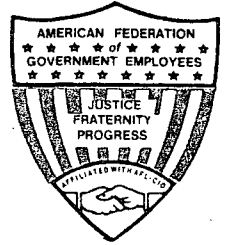


AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES  
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1 March 2005

MEMORANDUM FOR: Ms. Mary Lacey

FROM AFGE LOCAL 1367

SUBJECT: QUESTIONS OF GRAVE CONCERN AS IT PERTAINS TO NSPS

This is a flawed system for government personnel management. No matter how often they try, the leadership of DoD continue to believe that they are a component of a Fortune 500 company. Government is not driven by profit margin, they do not have qualifying metrics to measure employee contribution, and they do not produce a measurable product that can be quantified.

It seems like NSPS is leaving the question of performance, retention, promotion and pay increases entirely in the hands of the supervisor or reviewing official. In a perfect world it would work great, but in reality wouldn't this tend to promote the Good Ol' Boy way of doing business?

What precludes a superior from evaluating an employee's behavior as unacceptable when the employee has views that are contrary to the superior's views such as in a superior doing something unethical or illegal and the employee states that they should not be doing this?

Also, what precludes superiors from developing good old boy networks of employees with this system?

The system is NOT very specific about checks and balances when it comes to this area. Some of the regulations are very subjective in nature which means that if one does not agree with superiors, one can be graded down and have reduced pay and responsibility. Is this what we want?

No indication has been made of what training managers will be given to evaluate employees and what safeguards will be implemented to ensure that favoritism and cronyism do not return to the federal workforce. Managers have had the means to withhold raises, punish under-performing employees, and shape their offices under the GS system, but failed to do so.

How will the managers' skills be improved under NSPS to prove that they are capable of leading, of making difficult decisions, and doing hard work that they have shirked in the past under the GS system?

Training is a key factor for an effective program. What is the training budget going to be? Especially when budgets are being cut left and right currently.

Will it be fenced money that is required to be spent on training

What protections are in place to stop managers/supervisors from giving awards to friends and bypassing more deserving workers?

How does NSPS determine that supervisors should be an authority on pay?

Why should I have faith in managers under NSPS when they have failed to perform in the past?

With the reduction of employee ability to combat the impact cronyism and favoritism under the NSPS coupled with an utter lack of description of how MANAGEMENT will be forced to improve, I fail to see how this will improve productivity for the federal workforce. Indeed, while the current GS system encourages workers to share information and support one another knowing that it is in their best interest and assistance will have no punitive effect, the NSPS will encourage competition among employees that could actually hurt productivity. Why should anyone help a co-worker if offering help has the potential to reduce future raises?

The potential to detrimentally impact morale and productivity has not been addressed. In short, the NSPS regulations are high in detail on how they will limit employee ability to counteract poor management, but low on detail as to how managers will be trained, how standards will be expressed, and how this will make people more productive.

How will this affect the pay for those of us in intern programs? For example, the Air Force version of the DCIP (Defense Career Intern Program) and the Palace Acquire. DOD employees who entered under this program have the understanding of meeting a "target grade" before the competition for advancement begins.

Who specifically will determine the pay pool groupings? Will people from separate sections of a base be grouped together just because they are in the same series, even though there is no interaction between the 2 groups? The wording implies that the cost of living increase will also go into the pay pool. Please clarify - better to explain in plain English that the cost of living increases will not be given to all employees rather than masking it as "applicable across-the-board pay increases" in the Performance Pay Pools section. Also in that section - what grade level will the pay pool manager be?

How does NSPS equate fairness by taking away Veterans rights and seniority by implementing a management right to pick who they want to stay?

How does NSPS equate fairness by meeting budget goals on the backs of DoD employees?

For a lot of us we were not hired under these conditions of employment, does this mean that we will be "grandfathered" and the newly hired employees will fall under the NSPS?

Power corrupts most and Civil Service leaders are not immune!

Are we now military without the protections of the military?

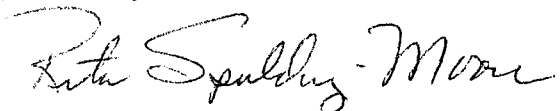
You can teach in a classroom all the information a person needs to do a job, but when it matters the most to get the job done right, experience comes out ahead every time. Experience is gained by doing. Longevity is doing something for a long time. Take away experience to make it easier to place people is affirmative action in principle and a form of discrimination.

Civilian workers can be moved overseas if the need arises. I have not volunteered to serve overseas and do not think it would be fair for the government to demand I move or serve for a war purpose unless I volunteer for it. We do not have a draft, but yet I could be drafted as such?

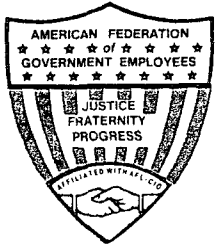
Has the development team discussed grand-fathering those in targeted positions as a viable option even if it means moving the individuals up to the next pay band?

How will this affect retirement since high 3 was determined under GS rating and step?

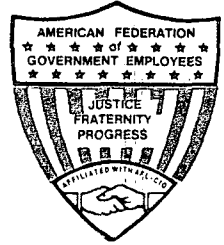
Sincerely,

A handwritten signature in cursive script that reads "Rita Spalding-Moore".

RITA SPALDING-MOORE  
AFGE LOCAL 1367, PRESIDENT



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DEPARTMENT OF DEFENSE  
PROPOSED NATIONAL SECURITY PERSONNEL SYSTEM

**Subpart A – General Provisions**

DoD says that its Guiding Principles for the proposed National Security Personnel System (NSPS) are:

- 1) To put mission first
- 2) Respect the individual
- 3) Protect rights guaranteed by law, including the statutory merit system principles
- 4) Value talent, performance, leadership, and commitment to public service
- 5) Be flexible, understandable, credible, responsive, and executable
- 6) Ensure accountability at all levels
- 7) Balance human resources system interoperability with unique mission requirements
- 8) Be competitive and cost effective

DoD says that its Key Operational Characteristics and Requirements are:

- 1) **High Performing Workforce and Management** – employees and supervisors are compensated and retained based on their performance and contribution to mission
- 2) **Agile and Responsive Workforce and Management** – workforce can be easily sized, shaped, and deployed to meet changing mission requirements
- 3) **Credible and Trusted** – system assures openness, clarity, accountability, and adherence to the public employment principles of merit and fitness
- 4) **Fiscally Sound** – aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance
- 5) **Supporting Infrastructure** – information technology support, and training and change management plans are available and funded
- 6) **Schedule** – NSPS will be operational and stable in sufficient time to evaluate it before the labor relation system sunset date

**Effective Dates** – The labor relations portion of NSPS will be imposed DoD-wide, as early as July 2005, on all employees currently covered by the labor relations provisions of title 5, Chapter 71. The other parts of NSPS will be imposed in phases, called “spirals.” The proposed regulations say that employees must also be put under the new performance management system if they are going to be covered by any other part of NSPS except labor relations. Until a category of employees is covered under one or more portions of NSPS, they continue to be covered by the applicable laws and regulations in effect before NSPS. All personnel actions affecting DoD employees will be based on the laws and regulations applicable on the effective date of the action.

**Continuing collaboration process** – The proposed NSPS includes a process to involve unions in developing the details of the system. In this process, the Secretary would decide how many union representatives would be included and whether or not they are merely commenting on draft directives or involved before the draft is actually proposed. Written comments submitted by the unions will become part of the record and will be considered before a final decision is made.

**Program Evaluation** – DoD will develop a process to brief the unions about how NSPS is doing and allow them to comment.

### **Subpart B – Classification**

**Pay Bands** – The proposed regulations do not actually provide details; they merely say that DoD will issue internal policies covering the classification system at some future date. The regulations say that DoD may establish career groups, pay schedules and pay bands that will replace the current classification system. An individual employee will be able to request that DoD or OPM reconsider the classification of his or her position. OPM's final determination will not be subject to further review or appeal.

**Conversion** – When employees are converted to the new system, DoD says they will not suffer a reduction in their rate of pay. There are no assurances in the regulations that they will be made whole, however, and given pro-rated amounts towards their next step or career ladder promotion.

### **Subpart C – Pay and Pay Administration**

DoD is introducing a new concept it calls “**National security compensation comparability.**” DoD says that it will try to ensure that, for fiscal years 2004 through 2008, the overall amount allocated for compensation of NSPS employees will not be less than the amount they would have had if they had not been converted to the NSPS. After that, DoD says it will provide a formula for calculating the overall amount to be allocated for fiscal years beyond FY 2008. The formula is supposed to ensure that employees are not disadvantaged in terms of the overall amount of pay available as a result of conversion to NSPS, while giving DoD flexibility to accommodate changes in the organization that might impact pay levels. In other words, DoD gives itself the right to lower overall payroll amounts to less than other federal agencies. DoD is speaking only of “overall” amounts of pay – it is making no promise to try to ensure that any individual employee is not disadvantaged because of conversion to NSPS.

**Setting and adjusting rate ranges** – Under NSPS, employees will be assigned to broad career groups. DoD uses the “Engineering and Scientific Career Group” as an example. Within that career group, employees will be assigned to pay schedules, for example, “Technical Support Pay Schedule.” Within the pay schedule will be bands, such as Entry or Full Performance. DoD will decide the ranges of basic pay for the pay bands, i.e., the minimum and maximum pay amounts in the band. In determining the rate ranges, DoD may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and other factors.

DoD will adjust the rate ranges as it believes necessary and it may raise the maximum and minimum rates by different amounts. All employees rated “Acceptable” or better will get a pay increase equal to the percent the minimum rate was increased. This would be instead of the annual increase GS employees receive. If the minimum rate does not increase, there is no general increase for employees in that band.

DoD may decide to increase the minimum rate in the Engineering and Scientific Professional Pay Schedule Band 2 by 5%, but only raise the Technical Support Band 2 by 2%, based on whatever factors DoD decides to apply. Professional scientists would get a 5% increase while Technicians would only get 2%. Federal employees under the GS system might be getting 3.5% that year, but DoD will not have to give that amount to NSPS employees. DoD could raise the maximum rate of both bands by 5%, but that would not affect the general pay increases. Employees rated below "acceptable" will not receive a pay increase.

**Local market supplements** – For each band, DoD may establish local market supplements that apply to employees whose official duty station is located in the given area. There may be different local market supplements for different career groups or for different occupations and pay bands within the same career group. Locality pay would no longer be given equally to all employees in the same local area. Instead, DoD will decide which jobs should be paid more and which jobs it believes are already being paid higher than similar jobs in the same local labor market. These supplements would be reviewed by DoD at least annually and may be adjusted up or down. All employees rated acceptable or better, to whom the supplement applies, will receive any pay increase that might result from that adjustment. Local market supplements will be considered basic pay for most purposes. Employees with an unacceptable rating will not receive a pay increase.

**Performance payouts** –The NSPS pay system will be a pay-for-performance system, based upon individual performance, individual contribution, organizational performance, or a combination. NSPS will use pay pools to manage, control, and distribute performance-based pay increases and bonuses. DoD will decide which parts of the organization and which jobs will be combined into each pay pool. DoD will also decide what percentage of payroll will go into each pay pool. Money for performance-based pay will come out of the existing payroll costs for such things as within-grade increases, quality step increases, promotions, etc. DoD is not putting more money into the system so performance pay will not be over and above current payrolls. Some employees can get more than under the GS system but only if some of their fellow employees get less.

The regulations provide little detail. DoD says that the performance payout will depend on the amount of money in the performance pay pool and the number of shares assigned to individual employees. At DoD's discretion, some pay pools might have proportionally less money than others, leaving smaller amounts for even the top performers. Employees will receive performance appraisal ratings as they do now. Under NSPS, that rating will not translate into an automatic number of shares, such as a level 4 rating equals 3 shares. Instead, NSPS would allow the supervisor to decide how many performance shares to give. As an example, DoD says that a level 5 rating might allow 6 to 8 shares, a level 4 rating might get 4 to 5 shares, etc. This means a supervisor could give one excellent employee 4 shares and give another excellent employee with the same rating 5 shares. The second employee will get a bigger pay increase than the first based solely on that supervisor's decision.

DoD says it will figure out how to determine how much a performance share is worth. An individual employee's performance payout will be determined by multiplying the share value by the number of shares the employee got. Remember that pay pools contain fixed amounts of money – usually, the more shares given out, the smaller the value of each share. DoD may also provide for control points within a band that limit

increases in the rate of basic pay. These are like invisible barriers that keep most employees from ever reaching the top of their band. DoD could require employees to have two years of outstanding ratings, for example, to go above a control point in their band. An increase in basic pay may not cause the rate to exceed the maximum rate or applicable control point. An increase that would raise an employee above the maximum rate of the band or above the control point could get some or all of the increase as a bonus, not added to basic pay.

Under NSPS, there will be pay pool managers and panels, charged with the overall responsibility for the ratings and distribution of the payouts in a given pay pool. Based on experience with existing personnel demonstration projects that use pay pools, the pay pool manager and panel are additional layers between your supervisor and your actual payout. Your supervisor could tell you all year long that you are doing a terrific job and can expect a meaningful increase. The pay pool manager might decide, however, that it makes more sense to give a bigger amount of the finite money in the pool to another employee or another part of the organization. You might get a smaller amount than you expected, or you might get a bonus payout rather than an increase in your basic pay.

In addition to the performance shares, managers may give some employees an "Extraordinary Pay Increase (EPI)." This increase may not place the employee above the maximum rate of his or her band. But remember, the maximum rate can increase more than the minimum and a raise in the maximum rate does not require increasing the pay of employees in that band. Raising the maximum rate could allow management officials to increase the basic pay of a few people who were at the top of the band, through an EPI, performance shares or both. Managers also can reward a team, unit, branch, or organization by giving employees additional compensation, called "Organizational Achievement Recognition."

**Treatment of developmental positions** – The "Entry and Developmental Band" is something like a career ladder leading to the full performance level of a job. In a career ladder, employees usually move ahead rapidly, often in one or two-grade increases, as they learn their job. DoD says it may issue implementing issuances regarding pay increases for developmental positions, which may require employees to meet certain standardized assessment or certification points as part of a formal training or developmental program.

**Setting pay** – Managers will be able to set the starting rate of pay anywhere in the band for newly appointed or reappointed employees, when an employee is promoted to a higher band, or reassigned voluntarily or involuntarily to a comparable band. Subject to the adverse action procedures, DoD may reduce an employee's rate of pay within a band up to 10 percent for unacceptable performance or conduct. DoD will issue implementing issuances regarding pay retention.

**Premium Pay** – DoD will issue rules regarding payments, including:

- (1) Overtime pay (excluding pay subject to the FLSA);
- (2) Compensatory time off;
- (3) Sunday, holiday, and night pay;
- (4) Annual premium pay for standby duty and administratively uncontrollable overtime;
- (5) Criminal investigator availability pay; and

(6) Hazardous duty differentials.

## **Subpart D – Performance Management**

**Setting and communicating performance expectations** – There are very few actual details. Supervisors will communicate performance expectations, prior to holding the employee accountable for them. DoD says it wants the flexibility to change and modify expectations throughout the year, but claims that supervisors will inform and involve employees in those changes. It is hard to imagine managers, many of whom fail to have any performance discussions with their employees, now communicating constant changes in expectations.

Performance expectations may include behavior; goals; objectives; competencies; contributions; work requirements, such as standard operating procedures or instructions, manuals, etc.; a particular work assignment, including expectations of quality, quantity, accuracy, timeliness, etc.; or any other means, provided that the expectation would be clear to a reasonable person. Supervisors will be expected to involve employees in the development of their performance expectations, however, the final performance expectations are at management's discretion.

**Monitoring performance and providing feedback** – Supervisors will monitor the performance and contributions of their employees and provide regular and timely feedback on their actual performance with respect to their performance expectations including one or more interim performance reviews during each appraisal period. DoD implementing issuances will set up procedures for supervisors to use to develop employee performance and address poor performance. This is no different from the current appraisal system, which is notorious for its failure to adequately document, motivate, deal with poor performers, or reward employees, with no indication of why NSPS would be different.

**Rating and rewarding performance** – The NSPS performance management system will establish a multi-level rating system. A rating of record will be used as a basis for a pay determination, determining RIF retention standing, and such other action that DoD considers appropriate. An appropriate rating official will communicate the rating and number of shares to the employee prior to payout.

**Challenging a rating** – A rating of record may be challenged only through a reconsideration procedure that DoD will establish. A payout determination will not be subject to reconsideration. In other words, there will be an internal process, not a negotiated grievance process, to challenge a performance appraisal rating. And there will be no process, not even an internal one, for challenging a performance payout. While NSPS will make the rating far more important than it is now, it will take away the right that bargaining unit employees currently have to appeal that rating to an outside arbitrator. And, although supervisors will impact employees' pay both by the rating they assign and the number of shares they choose to give, there will be no accountability and no redress for those decisions.



## **Subpart E – Staffing and Employment**

DOD and OPM will be able to jointly create new competitive or excepted appointing authorities for NSPS positions. These may include noncompetitive appointments and excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service. This will create new patronage opportunities for DOD.

The Secretary may establish probationary periods "as deemed appropriate" for employees in the competitive and excepted service covered by NSPS. No outside limits are set in the proposed regulations. Could probationary periods be set for 3 years? 5 years? 10 years? No criteria are included for determining the appropriate length of probationary periods. Since probationary periods will be set for employees and not jobs, persons appointed to the same position could serve different probationary periods. An employee appointed to a given position in one part of the country could serve a different probationary period from someone appointed somewhere else. A preference eligible, who has completed 1 year of a probationary period, would have adverse action and appeals rights.

The proposed regulations would allow DOD to establish in-service probationary periods and prescribe conditions for completing such periods as assignments, reassignments, reinstatements, details, transfers and promotions. Currently an employee moving into a supervisory position for the first time serves an additional probationary period. DOD would be able to set these additional probationary periods for any and all positions. All promotions could be considered probationary under this section. The proposed regulation does not say what happens to an employee who does not complete an in-service probationary period successfully.

## **Subpart F- Workforce Shaping**

The current OPM regulations list several specific grounds that must be present in order for an action taken against an employee to be considered a reduction in force and not an adverse action. Here, the regulation is stated very broadly. If the action is not taken against an employee based on the employee's personal conduct or performance, it will be covered by this subpart. This subpart will also apply to transfer of function.

Veterans' preference is retained in the "RIF" provisions of NSPS. Retention factors will include performance, veterans' preference, tenure of employment, length of service, and "such other factors as the Secretary considers necessary and appropriate." Conceivably, one could compete for retention based on one's "loyalty" or how well one "gets along."

Additional criteria for establishing competitive areas under NSPS include line of business, product line, and funding line. Current OPM regulations include only geographic location and organizational unit. "Competitive Group" is the NSPS term for competitive levels. OPM regulations base placement in a competitive level only on the employee's official position description (PD). The proposal allows the PD to be supplemented by "other applicable records that document the employee's actual duties and responsibilities."

Competing employees will be ranked for retention based on tenure, veterans' preference, performance rating of record, and length of service. Performance rating is now of a greater weight than seniority. Placement rights for those employees reached in a RIF are significantly reduced. Employees would only be able to displace someone who is lower-standing on the same competitive list, i.e., someone already in the same competitive group. Current OPM regulations allow employees to displace an employee who is in a lower tenure subgroup ("bumping") or someone who is in the same subgroup, but with less seniority, if the position is one that is essentially identical to a position that the released employee had held previously in the federal government ("retreating").

The Proposed regulation allows the Secretary to separate from service any employee who volunteers to be separated even though the employee is not otherwise subject to a reduction in force. For each employee who volunteers to be separated, the Secretary may retain an employee in a similar position who would otherwise be separated in a RIF. An employee who volunteers for separation in these circumstances would be considered to be involuntarily separated in a RIF, thus qualifying for severance pay under OPM regulations.

### **Subpart G –Adverse Actions**

**Definition** – “Adverse Action” means a removal, suspension, furlough for 30 days or less, reduction in pay, or reduction in pay band (or comparable reduction).

**Coverage** - In addition to the customary adverse actions, NSPS adds reference to “reduced in pay band (or comparable reduction)”. For purposes of this subpart, pay does not include locality-based comparability payments, local market supplements or other similar payments.

NSPS adds “Mandatory Removal Offenses” (MRO), a list of which DoD will publish in the future. The Secretary has the sole, exclusive, and unreviewable authority to determine what offenses will require removal as the only acceptable penalty or to mitigate that penalty..

Employees serving a probationary period will not be covered by the adverse action procedures, except for preference eligible veterans who have served one-year of a probationary period.

Adverse action procedures also will not cover terminations of temporary or term promotions that return an employee to the position promoted from *or a different position in a comparable pay band*. The decision to terminate grade retention upon conversion to NSPS, will not be subject to adverse action procedures. Non-appropriated Fund (NAF) employees are excluded from coverage in this subpart.

Under NSPS, employees subject to a proposed adverse action, have the right to a notice at least 15 days in advance of the proposed, a reply period of at least 10 days that will run concurrently with the notice period, and a notice of decision. Under NSPS, an employee's ability to reply appears to end prior to the end of the proposed notice period. Employees believed to be a threat to themselves, others, or government property can be reassigned, required to take leave, or placed in a paid, non-duty status. Notice periods

can be shortened to 5 days if the employer has reasonable cause (not defined) that the employee may have committed a crime for which imprisonment may be imposed. There are no indications that the employer would have to have any actual knowledge of a criminal investigation being conducted or actual charges being filed against the employee.

The Department may disallow a representative of the employee's choice by the mere assertion that a conflict of interest may exist, that security may be compromised, or that the employee's chosen representative cannot be released because it would cost too much or his or her duties cannot be interrupted.

## **Subpart H – Appeals**

NSPS adopts a single standard of proof, a preponderance of the evidence, for both conduct and performance actions. Currently, managers only have to show substantial evidence, a lower standard, for performance cases. RIF's or actions taken under DOD placement programs (including PPP) may not be appealed to the Merit Systems Protection Board (MSPB). Actions currently not appealable to MSPB remain so under NSPS.

The appellate procedures of MSPB are modified substantially. The appeal filing deadline is shortened from 30 to 20 days. Neither party to an appeal may unilaterally file for additional time to pursue discovery or settlement. Either party can ask MSPB to limit discovery because the information is privileged; not relevant; unreasonably cumulative or duplicative; or can be gotten somewhere else more easily. The proposed rules also limit interrogatories, depositions, and other means for gathering facts and. Employees will not be afforded interim relief or stays of actions unless ordered by the full MSPB, not just an administrative judge. Even if the full MSPB orders an employee back to work, the Department has the sole, exclusive, and unreviewable authority to place the employee in an alternative position or on excused absence pending final disposition of the case. The parties may mutually agree to use Alternative Dispute Resolution procedures.

Mitigation of MRO actions is only allowed by the Secretary. For other adverse actions, MSPB or arbitrators may only mitigate (substitute a lesser penalty) if the penalty is "wholly without justification." This is an almost impossible standard. Currently, reasonable factors, such as the length of employment and prior record of the employee, may be taken into consideration in finding whether management has applied an appropriate penalty. Under NSPS, such reasonable considerations are out the window.

The MSPB may not reverse an action by the Department due to mislabeling or characterization of the charge as long as the employee is given enough facts to respond to the charge. So if management mistakenly accuses an employee of one thing, but then claims it really meant something else, the employee is supposed to be able to figure out what management really meant, and present a good case on his or her own behalf. MSPB also may not reverse the Department's action based on the way a performance expectation is expressed, as long as the expectation would be clear to a reasonable person. Under NSPS, managers will be expected to change and modify performance expectations all during the year. DoD seems not to want them to be held

accountable for their communication of those expectations, rather, their miscommunication must be upheld by MSPB.

Attorney fees may be granted when the employee prevails, but only if the action taken against the employee was wholly without merit based on facts known to management at the time it took the action. If management says that an employee is guilty, but he or she is found innocent on appeal, it can always quibble that facts came out in the hearing that it didn't know, so DoD should not have to pay attorney fees. Once again, DoD is trying to avoid accountability for its actions. The Department will have authority to review MSPS decisions and reverse the initial decision merely by claiming impact on the Department's national security mission, erroneous interpretation of the law, governmentwide rule or regulations. Apparently, the Department also will be granted the power to determine for itself what cases constitute precedent.

### **Subpart I – Labor-Management Relations**

**Impact on existing agreements** – Any provision of a collective bargaining agreement that is inconsistent with NSPS will be unenforceable once it is covered, unless the Secretary allows a particular provision to remain in effect. He can cancel that provision at any time. The union may appeal DoD's determination that a provision is unenforceable to the National Security Labor Relations Board. The union also can request to bargain to bring into conformance parts of its bargaining agreements that are negotiable, but directly affected by the parts alleged to be unenforceable. The parties will have 60 days after the effective date of coverage to complete bargaining – if they don't reach agreement, they may use the NSPS negotiation impasse provisions.

**National Security Labor Relations Board (NSLRB)** – NSPS establishes the National Security Labor Relations Board (NSLRB), composed of at least three members (there can be more as long as it is an odd number). They will be appointed by the Secretary for terms of 3 years, although the first members will be appointed for staggered terms of 1, 2, and 3 years. The NSLRB will do many of the things currently done by the FLRA with regards to bargaining issues.

Members of the Board are supposed to be independent, distinguished citizens of the US, well known for their integrity, impartiality, and expertise in labor relations, and/or the DoD mission and/or other related national security matters, and will be able to acquire and maintain an appropriate security clearance. The Secretary will appoint two member, one to be Chair of the Board. The third member will be appointed by the Secretary from a list of three to five nominees developed in consultation with the Director of OPM. There is no provision to solicit or consider nominations from labor unions. Members may be removed by the Secretary only for inefficiency, neglect of duty, or malfeasance in office.

The Board will establish procedures for handling cases that address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. In addition, the NSLRB, not the FLRA, will resolve exceptions to arbitration awards and disputes over information requests. Decisions of the Board are final and binding. A Board decision is subject to review by a court after it has been reviewed by the FLRA.

**Federal Labor Relations Authority (FLRA)** – The FLRA will continue to handle union issues, such as determining the appropriateness of bargaining units and supervising or conducting elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit.

**Scope of Bargaining** – NSPS establishes a new management rights section, §9901.911. It spells out three categories of management rights:

Paragraph (a)(1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department.

Paragraph (a)(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; *to determine the numbers, types, pay schedules, pay bands and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work*; to assign employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission.

The rights shown in italics above, used to be things managers were allowed, but not required to bargain. NSPS would tie their hands and prohibit them from bargaining these things. It is hard to see this as contemporary and flexible.

Paragraph (a)(3) To lay off and retain employees, or to suspend; remove; reduce in pay, pay band, or grade; or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

Prior to NSPS, DoD managers could take actions within their rights, but had to bargain over the procedures they would use and arrangements they would make for employees harmed by their actions, such as single parents suddenly deployed away from their children. Under NSPS, this would change. Not only would managers not be required to bargain over the procedures they will observe in exercising their authorities in paragraphs (a)(1) and (2), they would be prohibited from bargaining over them. Management would only be allowed to consult over those procedures. The consultation process puts no pressure on managers to try to reach agreement with the union. Management is not even required to abide by any procedures it develops unilaterally. The regulations say, "Management retains the sole, exclusive and unreviewable discretion to determine the procedures that it will observe in exercising the authorities set forth in § 9901(a)(1) and (2) and to deviate from such procedures, as necessary."

DoD managers under NSPS will continue to have an obligation to bargain over procedures and appropriate arrangements when exercising their rights in paragraph (a)(3). Management will also have an obligation to bargain over appropriate arrangements for employees adversely affected by the exercise of any authority under paragraphs (a)(1) and (2), provided that the effects of such exercise is 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. "Foreseeable," "substantial," and "significant," are undefined and subject to abuse by

managers who want to evade their bargaining responsibilities. Even where managers are required to bargain over appropriate arrangements, the proposed regulations remove any duty to bargain over arrangements for the routine assignment to specific duties, shifts, or work on a regular or overtime basis. And management is required only to give notice to the union at the same time it actually makes a change or carries out an action. The proposed regulations allow but do not require managers to give any advance notice at all.

**Determination of appropriate units for labor organization representation** – The FLRA will continue to determine the appropriateness of any unit. The Authority will determine in each case whether the appropriate unit should be established on a Department, plant, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the Department, consistent with the Department's mission and organizational structure. The new rules would bar from coverage, supervisors of military members, employees engaged in all kinds of personnel work, even in a purely clerical capacity, and attorney positions.

**Representation rights and duties** – The proposed regulations weaken the so-called "Weingarten" rights for employees subject to an examination by an agency official in connection with an investigation. The employee will still have the right to request a union representative, but, the right will not apply to investigations conducted by the Offices of the Inspectors General and other independent Department or Component organizations whose mission includes the conduct of criminal investigations, such as the Army Criminal Investigation Division and the Air Force Office of Special Investigations. Note: A similar provision was removed during the DHS Meet and Confer.

The union will only have the right to be present at any formal discussion between a Department management official(s) and bargaining unit employees if the purpose of the meeting is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. This right does not apply to meetings for the purpose of discussing operational matters where any discussion of personnel policies, practices, or working conditions is a reiteration or application of existing personnel policies, practices, or working conditions; is incidental to the announced purpose of the meeting; or does not result in an announcement of or a promise to change an existing personnel policy(s), practice(s), or working condition(s). Under NSPS, a manager could call a meeting to discuss ways to better accomplish a task and exclude the union because it is strictly about operational matters. If one of the employees suggests changing the overtime roster as a way to get the job done, do we believe that the supervisor will say that such changes cannot be discussed in the meeting and either change the subject or call for a union representative?

**Standards of conduct for union representatives** – The proposed regulations say that employee representatives in the Department are subject to the same standards of conduct as any other employee, whether they are serving in their representative capacity or not. DoD rejects the current notion that only flagrant misconduct by a union representative would subject him or her to disciplinary action. This has the potential to go well beyond stopping abusive language or conduct. The standards of conduct for employees include an expectation of deference to superiors. A union representative who bangs on the table while loudly insisting, "NO!" is displaying behavior that might not

be tolerated by a subordinate. The whole idea of protected activity is threatened here. This is another provision that DHS put forward and then dropped.

**Information requests** – Under NSPS, DoD still has a duty to furnish information to an exclusive representative that is needed in grievance or appeal proceedings or in negotiations subject to similar limitations currently imposed. However, DoD managers will not have to disclose information if they believe that adequate alternative means exist for obtaining the information, or that proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without the information. Managers would just say, "You don't need that to talk to me."

**Unfair labor practices** – The unfair labor practices set out in the proposed regulations are essentially the same as those currently contained in chapter 71 with one major exception. Under NSPS, it is no longer a ULP to enforce a rule or regulation that is in conflict with an existing collective bargaining agreement. NSPS supersedes the agreements. Unfair labor practice charges must be filed within 3 months of the alleged practice, unless the Board determines good cause for late filings.

**Duty to bargain and consult** – Bargaining over an initial collective bargaining agreement or any successor agreement should be completed within 90 days, unless the parties mutually agree to continue bargaining. If there is no agreement, either party may refer the matter to the Board for resolution. At any time prior to going to the Board, either party may refer the matter to FMCS for assistance. Bargaining during the term of an existing collective bargaining agreement over a proposed change affecting bargaining unit employees' conditions of employment should be completed within 30 days. If there is no agreement, either party may refer the matter to the Board for resolution. Either party may refer the matter to FMCS for assistance at any time. Note: The supplementary material in the beginning of the regulations says, "Midterm bargaining ... must be completed within 30 days or management will be able to implement the change after notifying the union." It goes on say that either party may refer the matter to the NSLRB for impasse resolution. This appears to be an inconsistency.

Management may not bargain over any matters that are inconsistent with law or the regulations in this part, Government wide rules and regulations, Departmental implementing issuances and other Department or Component policies, regulations or similar issuances, or Executive orders. Not only will Department-wide regulations or policies be a bar to bargaining under NSPS, but even Component-wide regulations will preclude bargaining.

**Multi-unit bargaining** – DoD may require that bargaining take place at a level that involves multiple units, for example, a change affecting an entire installation. Any such negotiations will be binding on all parties included in the process and will supersede all conflicting provisions of applicable collective bargaining agreements of the labor organization(s) affected by the negotiations. These negotiations will be subject to impasse resolution by the Board. In resolving impasses, the Board will ensure that agreement provisions are consistent with regard to all similarly situated employees. The determination as to which organizations are covered under multi-unit bargaining is not subject to review by the Board. Any party may request the services of FMCS to assist with these negotiations. The unions may request multi-unit bargaining, but the Department has the sole and exclusive authority to grant the request.

Multi-unit bargaining will not be subject to ratification because, according to DoD, "...such efforts contradict the basis for such negotiations: timely, uniform application of policies."

**Collective bargaining above the level of recognition** – Negotiations can occur at the DoD or Component level with labor organization(s) above the level of exclusive recognition. The decision to negotiate at a level above the level of recognition as well as the unions involved, rests with the Secretary and will not be subject to review. Any such agreement reached in these negotiations will be binding on all subordinate bargaining units of the labor organization(s) afforded the opportunity to bargain at the level of recognition and their exclusive representatives, and DoD and its Components, without regard to levels of recognition. The agreement will supersede all conflicting provisions of other collective bargaining agreements of the labor organization(s), including collective bargaining agreements negotiated with an exclusive representative at the level of recognition. Except as provided for by the Secretary, there will be no further negotiations with the labor organizations for any purpose, including bargaining at the level of recognition.

The agreement will be subject to impasse resolution by the Board. In resolving impasses, the Board will ensure that agreement provisions are consistent with regard to all similarly situated employees. The determination as to which organizations are covered under national level bargaining is not subject to review by the Board. Labor organizations may request bargaining above the level of recognition, as appropriate. The Secretary has sole and exclusive authority to grant the labor organizations' request. The National Guard Bureau and the Army and Air Force National Guard are excluded from coverage under this section. Where National Guard employees are impacted, negotiations at the level of recognition are authorized.

These agreements will be subject to agency head review but not to ratification.

**Negotiation impasses** – If the Department and exclusive representative are unable to reach an agreement either party may submit the disputed issues to the Board for resolution. The Board may take whatever action is necessary and not inconsistent with this subpart to resolve the impasse, to include use of settlement efforts. The Board's regulations will provide for a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. Notice of any final action of the Board under this section will be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise. Nothing in this section precludes judicial review of any portion of a decision addressing a negotiability dispute or unfair labor practice charge.

**Grievance procedures** - Collective bargaining agreements will provide procedures for the settlement of grievances, including questions of arbitrability, and will be the only authorized procedure for resolving issues under its exclusive coverage. In addition to the matters historically excluded from federal sector grievance procedures such as classification, prohibited political activities, and retirement, NSPS excludes performance appraisal ratings and mandatory removal offenses from the scope of the grievance procedure. For appealable matters, except for mandatory removal offenses, an aggrieved employee may raise the matter under an applicable appellate procedure or under the negotiated grievance procedure, but not both.



**Exceptions to arbitration awards** – Will be filed with the Board. In addition to the bases contained in 5 U.S.C. 7122, exceptions may also be filed by the parties based on the arbitrator's failure to properly consider the Department's national security mission or to comply with applicable NSPS regulations and DoD issuances. The Board may take such action concerning the award as is consistent with this subpart. If no exception to an arbitrator's award is filed under paragraph during the 30-day period beginning on the date of such award, the award is final and binding. Either party will take the actions required by an arbitrator's final award. The award may include the payment of back pay.

**Official time** – These provisions remain essentially the same, although we can expect tougher negotiations and an unsympathetic Board to resolve impasses.

**Savings provisions** – This subpart does not apply to grievances or other administrative proceedings already pending on the date of coverage of this subpart. Any remedy that applies after the date of coverage under any provision of this part and that is in conflict with applicable provisions of this part is not enforceable.