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TO: Program Executive Office
National Security Personnel System
ATTN: Brad Bunn
1400 Key Boulevard, Suite B-200
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SUBJECT: COMMENTS ON PROPOSED NSPS REGULATIONS-RIN 3206-AK76/ 0790-AH82

Dear Mr. Bunn,

This is a response to the proposed Department of Defense (DOD) National Security Personnel, proposed regulations published in the Federal Register on 14 February 2005. I have been a Federal Employee since 1979, in DOD.

It is with much sadness and fear as a Federal Employee within DOD that I write this letter. It is my personal belief that this is just another plan supported by the Bush Administration to strip Federal Employees who work for DOD of their rights to due process to seek justice when it comes to unfair treatment, unfair performance appraisels, unfair labor practices and their rights to be active in the Union's of their choice, and to have Union representation. For anyone in the Bush Administration to support this initiative strikes to the very heart of patriotism and democracy and what this Country stands for and fights for in other countries around the world. This plan has nothing to do with National Security. Within DOD in 1996 and 1997 the Personnel Systems were consolidated and stove piped, supposedly for efficiency purposes. This stove pipe is dysfunctional at best, this was done on purpose, and added to the Human Resource (HR) problems in DOD. Therefore the HR system is grossly inadequate to support such radical changes. All those changes caused hiring to be slow and cumbersome, more rigid and inflexible rules were implemented, delays in disciplinary actions and appeals, and unclear guidance to supervisors about how to deal with poor performers. It is my feeling that if these stovepiped HR organizations remain in place NSPS will be a big failure. Implementation at China Lake and the Acquisition Demonstration Project clearly never spanned anywhere near the broad numbers of issues being addressed and

changed under NSPS. The fact still remains that the authority granted to DOD by Congress did not take away or waive the requirements under the Federal Labor Relations Act. (The Federal Service Labor Management Relations Statute, Chapter 71, Title 5 of the U.S. Code). In reading the fact sheet, it is clear that whoever wrote the NSPS does not have a clear understanding or working knowledge of the rights and flexibilities Management currently has and which rights they fail to exercise fairly and uniformly. Whoever wrote the NSPS does not have a clear understanding or working knowledge of the rights employees have and the rights the Unions have who represent Federal Employees under the U.S. Code. In reaction to that I have to say that the brain drain of the loss of experienced Human Resource workforce due to downsizing in DOD is the cause for this. It has also caused managements ability and effectiveness to work within the U.S. Code, due to lack of experience and training in these matters. DOD is going to spend literally trillions of dollars implementing this new system on the guinea pig approach to managing its human resources. This is appalling to say the least and just plain irresponsible. The fact is no Management Officials in DOD wants to deal with people (human resources) issues. Congress passed the Federal Labor Relations Act in 1978 to encourage collective bargaining between Federal Employees an their Supervisors. It did so after long years of turmoil and finding that such bargaining is "in the public interest", because among other things it "contributes to the effective conduct of public business and facilitates and encourages the amicable settlements of disputes between employees and their managers involving conditions of employment. The provisions of this Chapter should be interpreted in a manner consistent with the requirements of and effective and efficient Government." (5 U.S.C. Section 7101). DOD's whole proposal attempts to thwart Congress's intent to promote collective bargaining, such barriers are not "in the public interest", because these proposals hamper all realization of the benefits that such bargaining produces.

I will now address NSPS Proposed Regulations, 5 CFR Chapter XCIX and Part 9901, Proposed Rule, by section title.

The Case for Action – Why is there a belief that "important core principles" addressed in the Merit Principals, Title 5 USC Section 2301 are an inherent weakness? I believe these principals are strengths. The new NSPS proposals promote "no" relationship at all between labor and management over employee issues, and replaces it with less flexibility and total rule. NSPS is designed to promote a "servitude" atmosphere with rewards for those employees who kiss up to their supervisors. While those who fall from grace for whatever reason get nothing. The result will be controlled thought, word and deed, no new ideas, and lowered morale. This can not be in the public interest or an issue of national security. This atmosphere will not attract, skilled, talented or motivated people at all. Chapter 33 of Title 5 has to do with Reduction In Force procedures, Transfer of Function procedures, preference eligible, physical qualifications, and restoration rights for Reserves and National Guardsman when ordered to duty. These are dangerous issues to be changing and very scary for employees. What better way for employees and employee representatives to participate in developing, implementing and adjusting the Labor Relations System than what is now in place under Chapter 71, Title 5, U.S.C. We can not imagine what the U.S. Government and it's Management would do without the

checks and balances currently in place without the set procedures and the Union keeping a watchful eye on these kinds of actions.

Process – Leadership – Clearly in their own print DOD leadership admits the collaborative process they used did not include Union Leadership, to design and implement NSPS. We believe a **fatal flaw**, if any changes are to be embraced by Federal Employees. This shows DOD and OPM arrogance.

Guiding Principles and Key Performance Parameters – Nowhere do you see fair and equitable mentioned. All the Guiding Principles can be met under the current OPM rules. Parameters makes it sound like none of those things exist today, if they do not it is only because Management does not utilized them.

Working Groups – Why was there no Union Representation in these groups? Again a **fatal flaw.**

Option Development Process – We would like to see the material gathered from employees and their representatives, used by the Working Groups. We were never provided a forum to do this, so we do not think it exists. The fact that these Working Groups did not attempt to reach any consensus, tell us clearly that this is a subjective process at best. Again another **fatal flaw.**

Outreach - What is this comprehensive outreach and communication strategy, and implement down to the very last employee? What is addressed, only generalities and not specifics, there are no costs, down time for training, etc. associated with this. This will be the biggest cost to the government that we have seen since 1978.

Outreach to Employee Representatives – These meetings were a farce to say the least, the meetings were only for show. DOD did not take the 41 Unions or their comments seriously, they did not even have a draft of this regulation to review and provide comments to up until now. To my knowledge they have not modified or changed their plan at all based on verbal input the 41 Unions did give them. Please provide evidence that occurred.

Outreach to Employees – Focus group sessions and town hall meetings generated plenty of unanswered questions from employees. DOD did not take any of it back to modify or change the plan based on verbal input given to them by employees. Please provide evidence that occurred.

Classification – Subpart B – OPM currently sets classification standards by series, these are clear step by step guidances on how you get from A-Z when classifying positions. This subpart does not do that, it is general guidance. I suggest that specific step by step guidance be written and the Unions be provided the opportunity to review and collectively bargain this step by step procedure prior to implementation.

Pay and Pay Administration – Subpart C – I believe there is now a high performance culture within DOD, without the need for change. It would be interesting to see the facts on how many employees are receiving low performance ratings, or failing performance ratings under the current system since 9/11. Again pay for performance sets up the system of servitude. It will actually have the opposite affect when applied. We suggest that specific step by step guidance be written and the Unions be provided the opportunity to review and collective bargaining prior to implementation. How are you ever going to ensure equality and fairness to all employees?

Performance Management – Subpart D – Why is it a bad thing to communicate in writing through job descriptions, performance standards and elements, and to hold employees accountable to these written documents, which is what is in effect now. How else would employees be made aware what they are responsible for, do the employees become mind readers and the best mind readers get rewarded. The proposal also seems to combine performance and behavioral expectations into one. Performance and behavior have always been separate. You may have a fantastic performer in the work area, but they have what is perceived as a behavioral problem. I do not agree that the two should be linked, or used as a basis for increasing an employees pay. Or not getting a raise Chapter 43 of Title 5 does not include behavioral issues.

Staffing and Employment – Subpart E – Currently DOD has many flexibilities to recruit, shape and retain a high quality workforce. Quite often they do not utilize those flexibilities to the fullest extent. OPM has already established new programs to provide the managers with flexibilities. Please provide all the locations where these new programs have been utilized.

Workforce Shaping – Subpart F – Changing reduction in force, transfer of function etc. stated above will further lend itself to the servitude atmosphere. Another **fatal flaw, is taking away seniority. Even Congress understands what seniority means.** What do the proposed procedures actually say? This is referenced several times but we have not seen them in this document. We suggest that the specific proposed regulations be written and the Unions be provided the opportunity to review and collective bargain prior to implementation.

Adverse Actions – Subpart G –
2. Mandatory Removal Offenses – Allowing DOD to set up mandatory removal offenses is dictatorial and frightening. There are always mitigating factors in every case. Since DOD has not come up with the list yet it is very hard to talk about specifics on this issue. We propose that once they come up with the list the Unions should be provided the list and have the ability to review and collective bargain. We want also to make sure that the double standard does not apply, if the employees are to be subjected to the mandatory removals so should Management. Removals are serious and have the affect of harming employees for the rest of their Federal Careers.
3. Adverse Action Procedures – We do not see what is wrong with a 15 day advance notice for all offenses. If an employee has committed a crime for which a sentence of imprisonment maybe imposed then formal charges outside the DOD administrative

procedures would be filed, in some civil action. It appears DOD has really mixed apples and oranges in order to "wag the dog" and make people reading this to think a certain way, when it just is not true. Adverse actions procedures are an internal administrative process, not a criminal process at all.
4. Single Process and Standard for Action for Unacceptable Performance – This part only talks about unacceptable performance not misconduct. If Chapter 43 of Title 5 U.S. Code is not working the way Congress intended then obviously this is a DOD management problem to make it work. It should not require a change of law. In most performance based issues it is because Management has not communicated their expectations, or performance standards in writing to employees because the managers do not know what their employees jobs are. Management does not provide training, guidance, feedback, or counseling. These are things that are available to them now, but management does not do them. Eliminating the requirement for a formal set period for the employees to improve, just feeds into making sure none of the above occurs, under the new system. It will have the opposite affect intended.

Appeals – Subpart H – This part for all intended purposes does not say a thing about what the actual change will be when it come to "adverse actions" handled under 5 U.S. Code, Chapter 77. The definition is the same. The 5 CFR 315.806 appeal rights are the same. The only thing it does is put in an additional in house step to the process. An indication of further intentional interference to an employee seeking justice, be treated fairly and a speedy process. Why can't DOD review MSPB cases now? What is stopping them, they are published.
1. Appeals to MSPB – What are the new case handling procedures? It is very hard to comment when there is no substance to the DOD's words.
2. Department Review of Initial MSPB Administrative Judge Decisions – Why would DOD wish to put in an additional appeal procedure when basicially the MSPB decision is the end of the line, before civil court? This authority is like the fox watching the hen house. What is wrong with standards set by **Congress** as authorized to MSPB? Why does DOD believe the standards set by **Congress** to be to high?
3. Appeals of Mandatory Removal Offenses – Mandatory removal offenses do not leave any room for flexibility based on the individual circumstances or mitigating factors, and takes the flexibility away from DOD supervisors. In these cases I venture to say this will have the opposite affect. Supervisors will just not use this list of offenses.
4. MSPB Appellate Procedure Improvements – The only two changes we see in this are 1) the initial filing time for the employee to file an appeal to MSPB has been shortened from 30 days to 20 days, and 2) motions can be made by the Agency (not the appellant) to MSPB to limit information requests under discovery. These are not improvements from the employee's point of view, because they do not assist employees in their persuit of fairness, equal treatment, and effective due process. The contrary is true, these only assist the Agency.
5. Standard of Proof – No comment.
6. Affirmative Defenses – Why would DOD propose something different for discrimination cases than from strictly performance and adverse action cases? This is discriminating in and of itself.

7. Penalty Review – In the Section "Appeals Subpart H" DOD states "adverse actions" go to MSPB for decision, but this part states MSPB has no authority to reduce or modify the DOD penalty they imposed. It touches on the Arbitrators authority if a grievance is filed also. Mitigation is zero, so no one will ever get their due process or fair and equal treatment.
8. Attorney's fees – This should not change if the employee prevails in their appeals, the Agency should pay.
9. Alternative Dispute Resolution – This appears to set up other positions in the MSPB other than Administrative Law Judges (AJ), how much will this cost MSPB, who are not under DOD's budget. This could screw the process all around and force less settlements, because most MSPB AJ's work on settlement up until the hearing day itself. Forcing the Agency and employees to a decision on whether to settle does not help the process. Taking the AJ out of that process seems to create a whole other procedure within MSPB.
10. No comment.
11. No comment.
12. No comment.

Labor-Management Relations – Subpart I – How much more flexible can you get than bargaining at each location, taking into consideration the local culture, make up of the workforce, physical and infrastructure design, local community, State EPA requirements and OSHA standards, etc., like it is today. What is happening today is that collective bargaining is occurring at the lowest level, which is now designated to the Commanders and Union Locals. We believe these parties can determine their needs by working together on issues at the lowest level.
1. Purpose – These regulations do not modify provisions of 5 U.S. Code 7101 through 7135 , it castrates employees rights, union rights, and managements rights for that matter.
2. There has always been a difference between consultation and collective bargaining, most Agency representatives do not know the difference, if they don't know it now why would they realize it after NSPS implementation.
3. No comment.
4. Impact on Existing Agreements – This would wipe out totally all existing collective bargaining agreements in place today. This is definitely intended, but cloaked by the DOD words, another "wag the dog" plan.
5. No comment.
6.National Security Labor Relations Board – This is a DOD internal appeal process to replace the Federal Labor Relations Authority (FLRA) and Federal Services Impasse Panel.(FSIP), which are neutral parties. How neutral do you think a DOD Panel will be, in my opinion not neutral at all. Another fox watching the hen house group. This three member panel would have a "huge" case load. The FSIP and FLRA currently take sometimes a year or more to render decisions, due to workload. One can only hazard to guess what this panels time frames would be to render decisions. How much is this going to cost to set up this panel, staff it, budget, etc.?
7. Management Rights – What they are proposing takes away flexibility away from management to bargain over issues at their choice. Contrary to popular belief in DOD management does not always know the answers. Sometimes employees working though the Unions can help resolve problems. No advance notice, consultation, or collective

bargaining creates and promotes a hostile relationship between management and employees.

8. No comment.
9. No comment.
10. National Consultation – No comment.
11. Representation Rights and Duties – Representatives at formal discussions, is an integral part of representing employees interests. Operational matters have to be more defined. If an operational matter has an adverse impact on a bargaining unit employee it would be appropriate to invite the Union. This is like management saying the roof is caving in the on the building, over the employees heads, but that is an operational matter so any discussion on it would not include the Union. Why on earth would the Agency not want a Union to represent employees in EEO complaints? All this does is impede the employee from picking the representative of their choice, and raises costs for reimbursing attorney's fees by the Agency, instead of no charge for Union representation, if the employee prevails. We also do not understand why the Weingarten rights would not extend to investigations conducted by an Inspector General and Criminal Investigators. There is already case law on this. Nowhere in the private sector or military does a person give up their **Miranda Rights** during investigations that could lead to some adverse action on them. We believe that violates constitutional rights as a U.S. Citizen, but that will be deemed an issue of National Security. We are being treated like terrorists. The issue of taking misconduct of Union Officials out of the hands of the FLRA called "flagrant misconduct", is again the double standard. Management officials could then act anyway they want toward Union Officials, and the Union Officials would have to remain calm, and not say a word. We might agree with this if the same standard of conduct was imposed on the Agency Representatives who are delegated the authority to deal with Union Officials. The fact is Agency Representative's behavior is so bad in most cases during settlement of grievances, unfair labor practices and collective bargaining that it promotes bad behavior in Union Officials. There is no way a Union Official could tolerate that behavior from management. There is no way a Union Official can represent a bargaining unit employee without getting information from the Agency. This again ties employees hands and affects the effectiveness of the Union. Privacy Act considerations have always been covered by the FLRA practice. I like the multi-unit bargaining, but please tell us what level is above the level of exclusive recognition, what does that mean, I do not understand that at all.
12. Unfair Labor Practices – What this really means is that management will not be negotiating over adverse impacts to employees or over implementation of rules and regulations coming down from DOD. Obviously there is no way TOP DOD officials or the President of the United States could predict all adverse affects of their policies on employees. This is just another way to castrate the employees, Unions, FSIP and the FLRA and keep them from addressing employees issues.
13. Same answer as #12.
14. Multi Unit Bargaining – There are no impasse procedures set up for NSLRB so it is really hard to provide any comment.

15. Collective Bargaining Above the Level of Recognition – It is up to the Union to determine who will bargain for them. This is managements attempt to unilaterally decide for the Union who they will bargain with. This is another attempt to control impacted employees involvement and dissolve certification of bargaining units as defined by the FLRA.
16. Grievance Procedures – Again just another way for management to keep employees from filing grievances. Right now arbitrator decisions are appeal able to the FLRA, not MSPB. It is only after the FLRA makes their decision, can it be appealed to the Federal Circuit Court. We did not see anything in the Congressional authority that gave DOD rights to change issues accepted under DC Circuit Court, MSPB or the FLRA.
17. Exceptions to Arbitration Awards – The fact is most cases do not concern issues of National Security, the FLRA already has that exception in their criteria.
18. Saving Provisions – Well if it is not subject to the process, why should the remedy issued be in compliance with the provisions of this document. That makes no sense at all.

E.O. 12866 Regulatory Revisions – The costs associated with these changes, implementation, training etc are grossly underestimated and down played intentionally to get buy in, another "wag the dog", plan.

In closing this is a tremendous amount of change at one time. DOD is not prepared even administratively to handle this amount of change, neither is the workforce with trying to support the WAR ON TERRORISM. The DOD workforce is proud of the work they do, dedicated and trustworthy. They deserve to be treated with dignity and respect, and not like a second class citizen.

Thank you for the opportunity to provide comments.

Sincerely,

Deborah E. Witherspoon

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