisions to protect collective bargaining rights, Congress did not intend those rights to be eviscerated in the manner that your concepts envision. Congress expressly specified only two modifications to Chapter 71 – bargaining above the level of unit recognition and independent third party review of decisions. All Chapter 71 provisions not directly inconsistent with these two changes remain fully applicable to DOD. Any regulation reflecting any of the issues listed above is unacceptable and unfounded in the legislation and the law.

B. <u>Performance Management</u>

The law requires any new system to be "contemporary." Your labor relations and performance management concepts are, however, remarkably regressive. By proposing to silence frontline employees and the unions that represent them, the Agencies appear to have decided that employees and their unions can make no contributions to the accomplishment of the essential mission of protecting the national security and defense. This approach is at odds with contemporary concepts of labor relations. As the General Accountability Office recognized in congressional testimony

concerning the Department of Homeland Security's proposed regulations on human capital:

> [L]eading organizations involve unions and incorporate their input into proposals before finalizing decisions. Engaging employee unions in major changes, such as redesigning work processes, changing work rules, or developing new job descriptions, can help achieve consensus on the planned changes, avoid misunderstandings, speed implementation, and more expeditiously resolve problems that occur. These organizations engaged employee unions by developing and maintaining an ongoing working relationship with the unions, documenting formal agreements, building trust over time, and participating jointly in making decisions.

The performance management system breaks no new ground. Except for the elimination of employee procedural safeguards, the proposed system repeats many of the current system's themes, such as providing on-going employee feedback regarding performance and consistent and continual acknowledgment and reward of high performance and good conduct. Federal agencies have been struggling to attain credible performance systems for decades. Nothing in this proposal suggests that DOD will be able to avoid the credibility problems that have plagued federal employers. These problems are even more pronounced in view of the proposal to link employee pay more closely to their performance ratings.

We expect to engage in the full statutory collaboration process mandated by Congress to develop a new and improved performance management system. We recommend that it use collective bargaining for bargaining unit employees over the ongoing decisions that must be made once the system is in place.

C. Employee Appeals

Public Law 108-13 also reflects Congress's determination that DOD employees

be afforded due process and be treated fairly in appeals they bring with respect to their employment.

When it mandated that employees be treated fairly, afforded the protections of due process, and authorized only limited changes to current appellate processes, Congress could not have envisioned the drastic reductions in employee rights that your proposed regulations set forth.

No significant statistical evidence shows that current employee due process protections or the decisions of arbitrators or the MSPB jeopardize national security and defense. While we believe in an expeditious process for employee appeals, we cannot support biasing the process in favor of management or otherwise reducing the likelihood of fair and accurate decisions. You have provided no research that shows that the drastic changes proposed to Chapters 75 and 77 of Title 5 will further the agency mission.

Ideally, a new human resource management system would promote esprit-de-corps so as to enhance the effectiveness of the workforce. These proposed regulations fall far short of that ideal. Instead, they will result in a demoralized workforce composed of employees who feel as if they have been relegated to second-class citizenship. This system will encourage experienced employees to seek employment elsewhere and will deter qualified candidates from considering a career at DOD. It will put DOD at a competitive disadvantage.

We expect to engage in the full statutory collaboration process mandated by Congress to develop a new and improved employee appeals process. We recommend

that this include negotiated grievance and appeals processes for bargaining unit employees.

D. Pay and Classification

Your proposed regulations indicate that you desire radical change to the pay and classification systems, and, as the law requires, creating a pay-for-performance system "to better link individual pay to performance, and provide an equitable method for appraising and compensating employees." No reliable information exists to show that this proposed system will enhance the efficiency of DOD operations and promote national security and defense. As with the proposed system at the Department of Homeland Security, most of the key components of the system have yet to be determined.

One thing, however, is clear. The design, creation and administration of your concept would be complex and costly. A new bureaucracy would be created, and it would be dedicated to making the myriad, and yet-to-be identified, pay-related decisions that the new system would require. Our country would be better served if the resources associated with implementing and administering these regulations were dedicated more directly to protecting national security and defense.

As we stated to you during our meetings last year, until these and other important details of the new system have been determined and piloted, the undefined changes cannot be evaluated in any meaningful way. The unions are now forced to exercise their statutory collaboration rights on vague outlines, with no fair opportunity to consult on the "real" features of the new classification, pay and performance system. This

circumvents the congressional intent for union involvement in the development of any new systems, as expressed in Public Law 108-136.

Accordingly, we recommend that the pay, performance, and classification concepts be withdrawn in their entirety and published for comment and recommendations only when: 1) the Agencies are willing to disclose the entire system to DOD employees, affected unions, Congress, and the American public; and 2) the Agencies devise a more reasonable approach to testing any radical new designs before they are implemented on any wide-spread basis. We simply cannot accept systems that establish so few rules and leave so much to the discretion of current and future officials. As the representatives of DOD employees, it is our responsibility to protect them from vague systems, built on discretionary authority that is subject to abuse.

Regardless of the ultimate configuration of the pay proposal, we believe that any system must contain the transparency and objectivity of the General Schedule. We expect to engage in the full statutory collaboration process mandated by Congress to develop a new and improved pay and pay administration system. We believe the resulting system must contain the transparency and objectivity of the General Schedule, which includes involvement of Congress and the Federal Salary Council.

We recommend that the ongoing decisions, such as pay rates for each band, annual increases for employees in these bands and locality pay supplements be made through collective bargaining for bargaining unit employees. We object to these decisions being made behind closed doors by a group of DOD managers (sometimes in coordination with OPM) and their consultants.

Critical decisions on pay rates for each band, annual adjustments to these bands and locality pay supplements and adjustments must be made in public forums like the U.S. Congress or the Federal Salary Council, where employees and their representatives can witness the process and have the opportunity to influence its outcome. We are concerned that these decisions would now be made behind closed doors by a group of DOD managers (sometimes in coordination with OPM) and their consultants. Not only will employees be unable to participate in or influence the process, there is not even any guarantee that these decisions will be driven primarily by credible data, or that any data used in the decision-making process will be available for public review and accountability, as the data from the Bureau of Labor Statistics is today.

If the system DOD/OPM has proposed is implemented, employees will have no basis to accurately predict their salaries from year to year. They will have no way of knowing how much of an annual increase they will receive, or whether they will receive any annual increase at all, despite having met or exceeded <u>all</u> performance expectations identified by DOD. The "pay-for-performance" element of the proposal will pit employees against each other for performance-based increases.[2] Making DOD employees compete against each other for pay increases will undermine the spirit of cooperation and teamwork needed to keep our country safe at home and abroad.

It is also unclear from the current state of the deficit that funds will be available for performance based increases, a fact that has many DOD employees concerned about this proposal. As a practical matter, the Coalition has voiced its concern that your

[2] This element of the proposal does not really qualify as a "pay for performance" system. Employees performing at an outstanding level could not, under the proposal, ever be certain that they would actually receive pay commensurate with their level of performance.

ambitious goal to link pay for occupational clusters to market conditions fails to address the reality that pay for DOD employees is tied to Congressional funding, not market conditions.

E. Conversion

As of this date, the unions have had little or no discussion with the agencies on how DOD will convert from the current pay, performance, appeals and labor relations system into NSPS. With respect to the new pay and classification systems, employees' conversion should include pay adjustments for time already accrued toward a within grade increase or career ladder promotion. With respect to appeals, any grievances, complaints, cases, etc. already filed in the current system must retain the protections of the current system until final adjudication under the current system.

II. SUBPART A: GENERAL PROVISIONS

§ 9901.101 - Purpose

"This part contains regulations governing the establishment of a new human resources management system within the Department of Defense, as authorized by 5 U.S.C. 9902... These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM)."

In fact, the proposal does **not** contain regulations governing the establishment of a new pay, performance management, and classification system. These proposed regulations merely lay out some extremely broad parameters and note that the

Secretary "may" actually develop the systems in the future with or without OPM, and with an undefined process to involve employees and their representatives.

In § 9902(a) of the National Security Personnel System (NSPS) Law, Congress explicitly allowed the new personnel system to be established by "…regulations prescribed jointly with the Director [of OPM]." § 9902(f) requires the Secretary and Director to provide employee representatives with a written description of the proposed new or modified HR system. The employee representatives then must be given 30 calendar days to review and make recommendations regarding the proposal. If the Secretary and Director do not accept one or more recommendations, they must notify Congress of the disagreement and then meet and confer with employee representatives for at least 30 calendar days in an effort to reach agreement.

Congress allowed DOD to have a personnel system that deviated from certain chapters of 5 U.S.C., but only if the systems would be jointly created and promulgated by DOD and OPM, and the systems would be created through a specific collaboration process with employee representatives that was mandated by Congress. Contrary to the NSPS law, DOD has made it clear that it does not intend to develop these systems through the process mandated by Congress. Instead, DOD intends to develop these systems at its sole and exclusive discretion, perhaps in coordination with OPM, at some time in the future.

<u>§ 9901.102 – Eligibility and coverage</u>

§ 9901.102 (b)(1) says that the Secretary, at his sole discretion, may establish the effective date for applying subpart I (Labor Relations) to all eligible employees. This

is in direct conflict with 5 U.S.C. 9902(l)(1), which prohibits the application of NSPS to more than 300,000 civilian employees until the conditions in § 9902(l)(2) are met, namely that the Secretary must first determine that the Department has in place a performance management system that meets criteria spelled out in subsection (b) of the law. We recommend that this section be stricken from the regulations as it is contrary to law.

§9901.102(f) provides that the DOD Secretary may apply one or more subparts of NSPS to employees not covered by Title 5 of the Code. We object to this section and to the supplemental information under "Eligibility and Coverage" on page 7557 which states, "Other categories of employees, including those covered by other systems outside of title 5, will be phased in as appropriate." There is no statutory authority in the NSPS law that allows DOD to apply NSPS to employees covered by anything other than the waivable or modifiable chapters of Title 5. This is an unlawful overreach on the part of DOD.

§ 9901.103 – Definitions

We object to many of the definitions in this section because there are too few details or descriptions of the actual system DOD intends to establish for us to adequately assess and comment on their meanings. This includes such words and phrases as "Career group," "Competencies," "Pay band," and others. We especially object to "Implementing issuances," and "Mandatory removal offense." Our objection to "Implementing issuances" is described below. By relegating the development of the NSPS to internal issuances, DOD has delegated to itself far more power than Congress

intended. Our objection to the whole concept of mandatory removal offenses is described in our comments to subpart G. We recommend that both of these definitions be removed.

§ 9901.105 - Coordination with OPM

"Coordination" has a special meaning in these proposed regulations. It is described in §9901.105 as follows:

> …The Secretary will advise and/or coordinate with OPM in advance, as applicable, regarding the proposed promulgation of certain DOD implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Such pre-decisional coordination is intended as an internal DOD/OPM matter to recognize the Secretary's special authority to direct the operations of the Department of Defense pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system.

In other words, DOD is saying that the actual design of the system will not be done jointly with OPM but through a process in which DOD unilaterally designs the details, notifies OPM, and OPM intervenes only if it believes that what DOD wants to do could have a significant impact on other Federal agencies or the Federal civil service as a whole. This is not the new personnel system established by regulations jointly prescribed by DOD and OPM that Congress intended.

Similarly, DOD is signaling the start of the statutory collaboration process while providing the employee representatives with far too little detail to make meaningful comments and recommendations. We have been told that our 30 days to comment on the new personnel system has started, yet we have never received the "written

description of the proposed system" required by §9902(f)(1)(a). It is hard to imagine a productive mediation process over what the Secretary might decide to do in the future, but is not going to tell us now. How do we "meet and confer in an effort to reach agreement" about details DOD has not revealed to us and plans to develop unilaterally outside of the statutory process?

Rather, the proposed regulations repeat, over and over again, that the actual details of the systems may be determined in the future through "implementing issuances" developed internally, outside of both the public's right to comment and the statutory collaboration process required by the NSPS Law. "Implementing issuances, as defined in §9901.103, means:

> [D]ocuments issued at the Departmental level by the Secretary to carry out any policy or procedure established in accordance with this part. These issuances may apply Department-wide or to any part of DOD as determined by the Secretary at his or her sole and exclusive discretion.

In other words, DOD merely has to produce a document, not necessarily a directive or regulation, that the Secretary deems to be an "implementing issuance," and thereby relegate the union to the position of merely being allowed to comment and only if invited by the Secretary, as described in § 9901.106.

This falls far short of the statutory mandate that the personnel system be designed in collaboration with the unions. The statutory collaboration process was to include the provision of a written description of the proposed system, a 30-day opportunity for the unions to review and make recommendations, notification to Congress of the unions' recommendations including which ones DOD chooses not to accept, and a period of at least 30 days to meet and confer, with FMCS assistance if

requested, in order to attempt to reach agreement on whether or how to proceed with those parts of the proposal. We have not yet received a written description of the proposed system, but are being asked to squander our collaboration efforts on speculation about what the actual systems might be.

§ 9901.106 - Continuing collaboration

In this section, DOD spells out how it is actually going to involve its employees' exclusive representatives in the planning, development, and implementation of NSPS as required by law. It will not subject the actual development of the system to the statutory procedure described above, but rather, it proposes that the Secretary, entirely at his discretion, will decide how many union representatives to involve and how much time to give them to submit written comments and discuss final draft implementing issuances.

If the Secretary thinks it is necessary, he may involve the employees' exclusive representatives in commenting and discussing these issuances before they have become "final" drafts. There will be no meet and confer process with an outside mediator. There will be no public or congressional scrutiny of the process. The Secretary will decide who to involve, how much time to give them, and whether or not to involve them before it is essentially a "done deal." This is nothing like what Congress intended when it required union participation in the planning, development, and implementation of the NSPS and spelled out specific steps in that participation.

We expect to engage in the full statutory collaboration process mandated by Congress to develop a new and improved human resource system. DOD is required to

engage in collective bargaining for bargaining unit employees over the ongoing decisions that must be made once the system is implemented.

§9901.108 - Program evaluation

The NSPS law calls for the involvement of employee representatives in evaluating the regulations and implementation of the program. The proposed regulations say that DOD will establish procedures for this evaluation, and that designated employee representatives will be given an opportunity to be briefed and to comment on the design and results of program evaluation. We believe that it is not enough for certain employee representatives to be designated by DOD to sit through a briefing of what DOD wants us to know about the program. DOD employees' representatives must have access to information, the ability to meet with and survey employees, and other means to conduct an independent evaluation of the success of NSPS.

III. SUBPART B: CLASSIFICATION

General

The classification system described in Subpart B of this proposed regulation contains very few specific details about the career groups, pay schedules, pay bands, and other classification structures and rules that will apply to DOD employees under this regulation, if implemented. There is not enough detailed information provided in this section to allow for meaningful comments, beyond those provided below. Much more

detail is needed to allow for a meaningful and thorough review and discussion of this regulation, as required by the statute.

The preamble states that the Department "may" phase in coverage of "specific categories" of employees, or it "may" use OPM-approved occupational series and titles to identify and assign positions to a particular career group. See 70 Fed. Reg. at 7558. Yet no guidance is provided as to the process of the phase-in, where it may occur, and the criteria for establishing occupational series other than those approved and established by OPM. Also left out is any detail whatsoever as to how the Department plans to group any particular occupations or positions, or how it plans to assign certain pay bands to groups or subgroups.

Abandoning objective standards with established criteria, as the Department appears committed to doing, defies the core principles of fairness and uniformity inherent in a true merit and civil service system. Without using objective criteria, established across agencies, the opportunity for employees to receive disparate pay or job responsibilities increases, and the quality of working life for employees suffers. The Department will simply trade one perceived problem (inflexibility in occupational groupings or classifications) for another, more concrete one (a haphazard classification system lacking transparency and even the appearance of fairness).

A better approach is to focus more closely on how the Department's mission differs from other federal entities and tailor individual occupational series accordingly. Such a process would rest first and foremost on the painstaking work already accomplished by OPM in establishing government-wide classifications, but allow the Department to tailor an occupational series to the Department's specific needs.

Such an approach has the benefit of allowing the Department to make specific improvements to the personnel system by targeting concrete inadequacies without having to reinvent the wheel. We would note that OPM appears to believe that its present classification standards largely accomplish the same goals touted by the Department in this proposed rule. In its "Introduction to the Position Classification Standards", OPM stated that its standards program

> has been oriented toward a broad concept of job structure that aims to: (1) broaden the range of backgrounds for initial entry into occupations; (2) remove ***artificial barriers between related occupations***; (3) increase ***responsiveness to needs of management and of career patterns***; (4) facilitate coordination or integration of classification and qualification practices; and (5) ***improve and encourage greater use of different methods for evaluating the impact of individual contributions to the job***. The objective is to provide a classification system which permits agency managers to develop and use employee talents as fully as possible.

Office of Personnel Management, Workforce Compensation and Performance Service, Introduction to the Position Classification Standards, at 10 (August 2002).

The Department's dismissal of "lengthy" classification standards flies in the face of the gathered wisdom of OPM, which has concluded that classification standards, even "lengthy" ones, have the very fairness and consistency benefits which employees demand:

> Position classification standards encourage ***uniformity and equity*** in the classification of positions by providing an established standard for reference and use in different organizations, locations, or agencies. This "sorting out" and recording of like duties and responsibilities provides a basis for managing essential Federal personnel management programs, such as those for recruiting, placing, compensating, training, reassigning, promoting, and separating employees.

Introduction to the Position Classification Standards, at 7 (emphasis added).

With proper training and oversight by OPM, the Department can accomplish the goals it has set forth in the preamble to the proposed regulation, without sacrificing employee rights. Obviously, OPM's Workforce Compensation and Performance Service think so too. If the Department disagrees, we hope that before promulgating new regulations on the matter it would provide evidence and reasoning as to why it cannot accomplish its goals within the existing classification system. Since the Department has failed to explain, beyond generalities, why it wishes to introduce an entirely new classification system and abandon the existing one, we object to this proposed subpart in its entirety.

We recommend that no changes be made to the classification systems used by DOD agencies until the full statutory collaboration process has been completed. DOD is required to engage in collective bargaining for bargaining unit employees for the ongoing decisions that must be made once the new system is implemented.

A personnel system without fair and appropriate classification structures and rules will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

§9901.201 - Purpose

The language setting forth the purpose of this Subpart largely emulates that stated in the Civil Service Reform Act, except for the very important principle stated in 5 U.S.C. § 5101(2). That provision states that positions are to be classified and graded according to their duties, responsibilities, and qualification requirements and so described in published standards.

Fairness requires that, as far as is feasible, positions be grouped uniformly throughout the Department, and that the process and applied standards be transparent and uniform. As will be discussed below, § 9901.211 does not preserve this principle because it does not require that the classifications and grades be "published," and uses the permissive word "may," presumably so that the Department may exclude one or more, or all, factors as it alone deems appropriate.

In accordance with the NSPS law, the actual planning, development, and implementation of, or future adjustments to the NSPS must be done through the collaboration process described in §9902(f), not through internal, unilateral issuances. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

A crucial element of any civil service system is that personnel decisions be made with reference to general standards that all parties can feel are fair and uniform in light of the mission and function of the employer. We recommend that the Department demonstrate that these regulations are not solely intended to undermine employee rights by crafting regulations that actually inform employees of their own rights and establish bona fide limitations on management action. Language in the regulations should be mandatory, not permissive, and should include specific standards by which management action may be held accountable. At present, the Department's proposed regulations do not even closely resemble those of a true "merit system".

We also object, for reasons stated in our comments to § 9901.202, to establishment of any new classification system "in conjunction" with the pay system set forth in subpart C. Our recommendation, as described below, is to implement subparts

of the system (after sufficient changes have been made to correct the various severe defects in those subparts) in a cumulative fashion so that employees have an opportunity to adjust to the new system.

§9901.202 - Coverage

The Department has apparently reserved for itself the power to apply this new classification system to the entirety of the civilian workforce. We note, however, that managers and supervisors have not been provided with training nor has the Department apparently devised a system by which to transition employees from the old to the new system. The likelihood of confusion and mistake is unnecessarily heightened by the Department's urge to rush into an untested system that is a radical departure from the existing one.

Moreover, as is implied in § 9901.102(b)(2), none of the subparts B, C, E, F, G, or H should be applied to employees without first being covered by subpart D (pertaining to performance management). Employees should be subject *only* to the new performance management system for several evaluation cycles before the radical changes in this and other subparts are imposed.

Such an approach will allow employees the opportunity to adjust to the new performance management system with a lessened possibility that the inevitable confusion and mistakes caused by transitioning to a new system would cause irreparable and unjust harm to an employee.

The approach will also allow for a more efficient adjustment period once the other subparts are imposed. Similar efficiency gains would arise from imposition of this

subpart for several evaluation cycles *before* imposition of the other subparts C, E, F, G, or H. We therefore recommend that the Department not impose those subparts C, E, F, G, or H, with modifications, on "specific category or categories of eligible civilian employees" until first imposing subparts B and D, as modified, for several evaluation cycles. We recommend that the appraisal system be tested for several cycles before being certified as a proper system.

Finally, we recommend that, as in chapter 51, the decision of applicability of this subpart (and all other subparts) to an employee or category of employees be at any time grievable for bargaining unit members.

§9901.203 – Waivers

We have set forth elsewhere in these comments why we believe the Department has exceeded its statutory authority and Congress' intent by waiving rights of Department employees. We object to the waivers of chapter 51 and replacement of that chapter with unspecified, vague regulatory language as found in this subpart. We object to the waiver of that chapter in light of the fact that the Department has chosen to do so while reserving for itself the power to "document in implementing issuances" a replacement to that statutory system. Even assuming *arguendo* that Congress wished for the Department to abandon in whole the principles of uniformity and fairness to employees (as the Department clearly has done in the subpart) in establishing a new classification system, it plainly did not intend that the Department would do so through as yet unpublished "implementing issuances." Any "waiver" truly and lawfully authorized

by 5 U.S.C. § 9902 would, at the very least, require that it be replaced with standards or rules of substance, not self-aggrandizing promises to fill in the gaps later.

The Department is required, furthermore, to provide a "written description of the proposed system or adjustment" under collaboration provisions of the statute. It is hard to believe that Congress intended or expected that the Department's proposed subpart B would fit any reasonable interpretation of 5 U.S.C. § 9902(f). The Department has proposed language that only comically resembles "regulations" by any common understanding of the term: they are replete with "may," but never "shall," aggrandize the fullest possible authority to the Department, offer only platitudes to employee rights, and repeatedly inform the reader that the Department "will document in implementing issuances" various critical features of its new classification system. The Department has overreached and should revise its approach.

We strongly recommend that the Department not waive any measure without first proposing, through the regulatory and meet-and-confer process prescribed by applicable statutes, a specific and detailed written description of the system the Department wishes to impose on its employees. That description should include the actual proposals for applicable standards and procedures and substantially inform the reader as to the nature of the Department's proposed system.

§9901.204 - Definitions

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.211 - Career Groups

The Department reserves for itself the power to establish career groups but does not commit even to general principles of how it will establish those groups. The language suggests that the Department may pick and choose what "factors" will be applied to any single career group. We strongly recommend that the regulation be re-written so that the Department *shall be obligated* to apply the factors as agreed through the collective bargaining process.

We add one further comment regarding the stated factors. Although the Department makes no promises, it does list "relevant labor-market features" as one factor of many in establishing career groups. It is impossible to know precisely the Department's meaning given the overall lack of definition or clarity in the section. Notably absent in this section is any reference to OPM and its own expertise in developing classification structures for this Department and other federal agencies. The Department avoids accountability for its actions in devising new classifications. For employees to have confidence that positions have been grouped properly, the Department should commit to objective, uniform, and fair standards.

The contrast between this section and chapter 51 of Title 5, which the Department presumes to replace, is striking. For example, section 5106 sets forth objective criteria guiding and informing the establishment of classifications:

> § 5106. Basis for classifying positions
>
> (a) Each position ***shall*** be placed in its appropriate class. The basis for determining the appropriate class ***is the duties and responsibilities of the position and the qualifications required by the duties and responsibilities***.
> (b) Each class ***shall*** be placed in its appropriate grade. The basis for determining the appropriate grade ***is the level of difficulty,***

> ***responsibility, and qualification requirements of the work of the class***.
> (c) Appropriated funds ***may not*** be used to pay an employee who places a supervisory position in a class and grade solely on the basis of the size of the organization unit or the number of subordinates supervised. These factors may be given effect ***only*** to the extent warranted by the work load of the organization unit and then ***only*** in combination with other factors, such as the kind, difficulty, and complexity of work supervised, the degree and scope of responsibility delegated to the supervisor, and the kind, degree, and character of the supervision exercised.

5 U.S.C. §5106 (emphasis added). Absent from this statute, which was originally drafted in 1949 and remained largely unchanged since then, is any of the vague, self-aggrandizing language of § 9901.211. (This is to say nothing of the contrast, in terms at least of specificity, detail, and clarity, between OPM's own classification regulations, in 5 C.F.R. Part 511, and the Department's proposed ones.) It is entirely unclear why the Department feels that abandoning specific, concrete and well-established standards for vague and undefined ones serves the nation's security. It is clear, however, that doing so severely impacts employee rights. A personnel system without fair and appropriate classification structures and rules will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

The grouping of positions is a key first step in establishing the new pay system, and employees must have full confidence that positions have been grouped properly. We recommend that the career groups are published and that they are subject to the collaborative process of 5 U.S.C. § 9902(f) and collective bargaining before implementation.

§9901.212 - Pay Schedules and Pay Bands

We object to the Department's failure to provide sufficient detail for the public or employee representatives to comment on the new classification system and request that the Department provide that detail in its proposed regulations. At a minimum, we recommend that the Department clarify that the establishment of pay schedules and pay bands are subject to the collaborative process of 5 U.S.C. § 9902(f) and that collective bargaining is used for the ongoing decisions for bargaining unit employees once the system is in place. The establishment of these pay schedules and bands, and the distinctions between them, are key elements of the new pay system, and the involvement of employee representatives through collective bargaining is essential to provide credibility, transparency and accountability for these determinations.

As with section 9901.211 above, this section does not mention oversight by OPM. We recommend that this section require that newly-established or modified pay schedules be reviewed and approved by OPM before going into effect.

Moreover, although our comments on the proposed pay banding system can be found elsewhere, we do object to allowing the Department to set forth different pay schedules for similar career groups. This flies in the face of the statutory requirement that the new personnel system uphold the merit system principle of "equal pay for equal work" as required in 5 U.S.C. § 9902(b)(3). There is an enormous potential for claims by employees alleging violation of the equal pay requirements of 5 U.S.C. section 2301(b)(3), if employees do not believe that those in similar jobs are treated fairly with respect to the establishment of career groups, pay schedules and pay bands.

In paragraph (d), the Department's reference to § 9901.514 is confusing. The paragraph states that the Department will designate standards for each group, series, pay schedule, and/or pay band, "as provided in § 9901.514." That section of the Department's proposed regulations pertains to "Non-citizen hiring." It may be that the Department intended to reference § 9901.513 (which addresses "Qualification Standards").

§9901.221 - Classification requirements

We object to the Department's failure to provide sufficient detail for the public or employee representatives to comment on the classification requirements and request that the Department provide that detail in its proposed regulations. Subparagraph (b)(2) obligates the Department to apply the criteria and definitions "required by §§ 9901.211 and 9901.212" in assigning jobs to career groups, pay schedules and pay bands. Unfortunately, the Department expressly avoided listing *any requirements* in establishing career groups, pay schedules, or pay bands in § 9901.211 and .212. Reiterating our objections and recommendations set forth above, we strongly urge that the Department take the time to establish uniform, objective, and fair standards for assigning jobs to career groups, pay schedules and pay bands.

We recommend that subsection (b)(2) be modified to indicate that the assignment of positions to appropriate career groups, pay schedules and pay bands, using the criteria of 9901.211 and 9901.212, would be accomplished as part of the collective bargaining process. This will ensure credibility, transparency and

accountability for these determinations, which will be lacking if these decisions are made unilaterally by management representatives.

§9901.222 - Reconsideration of classification decisions

As with most other portions of these regulations, this section is wholly without detail or specificity, therefore, it is impossible to comment knowledgeably on the procedure for reconsideration of classification decisions. This section does not provide time periods for different appeals, or whether employees may seek retroactive lost pay or merely a prospective adjustment. It is unclear who within the Department is authorized to consider classification appeals, the format for conducting them, the procedures for performing a desk audit, the ability of an employee to obtain a representative to assist in conducting the appeal, or the right of an employee to information concerning the status of his or her appeal.

It is unstated what issues may be appealed and what issues may not be appealed. It is further impossible to comment on appeals because, as stated above, the criteria used to establish a classification system or category are not published in these regulations. We recommend that the Department incorporate directly the well-established regulations in 5 C.F.R. Part 511 for conducting classification appeals. Under any system, employees should be allowed to grieve classification decisions.

Paragraph (a) only proposes that an employee "may request" either the Department or OPM reconsider a classification. Notably absent is any guarantee that the request shall be considered, as is found in OPM regulations. See 5 C.F.R. § 511.603 (entitled "Right to appeal").

Also in contrast to OPM regulations, employees are apparently not entitled to prompt written notification of a reclassification decision or an explanation of the reasons for the reclassification, so that employees may learn of a reclassification after the fact, on receipt of a reduced paycheck. See 5 C.F.R. § 511.602 (Notification of classification decision). Since they do not have a guarantee of a written notification, it appears that employees will not even be informed of a right to appeal a reclassification decision. Employees should have a right to appeal a classification or reclassification.

The absence of an independent review and appeal procedure will undermine the credibility and accountability of such determinations for affected employees. Employees should be notified of their right to appeal both to the employing agency and to OPM, and the procedures and time limits for doing so. In addition, we recommend that this section be modified to provide that bargaining unit employees may elect to challenge any classification determination through the negotiated grievance procedure. This is consistent with our recommendation that the definition of "conditions of employment" be expanded, which would also make these matters grievable.

OPM has created an Office of Classification Appeals so employees can turn to an objective body with expertise and thorough knowledge of classification standards. See 5 C.F.R. § 511.613 ("Classification Appeals Office"). We strongly recommend that the Department's regulations create, in conjunction with OPM, a similar central office. We also recommend that the regulations provide that if a decision has been reached that is favorable to an employee; a personnel action implementing the decision must take place within a reasonable period of time following the decision but shall be effective as of the date of the decision. See 5 C.F.R. § 511.701(a).

In addition, 9901.222(e) states that reconsideration determinations made under this section will be based on criteria issued by DOD, unless DOD has adopted an applicable OPM classification standard. The use of criteria issued solely by DOD in lieu of an OPM standard or criteria will likely be considered unfair by employees. We recommend that only criteria and standards issued by OPM be used in reconsideration determinations made by DOD under this section.

§9901.231 - Conversion of positions and employees to the NSPS classification system.

We recommend that this section be modified to provide that the policies and procedures for converting bargaining unit positions to a career group, occupational series, pay system, pay schedule or pay band, upon initial implementation of the new NSPS classification system, are subject to collective bargaining. This will ensure credibility, transparency and accountability for these policies and procedures.

We recommend that where an employee is transferred or reassigned from a non-covered position to a position already covered by the NSPS system, that employee be provided with a copy of the new classification, position or series description, occupational group or subgroup, and pay schedule, and any other relevant documentation *before* entering service in the position.

Relationship to other Sections

§9901.903 - Definitions

We are recommending that the definition of “Conditions of employment” in 9901.903 be modified, so that matters pertaining to classification (among other things)

would not be excluded. In order for the new classification program to have any credibility with employees, and to maximize transparency and accountability, it is crucial that employee representatives be directly involved in designing this new system. Collective bargaining of job evaluation systems is common throughout the private sector, and should occur in the DOD as well.

IV. SUBPART C: PAY AND PAY ADMINISTRATION

§ 9901.301 - Purpose

The subsection states, "This subpart contains regulations establishing pay structures and pay administration rules for covered DOD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902." In fact, this subpart does not contain regulations establishing pay structures and pay administration rules – those are left to the Secretary to develop unilaterally in the future. In accordance with the NSPS law, the actual planning, development, and implementation of, or future adjustments to the NSPS must be done through the collaboration process described in §9902(f), not through internal, unilateral issuances.

A pay system such as this, which takes DOD out of the government wide system and leaves to its sole discretion determinations as vital to employees as their annual increases, their locality adjustments, and other pay setting decisions must have oversight.

We recommend that the pay system developed through collaboration, inasmuch as it will take DOD out of the government-wide system and give it discretion for determinations as vital to employees as their annual increases, their locality supplements, and other pay setting decisions, be a system that uses collective bargaining for pay and pay administration decisions for bargaining unit employees.

§9901.304 - Definitions

Even the definitions in § 9901.304 are difficult to comment about effectively because they depend upon policies that are not revealed to us. For example, take the definition of "Local market supplement." It states, "Local market supplement means a geographic- and occupation-based supplement to basic pay, as described in §9901.332." §9901.332 says, "For each band rate range, DOD may establish local market supplements that apply in specified local market areas." In other words, the promise of a description of "local market supplements" instead turns out to be a statement that DOD may actually establish them, presumably with internal rules and procedures, at some point in the future. When DOD does provide us with the descriptions necessary to comment on the definitions in this section, the statutory collaboration process should begin.

§ 9901.311 - Major features

This subsection tells us, "Through the issuance of implementing issuances, DOD will establish a pay system that governs the setting and adjusting of covered employees'

rates of pay and the setting of covered employees' rates of premium pay." It goes on to say that the system will include the following features:

(a) "A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part..." Subpart B does not lay out the structure of rate ranges or the classification structure, but merely states that DOD will do it in the future. This is circular logic at its best (or worst).

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322..." As we have seen before, these sections referred to merely say that DOD may or will do these things at some time, but do not contain descriptions. We are not actually given the details that would allow us to comment or collaborate effectively.

(c) Policies regarding the setting and adjusting of local market supplements to basic pay based on local labor market conditions and other factors, as described in §§ 9901.331 through 9901.333..." Once again, these subsections do not actually describe the policies; they say that DOD will unilaterally develop them.

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§ 9901.323 and 9901.334. These sections of the proposed regulations do set out some details of the system DOD has in mind, for example that employees with a current rating above "unacceptable" will receive increases, but leave most to be determined by DOD at a later date.

(e) Policies regarding performance-based pay increases, as described in §§ 9901.341 through 9901.34. Once again, these sections do not actually describe the performance-based pay system, just mention certain elements the system may contain, and leave it to DOD to develop the system unilaterally in the future.

(f) Policies on basic pay administration, including movement between career groups, as described in §§9901.351 through 9901.356. Those sections do not describe these policies but say they may be developed in the future.

(g) Linkages to employees' performance ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in §9901.361. This section merely states that DOD will issue implementing issuances regarding premium pay.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. DOD is required to engage in collective bargaining for ongoing decisions addressed in this section.

§ 9901.312 - Maximum rates

The Secretary will establish limitations on maximum rates of basic pay and aggregate pay for covered employees. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§ 9901.313 - National security compensation comparability

As required by §9902(e)(4) of the NSPS law, DOD says that for fiscal years 2004 through 2008 it will try to prevent slippage in, "…the overall amount allocated for compensation of the DOD civilian employees who are included in the NSPS…" so that it does not fall to "…less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS…." This is to be based at a minimum on the number and mix of employees in the pre-NSPS organizations and the pre-NSPS expected adjustments for step increases and promotions.

§ 9902(e)(5) of the NSPS law requires that, to the maximum extent practicable, the regulations implementing the NSPS provide a formula for calculating the overall amount to be allocated after FY 2008 for compensating civilian employees, so that, in the aggregate, such employees are not disadvantaged by the conversion to NSPS, while allowing the Department to accommodate changed circumstances that might impact pay levels. Yet, the proposed regulations do not contain any formula for calculating the overall amount for compensating employees after FY 2008. Instead, DOD says in § 9901.312(b) that it will, to the maximum extent practicable, provide such a formula in its later implementing issuances, after and outside of the regulatory process.

This lies at the heart of DOD employees' deep concerns about their future employment and compensation under NSPS. DOD reserves to itself the right to lower overall payroll costs and divert such funds elsewhere if it unilaterally decides to do so. Under NSPS, DOD civilian employee compensation is left to the Executive branch to

decide. It no longer will be worked out in negotiations between the Executive and Legislative branches of government.

This takes away an important right DOD workers have now – to influence their members of Congress to take into consideration their needs and their value in determining annual pay increases. NSPS would remove that. And, by making this formula something DOD does through implementing issuances in the future, DOD would effectively keep the employees' exclusive representatives from having any meaningful role in ensuring that their bargaining unit members are respected and protected. We do not believe that Congress intended DOD to go behind closed doors to develop policies so important to employee morale and the ability to recruit talent in the future.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.321 - Structure

This subsection states that DOD may establish ranges of basic pay for pay bands and will establish a common rate range for each pay band within a career group that applies in all locations. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.322 - Setting and adjusting rate ranges

Within its sole discretion, DOD, after coordination with OPM, may set and adjust the rate ranges established under §9901.321 and may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors. The rate ranges and adjustments may be different for different pay bands. The adjustment of the maximum rate may be a different percentage than the minimum.

We are concerned that the ability of DOD to raise the maximum rate of a band by an amount different from the minimum rate could allow the Department to benefit a few favorite employees at the expense of the rest of the good employees in a particular band. In a situation in which a few favorites are at the top of their band, DOD could raise the maximum rate by, for example, 6%. This would give room for managers to give those few employees, large performance increases to their basic pay rather than cash bonuses. In order to afford this, DOD might raise the minimum rate of the band by a much smaller amount, say 2% or even zero%, thereby giving the good employees in that band a very small annual increase or even no increase, in accordance with §9901.323. We believe that the ability to manipulate the annual increase that all good employees would get adds to the insecurity, confusion and real or perceived unfairness in the system.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system.

Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.323 - Eligibility for pay increases associated with a rate range adjustment

(a) As stated above, we believe there is too much opportunity for manipulation, confusion, and inequity in allowing DOD to adjust the minimum and maximum rates of a band by different amounts.

(b) We object to withholding the annual increase from an employee who receives an unacceptable rating. This is especially unconscionable if employees are denied the ability to grieve or appeal the rating to an external, neutral adjudicator who is able to overturn the rating based on the facts.

(c). We oppose the idea that an employee, who for whatever reason does not have a rating of record at the time the annual increase is given, will have his or her pay increase determined by future unilateral issuances. If management has not fulfilled its obligation to provide the employee with a rating of record, or other circumstances preclude issuing a rating, the employee should at least be credited with the modal rating for the purpose of receiving the annual increase received by other employees in the band.

DOD has been telling employees and others that all acceptable employees will get the annual increase. This is not exactly true. DOD leaves to its sole discretion the determination of the minimum and maximum rate ranges of the clusters and bands. (See §§ 9901.321 through 9901.322). The determination of the minimum rate range increase governs what will be the annual increase for acceptable employees in a

particular band. So, for example, employees in one band could get an annual increase of 1 percent, or even no percent even though Congress and the President approved an increase of 4.1 percent for non-DOD employees. At the same time, employees in another band could get a 6 percent increase. This could happen because DOD might, based on as yet unrevealed issuances, determine, for example, that the first band is being paid more than the labor market requires while the second band is being paid under market, or because one career group is considered to be more important than another at a particular point in time.

We object to this unfettered authority by DOD. We also object to DOD and OPM misleading employees into thinking that all good workers will get an annual increase. In reality, DOD has retained for itself the right to give no increase or a smaller increase than non-DOD employees are getting to a particular band, while giving another band an amount higher than other federal employees are getting. This decision would have nothing to do with the relative performance of individual employees.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.331 - General

This subsection says that the pay ranges may be supplemented by local market supplements as described in §§9901.332 through 9901.334. Those subsections do not actually describe or set out the regulations and policies governing these

supplements. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9701.332 - Locality pay supplements

(a) DOD may establish local market supplements for employees whose official duty station is located in the given area. The supplements may be different for different career groups, occupations, or different pay bands within the same career group. There is a great potential for errors and inequities to develop over time.

(b) This subsection says that DOD may set the boundaries of locality pay areas. If it decides to use locality pay areas established by the President's Pay Agent under 5 U.S.C. 5304, no regulations are required and the decision is not subject to judicial review. If DOD establishes locality areas different from those established under 5 U.S.C. 5304, DOD may make boundary changes by regulation. Judicial review of any regulation on boundary changes is limited to whether or not any regulation was promulgated in accordance with 5 U.S.C. 553.

(c) We believe local market supplements should be basic pay for at least all of the purposes locality pay under the GS System is considered basic pay.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.333 - Setting and adjusting local market supplements

Within its sole discretion, DOD may set and adjust local market supplements and determine their effective dates. DOD says it will base these determinations on mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C., chapter 59, and any other relevant factors. The labor market is notoriously volatile – the skills that are in demand today are a dime a dozen tomorrow. Witness the pay incentives to attract Information Technology workers a few years ago and the relative surplus today. The ups and downs of market-based decisions will be hard for employees to understand or trust.

This will be even worse unless DOD makes the major investment of money, people, and time to do the ongoing studies, analyses, and validations necessary to keep up with the labor market. And remember, decisions would have to be made about adjustments for each locality and each band within each career group within that locality. DOD says it will review these supplements at least annually. Is this the best use of time and resources in the dangerous world we face? We support and want to help in doing strategic and long-range planning to anticipate the skills needs of the future and prepare current and future employees to meet those needs. We do not support the notion that time and resources should be spent plotting the variations in pay from one year to the next for every occupation and withholding or granting small increases based on these fluctuations.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the

decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.334 - Eligibility for pay increase associated with a supplement adjustment

(a) We are concerned that the decisions to vary the local market supplements from one career band to another, and from one pay band to another within a career band, is subject to error and inequity. We believe that employees will begin to see a confusing array of different pay rates that will be neither understandable nor credible to them.

(b) We object to withholding the local market supplement from an employee who receives an unacceptable rating. This is especially unconscionable if employees are denied the ability to grieve or appeal the rating to an external, neutral adjudicator who is able to overturn the rating based on the facts.

(c) We oppose the idea that an employee, who for whatever reason does not have a rating of record at the time the local market supplement is given, will have his or her pay increase determined by future unilateral issuances. If management has not fulfilled its obligation to provide the employee with a rating of record, or other circumstances preclude issuing a rating, the employee should at least receive the modal rating for the purpose of receiving the supplement received by other employees in the band.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the

decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.341 – General

This section says that §§ 9901.342 through 9701.345 describe the performance-based pay system that is part of the pay system established under this subpart. In fact, once again, these sections merely mention some concepts and state that DOD may or will issue issuances actually describing them in the future. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§ 9901.342 - Performance payouts

(a)(1) gives a broad overview of the system, saying that NSPS will be a pay-for-performance system that will distribute available performance pay funds based upon individual performance, individual contribution, organizational performance, or a combination of these. The proposed regulations further state that DOD will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The actual performance payout any employee might receive will depend on how much money was put into his or her particular pay pool and how many performance shares were given to employees in that pool.

(2) DOD says it will use the rating of record for the most recent rating period for making payout decisions. But even here, DOD wants to give itself the option to pull the rug out from under an employee at any time. The proposed regulations allow the Department to substitute another rating that will determine the employee's pay if an appropriate rating official believes that an employee's current performance is inconsistent with that rating. What are we talking about here? Do we really want to create an environment in which employees fear every time they have a bad day? We object to giving managers this excessive power to manipulate ratings and payout decisions. Employees should have a reasonable expectation that their rating, which will affect their pay, will be based on their performance over an entire rating cycle and not on their performance at any current moment.

Performance appraisal systems are notoriously bad at accurately and objectively evaluating performance. This becomes a crucial weakness when pay-for-performance is involved. If DOD is not even willing to stand behind the ratings managers give employees under its new NSPS performance management system, but reserves the right to change that rating when it comes time for the payout, there is no possibility for credibility, trust or stability in the proposed system.

(b) Performance pay pools. (1) DOD says it will issue implementing issuances for the establishment and management of pay pools for performance payouts; and that

(2) it may determine a percentage of pay to be included in pay pools and paid out in accordance with future issuances as performance-based pay increases, bonuses or a combination of the two. The supplemental information, under "Performance Pay Pools" on page 7560, states that each pay pool will have a pay pool manager, who will manage

"in concert with appropriate management officials," as a pay pool panel. The supplemental information goes on to say that the pay pool manager, "…is the individual charged with the overall responsibility for rating determinations and distribution of the payout funds in a given pay pool."

If the NSPS performance management system is working as DOD says it should, all year long employees would be getting feedback about what their performance expectations are and how well they are meeting them. Maybe a supervisor thinks an employee is doing a great job and making that extra contribution to the mission. The supervisor may have laid out various assignments or directions to make the best use of that employee's skills and contribution to the mission. At the end of the rating period, the supervisor may have given the employee a high rating and a high number of performance shares. What happens when the supervisor's recommendation comes to the pay pool manager and pay pool panel?

The pay pool panel and manager may disagree with the supervisor. In fact, they may actually agree with the supervisor's assessment, but believe that the finite amount of money in the pay pool would be better used elsewhere. Pay pool managers and pay pool panels, in reality, are additional layers between an employee's supervisor and the actual payout the employee receives.

According to the supplemental information, the pay pool manager is charged with the overall responsibility for rating determinations and distribution of the payout funds in a given pay pool. What will go into deciding whose supervisor's rating and share determination will win out? Some supervisors are more assertive and persuasive than others. Some are better liked. In some cases, pay pool managers and panels have

had to make hard decisions about who, among equally outstanding employees, should get higher performance-based pay and who should not. Setting aside the very real potential for discrimination and favoritism in such decisions, there are other reasons that one employee might get more than another equally qualified employee.

A pay pool manager might decide that one outstanding employee is more likely to leave than another and therefore needs a higher payout as an incentive to stay. Maybe one outstanding employee is in her forties and is considered not likely to leave for another job, while another is young and is believed to have other options. Maybe one employee is in a job that is easy to fill, while another is in a job considered hard to fill in the market at this moment. Perhaps there are two equally outstanding and valuable employees, but one recently was promoted to a higher band while the other hasn't had a large increase for a while.

The pay pool manager, who has the overall responsibility for rating determinations and distribution of the payout funds in a given pay pool, might decide to give one employee a lower number of shares (or even a lower rating) in order to give more money to another employee. We object to the concept and legality of pay pool panels and pay pool managers with authority to manipulate the system. These concepts should be eliminated.

(c) Performance shares. The proposed regulations say that; (1) DOD will issue implementing issuances setting up a range of shares that supervisors (and later pay pool managers) will be able to assign for the various performance ratings that may be assigned to employees. Once again, DOD is expecting employees' exclusive representatives to go through the statutory collaboration process, in an area vital to our

bargaining unit members, strictly on speculation without any actual details. In this case, it is about how much leeway DOD will give supervisors and pay pool managers to pay different performance payouts to employees with the same performance rating in the same pay pool.

The current GS system allows managers to reward employees for superior performance. For many reasons, including funding, management training, and an unwillingness to spend the time necessary on performance management, the Federal government does a terrible job of rewarding performance now. We are deeply concerned about the amount of discretion given to supervisors to affect their employees' pay under NSPS. They will not only assign performance ratings, but will decide how much that rating will be worth for one employee and how much the same rating will be worth for another employee. Now supervisors will be able not only to reward exemplary performance, but to cause the pay of good employees to drop below what it would have been without NSPS. We have no confidence that the managers operating under NSPS will be so different from the managers operating under the GS system that they will do a good job of carrying out these increased responsibilities. We have no confidence that NSPS will receive the funding necessary for there to be even a chance of a successful performance-based pay system.

(2) We can accept the idea that an employee who receives an unacceptable rating does not get a performance increase, but only if that employee has the ability to appeal or grieve the rating to an external, neutral adjudicator who is able to overturn the rating based on the facts.

(d) Performance payouts. The proposed regulations say (1) that DOD will establish a methodology that authorized officials will use to determine the value of a performance share, which may be expressed either as a percentage of an employee's rate of basic pay (exclusive of local market supplements under § 9901.332) or as a fixed dollar amount, or both.

(2) DOD will determine an individual employee's performance payout by multiplying the share value by the number of performance shares assigned to the employee.

DOD offers no written description of the methodology it says it will establish in the future that would allow us to participate in the statutory collaboration process as envisioned by Congress. The supplemental information ("Performance-Based Pay" page 7560) says, "The performance payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees."

This appears to be describing a system in which the amount of money in the pay pool is divided by the number of shares assigned to employees in that pool to arrive at the value of each share. That value is then multiplied by the number of shares assigned to an individual employee to determine the performance payout amount.

This type of performance share process would set up a dysfunctional system in which one employee does better if more of his or her co-workers do poorly. The more ratings given out in a pay pool that exceed acceptable, the lower the value of each performance share. The more ratings of acceptable or lower given out in a pay pool, the more valuable is each performance share. The lower the performance of the employees in the pay pool as a whole, the bigger the raise an employee judged to be a

high performer will receive. Someone motivated to work hard for the promise of a big raise will only achieve the goal if management judges the majority of his or her coworkers to be losers. Of course, we are only guessing that this is the method of determining a share value that DOD is planning to use.

There are many unanswered questions that make it impossible to comment adequately. For example, is it expected that all of the money assigned to a pay pool will be paid out, or will managers be able to divert some to other uses or save some for the following year? If the share value is derived as described above, by dividing the total number of shares into the amount of money in the pay pool, then it only makes sense that the entire pool is distributed. Our objection to a system that makes the value of a share dependent upon how many superior employees are in a pay pool is described above. But we also strongly oppose any system that would allow managers to withhold or divert any of the money budgeted for performance pay pools.

(3) The proposed regulations say that DOD may provide for the establishment of control points within a band that limit increases in the rate of basic pay. It goes on to say that DOD may require that certain criteria be met for increases above a control point.

Control points are like invisible barriers that prevent most employees from ever reaching the top of their band. DOD could require, for example, that employees have at least two “Outstanding” ratings in order to get beyond the control point. It could set other criteria, including retention needs or hard to define and communicate “contributions,” or “competencies,” that might keep employees from reaching the rate in the band they thought “pay-for-performance” would let them attain as long as they were

high performers. In fact, the regulations would allow DOD to establish control points that could prevent or make it more difficult for good DOD employees to reach the levels they would have reached had NSPS not been created.

We oppose the use of control points. There is no need and no justification for them. Control points are cost control devices. Pay pools are cost control devices. It makes no sense to have both. We believe that so-called “pay-for-performance” is the wrong system for most organizations, and certainly for DOD, whose mission requires employees to support each other rather than try to grandstand each other. Experience has shown time and time again that pay-for-performance without enough investment of time, money and resources is doomed to failure.

If we are correct in our guess at how DOD intends to determine the value of shares and performance payouts, management will only be responsible for paying out what is in the pay pool. If DOD manages properly, it will budget only what it can afford and believes is appropriate for performance pay. If it has a large number of high performers, the value of each share will be lower – the total amount will never be more than DOD budgeted for that purpose. Control points are an unnecessary and confusing addition to an already confusing system. They also add the potential for manipulation and abuse by managers and frustration for employees.

(4) The proposed regulations say that performance pay may be in the form of an increase to basic pay, a cash bonus, or a combination of the two. An employee’s basic pay may not exceed the maximum rate of the band or applicable control point. Once again, we believe that control points are redundant – there are enough cost control

mechanisms. Without the details DOD says it will provide later in implementing issuances, we cannot comment adequately.

(5) DOD says it will determine the effective dates of increases in basic pay made under this section.

(6) DOD says it will issue implementing issuances addressing retained rates.

(e) Proration of performance payouts. DOD says it will issue implementing issuances regarding proration of performance payouts for employees who were hired or reassigned during the rating period, were in a leave without pay status, or for other circumstances.

(f) Adjustments for employees returning after performing honorable service in the uniformed services. Once again, DOD says it will issue implementing issuances with the details. The proposed regulations do say that the returning employee will be credited with his or her last DOD rating of record or the modal rating, whichever is more advantageous to the employee. We agree that every effort should be made to ensure that employees who return from performing honorable service on their nation's behalf should not be disadvantaged in any way, and certainly not in their pay. We do note, however, that the proposed regulations do not address the flexibility managers will have to assign a returning service member the low end or the high end of the share range allowed for the rating.

(g) Adjustments for employees returning to duty after being in workers' compensation status. Once again, DOD says it will issue implementing issuances with the details. The proposed regulations do say that the returning employee will be credited with his or her last DOD rating of record or the modal rating, whichever is more

advantageous to the employee. We agree that every effort should be made to ensure that employees who return after recovering from an injury suffered on the job should not be disadvantaged in any way, and certainly not in their pay. We do note, however, that the proposed regulations do not address the flexibility managers will have to assign a returning employee the low end or the high end of the share range allowed for the rating.

In NSPS, DOD makes no promise to employees that they can expect a particular performance reward if they receive a certain performance rating. Instead, DOD may decide to put less money in one pay pool and more in another, thus affecting the size of the payout. An employee's rating will not translate into a fixed number of performance shares – there will be a range and the supervisor will decide the number.

The value of a performance share cannot be determined until the ratings have been assigned, and the distribution of ratings will cause the value to be higher or lower. This could be a small amount of actual money, hardly worth the disruption and demoralization the research shows that pay-for-performance systems create when they tell some good and valuable employees that they are losers while failing to give top performers enough to make a difference. We do not want to create a system in which some people are supposed to feel rewarded by feeling superior to their co-workers, and other good employees are supposed to feel inferior.

We believe that pay-for-performance has more problems than benefits. We believe that a dedicated work force of employees committed to keeping this country safe can be demoralized by attempts to fulfill misguided political agendas to impose pay-for-performance. We believe that DOD cannot promise that it will adequately fund

a pay-for-performance system into the future because it does not control its budgets. DOD, like other federal agencies, depends upon Congress for its appropriations. Even if it wanted to, today's Congress cannot bind future Congresses to adequately fund a pay-for-performance system. An inadequately funded pay-for-performance system is almost guaranteed to create work place tensions, disruptions, and inequities that this nation simply cannot afford in these dangerous times.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.343 - Pay reduction based on unacceptable performance and/or conduct

The proposed regulations say that a pay reduction for unacceptable performance or conduct, essentially a demotion, may be no more than 10% for a within-band reduction. The proposal does allow for a greater reduction if the employee is being demoted to a lower band and the maximum rate of that band is more than 10% lower than the employee's current rate of pay. We agree that there must be limits to a reduction in pay. We would have less concern if we believed that the adverse action procedures and methods for challenging performance ratings that are proposed in these regulations were adequate. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.344 Other performance payments.

(a) The proposed regulations say that there will be implementing issuances describing how authorized officials can give some employees or teams extraordinary performance increases (EPI).

(b) These payments will be in addition to performance payouts under §9901.342 and the future performance of the employee will be expected to continue at an extraordinarily high level. Or what? We assume that an EPI is an increase to basic pay, but the regulations don't say that.

We do not fully understand the need for these special increases. Employees are eligible for performance increases and management could ensure that the extraordinary employee gets the highest possible rating and shares. Where will the money for these additional increases be? Will they come out of the performance pay pool or be separately funded? We fear that this could be a license to siphon money from high-performing employees to pay favorites, or cronies, or management "lap dogs" large increases.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.345 - Treatment of developmental positions

The proposed regulations say that DOD may issue implementing issuances regarding pay increases for developmental positions. We agree that it can make sense to link progression through the Entry and Developmental band to the demonstration of the required competencies, skills and knowledge necessary to advance to the full performance level. This is very similar to the current career ladder system. We also believe that it is very important to set standard timeframes, perhaps call them "Opportunity Points," that move an employee through the band at a pace similar to what a GS employee might expect in a career ladder. Our members have expressed concern that favoritism and cronyism could result in one employee getting the training and assignments needed to demonstrate competency while another is denied or delayed.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.351 - Setting an employee's starting pay

This section says that, subject to DOD implementing issuances, DOD may set the starting rate of pay for individuals who are newly appointed or reappointed anywhere within the assigned pay band. We believe that any Government employee entering a new DOD pay system, either from another agency or from a non-covered DOD position into a covered position, should receive no reduction in basic pay. When

DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.352 - Setting pay upon reassignment.

This proposed section says that DOD may set pay anywhere within an assigned band when an employee is reassigned voluntarily or involuntarily to a comparable pay band. If the reassignment results in a reduction in pay, that reduction may be no more than 10% and is subject to the adverse action procedures. We agree that there must be limits to a reduction in pay. We would have less concern if we believed that the adverse action procedures and methods for challenging performance ratings that are proposed in these regulations were adequate. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.353 - Setting Pay Upon Promotion

This section says that, subject to DOD implementing issuances, DOD may set pay anywhere within the assigned pay band when an employee is promoted to a position in a higher pay band. The supplemental information ("Pay Administration" page 7561) states:

> Promotion pay increases (from a lower band to a higher band in the same cluster or to a higher band in a different cluster) will be a fixed percent of

> the employee's rate of basic pay or the amount necessary to reach the minimum rate of the higher band, whichever is greater. This amount is roughly equivalent to the value of a promotion to a higher grade within the GS system.

First, what is the magic percent of an employee's pay that will be roughly equivalent to a higher grade within the GS system? It is impossible for us to comment without this most basic of facts. Second, what is a "cluster"? We assume you mean "career group." In order to be credible and acceptable to employees, the new DOD pay system must leave employees at least as well off as they would have been had the NSPS not been created.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9701.354 - Setting pay upon reduction in band.

(a) The proposed regulations say that DOD may set pay anywhere within the band when an employee is reduced in band, either voluntarily or involuntarily, subject to pay retention provisions.

(b) Subject to adverse action procedures, DOD may assign an employee to a lower pay band and reduce his or her pay for unacceptable performance or conduct. The reduction may not be more than 10% unless more is required to bring the employee to the top of the lower band.

(c) DOD will issue issuances covering reductions in pay for employees involuntarily reduced for other than adverse actions, such as terminations or temporary promotions.

We agree that there must be limits to a reduction in pay. We would have less concern if we believed that the adverse action procedures and methods for challenging performance ratings that are proposed in these regulations were adequate.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.355 - Pay retention

The proposed regulations say that DOD will issue issuances regarding pay retention. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.356 - Miscellaneous

While we have no specific objections to any of these provisions, we recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin.

§ 9901.361 - General

This section says that DOD will issue implementing issuances regarding additional payments for several categories of work and employees that currently receive premium pay. Employees under NSPS should receive at least as much in the way of premium pay as non-NSPS employees – they should not be disadvantaged by their coverage under NSPS. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.371 - General

While it is essential that provisions such as those in §§ 9901.372-373 be part of any set of regulations governing the DOD pay system, without the significant details such as the rate ranges, pay bands, and career groups, it is impossible to make complete comments. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.372 - Creating Initial Pay Ranges

This section merely states that DOD will set the initial band rate ranges for the NSPS pay system. When DOD does develop regulations and policies for the matters

discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

§9901.373 - Conversion of Employees to the NSPS Pay System

We agree that employees who are converted to NSPS should suffer no reduction in their rate of pay. We also believe that employees, who have already served some portion of their waiting period for their next within-grade increase or career ladder promotion, should receive prorated amounts of these increases as part of basic pay. This should not be left to the Secretary's discretion. When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin. We recommend that the decisions discussed in this section be determined through collective bargaining for bargaining unit employees.

The proposed regulations suggest elements of a system that promises to be complex, confusing, constantly fluctuating, and lacking in credibility for employees. DOD employees have been told this will be a system that will reward them for their performance. In reality, the system sketched out in the proposed regulations might give an employee, let's say even an outstanding performer, a small or large performance payout depending upon how much money is in that employee's pay pool, how many shares his or her supervisor assigns, how many other superior ratings are given employees in the pay pool, and what the pay pool manager and panel ultimately determine. That same employee may be in a band that gets little or no annual increase because DOD determines that the minimum rate of the band should have little or no

adjustment. Our outstanding employee might be in a career group, or pay band in a career group that DOD determines is overpaid in the local market and so gets no local market supplement, while other co-workers in the same local area might get those supplements.

Our outstanding employee may get a small or large performance payout due to circumstances beyond his or her control. That employee may get little or no annual increase due to circumstances beyond his or her control. And, that employee may or may not get a local market supplement due to circumstances beyond his or her control. NSPS will demoralize employees, create instability in their compensation that makes it difficult for them to plan for their future, foster inequities, and make it hard to attract and keep the talent this nation needs for its defense.

In its rhetoric, DOD paints NSPS as a "modern, flexible and agile human resource system that can be more responsive to the national security environment, while enhancing employee involvement, protections and benefits." We believe the proposed NSPS is regressive, rather than modern, and so complex as to call into question how flexible and agile it can be. And, in almost every section of these proposed regulations, employees lose – they lose pay stability; employment stability; protections from erroneous, discriminatory, or vengeful management actions; and a meaningful voice in their work place through collective bargaining.

V. SUBPART D: PERFORMANCE MANAGEMENT

Performance and Behavior Accountability - Representational Matters

We are concerned that the broad discretion provided supervisors and other management officials under Subpart D of the proposed regulations, particularly as it pertains to evaluating employee behavior, may result in retaliatory actions taken against Department employees who form or participate in labor organizations. As set forth in the preamble of the proposed rule:

> Typically, poor behavior or misconduct has been addressed only through the disciplinary process. Little attention has been paid to the impact of behavior, good or bad, on performance outcomes of the employee and the organization. DOD has determined that conduct and behavior affecting performance outcomes (actions, *attitude*, manner of completion, and/or *conduct or professional demeanor*) should be a tracked and measured aspect of an employee's performance. . . By providing supervisors and managers realistic alternatives for setting employee expectations, and assessing behavior and performance against those expectations, DOD will be better able to hold its employees accountable . . .

70 Fed. Reg. at 7562 (emphasis Added).

The Federal Labor Relations Authority has long acknowledged that the freedom of union representatives and activists to speak freely in the workplace and to engage in robust debate with management officials and supervisors is central to the effective representation of employees. *See Veterans Administration Medical Center, Bath, New York and American Fed'n. of Gov't. Employees Local 491*, 12 FLRA 552, 576 (1983) (noting that "when an employee who is also a Union official is acting in an official capacity as a union official, he is entitled to greater latitude in speech and action"); see also *Internal Revenue Service and Nat'l Treasury Employees Union*, 6 FLRA 96, 106 (1981) (finding that an employee's right to engage in protected activity permits leeway for impulsive behavior, balanced against the employer's right to maintain order and respect for its supervisory staff on the job site, and that to remove conduct from the ambit of protected activity, the employee must have engaged in flagrant misconduct);

Internal Revenue Service, North Atlantic Service Center, and Nat'l Treasury Employees Union, Local 69, 7 FLRA 596, 603 - 604 (1982) (finding that inclusion of insulting and derogatory references to management officials in the context of specific complaints does not remove union literature from protection); *Dep't of Air Force, Grissom Air Force Base and American Fed'n of Gov't Employees,* 51 FLRA 7 (1995) (holding that management improperly suspended a union official who used vulgar language toward a management representative after the union representative was angered by what he thought was an unjustified change in management's negotiating tactics); *Dep't of Navy, Naval Facilities Engineering Command, San Bruno, CA and Nat'l Fed'n of Fed'l Employees, Local 2096*, 45 FLRA 138, 155 (1992) (holding that a union representative has the right to use "intemperate, abusive, or insulting language without fear of restraint or penalty" if he or she believes such rhetoric to be an effective means to make the union's point).

The proposed regulations fail to address what constitutes acceptable employee behavior and conduct for purposes of performance management, instead providing supervisors and other management officials with unfettered discretion to make *ad hoc* determinations without specific guidance from objective regulations and without allowing employees to hold managers accountable for abuse of the new system. We therefore recommend that the introduction to Subpart D, "Performance and Behavior Accountability," be revised to include the following language: "Union representatives and bargaining unit employees shall not be negatively appraised for 'poor behavior or misconduct' to the extent that the behavior or conduct appraised is related to the

exercise of their rights to organize, bargain collectively, participate in a labor organization of their choosing, and engage in other representational activities."

§9901.403 - Waivers

We object to the waiver of 5 U.S.C. chapter 43 and 5 CFR part 430, which provide important criteria, standards and procedures governing the performance management system. DOD has provided no evidence that there is a compelling need to "waive" these provisions, which have long protected employees from arbitrary and unfair treatment in the evaluation of their job performance. Waiving the standards and criteria set forth in 5 U.S.C. chapter 43 and 5 CFR part 430 will not promote greater "flexibility" and efficiency, as intended by the drafters of the proposed regulations. Rather, the proposed performance management system will lead to greater uncertainty among DOD employees about supervisor and management performance expectations, which will result in workplace disruptions, confusion, lowered employee morale and, ultimately, organizational inefficiencies and performance deficiencies.

The Department asserts that its proposed rule "builds in the flexibility to modify, amend, and change performance and behavioral expectations during the course of a performance year . . . "70 Fed. Reg. at 7561. Such *ad hoc* modifications, amendments and changes to performance and behavioral expectations during the course of a performance year will make it difficult for employees to understand the criteria upon which they are being rated. As a result, fewer employees will be able to meet the performance and behavioral expectations of their supervisors and other management officials.

The Merit Systems Protection Board and the federal courts have long recognized the importance of objectivity and foreseeability in the application of performance standards, to enable affected employees to understand the criteria upon which they are to be evaluated. See, e.g., *Melnick v. Dep't of Housing and Urban Development*, 42 MSPR 93, 98 (1989) ("standards may be more or less objective depending upon the job measured, but must be sufficiently specific to provide a firm benchmark toward which the employee must aim her performance"); *Smith v. Dep't of Energy*, 49 MSPR 110 (1991) (finding that the agency failed to properly explain a performance standard that was inappropriately vague and that therefore the agency failed to present substantial evidence that, in practice and/or by the agency instruction, the employee was on notice as to what performance was required to achieve the marginal level); *O'Neal v. Dep't of Army*, 47 MSPR 433 (1991) (holding agency's performance standard was impermissibly vague and that the agency failed to prove that it had given content and specificity to the standard in its communications with appellant); *Callaway v. Dep't of Army*, 23 MSPR 592, 601 (1984) (discouraging the use of performance standards to measure traits such as dependability, interest, reliability, and initiative, unless such traits are clearly job-related and capable of being documented and measured).

In accordance with the NSPS law, the actual planning, development, and implementation of, or future adjustments to the NSPS must be done through the collaboration process described in §9902(f), not through internal, unilateral issuances. We recommend that the performance management system developed through collaboration, inasmuch as it will take DOD out of the government-wide system and give it discretion for determinations vital to employees, be a system that uses collective bargaining for ongoing performance decisions for bargaining unit employees.

§9901.405 - Performance management system requirements

The performance management system proposed in this section has not been defined, so there is no way to determine if it will be a fair, effective and credible process. This process should have been defined in these regulations.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

A system without a fair and credible performance management procedure will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

§9901.406 - Setting and communicating performance expectations

We recommend that subsection (a) be modified to add the following: "Performance expectations must, to the maximum extent feasible, permit the accurate evaluation of job performance based on objective criteria." This recommendation incorporates a current requirement for performance standards under 5 U.S.C. 4302(b)(1).

We recommend that the first sentence of subsection (b) be modified to read as follows: "Performance expectations will be provided to employees in writing and discussed with employees at the beginning of the rating period. When performance expectations are amended, modified or clarified, such additions, modifications or clarifications must be captured in writing and provided to affected employees within a reasonable time period."

The proposed regulations are seriously flawed in that they do not appear to require that performance expectations be provided to employees in writing. While it may be true that performance expectations can take many forms, some of which may already be set forth in existing standard operating procedures, regulations or manuals, there should never be a need to rely on performance expectations that are not provided in writing.

To the extent that performance expectations are only conveyed orally, and not provided in writing, this loose process will likely lead to a great number of misunderstandings and disputes between supervisors and employees as to how the expectation was expressed or understood, or whether it was even expressed as a performance expectation. If only as a means of self-protection, employees are likely to want to memorialize these conversations in a written document, and seek the supervisors' confirmation of the accuracy of this account, so there is not likely to be a reduction in paperwork or an increase in efficiency through adoption of these more "flexible" performance standards. Supervisors should be trained to expect these inquiries, and to understand the importance of timely responding to them.

Fairness requires that all performance expectations be clearly communicated to employees in advance, and some form of written document or instruction is the most efficient and effective way to convey these expectations. To the greatest extent possible, we should try to keep performance management (and pay determinations based on performance) from being a game of "he said/she said." Subsection (b), unless modified, will only foster such disputes. We expect to negotiate over procedures that communicate performance expectations for bargaining unit employees.

We recommend that subsection (c) be modified to add the following: "Supervisor and managers are always accountable for demonstrating professionalism and standards of appropriate conduct and behavior, such as civility and respect for others. Supervisors and managers must set the standard of behavior for employees to follow. Therefore, professionalism, civility, respect for others, and similar exemplary behavior will be an absolute requirement for management, and will directly impact their performance ratings and pay."

This language is necessary to ensure that the language set forth in subsection (b) specifying these behavioral and conduct requirements for employees is clearly applied to supervisors and managers as well, recognizing the need for management to set the standard for conduct in the workplace.

We recommend that subsection (e) be modified to read as follows: "Supervisors must involve employees, and their exclusive representatives, insofar as practicable, in the development of their performance expectations. In this regard, supervisors shall solicit input and feedback from employees as to the appropriate performance expectations for each position, and shall fully consider such input and discuss it with the affected employee(s). However, final decisions regarding performance expectations are within the discretion of the agency, subject to the requirement that performance expectations for employees in the same occupational series and pay band will be equivalent or comparable. Employees will not be held responsible for performance expectations unless and until they have been clearly and expressly communicated by management."

These recommended changes will provide an appropriate level of employee involvement in developing performance expectations. The change in the last quoted sentence recognizes the agency's authority to assign work and identify associated performance expectations, while at the same time ensuring fairness and eliminating possible favoritism in the development and application of performance expectations. This is especially important if/when evaluation of employee performance against these expectations is used as a determining factor in providing pay increases. To ensure fairness and credibility, the bar needs to be set at the same level for all employees in the same occupational group and pay band, so that all employees have an equal chance to earn performance-based pay increases.

We recommend that supervisors be required to meet with the employees they supervise at the beginning of the appraisal period and at scheduled times thereafter during the appraisal period. At these meetings, performance expectations must be communicated. We also recommend that, should priorities or expectations change during the appraisal year, such new priorities and expectations be communicated to employees pursuant to collectively bargained procedures.

§9901.407 – Monitoring performance and providing feedback

We recommend that subsection (b) be modified to read as follows: "Provide regular, ongoing, and timely feedback to employees on their actual performance with respect to their performance expectations, including one or more formal interim performance reviews during each appraisal period."

"Periodic" feedback, as proposed in the regulations, is not sufficient, as it is too amorphous and allows large gaps of time and numerous instances of performance between periodic updates. Regular, ongoing, and timely feedback on performance is not only the most effective way to properly manage employee performance, but it is the only fair and credible way to do so when the results are being used as a central component of the Department's pay system. Procedures for monitoring performance should be negotiated with the unions.

§9901.408 - Developing performance and addressing poor performance

The procedures that supervisors will use to develop employee performance and address poor performance have not been defined, so there is no way to determine if they will be fair, effective and credible to employees. This process should have been defined in these regulations to allow for a meaningful review and comment period, as required by law.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

A system without a fair and credible performance management procedure will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

We recommend that a subsection (b)(3) be added, which would read as follows: "An employee will be provided a reasonable opportunity to improve performance before an adverse action is proposed or initiated, except in the most extreme case of a performance deficiency which endangers national security or the safety of personnel." Adopting this language preserves the protections afforded employees under 5 U.S.C. chapter 43 and Merit Systems Protection Board precedent. See, e.g., *Betters v. Federal Emergency Management Agency*, 57 MSPR 405 (1993) (reversing a removal action on the basis of the agency's failure to provide the employee with a reasonable opportunity to improve); *Gromley v. Dep't of Navy*, 48 MSPR 181 (1991) (same).

Giving supervisors the authority to take actions ranging from remedial training to such drastic measures as adverse actions and demotions, without providing specific criteria to make such decisions, is unfair to employees and supervisors. Only fair and effective rules prescribing appropriate actions to be taken by management to address poor performance will be accepted by employees. Otherwise, the resulting distrust of management and decreased morale and productivity will harm national security.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.409 - Rating and rewarding performance

The multi-level rating system proposed in this subsection has not been defined, so there is no way to determine if it will be an effective and appropriate process to rate

employees. This rating system should have been defined in these regulations to allow for a meaningful review and comment period, as required by law.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

A process without a fair and credible rating system will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

9901.409(b) states (in part): “A rating of record will be used as a basis for - (3) Such other action that DOD considers appropriate, as specified in DOD implementing issuances.”

These “other actions” have not been defined, so there is no way to determine if they will be appropriate, fair or credible to employees. All proposed uses of ratings of record should have been defined in these regulations to allow for a meaningful review and comment period, as required by law.

We recommend that no additional uses for ratings of record be implemented by DOD with respect to bargaining unit employees until a full comment and review period is completed, followed by a full collective bargaining process with the unions representing DOD employees. Otherwise, the rating system will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

The reconsideration process proposed in section 9901.409(g) has not been defined, so there is no way to determine if it will be a fair and credible process for employees. This process should have been defined in these regulations to allow for a meaningful review and comment period, as required by law.

However, unless there is an independent third party available to impartially review and make reconsideration decisions, no such process will be considered fair or credible by employees. Therefore, we recommend that the negotiated grievance and arbitration procedures currently available to employees under 5 USC Chapter 7121 be used to challenge ratings of record.

A system without a fair and credible reconsideration process will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

9901.409(g) states: “A payout determination will not be subject to reconsideration procedures.”

A payout process without a fair and credible reconsideration procedure will be rejected by employees, and will result in distrust of management, decreased morale, and lower productivity, ultimately harming national security.

Therefore, we recommend that the negotiated grievance and arbitration procedures set forth in 5 USC Chapter 7121 be available to employees to challenge payout determinations.

VI. SUBPART E: STAFFING AND EMPLOYMENT

§9901.501

As described in the explanatory section of the Federal Register, the proposed regulations on staffing and employment seek to expand the ". . . set of flexible hiring tools to respond effectively to continuing mission changes and priorities." While DOD purports to retain the merit principles and veterans' preference of existing law, it fails to reiterate compliance with its collective bargaining obligations under 5 U.S.C. Chapter 71. The final version of the NSPS regulations needs to be corrected for this glaring omission.

§9901.502

In Subpart E and elsewhere throughout the proposed regulations, only general concepts have been presented, thereby making it virtually impossible to offer specific comments regarding the manner in which these staffing flexibilities will be exercised. Moreover, as stated in the Federal Register, DOD intends to administer its authority through implementing issuances, which neither will be open for comment nor within the limited scope of issues subject to collective bargaining with democratically-elected representatives of DOD civilian employees.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.504

As proposed, longstanding civil service definitions—including such important terms as “promotion” and “reassignment”- will be modified to fit the NSPS scheme. If DOD believes there to be a mission-related reason to change terminology, the revised meanings and the manner in which DOD managers will exercise their authority to affect such actions should be subject to discussions and negotiations with democratically-elected representatives of DOD civilian employees.

§9901.511, 512 and 516

Under NSPS, DOD suggests that there be only two general categories of employees: 1.) career; and, 2.) time-limited. The regulations, however, offer no explanation as to how employees currently serving under career-conditional status will be treated.

While DOD commits to following certain appointing authorities of existing law (5 U.S.C. Chapters 31 and 33), there is expected to be greater use of noncompetitive appointments. In some instances, DOD will publish a notice in the Federal Register and request comment. When there is a “critical mission requirement,” however, DOD would be free to exercise noncompetitive appointment authority and publish a notice in the Federal Register without a comment period. Such an arbitrary system will be subject to all kinds of abuse within the huge DOD management hierarchy, and render time-honored federal employment principles of merit and fair competition nonexistent under NSPS. Agreeing to publish an annual *list of appointing authorities* with details prescribed in implementing issuances allows for no prior input, comment, or collective

bargaining. As designed, the process shuts out Congress, the taxpaying public, and democratically-elected representatives of DOD civilian employees.

The exercise of direct hire authority and the conversion of time-limited appointments, with the right to assign, reassign, reinstate, detail, and transfer employees, will also be prone to arbitrary acts and mismanagement if the proposed regulations are put into effect. DOD will be able to avoid proper disclosure and accountability, as well as the development of a fair and objective system, by using its internal issuance process. Congress did not intend for DOD to unilaterally devise a new human resource system under NSPS through implementing issuances. Our lawmakers required collaboration, collective bargaining, and public comment. The proposed regulations miss these key aspects on all counts.

The opportunities for abuse will be especially ripe in connection with the establishment of varying probationary periods (of undisclosed lengths) for those who are newly-appointed into positions, including current career employees. Furthermore, through its implementing issuances, DOD intends to mandate that experienced federal employees with career status serve multiple probationary periods under NSPS. Such broad discretion will not attract and retain high performing workers; rather, it will expand a subjective at-will employment relationship, which will demoralize the current workforce and impede future hiring.

§9901.513

DOD should not be granted the exclusive authority to establish qualification standards for positions covered by NSPS. The final regulations should require the

substantive involvement of the democratically-elected representatives of DOD employees in creating any new or revising any existing qualification standards.

§9901.514

The proposed regulations allow for appointing *non-citizens to positions* within NSPS. When Congress passed the law authorizing DOD to explore new human resource systems, they never intended to permit the hiring of non-citizens for such critical security-related positions. This flexibility should be removed.

§9901.515

Before DOD establishes any new procedures for the examination of applicants for entry into the competitive or excepted service, it should first publish its proposals (with sufficient specificity) in the Federal Register for advance comment. Moreover, DOD should be mandated to use traditional numerical rating and ranking procedures, when establishing examination procedures for appointing employees in the competitive service.

VII. SUBPART F: WORKFORCE SHAPING

§9901.601

Under the proposed regulations, DOD will have total flexibility to reduce in numbers (RIF) the size of its workforce. In addition, it will be able to realign staff and reorganize work units within any department. Through the use of surgical workforce shaping actions, managers within DOD will have new power to reassign or remove staff

with whom they disagree. Clearly, these were not the types of personnel flexibilities that Congress envisioned under NSPS.

In accordance with the NSPS law, the actual planning, development, and implementation of, or future adjustments to the NSPS must be done through the collaboration process described in §9902(f), not through internal, unilateral issuances.

When DOD does develop regulations and policies for the matters discussed in this section, the statutory collaboration process should begin to develop the system. Upon implementation of the system, DOD is required to engage in collective bargaining for the ongoing decisions addressed in this section.

§9901.602

DOD has failed to provide a sufficient explanation for how this subpart will be administered. Relying on implementing issuances is unacceptable, and denies Congress, the taxpaying public, and democratically-elected representatives of DOD civilian employees with a legal opportunity to offer comments as to how such authority should be exercised.

§9901.603 through §9901.608

In contrast to existing government-wide regulations, DOD will have the ability to create *competitive groups* using a variety of criteria when conducting targeted RIF's. This will result in staffing reductions within DOD based on different factors, which will make it impossible for an adversely impacted employee to get a fair hearing when challenging an action.

In essence, DOD wants the ability to customize its RIF actions without regard to civil service rules, which were originally instituted to balance the interests of affected workers with the legitimate mission requirements of agencies. Under NSPS, the scales will be tipped completely in favor of DOD.

Maximum flexibility under NSPS will permit departmental issuances to be frequently modified to justify whatever staffing reductions or realignments management desires. The Merit Systems Protection Board will be ill-equipped to judge any RIF cases, because there will not be a consistent set of rules in which to determine whether the proper procedures were followed and/or whether the rights of those subject to the RIF were violated.

Employees with many years of service and satisfactory performance will be more susceptible to a RIF, since the proposed regulations place maximum reliance on employee performance ratings. Under this new NSPS RIF arrangement, a DOD civilian worker with three years on the job who has been rated as highly acceptable or outstanding will be retained, whereby a 30-year professional with a satisfactory rating will be removed. These revised rules will cause DOD to lose many of its experienced workforce when RIF actions are implemented, because performance will be placed ahead of length of service.

Even veterans may have their priority employment rights taken away, since DOD will be able to carry out surgical RIF's within pre-determined competitive groups. While DOD’s explanation in the Federal Register claims to retain existing veterans’ preference protections, the operation of the new rules (if implemented in its current form) would cause serious harm to veterans. With NSPS, there will be no immunity for veterans.

VIII. SUBPART G: ADVERSE ACTIONS

§9901.701 - Purpose and §9901.703 - Definitions

Although a later Subpart specifically addresses the definition of adverse actions, it is unclear from these sections whether or not DOD intends to retain the current definition of adverse actions. We recommend however, that the definition of adverse actions include any type of suspension, even if such suspension is less than 14 days in order to preserve the procedural protections promulgated in this Subpart.

Although only suspensions exceeding 14 days may be appealed to the MSPB, this amendment would provide such due process, which the law requires, to any employee who is facing loss of pay as a result of a proposed suspension. We also recommend that the definition of adverse action include "reduction of pay band or other similar reduction" in addition to reduction in grade. Again, we believe employees should be provided procedural protections when pay is adversely impacted. DOD/OPM have not demonstrated that the Agency's ability to suspend individuals and/or reduce pay with due process as required by the law, impedes national security or is somehow 'inflexible', 'not contemporary', or as the Supplementary Information claims, "restrictive."

9901.704 - Coverage

As stated above, we recommend that the definition of "Actions covered" in Subsection (a) remain consistent with Chapter 75.

With respect to “Actions excluded”, we recommend that the proposal be rewritten to clarify that employees who are serving an "in-service” probationary period be covered for the purposes of this Subpart.

§9901.711 - Standard for Action

We agree with the retention of the current standard of "such cause as will promote the efficiency of the service". This statutory standard, intended to protect employees from unjust personnel actions, has been in place for nearly a century and is well understood.

§9901.712 - Mandatory Removal Offenses

We object to the establishment of the mandatory removal offense scheme in its entirety and recommend that this section be deleted from the regulations. It is not possible to evaluate the impact of this proposal fully because the offenses are not listed. Instead, the Secretary is given unfettered discretion to identify offenses, subject only to the vague and overly broad requirement that they have a direct or substantial impact on homeland security. This could cover virtually anything and could result in a list containing offenses for which removal is, as judged by any impartial reviewer, too harsh a penalty.

The inability of an employee to have the penalty mitigated upon review by an independent reviewer and the uncertain availability of judicial review further undermines the process’ credibility. Employees will have no confidence that their due process rights will be protected in this process. It appears that the outcome of appeals hearings will be

pre-determined. An impartial and disinterested tribunal will not hear their cases. Instead, as proposed in §9901.808, a panel hand-picked by the same employer that imposed the penalty will decide these cases.

Despite any claim to the contrary, this proposed panel will never be accepted by employees as being fair and independent. It is unacceptable to have the idea of judge, jury and prosecutor rolled into one entity. This is true, whatever the nature of the charges against the accused. It is even more critical when the charges allege harm to our national security.

Additionally, the proposal does not specify the type of judicial review that could follow a panel decision. This approach is particularly inappropriate for the types of serious offenses contemplated by these sections. The more serious the offense, the more important it is for employees to have access to a fair and impartial appellate process, including impartial judicial review.

The concept of Mandatory Removal Offenses originates from a 1998 statute Congress passed pertaining to the Internal Revenue Service, specifically Public Law 105-206, section 1203, which the Supplemental Information references at page 7565. Since Congress delegated the authority to the Internal Revenue Service (IRS), but elected not to provide the same authority to DOD; any attempt by DOD/OPM to include this concept clearly overreaches the public law providing for personnel reform at DOD. Stated another way, we believe that DOD/OPM are attempting to "legislate" through the regulation and obtain what they did not obtain under the statute.

Without waiving our objection to the establishment of Mandatory Removal Offenses, we specifically recommend that subsection (c), which prohibits the MSPB

from penalty mitigation, be deleted in its entirety since this portion of the proposal violates 5 U.S.C. § 9902(h)(5), which authorizes the MSPB to "order such corrective action as the Board considers appropriate" when an adverse action is "arbitrary, capricious, (or), an abuse of discretion."

§9901.714 - Proposal notice

We recommend that the current notice and reply requirements (30 days written notice and not less than 7 days to answer for serious adverse actions and advance written notice and a reasonable time to answer proposed suspensions of 14 days or less) be retained. Having adequate notice and a reasonable chance to answer are essential components of due process.

By proposing to reduce the notice and reply periods in subsection (a), DOD/OPM seek to deprive DOD employees of precious time that is required to consider the charges against them, obtain representation, gather information, and prepare their answers. The modest acceleration of the disciplinary process that DOD would realize from this change is outweighed by the harm that would be done to the employees' opportunity to defend themselves fully and fairly.

§9901.715 - Opportunity to Reply

We recommend that the current periods for response to the proposed notice be retained (30 days to provide a written response and not less than 7 days to answer for serious adverse actions and advance written notice and a reasonable time to answer proposed suspensions of 14 days or less). The modest acceleration of the disciplinary

process that DOD would realize from this change is outweighed by the harm that would be done to the employees' opportunity to defend themselves fully and fairly through obtaining representation, gathering and reviewing information authorized in (c), and preparing their answers.

The shortened reply time is exacerbated by DOD's ability to limit an employee's choice of representative in (f) by merely alleging that the release of the representative "would give rise to unreasonable costs"' or when his/her "work assignments preclude his or her release." Such an overbroad basis to prevent DOD employees from choosing their representative allows DOD to unreasonably restrict and employee's choice of representatives without meaningful standards. Indeed, any work assignment, no matter how small or insignificant, may preclude release under this standard. We recommend that (f) be deleted in its entirety.

§9901.717 - Department Record

We recommend that this section be amended to require DOD to retain, in addition to the information in Subsection (a), such information which the employee requests that the Department retain as part of the official record of any adverse action.

IX. SUBPART H: APPEALS

We object to all of the sections contained in Subpart H with the exception of section 9901.806 and recommend that they be deleted. We recommend that any appeals system include a process which will be perceived as credible and will allow the MSPB to perform its functions independently. As proposed, this system allows

DOD/OPM to opt out of the appeals system or override MSPB decision makers and substitute their own judgment during much of the appellate process outlined in this section.

DOD/OPM note there will be conducting ongoing evaluations of the DOD HR System paying special attention to the adverse action and appeals process'. We recommend that if this process is included in the final regulations that DOD provide the information it gathers to employee representatives and allow the Unions to have a role in the review process.

§9901.801 – Purpose

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.802 - Applicable legal standards and precedents

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.803 - Waivers

In this section, DOD/OPM purport to supersede MSPB appellate procedures that are inconsistent with these regulations. DOD/OPM also purport to direct MSPB to follow these regulations until MSPB issues its own conforming regulations. Nothing in the Act or any other law gives DOD/OPM such authority over the MSPB. Accordingly, we recommend that this proposal be deleted from the regulations.

§9901.804 - Definitions

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.805 - Coverage

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.806 - Alternative Dispute Resolution

We endorse the concept of alternative dispute resolution (ADR) in disciplinary matters. We recommend that ADR procedures, including those contained in negotiated grievance/arbitration procedures, continue to be subject to collective bargaining.

§9901.807 - Appellate Procedures

We recommend that this entire section be deleted as DOD/OPM do not have the authority to make the changes set forth in this section.

§ 9901.807(b)(1)

There is no indication that there is a need to improve the efficiency of the appeals process before the MSPB. MSPB statistics contained in its annual report demonstrate that its process is an efficient one.[1] Despite DOD's push for efficiency, in some cases

[1] According to the Board's Performance and Accountability Report for Fiscal Year 2004 (November 15, 2004), the MSPB has met all of its GPRA goals for timely processing cases at both the regional and Board levels. For the last four years, the average processing time for initial decisions at regional offices ranged from 89 to 96 days – always below the MSPB goal of 100 days. During the same period, the

parties have a legitimate need to delay the proceedings. There are some categories of cases, for instance adverse actions which include a whistle blower component that involve multiple issues of law and are factually complicated matters. It does not promote fairness to rush these cases through an expedited process.

We believe that DOD has not done the sufficient fact finding necessary to indicate that appeals procedures are in fact too slow. The most important consideration in any case is for an independent third party reviewer to move cases in a manner that not only provides for rapid resolution but ensures above all that the processes are fair and are perceived as fair. The system proposed by DOD will not be perceived as credible and will not accomplish the goals set forth by DOD/OPM.

§9901.807 (c)

The proposed regulations take away the authority of the AJ to grant interim relief. We recommend that this proposal be deleted. However, should DOD/OPM reject this option, we recommend that the AJ be allowed to offer the parties an interlocutory appeal, allowing the decision to be stayed until the Board hears the full case.

§9901.807(c)(1)

DOD has noted that it will unilaterally decide whether employees who have been reinstated by the full MSPB will be allowed to return to their positions. DOD asserts

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average age of pending PFRs at Board headquarters ranged from 141 days to 164 days. This latter high mark occurred in FY 2003, when for a two month period, the full Board was unable to issue decisions at all because it had only one Board member and lacked a statutory quorum. The Board has reduced the time periods for processing cases at the Board level for FY 2005.

unreviewable discretion over this matter. DOD may select an alternative position or the employee may be placed on excused absence pending the final disposition of the appeal. This proposal undermines the MSPB's authority to take corrective action as it sees fit. Moreover, DOD/OPM does not specify the pay status of the employee if he/she should be placed in excused leave.

§9901.807(c)(2)

We object to the fact that DOD has proposed that attorney fees will not be paid before an award becomes final. We recommend that this section be deleted. There is well established case law about when attorney fees are due and this change negates these precedents.

§9901.807 (h)

We object to the proposal to reduce an employee's current right to recover reasonable attorney fees in MSPB cases. Currently, reasonable fees can be ordered if the employees is the prevailing party and the MSPB determines that payment of fees by the agency is in the interest of justice, including any case in which a prohibited personnel practice was committed or any case in which the agency action was clearly without merit.

DOD/OPM propose to limit an employee's ability to recover fees to cases where MSPB determines the action constituted a prohibited personnel practice, was taken in bad faith, or the Department's action was clearly without merit based upon facts known to management when the action was taken.

Through this proposed regulation, DOD provides itself with an ever present excuse that there were facts it was not aware of to avoid payment of reasonable attorney fees. DOD reserves great authority to itself under these proposed regulations and if there are facts not known to management in an investigation it will most likely be because DOD representatives failed to take the time to fully investigate. As a national security agency DOD has unfettered access to information and detailed procedures and extensive resources to collect the information.

The proposal's effect will be to chill the willingness of employees to exercise their rights to appeal unjust agency decisions. It will also serve as a disincentive for representatives to initiate meritorious class actions or multi-employee consolidated actions. The result will be uneconomical, piecemeal litigation before the MSPB.

§9901.807 (k)(1)

DOD/OPM propose an appeal filing deadline which reduces the time from 30 to 20 days. This will present a hardship, especially for DOD employees stationed abroad.

§ 9901.807 (k)(2)

DOD has provided no reason as to the necessity for the proposal that either party may file a motion to disqualify a party's representative during appellate proceedings. This is highly unusual and no standard has been provided as to when such a motion should be approved. Unless there is some conflict of interest argument which can be described, this provision is unnecessary, highly objectionable and we recommend that it be deleted.

§ 9901.807 (k)(3)

We recommend that the proposed regulations concerning discovery be deleted. Currently, the Agency must provide to the Board the full file upon which it based its decision. It is the first thing the Agency has to do in a response. This is not reiterated any place in the proposed regulations. DOD appears to be introducing new limitations on discovery. It can limit the discovery response if it believes that a request is "privileged, not relevant .....or the information can be secured from some other source that is more convenient, less burdensome, or less expensive." This, along with the proposal that "discovery can also be limited through a motion if the burden or expense of providing a response outweighs the benefit is unnecessary", is too limiting and may be easily abused.

The proposed regulations regarding depositions are also unnecessary and should be deleted. Depositions are very expensive to conduct and parties will not usually hold them unless they are truly necessary. Two depositions is an arbitrary cut off number. Fact patterns can be complicated and a party may need more than two depositions to obtain an accurate understanding of the matter at issue. Discovery is also helpful to develop settlement options.

§ 9901.807(k)(5)

If the material facts are in dispute and there is a credibility question at hand, the AJ should have to hear the conflicting evidence to ensure a fair hearing and a just result.

§ 9901.807 (k)(6)

DOD/OPM stress the need for deference to adverse actions taken by DOD. There is no indication from statistical analysis, anecdotal explanations or any other information that it is necessary for MSPB to provide any greater deference to DOD than it does to any other Agency. The MSPB has developed legal standards and precedents which have been in effect for more than 25 years. Independent Board members have developed objective legal analyses and a credible appeals process to protect fundamental personnel practices. Changing the process by incorporating DOD internal reviews and new standards only takes away from the credibility of this process.

This proposal provides that neither an arbitrator, AJ or the full MSPB may modify a penalty unless such penalty is so disproportionate to the basis for the action as to be wholly without justification.

We believe that this proposal is so disproportionate as to be wholly without justification. The MSPB has always had the authority to mitigate penalties. Statistics do not show that the MSPB has even a minor effect on DOD's ability to permanently remove employees from their position through mitigation of discipline penalties. [2]

[2]For example, in FY 2003, of 1450 cases adjudicated by MSPB AJs, 68 involved the Department of Defense. Of those 2.9% were mitigated or modified in some way at the AJ level. This indicates that fewer than 2 cases were mitigated. MSPB Annual Report, FY 2003 (August 2004) at p. 23. In the same year, the Board itself heard 54 cases from the Department of Defense. The Board's annual report does not state how many of these cases involved adverse actions (as opposed to Reductions-in-Force, retirement, performance appeals, etc.) However, the report does show that it handled a total of 469 adverse cases from all agencies. The statistical analysis shows that none of those adverse actions were mitigated. Id at 24.

The MSPB has consistently held that it is precluded from, or lacks the authority to, adjudicate the merits of the denial or suspension of a security clearance. *Egan v. Department of Navy,* 28 MSPR 509 , vacated and remanded by 802 F. 2d 1563 (Fed. Cir. 1986), writ of certiorari granted, *Department of Navy v. Egan*, 481 U.S. 1068 (1987), (Federal Circuit) reversed by Department of *Navy v. Egan*, 484 U.S. 518 (1988) and subsequent Board cases citing thereto. It has maintained that position even after Congress reconsidered the issue in 1994 amendments to the Whistleblower Protection Act and granted the Board broader authority. *Roach v. Department of the Army*, 82 MSPR 464 (1999) ; see also *Hesse v.*

DOD currently has the authority to pull an employee's security clearance to address any concern that an employee threatens national security. If it chooses to remove someone for misconduct, DOD has effectively determined that there is no security risk underlying the disciplinary/removal action.

MSPB review in its current form is already severely limited. This proposal does DOD employees an even greater disservice by providing the Board less latitude in modifying decisions that will help to level the playing field, protect the limited rights DOD employees now enjoy and help employees and their advocates believe that there is a credible appeals system still available to them.

§9901.807(k)(8)

There is no statutory authority for DOD to perform this type of review. While maintaining that DOD is using the services of MSPB, essentially, DOD is setting up a duplicative and parallel review structure. This allows DOD to second guess the MSPB at every turn. With another layer of review, we anticipate that the entire process will be delayed. We believe that an internal DOD review process will be very expensive and will waste tax payer money.

The proposed regulations address the Request for Review (RFR) process and how decisions will become final or "precedential". We recommend that DOD/OPM delete the language concerning this entire process. The language involving the DOD

Department of State, 82 MSPR 489 (1999), affirmed by 217 F. 3d 1372 (Fed. Cir. 2000), cert. denied , 531 U.S. 1154 (2001). Indeed, the Board specifically solicited amici briefs on the issue. The Department of Defense, Office of Personnel Management, Department of Justice, and the Central Intelligence Agency all filed briefs in support of the agency and the Office of Special Counsel filed a brief in support of the Board's authority to consider the withdrawal or suspension of a security clearance in the context of a whistleblowing case.

designation of precedential decisions is confusing and beyond the scope of authority granted to DOD/OPM by the statute. DOD has not specified the significance of cases being deemed precedential. Additionally, no details have been supplied as to whether these decisions will be published and whether they will be made available. Transparency of decisions is crucial to the fairness of an appeals system and this section lacks transparency.

DOD/OPM take the opportunity in the proposed regulations to change the standards used in the administrative review of an adverse actions because DOD/OPM believe the standards are too high. To say the standards are too high is inaccurate. The APA standards are the widely recognized and traditionally used standards. Established Supreme Court case law provides a deferential consideration to administrative agencies with an expertise in making these types of decisions. Additionally, DOD does not say what standard will be applied. DOD/OPM are obliged to set forth a clear understandable statement of such standards.

DOD/OPM maintain that these regulations should not give DOD unlimited authority, despite DOD's need for review authority over MSPB AJ decisions. These regulations however do give DOD unlimited authority because it can file a request for review in any case, with no articulated standard as a basis of review. These actions can be totally subjective and arbitrary and undermine the credibility of the MSPB.

§9901.808 - Appeals of mandatory removal actions

The provisions of this section that prohibit the MSPB from mitigating the penalty in cases involving "mandatory removal offenses" should be deleted because they violate

5 U.S.C. §9902 (h)(5), which authorizes the MSPB to "order such corrective action as the Board considers appropriate" when an adverse action is "arbitrary, capricious, an abuse of discretion" or otherwise subject to being overturned.

§ 808(d) allows DOD to have a second opportunity to bring an adverse action against an employee even if the MSPB AJ or full Board sustains an employee's appeal. This is highly objectionable. DOD should not be allowed to reprocess a removal or suspension on the same set of facts because it failed to properly investigate or prepare the case initially.

§9901.809 - Actions Involving Discrimination

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

§9901.810 - Savings Provision

Other than to reiterate our objections set forth as recommendations to this subpart, we have no comments for this section.

X. SUBPART I: LABOR-MANAGEMENT RELATIONS

A. General Comments

We recommend that Subpart I be deleted from the final regulation in its entirety. We make this recommendation for three reasons.

First, the process by which the Department developed Subpart I violated 5 U.S.C. § 9902(m). *See AFGE v. Rumsfeld*, Civ. A. No. 05-367 (EGS) (U.S. Dist. Ct. D.C. complaint filed February 23, 2005).

Second, each provision of proposed Subpart I is either contrary to law or unnecessary. The provisions that are contrary to law are those that (1) purport to modify or replace the provisions of 5 U.S.C. §§ 7101 through 7135 other than by providing for bargaining above the level of bargaining unit recognition or new independent third-party review of decisions, or (2) violate 5 U.S.C. § 9902 in other ways. The unnecessary provisions are those that (1) though not contrary to law themselves, have no use or purpose besides introduction or implementation of other provisions that are contrary to law; (2) merely repeat statutory provisions; or (3) are unnecessary for other reasons stated below.

Third, the goal that the Department says it seeks to accomplish, the "ability to carry out its mission swiftly and authoritatively," can be accomplished, as it always has been, by continued adherence to the provisions of chapter 71. The Department has not pointed to a single instance in which the Department ever has failed to carry out its mission swiftly and authoritatively due to the existence of a chapter 71 requirement. Congress provided the Department two new tools to increase efficiency—bargaining above the level of bargaining unit recognition and new independent third-party review of decisions. To act with requisite swiftness and authority and to achieve increased efficiency, the Department need only use these new tools properly and train its managers and supervisors properly to use the authority that current law provides.

DOD erroneously asserts that the current labor relations system is "inefficien[t]" and "detract[s] from the potential effectiveness of the total force" because it "encourages a dispute-oriented, adversarial relationship between management and labor." DOD offers no evidence to support this assertion and Congress has found that the opposite is true. Congress has determined that "statutory protection of the right of employees to . . . bargain collectively and participate through labor organizations . . . in decisions which affect them safeguards the public interest" and "contributes to the effective conduct of public business" because it "facilitates and encourages the *amicable settlement of disputes* between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a)(1). (Emphasis added.)

B. The Department Developed Subpart I by an Unlawful Process

The court complaint in *AFGE v. Rumsfeld*, Civ. A. No. 05-367 (EGS) (U.S. Dist. Ct. D.C. complaint filed February 23, 2005) states the unlawful process by which the Department developed Subpart I:

> 15. The National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 139 (2003), which includes 5 U.S.C. § 9902(m), became law on November 24, 2003. In § 9902(m)(1) Congress authorized "the Secretary, together with the Director," to "establish and from time to time adjust a labor relations system for the Department of Defense."
>
> 16. In § 9902(m)(3), Congress directed that the Secretary and the Director "ensure the that the authority of this section is exercised in collaboration with, and in a manner that ensure the participation of, employee representatives in the development and implementation of the labor management system. . . ." Congress specified that the "process for collaborating with employee representatives . . . shall begin no later than 60 days after the date of enactment of this subsection." § 9902(m)(3)(D). In § 9902(m)(3)(A) Congress specified additional requirements of the collaboration process:

(A) The Secretary and the Director shall, with respect to any proposed system or adjustment-

(i) afford employee representatives and management the opportunity to have meaningful discussions concerning the development of the new system;

(ii) give such representatives at least 30 calendar days (unless extraordinary circumstances require earlier action) to review the proposal for the system and make recommendations with respect to it; and

(iii) give any recommendations received from such representatives under clause (ii) full and fair consideration.

17. After enactment of the law, defendants over the course of more than a year developed their proposed labor relations system—to the point of publication in the Federal Register—using secret working groups. During this time, despite plaintiffs' repeated requests, defendants denied plaintiffs opportunity to collaborate with, participate in, or have discussions with the secret groups, and refused to reveal to plaintiffs any of defendants' instructions to the groups, or any of the groups' preliminary draft proposals or other work products.

18. While the secret groups developed the labor relations system behind closed doors, defendants' representatives gave plaintiffs "concept" papers and engaged plaintiffs in meaningless discussions, in which defendants presented no proposals. Defendants did not even claim that these papers and discussions were the "meaningful discussions" required by § 9902(m)(3); rather, they expressly said that these papers were not proposals and that the discussions were "pre-statutory."

19. Defendants announced that they would establish DOD's labor relations system through formal, notice-and-comment rulemaking. Defendants then asserted that this formal rulemaking process prohibited DOD from revealing to or discussing with plaintiffs (or anyone else outside the agency) any preliminary or the final draft of the proposed labor relations system regulation before publication of the proposed final regulation in the Federal Register. Based on this assertion, defendants rejected plaintiffs' requests to collaborate with, participate in, or have discussions with defendants' secret working groups; and denied plaintiffs' requests to review defendants' instructions to the groups, the groups' preliminary draft proposals, and the final proposed regulation, before its publication in the Federal Register.

C. Claim

20. Defendants Secretary and Director have failed to ensure that the authority of § 9902(m) was exercised in collaboration with, and in a manner that ensured the participation of, employee representatives in the development of the

> labor management relations system for the DOD, in violation of 5 U.S.C. § 9902(m)(3). In particular, defendants have breached their § 9902(m)(3) duty not to develop a "labor relations system" without "afford[ing] employee representatives . . . the opportunity to have meaningful discussions concerning [its] development." Congress required that "collaboration with, and . . . participation of, employee representatives in the development . . . of the labor management relations system," including "meaningful discussions," start "no later than 60 calendar days after the date of enactment." In imposing this requirement, Congress required collaboration with, participation of, and meaningful discussions with employee representatives in the *early* development of the system. Defendants' use of secret working groups over the course of more than a year to develop to the point of publication in the Federal Register DOD's proposed labor relations system; defendants' denial of the opportunity for plaintiffs and other employee representatives to collaborate with, participate in, or have discussions with the secret groups; and defendants' refusal to reveal to plaintiffs and other employee representatives any of defendants' instructions to the groups; any of the groups' preliminary draft proposals or other work products; or the final proposed regulation, before publication in the Federal Register violated plaintiffs' rights under § 9902(m)(3).

Because of the unlawful process used by the Department to develop Subpart I, this subpart should be deleted from the final regulation. A new Subpart I, developed in accordance with § 9902(m), should be substituted in its place.

D. Each Provision of Subpart I is Contrary to Law or Unnecessary

In the National Defense Authorization Act for Fiscal Year 2004, P. L. 108-136, enacted November 24, 2003; Congress rejected the Defense Secretary's request for authority to waive all provisions of chapter 71. 5 U.S.C. § 9902(b)(3)(D) and (d)(2). Congress prohibited the Department of Defense from waiving, modifying or otherwise affecting chapter 71 except "to the extent . . . otherwise specified" in the new law. §§ 9902(b)(3) and (d).

Congress specified only two permissible modifications of chapter 71. First, Congress authorized bargaining "at a level above the level of exclusive recognition." 5 U.S.C. § 9902(m)(5). This is commonly called national level bargaining. *See* § 9902(g). Second, Congress authorized the Secretary to "provide for independent third party review of decisions." § 9902(m)(6).

The legislative history of the Authorization Act confirms these points. The Secretary sought and the House of Representatives passed a bill that would have granted the Secretary authority to waive all provisions of chapter 71. The Senate authorization bill contained no provisions on labor relations; but at a hearing held by the Senate Committee on Governmental Affairs, both Republican and Democratic Senators expressed disapproval of the Secretary's request for authority to waive chapter 71. The Senate Committee, by a 10-1 vote, passed S. 1166, which authorized only two modifications of chapter 71—national level bargaining and time limits on Federal Labor Relations Authority (FLRA) processing of Defense Department cases.

The Senators who served on the Conference Committee brought S. 1166 to the conference. The Conference Committee rejected the House bill's waiver of chapter 71; authorized national level bargaining; and, as a substitute for S. 1166's time limits on the FLRA, authorized the Secretary to provide for new independent third party review of decisions.

Speaking on the Senate floor November 12, 2003, Senator Lieberman, a member of the Conference Committee and the ranking Democrat on the Senate Committee on Governmental Affairs, confirmed that the new law "overrides chapter 71 only where" the new law "and chapter 71 are directly inconsistent with each other" and

"that the Secretary of Defense has no authority" to depart from chapter 71 in any other area:

> [I]n the area of collective bargaining, the conference agreement included the provision of S. 1166 stating that the Secretary of Defense has no authority to waive chapter 71 of civil service law, which governs labor-management relations. . . . However, the conferees also agreed to a new provision authorizing the Secretary . . . to establish a "labor relations system" for . . . the Department's civilian workforce. As the conference report makes chapter 71 non-waivable, this new provision overrides chapter 71 only where the new provision and chapter 71 are directly inconsistent with each other.

149 Cong. Rec. S14490 (November 12, 2003).

The sections of the new law providing for national level bargaining and independent review of decisions, §§ 9902(m)(5) and (6), are the only portions of the law that are directly inconsistent with chapter 71. On this point, and specifically regarding independent review, Senator Lieberman explained:

> The new provision . . . does not conflict with the statutory rights duties, and protections of employees, agencies, and labor organizations set forth in chapter 71, including . . . the duty to bargain in good faith . . . and others and such rights, duties, and protections will *remain fully applicable* at the department. The conference agreement provides . . . "for independent third party review of decisions." . . . The Secretary may use this provision to expedite the review of decisions, *but not to alter the statutory rights, duties, and protections established in chapter 71* or to compromise the right of parties to obtain fair and impartial review. [Emphasis added.]

149 Cong. Rec. S14490.

Under § 9902(b)(3) and (d) and chapter 71, provisions of Subpart I that depart from chapter 71 other than by providing for national level bargaining or independent review of decisions are contrary to law. Some provisions of Subpart I violate other provisions of § 9902. All but two of the Subpart I provisions that are not themselves unlawful are unnecessary—because they either have no use or purpose besides

introduction or implementation of other provisions that are contrary to law or merely repeat statutory provisions. The only two exceptions are the provisions for grievance procedures and official time.

§9901.901 - Purpose

We recommend that this section be deleted. This section has no use or purpose other than to introduce other sections that are contrary to law. It erroneously states that Subpart I "contains . . . regulations which implement . . . § 9902(m)." In fact, Subpart I contains regulations that violate § 9902(m). Contrary to § 9901,901, Subpart I's proposed regulations do not "recognize the rights of DOD employees"; rather, they violate the rights of DOD employees.

§9901.902 - Scope of Authority

We recommend that this section be deleted. Its assertions are contrary to law. This section erroneously asserts that "the provisions of 5 U.S.C. 7101 through 7135 are modified and replaced by the provisions" of Subpart I. The Secretary has no authority to depart from any of the provisions of §§ 7101 through 7135 other than by providing for national level bargaining or independent review of decisions.

This section also erroneously asserts that "DOD may prescribe implementing issuances to carry out the provisions" of Subpart I. DOD has no authority to carry out the provisions of Subpart I that are contrary to law. Further, DOD has no authority unilaterally to "prescribe implementing issuances to carry out" Subpart I, even if Subpart

I were lawful. Any "adjustment" of DOD's labor relations system must be developed not unilaterally, but in accordance with the collaboration process provided by § 9902(m)(3).

§9901.903 - Definitions

We recommend that this section be deleted. The definitions of "Board," "Component," "Consult," "DOD issuance or issuances," and "Grade" are unnecessary because their sole use and purpose is to implement provisions of Subpart I that are contrary to law. To the extent the other definitions depart from the definitions of the same terms in chapter 71 they are contrary to law. To the extent they conform to chapter 71 they are duplicative and unnecessary.

§9901.904 - Coverage

We recommend that this section be deleted. To the extent this section denies any employee chapter 71 rights—other than those that lawfully may be superseded by proper provision for national level bargaining or independent decision review—this section is contrary to law.

To the extent this section applies the 5 U.S.C. § 9902(m) labor relations system to employees not subject to it under §§ 9902(c)(1) and (l)(2), this section is also contrary to law. Under 5 U.S.C. § 9902(b)(4), the labor relations system is part of the § 9902(a) human resources management system; and the law restricts implementation of this system in certain parts of DOD. Under § 9902(c)(1), the system may not be implemented at a laboratory before October 1, 2008, and then only if the Secretary makes a determination required by that provision. Under § 9902(l)(2), the system may

not be applied to an organizational or functional unit including more than 300,000 employees unless the Secretary determines that the unit has in place a proper performance management system.

To the extent § 9901.904 repeats exceptions from the chapter 71 definition of "employee," 5 U.S.C. § 7103 (a)(2), it is duplicative and unnecessary.

§ 9901.905 - Impact on existing agreements

We recommend that this section be deleted. This section is contrary to law to the extent it makes collective bargaining agreements unenforceable due to inconsistency with either provisions of Subpart I that are unlawful or unilateral "DOD implementing issuances." Unlawful provisions of Subpart I do not override lawful collective bargaining agreements. Also, unilateral DOD issuances cannot be the basis for any change of employee rights under chapter 71 or § 9902(m). As noted above, any "adjustment" of those rights—even if it is a permissible provision for national level bargaining or independent decision review—cannot be promulgated other than through the collaborative process prescribed by § 9902(m)(3).

To the extent § 9901.905 provides for decision review or impasse resolution by "the National Security Labor Relations Board," this section violates 5 U.S.C. § 9902(m)(6) because, as stated below in the discussion of § 9901.907, the Board is not an "independent third party."

To the extent, if any, that § 9901.905 might be construed to provide for lawful superseding of a collective bargaining agreement under 5 U.S.C. § 9902(m)(8), this section is duplicative of § 9902(m)(8) and therefore unnecessary.

§9901.906 - Employee rights.

We recommend that this section be deleted. This section repeats 5 U.S.C. § 7102, except it substitutes the word "subpart" for "chapter." This section is contrary to law to the extent it restricts chapter 71 employee rights by making them subject to unlawful provisions of Subpart I. To the extent, if any, that it preserves a right provided by § 7102 it is duplicative of § 7102 and unnecessary.

§ 9901.907 - National Security Labor Relations Board and § 9901.908 - Powers and Duties of the Board.

We recommend that these sections be deleted. These sections are contrary to 5 U.S.C. § 9902(m)(6) because they create and vest authority in a board that is not an "independent third party." The Board created by § 9901.907 is not independent because (1) its members are chosen and appointed by the Secretary; (2) the Secretary has "sole and exclusive discretion" to pack the Board with an unlimited number of members to out-vote any previously-appointed members who might manifest independence from the Secretary's views; (3) the nominal requirements that Board members be "independent, distinguished, . . . well known for their integrity, impartiality, and expertise"; and subject to removal "only for inefficiency, neglect of duty, . . . malfeasance in office" or failure "to acquire and maintain an appropriate security clearance" are vague, subjective, and unaccompanied by appropriate enforcement procedures; (4) the Secretary's discretion to select members whose only expertise is "in . . . the DOD mission" permits the Secretary to select members who are unqualified and narrow-minded.

There is no single formula for creation of a genuinely independent board, but establishing an independent board requires provisions that include an adequate number and appropriate mix of concepts such as those in the following illustrative and non-exhaustive list: (1) appointment of board members by a commission having a balanced composition, such as a commission comprised of an equal number of commissioners selected by labor and management, respectively; where two board members each are appointed by the labor-selected commissioners and the management-selected commissioners, respectively; and a fifth board member is selected by consensus, majority vote, or alternating striking by commissioners of candidates who apply, until one is left; (2) in the absence of, or in addition to, appointment by a balanced (or perhaps genuinely independent commission), relatively objective and specific qualifications for board members—such as no previous employment or service within the Department (or prior employment exclusively in bargaining unit positions for two members, prior employment in managerial positions for two members, and no prior government service for a fifth member); (3) substantive provisions for tenure similar to those that protect other tenured professionals, such as judges or university faculty; (4) specific and adequate procedures for impartial adjudication of agency accusations against board members, including adequate incentives for accused members to defend themselves rather than resign—such as contemporaneous payment by the Department of members' reasonable expenditures for legal representation and automatic award of substantial monetary compensation to board members who defeat proposed removal or discipline and show that the accusations were wholly unjustified.

Apart from provisions ensuring its independence, an independent board should have its own appellate judicial review statute. Judicial review achieved by affording review of board decisions by the Federal Labor Relations Authority (FLRA), followed by judicial review under 5 U.S.C. § 7123, is inefficient. If the board is well-qualified and genuinely independent, review by the FLRA is unnecessary and a waste of time. Board decisions should be immediately reviewed by an appellate court. A board that is not subordinate to the FLRA, moreover, will attract higher quality candidates.

Section 9901.907(f) of Subpart I seeks to reduce the inefficiency of making Board decisions subject to FLRA review by forcing the FLRA both to speed up its decision-making process and to develop other procedural standards in conjunction with the Board. While this attempt is not objectionable from a policy standpoint, it probably is unlawful. The Department does not have express legislative authority to force the FLRA to change its internal procedures.

While channeling Board decisions through the FLRA is inefficient, establishing a board by regulation but not providing for review through the FLRA also is an unattractive option. Under this option, board decisions would be subject to federal district court review, followed by federal appellate court review, under 5 U.S.C. § 701 *et seq*. This two-court review would be inefficient.

In light of the considerations discussed above, an independent board should be created by statute, not by regulation—so that at the outset direct appellate judicial review of board decisions can be established and the highest quality candidates can be attracted. If the Department desires an independent board, it should work with the

employee representatives to draft a mutually-acceptable statute. Such a statute undoubtedly would be quickly passed by Congress.

A lawful alternative to creation of a new independent board would be expanded, effective use of Federal Mediation and Conciliation Service arbitrators, followed by FLRA and judicial review of legal issues. Procedures and time limits for arbitration would be lawful.

Separate from these points, § 9901.908(b) is contrary to law. The Department's authority under 5 U.S.C. § 9902(m)(6) is limited to providing "for independent third party review of decisions." A new board, even if independent, may not be vested with authority to issue binding opinions merely upon request.

§ 9901.909 - Powers and duties of the Federal Labor Relations Authority

We recommend that this section be deleted. This section, with § 9901.912, unlawfully modifies the chapter 71 standards for FLRA determination of appropriate bargaining units. The section therefore is contrary to law.

The section also is contrary to law because it deprives the FLRA of jurisdiction over matters within the jurisdiction of the Department's illegal, non-independent Board.

To the extent the section preserves some of the FLRA's lawful chapter 71 authority; it is duplicative of chapter 71 and unnecessary.

§9901.910 - Management rights

We recommend that this section be deleted. This section unlawfully expands the management rights listed in 5 U.S.C. § 7106(a). The section unlawfully eliminates §

7106(b) exceptions to § 7106(a) management rights. The section also unlawfully eliminates the agency's chapter 71 obligation to preserve the status quo pending completion of collective bargaining, including impasse resolution. For these reasons, the section is contrary to law.

Apart from the section's illegality, its unlimited expansion of non-negotiable management rights to include "whatever other actions may be necessary to carry out the Department's mission," and its gutting of § 7106(b) exceptions to management rights, are nothing less than obnoxious. They are a clear manifestation of the Department's intent to eliminate all meaningful collective bargaining.

Particularly repugnant is the cynical creation in § 9901.910(e)(1) of an illusory "right" to negotiate procedures for implementation of § 9901.910(a)(3) management rights. Under § 9901.910(f), proposed procedures that affect both (a)(3) and (a)(2) management rights are negotiable only to the extent procedures affecting (a)(2) rights are negotiable. Under § 9901.910(b), procedures affecting (a)(2) rights are not negotiable at all. This effectively bans all negotiation of procedures affecting (a)(3) rights, because (a)(2) rights embrace everything in (a)(3). This is the case because (a)(2) rights include the unlimited right to take "whatever . . . actions may be necessary to carry out the Department's mission," and every exercise of an (a)(3) right is an action that "may be necessary to carry out the Department's mission."

To the extent § 9901.910 incorporates § 7106(a) management rights and a few shredded remains of the exceptions to management rights stated in § 7106(b), the section is duplicative of § 7106 and unnecessary.

§ 9901.911 - Exclusive recognition of labor organizations

We recommend that this section be deleted. This section is duplicative of 5 U.S.C. § 7111(a) and unnecessary.

§ 9901.912 - Determination of appropriate units for labor organization representation

We recommend that this section be deleted. This section alters the standards of 5 U.S.C. § 7112. To the extent it does this, it is contrary to law. To the extent the section preserves standards stated in § 7112, the section is duplicative and unnecessary.

Apart from the section's illegality, its unlawful, total elimination of the collective bargaining rights of all attorneys and all personnel department clerical staff is unwarranted. The Department bases the exclusion of all personnel workers on its assertion that there are no (and never will be any) personnel workers who perform in a "purely clerical capacity," within the meaning of 5 U.S.C. § 7112(b)(3). But if what the Department asserts is true, then there is no need to change current law, because current law already excludes personnel workers except those who work in "a purely clerical capacity."

A similar point applies to attorneys. The Department asserts that all attorneys communicate confidentially with management on matters that "go to the heart of the managerial function." If that were true, then there would be no reason to change the law, because attorneys who provide confidential advice going to the heart of the managerial function are confidential employees excluded under current law, 5 U.S.C. § 7112(b)(2). The Department's assertion, however, is not true. Not all attorneys provide

advice concerning core managerial functions. There is no valid reason to terminate the collective bargaining rights of attorneys whose work concerns, for example, litigation between the Department and private businesses or individuals.

The Department's asserted rationales for change being invalid, the real motive for the proposed change is apparent—union busting. The Department's unlawful termination of the rights of all personnel workers and attorneys is an attempt to deprive bargaining units of employees who are particularly knowledgeable of employment matters and especially skilled in the exercise of employee rights.

§ 9901.913 - National consultation

We recommend that this section be deleted. This section unlawfully transfers from the FLRA to the Department's Board authority to determine eligibility criteria for national consultation rights. This transfer violates 5 U.S.C. § 7113. It is not authorized by § 9902(m)(6), because the authority granted by that section to define standards for review of decisions does not extend to determinations of criteria for the granting or denial of national consultation rights.

Section 9901.913 also grants the Board authority to adjudicate eligibility for national consultation rights. This is contrary to law because, as noted above, the Board is not an "independent third party" under § 9902(m)(6). For this reason, it cannot be vested with any authority to adjudicate chapter 71 legal rights.

§ 9901.914 - Representation rights and duties

We recommend that this section be deleted. This section alters the standards of 5 U.S.C. § 7114, depriving employees and labor organizations of rights guaranteed by § 7114. To the extent the section does this, it is contrary to law. To the extent the section preserves some threads of the standards stated in § 7114, the section is duplicative and unnecessary.

The changes made by § 9901.914 are unwarranted as well as unlawful. There is no valid reason why a union's right to attend formal discussions should be limited to discussions with "management official(s)," rather than other agency representatives, such as supervisors, as § 7114(a)(2)(A) requires. There is no valid reason why a union's right to attend formal discussions should not extend to formal discussions "concerning any grievance," as § 7114(a)(2)(A) also requires, rather than just grievances that have been "filed." There is no valid reason why unions should be excluded from formal discussions that occur in EEO proceedings—particularly since the Department would continue to allow union participation in such discussions where EEO claims are presented through the grievance procedure.

Nor is there a valid reason for the section's exclusion of the union, contrary to § 7114(a)(2)(A), from formal discussions of "any personnel policy or practices or other general condition of employment." The section's proposed exemptions—for formal "operational" discussions involving only "reiteration or application of existing personnel policies," policy change discussions "incidental or otherwise peripheral to the announced purpose of the meeting, or policy discussions that do not "result in an announcement of . . . or a promise to change" a policy—are unjustified. As a practical

matter, a formal discussion of policy or policy application almost always seeks change. The reason management formally discusses policy or policy application with employees is to change their behavior to increase conformity with policy. Unions should be present at all formal policy discussions that seek to change employee behavior.

Further, management should not be allowed to effect policy change through formal discussion by-passing the union simply by making a phony advance announcement as to the purpose of the discussion and then claiming that discussion of policy change during the meeting was merely "incidental." The section's proposed exemption for "phony announcement" meetings is insidious.

The section's unlawful elimination of employees' right to union representation during interrogations by agency criminal and inspector general investigators is another unwarranted change. The need for union representation is at its greatest in these serious contexts, which almost always threaten severe discipline. The Department's assertions that union representation threatens the independence, speed, integrity, or confidentiality of investigations are groundless. The Department points to no instance in which such a threat ever has occurred. The Department's proposed elimination of union representation in these interrogations is not based on any policy considerations underlying the reason Congress originally created the right to union representation. Instead, this proposed change is another manifestation of the Department's desire to deprive unions of any meaningful role in the work lives of employees.

The section's unlawful assertion that union representatives who are employees "are subject to the same expectations regarding conduct as any other employee, whether they are serving in their representative capacity or not," § 9901.914(a)(4), is

also indefensible. Contrary to § 9901.914(a)(4), employees serving in a representative capacity have statutory and first amendment rights to speak, write, associate, and petition for redress that other employees do not have.

When an employee represents another employee during an agency interrogation, for example, the representative has the right to advise the interrogated employee, to seek clarification of unclear questions, to ask other questions, and to make statements—provided the representative does not unduly interfere with the interrogation. "Any other employee" may not engage in this conduct. "Any other employee" may not attend the interrogation, advise the interrogated employee, ask questions, and make statements. If "any other employee" engaged in such conduct the employee could be ordered to stop and to go away and could be punished if she or he failed to do so. The same is not true of the employee who is a union representative engaged in representing the interrogated employee. Section 9901.914(a)(4)'s assertion that a union representative may engage in no conduct other than that in which "any other employee" also may engage, reflects a determination by the Department that employees should have no meaningful union representation at all.

Section 9901.914's unlawful total elimination of unions' § 7114(b)(4) right to information is another manifestation of the Department's intent to render unions impotent and useless to employees. The section authorizes the Department to ban all disclosure of information to unions simply by issuing a policy, regulation, or other "issuance" saying so. § 9901.914(c)(1).

The section also states that any "authorized official" may block any disclosure of information to a union if the official "has determined"—unreasonably or otherwise—that

the disclosure "would compromise the Department's mission, security, or employee safety." § 9901.914(c)(4). Presumably, "security" includes "information security," which always is "compromised" by any disclosure of information. The section thus authorizes a ban on disclosure if the official "has determined" that because disclosure of the information would result in disclosure of the information, the disclosure must not occur, lest "information security" be "compromised."

Finally, the section's total elimination of the statutory right to collective bargaining—repeated in § 9901.917 and reinforced by § 9901.910's expansion of management rights to include "whatever other actions may be necessary"—also manifests the Department's intent to deprive employees and unions of any meaningful rights. Under § 9901.914(d)(2), the Department or any Component of the Department can wipe out any term of a collective bargaining agreement merely by writing a "rule, regulation or similar . . . issuance" saying so. Under § 9901.914(d)(5), provisions of any collective bargaining agreement are "unenforceable if an authorized official determines"—correctly or incorrectly—"that they are contrary to . . . DOD issuances." Under §9901.914, collective bargaining is not a statutory right. Under this section, and §9901.917 as well, collective bargaining can be totally banned through DOD "issuances."

§9901.915 - Allotments to representatives

We recommend that this section be deleted. This section duplicates 5 U.S.C. § 7115 and is unnecessary.

§9901.916 - Unfair labor practices

We recommend that this section be deleted. This section limits unfair labor practices to violations of Subpart I, thereby unlawfully permitting practices that are violations of 5 U.S.C. § 7116, but not Subpart I. In this regard the section is contrary to law. Particularly noteworthy is the section's unlawful elimination, in its entirety, of the unfair labor practice stated in § 7116(a)(7) (enforcement of a regulation that conflicts with a collective bargaining agreement, if the agreement predates the regulation).

The section's unlawful elimination of unfair labor practices contradicts Under Secretary Chu's explicit contrary representation to Senator Levin during the Senate Committee hearings in the summer of 2003. Senator Levin said, "The question is, do you intend to modify the provisions of Chapter 71 of Title 5 relative to unfair labor practices." Mr. Chu replied, "We don't have such an intent, sir."

To the extent unfair labor practices under § 9901.916 also are unfair labor practices under § 7116, the section is duplicative and unnecessary. The provision in § 9901.916(e) of a 90-day time limit for filing unfair labor practice charges with the Department's Board is unnecessary because its sole use and purpose is to implement the functioning of the unlawful Board. The Board has no authority to adjudicate legal rights because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6).

§ 9901.917 - Duty to bargain and consult

We recommend that this section be deleted. This section, as noted earlier, totally eliminates the statutory right to collective bargaining by banning bargaining of any

matter “inconsistent with . . . Department or Component policies, regulations or similar issuances.” § 910.917(d)(1). The section’s total elimination of the chapter 71 statutory right to collective bargaining is contrary to law. Under 5 U.S.C. § 7117, only agency regulations for which there is a compelling need restrict bargaining.

In addition to making bargaining rights subject to elimination by “issuances,” § 9901.917 unlawfully shrinks the Department’s chapter 71 obligation to bargain over significant changes in working conditions or at least their impact and implementation. In eliminating the duty to bargain over changes that are not “foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change,” § 9901.917(d)(2), the section is contrary to law.

The section authorizes labor and management to refer bargaining impasses and negotiability disputes to the Department’s unlawful Board. These provisions are unnecessary because their sole use and purpose is to implement the Board’s unlawful functioning. Because the Board is not an “independent third party” authorized by 5 U.S.C. § 9902(m)(6), the Board has no authority to determine employee rights or to resolve bargaining impasses.

<u>§ 9910.918 Multi-unit bargaining and § 9901.919 Collective bargaining above the level of recognition</u>

We recommend that these sections be deleted. These sections are contrary to law to the extent they ban union ratification of collective bargaining agreements.

Contrary to the Department's assertion, ratification does not delay implementation of agreements. Ratification is part of reaching an agreement.

These sections also are contrary to law to the extent they make bargaining impasses subject to resolution by the Department's Board. Because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6), the Board has no authority to resolve bargaining impasses.

To the extent these two sections are not contrary to law they are duplicative of 5 U.S.C. §§ 9902(g) and (m)(5) and are unnecessary.

§ 9901.920 - Negotiation impasses

We recommend that this section be deleted. This section unlawfully authorizes the Department's Board to resolve negotiation impasses. Because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6), the Board has no authority to resolve bargaining impasses. The section also authorizes labor and management voluntarily to refer bargaining impasses to the Board. These provisions are unnecessary because their sole use and purpose is to implement the Board's unlawful functioning.

§9901.921 - Standards of conduct for labor organizations

We recommend that this section be deleted. This section duplicates 5 U.S.C. § 7120 and is unnecessary.

§9901.922 - Grievance procedures

We recommend that this section be deleted and we incorporate here our recommendations and objections stated elsewhere with regard to specific actions subject to the negotiated grievance procedure. The deletion of "administrative," a term found in 5 U.S.C. § 7121(a)(1), is contrary to law. The deletion erases legal rights to seek judicial redress. The Department's authority to provide new independent third party review of decisions does not include authority to eliminate currently available judicial review

The exclusions of pay and ratings of record are contrary to law because no new independent third party review of these matters is afforded. The effect of the exclusions is to eliminate all independent review of these matters. Congress did not grant the Department authority to eliminate existing rights to independent review without providing lawful substitutes.

The reference to mandatory removal offenses is unnecessary because its sole use and purpose is to facilitate the Department's unlawful establishment of mandatory removal offenses. As we stated earlier, the Department's attempt to eliminate the authority of the Merit Systems Protection Board to mitigate penalties is contrary to law. It violates 5 U.S.C. § 9902(h)(5), which expressly preserves the Board's authority to "order such corrective action as the Board considers appropriate" in any case where the Department's decision is "arbitrary, capricious, an abuse of discretion" or unlawful under any of the other standards of § 9902(h)(5)(A) through (C).

The insertion of an additional appellate layer—the Merit Systems Protection Board—between arbitration and judicial review of adverse actions or other appealable

matters is unwarranted. The creation of this additional layer belies the Department's assertions of intent merely to make review more speedy and efficient. The delay and inefficiency injected by this additional review layer is designed to eliminate proper deference to arbitrators—obviously because, in the Department's mind, arbitrators are too independent.

To the extent § 9901.922 incorporates provisions of 5 U.S.C. § 7121, it is duplicative and unnecessary.

§9901.923 - Exceptions to arbitration awards

We recommend that this section be deleted. This section unlawfully authorizes the Department's Board to decide exceptions to arbitration awards. Because the Board is not an "independent third party" authorized by 5 U.S.C. § 9902(m)(6), the Board has no authority to decide arbitration cases.

The section also authorizes labor and management to submit exceptions to the Board, states a new ground for exceptions, and authorizes the Board to determine its jurisdiction. These provisions are unnecessary because their sole use and purpose is to implement the Board's unlawful functioning.

§9901.924 - Official time

We recommend that this section be deleted. This section authorizes official time for employees performing employee representational duties under Subpart I, but not under chapter 71. In this regard, the section is contrary to law.

The section also is unnecessary. It is unnecessary to authorize official time for representational duties under Subpart I because no provision of Subpart I should be adopted or implemented. Apart from this, the section also is unnecessary because it is duplicative of 5 U.S.C. § 7131, which authorizes official time for "any employee representing an exclusive representative." § 7131(d)(1).

§ 9901.925 - Compilation and publication of data

We recommend that this section be deleted. This section is unnecessary because its sole use and purpose is to facilitate the Board's unlawful functioning.

§9901.926 - Regulations of the Board

We recommend that this section be deleted. To be independent, a Board must determine its own rules of operation. The Department's usurpation of this function is contrary to law.

In addition, the Department has no authority to issue rules merely upon consultation with unions having national consultation rights. Any "adjustment" of the labor relations system must be accomplished through the collaboration procedures established by 5 U.S.C. § 9902(m)(3).

Apart from these points, § 901.926 is unnecessary because its sole use and purpose is to facilitate the Board's unlawful functioning.

§9901.927 - Continuation of existing laws, recognitions, agreements and procedures

We recommend that this section be deleted. To the extent this section invalidates collective bargaining agreements and Executive Orders on the ground that they are inconsistent with DOD regulations and issuances, the section is contrary to law. To the extent it acknowledges the continuing validity of collective bargaining agreements and Executive Orders it is unnecessary.

§9901.928 - Savings provisions

We recommend that this section be deleted. To the extent this section declares administrative remedies unenforceable on the ground that they are inconsistent with provisions of the proposed regulation that are unlawful, the section is contrary to law. To the extent that this section acknowledges the inapplicability of Subpart I to pending grievances or administrative proceedings, the section is unnecessary.

D. Current Law Does Not Impede Pursuit of the Department's Professed Goals

On August 16, 2004, the Department of Defense released a paper entitled "Potential Options for the National Security Personnel System." This paper, among other things, stated goals the Department sought to accomplish regarding labor relations, and potential options for accomplishing them. We asked the Department to explain, with citation of cases, how current law impeded pursuit of the Department's goals. On September 9, 2004, the Department responded with remarks and an annotated list of cases. We replied, showing that the cases cited by the Department did not support the Department's views, and pointing out that current law did not impede

pursuit of the Department's professed goals. We attach and incorporate that reply here, as Attachment A. The Department has never answered it.

XI. CONCLUSION

The fundamental bases for the proposed human resources management system, including the appeals process and the labor management relations system, are unacceptably flawed. Except to the extent expressly stated above, we object to the proposed rule in its entirety and do not acquiesce to the implementation of any part of it. Any individual proposal in the rule that is not expressly accepted in these comments and recommendations is rejected. We recommend that all current provisions of law be retained until such time as all of the numerous defects of the proposed rule can be cured.

During the statutorily prescribed consultation process, we will attempt to work with you to devise a human resource system that meets legitimate management needs without sacrificing important employee rights and union protections. Through a process which includes collaboration and collective bargaining, employee representatives expect to work with the Agencies to create a personnel system described in the statute. Once the system is developed and implemented, the new personnel system will be subject to the collective bargaining process.

Such a system should, at a minimum, include the following elements:

1. It should preserve all chapter 71 rights and legal standards except those directly inconsistent with the two labor relations changes expressly specified by chapter

99—bargaining above the level of unit recognition and new independent third party review of decisions.

2. It should provide for collective bargaining over the design of the pay, performance, and classification systems. Such bargaining is common in the public and private sectors, including federal components not covered by the General Schedule pay and classification system. Bargaining would in no way negatively impact the agency's ability to accomplish its mission. Instead, it would enhance the effectiveness of the system by providing greater fairness, credibility, accountability and transparency.

3. It should ensure that employees are not disadvantaged by the implementation of any new pay system. That is, employees must, at a minimum, be entitled to the same pay increases and advancement potential under a new system that is available under the General Schedule.

4. It should retain the provisions of 5 U.S.C. Chapter 43 and 5 C.F.R. Part 430, governing performance management.

5. It should provide, as does the current system, for a choice between the Merit Systems Protection Board and the negotiated grievance/arbitration procedure for serious adverse actions.

6. It should provide for impartial review of labor relations disputes by an independent entity like the Federal Labor Relations Authority.

7. It should protect, as we believe Public Law 108-13 mandates, the right of employees to organize and bargain collectively over workplace decisions that affect them. For example, employees should have the right to bargain over procedures and

appropriate arrangements related to the exercise of management's right to assign work, deploy personnel, and use technology.

To require such bargaining would not prevent management from exercising its rights. Instead, it would allow agreements to be reached over such things as fair and objective methods of assigning employees to shifts and work locations. It would allow agreements to be reached over fair and objective methods of reassigning employees on short notice to new posts of duty that may be thousands of miles from home and family. It would allow agreements to be reached over training and safety issues related to the use of new technology by employees whose jobs put their lives at risk on a daily basis.

8. It should encourage, not suppress, the pre-implementation participation of employees and their unions in mission-related decisions. Frontline employees and their unions want to help DOD accomplish its mission, and they have the expertise to do it. They should not be shut out of mission-related decisions.

9. It should, as the law requires, protect the due process rights of employees and provide them with fair treatment. Employees must have the right to a full and fair hearing of adverse actions appeals before an impartial and independent decision maker, such as an arbitrator or the MSPB. DOD should be required to prove, by the preponderance of the evidence, that adverse actions imposed against employees promote the efficiency of the service. An impartial and independent decision maker must have the authority to mitigate excessive penalties.

We hope the statutory collaboration process will be a success. We are determined, however, to protect the rights of DOD employees and will use all appropriate means to challenge the implementation of any system that does not

comport with law, needlessly reduces employee rights, or amounts to a waste of our nation's resources.

Sincerely,

Byron Charlton

On Behalf of the
United Department of Defense Workers Coalition

Attachment A
to the Recommendations on Subpart I

Union Coalition's Reply to the Department of Defense on Questions Concerning Labor Management Relations

Introduction

The Department of Defense prepared an August 16, 2004, paper entitled "Potential Options for the National Security Personnel System." The Union Coalition presented to the Department written questions regarding the portions of the Department's August 16 paper that concerned labor management relations. On September 9, 2004, the Department responded with remarks and an annotated list of cases.[3] The Coalition now replies.

Negotiation Speed

The Union Coalition asked the Department, "Have there been protracted negotiations that, due to resulting delay in change of working conditions, have caused the Department's national security mission not to be properly supported?"

The Department's September 9 paper said there have been "many negotiations where there is no agreement reached either because of different[t] perspectives or difficult relationships." This assertion, however, is not relevant to the issue of negotiation speed. Under Chapter 71, failure to reach agreement--whether due to different perspectives or difficult relationships, or other reasons--does not mean the parties must have spent a long time negotiating. Agencies can prevent negotiating sessions from becoming "protracted" simply by having a mediator declare the parties to be at impasse. The Department's September 9 response identified no instance in which the Department believed the parties to be at impasse, but a mediator refused to declare an impasse, causing negotiations to become "protracted."[4]

[3] In addition, the Department repeated assertions made in its August 16 paper and presented an annotated list of cases concerning individual employee appeals. We do not, in this paper, address individual employee appeals. We reply to the Department's September 9 paper to the extent it contains new statements concerning labor relations.

[4] Chapter 71 may not even require the agency to obtain a mediator's declaration of impasse. It may (1) allow the agency, based on belief that an impasse exists, to announce that it will implement its last proposal; and (2) require the union thereafter to seek FSIP assistance within a few days or lose the right to preserve the status quo. Whether Chapter 71 does or does not require an agency to obtain a mediator's declaration of impasse, the law clearly affords the Department effective means to reach agreement or impasse promptly.

The Department's September 9 response asserted that "facilitation" and "mediation" are factors that cause negotiations to be "protracted," but this assertion makes no sense. Under Chapter 71, resort by the agency to a mediator is required (if required at all, see n. 2) only if the agency desires to *shorten* negotiations, by having the mediator declare the parties to be at impasse. All other resort to third-party facilitation or mediation of negotiations is voluntary.

Delay During Impasse Resolution

The Department's September 9 response asserted that instances of "protracted" negotiations "typically include . . . impasse procedures." The Department, however, overlooked that under current law impasse proceedings do not preclude the Department from changing working conditions if the "necessary functioning of the agency" requires the change before the proceedings are completed. Our previous paper pointed out, and the Department's September 9 response did not dispute, that if failure to make a particular change in working conditions before completion of impasse proceedings would cause the Department's national security mission not to be properly supported, the "necessary functioning of the agency" standard would allow the Department to make the change before the FSIP resolves the impasse.

On the issue of delay due to pending impasse proceedings, the Union Coalition asked the Department three specific questions:

> Have there been cases where the Department, invoking the "necessary functioning of the agency" doctrine, has implemented a change in working conditions during pending impasse resolution proceedings, but subsequently the Department has been found guilty of an unfair labor practice because the change was determined by the FLRA not to be necessary for the functioning of the agency? . . . If so, in what published cases has this occurred?
>
> * * *
>
> Have there been instances in which the Department, due to fear of being found guilty of an unfair labor practice, has declined to implement a working condition change during pending impasse resolution proceedings even though the Department believed the change was necessary for the functioning of the agency, and harm resulted from the decision not to implement during impasse resolution?
>
> * * *
>
> Are there any published cases (involving any agency) on implementation of change during pending impasse resolution proceedings that the Department maintains were wrongly decided? If so, which ones and why?

The Department's September 9 response answered none of these questions. It did not identify a single published case or instance falling in any of the categories described by these questions. The September 9 response asserted that "as noted in [the Department's discussion of cases cited in the paper], delay of implementation directly affects how positions are filled, which is critical to the support of the DOD mission"; but none of the cases cited by the September 9 response was a case in which (a) the Department, while impasse proceedings were pending, changed the manner in which the Department filled positions; (b) the Department asserted the change was necessary for the functioning of the agency because it was critical to support a DOD mission; yet (3) the FLRA rejected the Department's assertion and found the Department guilty of an unfair labor practice.

The September 9 response did not explain, moreover, how mere change in the procedure for filling positions could be so critical that delay in making the procedural change could result in a mission not being properly supported. This would be the case only if the procedure to be changed were so ineffective as to be incapable of selecting competent persons to fill mission-critical positions. DOD's September 9 response did not assert that DOD's position-filling procedures have ever been incapable of selecting competent applicants; nor did DOD point to any case law saying that, if the Department ever were to have a position-filling procedure so flawed as to be incapable of selecting competent personnel for mission-critical positions, the Department nonetheless would have to keep using the flawed procedure while impasse proceedings were pending.

Delay During Dispute Resolution

The Department's September 9 response asserted that instances of "protracted" negotiations "typically include . . . negotiability disputes." The Department, however, did not deny the point we made in our previous paper that under Chapter 71 pending negotiability disputes "do not preclude the agency from assigning work or taking other action to accomplish a mission."

If a negotiability dispute is pursued as a negotiability appeal under 5 U.S.C. § 7117(c), the agency not only may act without waiting for resolution of the appeal but also faces no possibility of status quo ante relief if the union wins the case. Under Chapter 71, a union can prevail on an unfair labor practice charge concerning the negotiability of a proposal only if the negotiability of the proposal has been clearly established by previous FLRA decisions. Even then, status quo ante relief cannot be ordered if this relief would cause undue disruption of agency operations outweighing the benefits the relief would provide to the affected employees.

On this latter point, which the Department's September 9 paper did not dispute, we asked:

> Have there been cases where the Department has argued against status quo ante relief from the Department's legal violations, asserting that delay in dispute resolution has made status quo ante relief unduly disruptive, but

> the relief has been ordered over the Department's objection, causing, in the Department's view, harm to mission accomplishment? . . . If so, in what published cases has this occurred?
>
> * * *
>
> Are there any published cases (involving any agency) in which status quo ante relief was ordered over agency objection that delay made the relief unduly disruptive, and that the Department maintains were wrongly decided? If so, which cases and why?

The Department's September 9 response answered neither of these questions. It did not identify a single published case falling in either of the categories described by these questions.[5]

Cases Cited in the Department's September 9 Paper

The Department's September 9 paper included, in addition to the remarks we have discussed above, an annotated list of cases. Our review of the list follows.

> ***Department of the Navy, Naval Air Depot, NAS Jacksonville, Florida*, Case No. AT-CA-02-0575 (FLRA Regional Director letter, December 26, 2002); *Department of the Navy, Naval Air Station, Naval Air Depot, Jacksonville, Florida* and Local 1943, AFGE, AFL-CIO, Case No. 02 FSIP 34 (June 13, 2002) (Executive Director letter)**

The Department's September 9 paper asserted that in this case "[d]eployment of a . . . hiring and recruitment tool--RESUMIX--was delayed nearly two years . . . because of [the Department's] bargaining obligation."

The Department's assertion is incorrect. The delay was not "because of" the Department's "bargaining obligation." The delay was due to the agency's failure--during over a year and eight months of "sporadic" negotiations--either to seek a mediator's declaration of impasse or to announce that the agency would implement its last proposal.

The facts were as follows. The agency in late 1999 notified the union that the agency intended to implement RESUMIX in March 2000. The union on January 7, 2000, demanded negotiations. The agency waited until February 23, 2000, to invoke its contractual right to demand written union proposals. The union submitted its proposals eight days later. Thereafter, the agency and the union negotiated sporadically for 20 months. Until November 13, 2001, the agency failed either to seek a mediator's

[5] Regarding the latter question, the Department's September 9 paper listed some cases and indicated generally that the Department does not like their outcomes, but the Department did not say whether the Department thinks the cases were (1) wrongly decided under current law (and thus vulnerable to future overruling) or (2) correctly decided under current law (warranting, in the Department's view, statutory change).

declaration of impasse or to announce that the agency would implement RESUMIX. The case plainly reveals that the delay was due not to the agency's "bargaining obligation," but to its agreement--not required by Chapter 71--to negotiate intermittently over a long period of time.

***DOJ, INS and AFGE National Border Patrol Council*, 55 FLRA 892 (1999)**

The Department's September 9 paper asserted that in this case the FLRA found the agency had committed an unfair labor practice by implementing a new policy without bargaining its effects, "even though the policy was implemented pursuant to a congressional mandate."

The Department's assertion is incorrect. The FLRA held that the policy was *not* implemented "pursuant to a congressional mandate." Rather, the policy adopted by the agency was an exercise of agency discretion granted by Congress, where Congress had not said that discretion was to be exercised without negotiation. 55 FLRA at 898 ("[a]lthough [the statutory] provision specifically requires the Attorney General to promulgate regulations setting forth a policy on this matter, and sets forth the points that the regulations must address, there is nothing . . . that specifies the actual policy to be established, or limits the discretion of the Attorney General to implement any particular policy; . . . [r]ather, [the law] leaves the content of the policy to the discretion of the Attorney General").

The FLRA, applying settled law, rejected the agency's argument that *status quo ante* relief should not be ordered in this case. The FLRA held, "The Respondent does not provide any explanation for its assertion that such a remedy would be 'extremely disruptive,' and there is no record evidence establishing that the efficiency of the Respondent's operations would be impaired." 55 FLRA at 907. The Department's September 9 paper challenged neither the legal standard used by the FLRA in determining the appropriateness of *status quo ante* relief nor the FLRA's application of the standard in the particular case in question.

Three information cases

The Department's September 9 paper cited three cases on union access to information, saying the agency's "requirement to produce information can serve to delay bargaining" and have "a significant impact on agency resources" because it can include the obligations "to 'comb through' 90 locations in search of union requested documents" and "to spend three weeks compiling data."

The Department's September 9 paper, however, overlooked that Chapter 71 grants unions a right to agency information for the purpose of bargaining a negotiable subject only if the information is (1) "normally maintained by the agency in the regular course of business"; and (2) "reasonably available and necessary for full and proper discussion, understanding, and negotiation" of that subject. 5 U.S.C. § 7114(b)(4). The Department's September 9 paper did not assert that the information at issue in any of

the three cases was not necessary for reasonably full and proper understanding of the subject in question.

This being the case, the Department's September 9 paper identified no valid basis for complaint. Under Chapter 71, an agency that has "reasonably . . . full and proper . . . understanding" of a subject on which the agency proposes to take action suffers no delay in bargaining due to its obligation to produce to the union information that is "reasonably available and necessary for full and proper . . . understanding" of that subject. The reason is simple. If the available information is reasonably necessary for full and proper understanding of the subject, then the agency officials proposing action on that subject must, themselves, have compiled and reviewed the information in order to have full and proper understanding of what they propose to do. If they have compiled the information to review it themselves, they are in a position to turn it over to the union without delay.

For this reason, to complain that union information access rights delay negotiation of, and agency action on, a particular subject is to complain that negotiation should occur, and agency action should be taken, without either the agency or the union having a full and proper understanding of the subject in question. To so complain is absurd.

***DOD American Forces Radio and Broadcast Center and AFGE Local 2776*, 59 FLRA 759 (2004)**

The Department's September 9 paper asserted that in this case the Department was found to have committed an unfair labor practice by changing work schedules set by a collective bargaining agreement, even though the change was "due to mission requirements."

The Department's assertion is incorrect. In *Broadcast Center*, the agency presented no argument that changing work schedules was required to accomplish a mission. The agency did not claim that a mission could not be accomplished properly using the work schedules stated in the collective bargaining agreement.

The Department's September 9 paper said, "The FLRA ordered a status quo ante remedy forcing management to return to the previous work schedule." This is true, but the agency made no argument that return to the previous work schedule was an inappropriate remedy. The agency did not claim that return to the previous work schedule would cause undue disruption of agency operations outweighing the benefits that the relief would provide to the employees.

Potential obligation to bargain over de minimus changes

The Department's September 9 paper said that a pending D.C. Circuit case may decide that even de minimis changes in working conditions are subject to substantive or impact and implementation bargaining. The Department's paper, however, did not

assert that any significant consequence for the Department's national security mission, or any other agency concern, would result if the court were to so decide. Nor could such an assertion reasonably be made. Whether de minimis changes are negotiable is unimportant to the establishment of the Department's labor management relations system.

***AFGE Local 1760 and HHS, SSA*, 28 FLRA 160 (1987)**

The Department's September 9 paper noted that this case held negotiable a proposal that would require an agency to delay implementation of transfers until resolution of any grievances challenging them.

The Department's annotation is correct. That this subject is negotiable, however, does not mean the FSIP always will order agencies to adopt contract terms providing for delay of all transfers pending resolution of grievances--in all circumstances, regardless of proven deleterious mission impact. Such a contract term, moreover, if adopted, would not restrain the agency in an emergency. 5 U.S.C. § 7106(a)(2)(D). And if the agency repudiated the provision and carried out transfers immediately, despite pending grievances, status quo ante relief would be unavailable if the disruption that would be caused by this relief were to outweigh its value to the affected employees. The significance of the disruption would depend substantially on the extent to which the transfers were, and continued to be, necessary to meet mission requirements; and the value of the relief to the employees would depend substantially on the merit, or likely merit, of their grievances. The merit of the grievances, in turn, would depend on whether the transfers clearly or likely violated a statute, a government regulation, or a negotiated contract term providing pre-transfer procedures.[6] Statutes, regulations, and negotiated procedures do not significantly constrain agency discretion to transfer employees. So long as the agency met the minimal requirements of these provisions, meritorious transfer-blocking grievances could not arise. In light of these considerations, the mere negotiability of contract terms that would delay transfers until resolution of grievances is not a threat to mission accomplishment.

***Association of Civilian Technicians, Inc., Heartland Chapter and DOD, NGB, Iowa National Guard*, 56 FLRA 236 (2000)**

The Department's September 9 paper asserted that this case required the Department "to bargain over the Bureau-wide Merit Promotion Regulation" even though the regulation is intended "to ensure consistency throughout the National Guard."

The Department's assertion is incorrect. The FLRA did not decide whether a compelling need for the regulation precluded negotiation of proposals inconsistent with it, because the FLRA found the union's proposal to be consistent with the regulation. 56 FLRA at 241-242.

[6] Because filling positions from any appropriate source is a management right, 5 U.S.C. § 7106(2)(C), pre-transfer procedures negotiable under § 7106(b)(2) would be the only negotiable pre-transfer requirements. (Appropriate arrangements for transferred employees, negotiated under § 7106(b)(3), would be post-transfer agency obligations, rather than bases for stopping or rescinding transfers.)

Nonetheless, if merit promotion procedures in the Guard should be federal standards that are consistently implemented nationwide, as the Department's September 9 paper seems to indicate would be desirable, this could be accomplished by national-level bargaining. The legislation supported by the Department and enacted by Congress, however, excluded the Guard from national level bargaining. As we said in our previous paper, we support legislative repeal of this ill-advised exclusion. The Department should join us in seeking this change. In the meantime, uniform nationwide procedures could be negotiated among the Department and local bargaining units by mutual agreement to engage in coordinated bargaining.

***AFGE Local 1786 and Dept of the Navy, Marine Corps Combat Development Command*, 49 FLRA 34 (1994)**

The Department's September 9 paper said that in this case, despite "a Congressional letter," the FLRA (1) "found no Congressional mandate" for an agency regulation "limiting Exchange shopping privileges," and (2) rejected "the agency's assertion that the proposal interferes with the agency's right to determine the mission of the Exchange system."

The FLRA held the congressional letter did not establish a congressional mandate because it "was a personal letter expressing the Congressman's views as Chairman of the HASC [House Armed Services Committee] concerning the use of military exchanges and . . . there is no indication that Congress as a whole was aware of those views."

The agency, moreover, admitted that "the mission of base exchanges is to serve authorized patrons," not just the persons mentioned in the Congressman's personal letter. The FLRA held that the union's proposal did not interfere with accomplishment of the agency's mission, because the proposal merely added a new category of authorized patrons. The Department made no claim that serving the new category of patrons would directly interfere with serving the other authorized patrons. Further, the agency's own regulation authorized the Secretary "to grant deviations from the list of authorized patrons set forth in the regulation."

Thus, the agency's evidence was patently deficient to establish a congressional mandate prohibiting new categories of authorized patrons. The agency's own regulation precluded a finding that the agency's mission was to limit patrons to those expressly listed in the regulation; and the agency did not even argue that adding the category identified in the union proposal would directly interfere with accomplishment of the agency's mission.

***NAGE Local R4-26 and Dept of the Air Force, Langley Air Force Base*, 40 FLRA 118 (1991)**

The Department's September 9 paper said that in this case "[t]he FLRA held that Non-appropriated Fund (NAF) regulations regarding NAF insurance coverage and wage increases are not a bar to negotiations and, thus, subject to negotiations at each NAF bargaining unit."

In a lengthy opinion, the FLRA considered and rejected each of the agency's several arguments asserting compelling need for the regulations. The Department's September 9 paper did not state the Department's view of which of the agency's arguments were improperly rejected by the FLRA. The paper did not state whether, in the Department's view, the FLRA's decision was consistent or inconsistent with other compelling need decisions, or whether the Department believes the Authority's entire body of precedents on this subject is correct or incorrect.

If the Department will state its views specifically we will respond. So far as we can tell from the Department's September 9 paper, the Department appears to object to negotiation of any proposal that is inconsistent with an agency regulation. If that is the case, then the Department's view is nothing less than a belief that the Department should have unrestricted authority to eliminate all collective bargaining, simply by issuing a regulation on each negotiable subject. If that is not the Department's belief, we ask the Department to articulate specifically whatever criticism it has of the FLRA's precedents on compelling need, and to tell us, in particular, how those precedents preclude or impair the agency's accomplishment of its national security mission.

If the Department's concern, however, is merely that the FLRA's decision required "negotiations at each NAF bargaining unit," the Department's new legislative authority to bargain above the level of unit recognition satisfies that concern.

***AFGE Local 1501 and Dept of the Air Force, Airlift Military Command*, 38 FLRA 1515 (1991)**

The Department's September 9 paper said that in this case, "[t]he FLRA found that DOD-wide Instructions on childcare were negotiable and, thus, subject to negotiations at all DOD bargaining units having child care centers."

The Department's annotation is correct. The FLRA so held, principally because (1) the Department admitted that the applicable federal statute afforded the agency discretion as to the manner in which it would provide childcare; (2) the agency's own behavior was inconsistent with its interpretation of its regulation; and (3) the Department submitted "no evidence, empirical or otherwise, to support its assertions" that particular adverse consequences would follow if childcare were provided in a manner other than that stated in the agency's interpretation of its regulation. The Department's arguments, behavior, and (non-existent) evidence plainly failed to establish a compelling need for the Department's regulation.

Again, however, if the Department's concern is merely that the FLRA's decision required "negotiations at all DOD bargaining units having child care centers," the

Department's new legislative authority to bargain above the level of unit recognition satisfies that concern.

***Dept of Veterans Affairs, Newington Medical Center and NAGE Local R1-109*, 53 FLRA 440 (1997)**

The Department's September 9 paper said that in this case an "[e]mployee removed for absence without leave (AWOL) appealed [the] action before both [the] MSPB and [through] grievance arbitration."

The arbitrator ruled that the AWOL charge was arbitrable because it was separate from the removal. The arbitrator deemed it separate because the settlement of the MSPB removal case did not resolve the dispute over the AWOL charge. The agency filed an exception to the arbitrator's award, saying that the AWOL charge and the removal action were not separate. The FLRA agreed with the agency, but a consequence of the FLRA's agreement was that, under 5 U.S.C. § 7122(a), the FLRA lacked jurisdiction over the case and had to dismiss the agency's exception. As noted, however, the FLRA's *opinion* resolved the issue, for future cases, in favor of the agency's position. The opinion also noted that the agency could have avoided the problem if it had conditioned settlement of the MSPB case on the employee's withdrawal of the grievance.

Under 5 U.S.C. § 9902(h), the Department now has authority to establish a new employee "appeals process." This authority affords the Department opportunity to clearly define the jurisdiction of the employee appeals process and to address the question of overlapping jurisdiction with grievance arbitration. If the Department will send us its proposed draft regulation, we will review it and respond in an effort to ensure clarity and to otherwise improve the draft.

***Headquarters, Space Division, Los Angeles Air Force Station and AFGE Local 2429*, 17 FLRA 969 (1985)**

The Department's September 9 paper said that in this case the [u]nion pursued [the] same issue through ULP and arbitration procedures resulting in unnecessary costs."

This early case clarified the applicable law, and did so in accordance with the agency's position. The Department's September 9 paper did not assert the existence of continuing ambiguity or uncertainty on the issue that this case resolved, nearly twenty years ago. We are aware of no current confusion or lack of clarity in this regard. If the Department believes otherwise, we ask the Department to state specifically what cases give rise to continuing ambiguity or uncertainty, and what particular issues remain to be resolved.

***Dept of the Navy, Navy Resale Activity, Guam and AFGE Local 1689*, 40 FLRA 30 (1991).**

The Department's September 9 paper asserted that in this case the "FLRA upheld [an] arbitrator's award overturning a debarment from the installation, which did not take into account [the] agency's national security mission."

The Department's assertion is incorrect. The FLRA did not uphold the arbitrator's decision. The FLRA dismissed the agency's exception for lack of jurisdiction. The arbitrator did not fail to consider the agency's national security mission; rather, the arbitrator held "that the Agency violated its own rules and regulations when it barred the grievant permanently from the Naval Station."

***Dept of the Air Force, Grissom Air Force Base and AFGE*, 51 FLRA 7 (1995)**

The Department's September 9 paper asserted that in this case the "[s]ame set of facts led to inconsistent decisions by an arbitrator and the Federal Labor Relations Authority."

The Department's assertion is incorrect. This ULP case makes no reference to an arbitration decision involving the same set of facts.

***DOD Defense Logistics Agency and LIUNA Local 1276*, 37 FLRA 952 (1990)**

The Department's September 9 paper stated that in this case "[d]uring a meeting to discuss work procedures (which was not a formal discussion), management was found to have committed a ULP when it responded to employees' questions regarding impact of leave on performance standards."

The Department's unqualified assertion that the meeting "was not a formal discussion" is incorrect. The meeting did not start out as a formal meeting, because at the outset management merely presented instructions for implementing previously established methods and means of work; but management thereafter responded to employees' questions by announcing a general personnel policy. In doing so, management transformed the meeting into a formal meeting, under clearly established law.

Formal meetings concerning EEO claims and grievances in arbitration

Citing four cases, the Department's September 9 paper said, "Mediation of a formal EEO complaint, even when conducted by a contractor, requires management to invite the union, [which] has an independent right to attend, regardless of the employee desires or whether the employee has elected other legal representation. . . . Failure to

invite the union to the agency attorney's brief interview of unit employees in preparation for arbitrations resulted in a ULP."

These four cases were straightforward applications of the clear, mandatory text of the statute, which affords the union a right to attend "any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. § 7114(a)(2)(A). Agency contractors and attorneys clearly are representatives of the agency. The purpose of the union's presence at formal meetings involving individual complaints or grievances is not to represent the individual complainant or grievant (unless asked), but to represent the interests of the bargaining unit as a whole. Under the text of the statute, whether the individual complainant or grievant is personally represented by someone else or would prefer that the union not attend is irrelevant.

***Weingarten* rights**

Citing a case, the Department's September 9 paper said, "Management must reasonably postpone criminal, as well as administrative investigations, if the employee's selected representative is not available."

Again, the statute clearly requires this. It says the union, upon the employee's request, "shall be given opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if . . . the employee reasonably believes that the examination may result in disciplinary action against the employee." 5 U.S.C. § 7114(a)(2)(B). A criminal investigation is "an investigation"; and it certainly is reasonable for an employee to believe that if examination may result in criminal charges, it may result as well in disciplinary action.