



UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, DC 20415-1000

OFFICE OF THE DIRECTOR

March 9, 2004

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
Washington, DC 20301-1155

Dear Mr. Secretary:

On February 25, 2004, we received the proposed pay and staffing components of the National Security Personnel System (NSPS) for Office of Personnel Management (OPM) review. We were asked to complete that review and provide comments by March 9, 2004. I know how critical this effort is to you and the Department, and I want to ensure that we in OPM do our part as members of the NSPS team. My staff has no higher priority, and in an effort to provide you with as much support as we could within that limited time frame, I have attached an initial set of detailed policy and technical comments based upon our preliminary analysis of the proposal. As we continue to work together in this historic endeavor, we will be providing additional analysis, guidance, comments, and recommendations.

I trust that you can appreciate that since this is our first opportunity to, in any way, review the Department's concepts or proposal, our staff experts have identified a broad range of legal, policy, and technical issues that need to be addressed. In addition, we have a number of concerns about the impact of the proposal on other Federal agencies, particularly the Department of Homeland Security (DHS). Many of these issues have profound tactical and strategic implications for the Department of Defense (DoD), OPM, and the Administration, and I would like to call the most critical of them to your immediate attention.

First, the NSPS proposal significantly diminishes veterans' preference, contrary to the express policy of the President, and what I believe to be your intent. For example, the proposal eliminates protection for veterans affected by reduction-in-force (RIF), unless they have the most severe of service-connected disabilities. Compared to current law, it also diminishes hiring preference for even the most severely disabled veterans. Finally, the proposal eliminates every veteran's right to a pre-termination notice and hearing after one year of Federal service; instead, it treats veterans and non-veterans alike, requiring both to have at least three years of service before such rights accrue. In this latter regard, you should know that the Administration struck a similar proposal in the draft regulations initially developed for DHS because it could have been construed as diminishing the protections accorded those who have served our Nation.

Second, the NSPS proposal undermines the Administration's efforts to modernize the Federal civil service, and in particular, the Department of Homeland Security's personnel system. Thus, although the pay and performance management provisions of the proposal do offer some improvements over the law and regulations that govern most Federal

employees, they do not take full advantage of the flexibilities afforded DoD. This is in sharp contrast to the proposed DHS personnel system, and as a result, the NSPS proposal may give congressional and union critics ammunition to pressure DHS to "pull back" on the more far-reaching and innovative elements of its proposed personnel system.

For example, unlike the pay system proposed by Homeland Security, the NSPS proposal remains firmly tied to the General Schedule, a scheme we all know to be outdated and obsolete, and it fails to move the Department to greater occupational and local labor market precision in matching Federal pay to the private sector. In addition, the NSPS proposal continues to require rigid employee performance standards and lengthy improvement periods as the means for dealing with poor performers, and may even grant additional procedural protections in this regard; in comparison, the DHS system dramatically streamlines and simplifies that process, reducing the managerial burden rather than raising it.

Third, while provided to us under separate cover and not part of our attached comments, the Department's labor-management relations proposal also warrants your reconsideration. That proposal was distributed to the Department's unions on February 27, amid much controversy and criticism; it too was developed without any prior OPM involvement or union input, and the unions' negative reaction was both predictable and public. We strongly support the objective of assuring DoD's discretion to act without being burdened by collective bargaining obligations; such discretion is both needed and justified for national security reasons and is similar to that provided by the proposed DHS regulations. However, we believe the proposal may be contrary to law, insofar as it attempts to replace collective bargaining with "consultation" and eliminate collective bargaining agreements altogether. In addition, other elements of the proposal - for example, those dealing with union elections and dues withholding - lack a clear and defensible national security nexus and jeopardize those parts that do.

Finally, perhaps the most important issue raised by the NSPS proposal is a legal one, but that issue also has profound strategic and tactical implications for the future of the system itself. As you know, the law requires that NSPS be established by "regulations jointly prescribed" by the Secretary of Defense and the Director of OPM. I have maintained from the beginning that this means the joint publication of broad, proposed NSPS regulations in the *Federal Register*; the opportunity for the public to review and comment on their content; the involvement of labor unions through the formal collaboration process set forth in the law; and their final issuance as a chapter in the Code of Federal Regulations (CFR). All of these steps can be accomplished within the time frames you have established, and in the end, such an approach gives you far more flexibility and freedom of movement than the one that is currently being pursued by DoD.

Mr. Secretary, this is not a case of form over substance. Failure to execute correctly could undermine everything we are trying to achieve with NSPS. I understand that your staff believes this to be a matter of policy and not simply a legal question. I agree. The attorneys at OMB and OPM have concluded that the language in the law is clear and unambiguous on this point, and so is congressional intent. I believe the merits of the approach I have described are equally compelling. In point of fact, the issuance of broad "enabling" regulations will give you far more internal flexibility as you implement NSPS.

Once those enabling regulations are published in the CFR, you will be in a position to issue as many standardized, detailed internal NSPS implementing directives as and when you see fit, including the document you have provided us for comment – generally *without* further public comment, formal collaboration with unions, or OPM approval.

In contrast, if issued in its present form, the NSPS proposal will be as rigid and inflexible as the system we are trying to transform. Its excessive and unnecessary detail, once locked in regulation, will be extremely difficult to change. By law, each time DoD needs to modify its content in *any* substantive way, it will be required to invoke the statutory union notification and collaboration process, obtain formal OPM approval, and notify Congress. Surely this is not the result you intended; it certainly is not what we envisioned when we fought for NSPS.

So that our choices are clear in this regard, I have asked my staff to prepare, as an example, a draft set of broad enabling NSPS regulations for our consideration by the end of this week. These draft regulations will be designed to establish the parameters for far more detailed internal DoD directives governing compensation, classification, and performance management – in short, just the sort of highly detailed internal operating directives that you have provided us for comment. Once enabling regulations are issued, you would be free to make those internal directives as uniform or as flexible as you see fit; for example, to the extent that those internal directives need to be tailored to address the unique needs of a particular military department or functional community within DoD, you could do so without triggering the cumbersome procedures established by the statute.

Thus, while the law supports the approach I have advocated, I also believe that it makes the best sense from a tactical and strategic standpoint. It also offers one other important advantage. By starting with broad, enabling regulations, we are in a better position to involve and engage critical stakeholders, especially the Department's civilian employees, in a far more substantive and meaningful way. At the risk of stating the obvious, their input and "buy in" is essential to the successful implementation of NSPS, and presenting the workforce with what amounts to a fait accompli, crafted with only token employee involvement, will just serve to provoke even more resistance from those who are most crucial to its success. I certainly intend to conduct such communications and outreach to better inform OPM's input to DOD. However, I firmly believe it would be far better for DOD and OPM to conduct this process together so that the overall Administration is reaching out.

I have noted the high level of concern already expressed by congressional oversight committees and by affected stakeholders and constituent groups monitoring our progress. It is therefore vital to the Administration and our respective agencies that we develop and execute a joint strategy that maximizes the chances for successful NSPS implementation. While a great deal of emphasis has been placed on implementation deadlines, not enough attention seems to be focused on the fundamental efficacy of the proposal and its acceptance by the Congress and DoD's civilian workforce – particularly if it is your intent to have it apply to 300,000 employees all at once.

Thank you for the opportunity to comment on the NSPS pay, staffing, and labor relations proposals. I look forward to working with you and Secretary England in creating an NSPS that we can all be proud of, and whatever the outcome of the issues I have raised above, you can rest assured that I will do everything within my authority to support you and the Department. In the end, we are one team with the same goal of providing the Department with a personnel system that supports your mission to safeguard the security of our Nation.

Sincerely

A handwritten signature in black ink, appearing to read 'Kay Coles James', written in a cursive style.

Kay Coles James
Director

cc: DOD Deputy Secretary Paul Wolfowitz
Navy Secretary Gordon England
OMB Deputy Director Clay Johnson

Enclosure