ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

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March 16, 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301

The Honorable Dan G. Blair
Acting Director
Office of Personnel Management
1900 E St., NW
Washington, DC 20415

Re: NSPS-2005-001/RIN 3206-AK76

Dear Mr. Secretary and Mr. Blair:

We are writing to express our serious concerns about the human resources management system that has been proposed for the Department of Defense (DOD), and we would like you to comment. In addition, this letter will serve as our comments with regard to the rulemaking on the proposed regulations published in the Federal Register on February 14, 2005.

In passing the National Defense Authorization Act for Fiscal Year 2004 (P.L. 108-136), Congress intended to give DOD some personnel flexibilities to accomplish its unique mission. However, Congress also clearly stated that any new personnel system must protect fundamental employee rights, such as due process and collective bargaining. Unfortunately, the proposed regulations unnecessarily infringe on employee rights. We urge DOD and the Office of Personnel Management (OPM) to reconsider the proposed regulations and to strive for a better balance between employee rights and management's need for flexibility.

I. COLLECTIVE BARGAINING

The proposed rule would drastically alter the conduct of labor-management relations at DOD. Most significantly, the proposed regulations would severely limit the number of issues subject to collective bargaining and would drastically restrict the authority of the Federal Labor

Relations Board (FLRA) over DOD. These proposed changes are unwarranted and should be modified.

A. Issues Subject to Bargaining

In §9901.910, the proposed rule significantly limits the types of issues that would be subject to collective bargaining. We believe these changes are unjustified and should be reconsidered.

First, the Department would no longer be permitted to negotiate over "the numbers, types, pay schedules, pay bands and/or 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." The proposed rule would prohibit DOD and its components from bargaining over these issues, even at their own discretion, as is presently the case. We see no reason why the flexibility of DOD supervisors should be limited in this way.

Second, the regulations propose post-implementation bargaining over arrangements for employees adversely affected by the exercise of management rights only when the "effects of such exercise is foreseeable, substantial, and significant in terms of both impact and duration." The terms "substantial and significant" are nowhere defined in the proposed regulations. We believe they should be defined because they are otherwise subject to abuse.

B. Internal Labor Relations Board

Section 9901.907 proposes the creation of a new National Security Labor Relations Board (NSLRB) to resolve labor-management disputes. Supplementary information to the proposed rule states that the Board is needed because DOD and OPM want members with "a deep understanding of and appreciation for the unique challenges the Department faces in carrying out its national security mission."

Nowhere does the proposed rule explain why the "unique challenges" faced by the Department would preclude it from going to FLRA. Indeed, for the past quarter century, FLRA has successfully resolved complicated labor disputes at a myriad of federal agencies, including those with a national security mission. We believe that retaining FLRA's jurisdiction over DOD's personnel system is a more cost-efficient solution than creating the new NSLRB.

We are also concerned about the fairness of the decisions that would be reached by NSLRB. The Secretary of Defense, who is an interested party in labor-management disputes, would select all three members of the Board. Although the Director of OPM would consult with the Secretary to create a list from which one Board member would be selected, there is no

requirement that federal employee unions have any input into the selection of any Board member. In addition, the Board must interpret departmental regulations and policies "in a way that recognizes the critical mission of the Department and the need for flexibility." Such an overly deferential standard, combined with a membership chosen exclusively by the Secretary, would seem to guarantee that the Board would rule in the Department's favor in most, if not all, instances.

II. APPEALS

The appeals process created by this rule gives the Department broad discretion to suspend and dismiss its employees with only a modicum of due process. While we are supportive of DOD's decision to allow the Merit Systems Protection Board (MSPB) to adjudicate mandatory removal offenses (MROs), we are concerned that the regulations obligate MSPB to give deference to DOD's mission requirements when considering whether to reduce or to overturn a disciplinary action. Section 9901.107(a)(2). The proposed regulations substantially weaken MSPB's ability to overturn and to modify the Department's decisions and tip the scales in favor of DOD. We urge DOD and OPM to reconsider these proposed changes.

A. Appellate Procedures

The Department proposes significant changes to MSPB's appellate procedures. Section 9901.807,808. We support efforts to expedite the appeals process but believe these changes are one-sided and should be reconsidered.

Under the proposed rule, MSPB could not consider a request for additional time to pursue discovery by one party; both parties would have to agree to the request. Parties would be allowed to submit only one set of interrogatories, requests for production, and requests for admissions. There would be a limit of 25 interrogatories or requests for production or admissions, and each party could conduct no more than two depositions.

In theory, these changes appear to be neutral, but in practice, they disproportionately impact employees. When an employee has been suspended or dismissed, the agency typically controls all the information, including personnel records needed by the employees in order to challenge the agency's decision. Furthermore, allowing only one set of interrogatories and requests for productions or admissions might encourage the Department to provide vague or incomplete discovery responses, since an employee could not file a supplemental request or request additional time to pursue discovery.

Furthermore, employees will not be afforded interim relief or stays of actions unless ordered by the full MSPB, not just an administrative law 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 an excused absence pending final disposition of the case.

This provision gives the Department the authority to overrule an MSPB order of interim relief and, in so doing, delays relief for the employee. Under this provision, after the MSPB has issued an order granting interim relief, which requires reinstatement of an employee, and the Department places the employee on excused leave, will the employee be paid for such excused leave? The provision is unclear in this regard. Please explain.

B. Mitigation of Penalties

Under current law, MSPB is permitted to mitigate penalties (substitute a lesser penalty) in cases where an employee is removed or suspended for more than 14 days or suffers a reduction in grade or pay. Under the proposed rule (§9901.712), only the Secretary can mitigate mandatory removal offenses. For other adverse actions, MSPB or arbitrators may mitigate only if the penalty is "wholly without justification." This is an almost impossible standard to meet. Under current regulations, reasonable factors, such as the length of employment and the prior record of the employee, may be taken into consideration in determining whether management has applied an appropriate penalty.

We urge you to reconsider these proposed regulations.

C. Attorney Fees

Currently, under 5 U.S.C. §7701(g), an employee who prevails in an appeal before MSPB may recover attorney fees if such an award is "in the interest of justice." The Department proposes altering this standard to a much narrower standard: "fees are warranted in the interest of justice only when the Department engaged in a prohibited personnel practice or the Department's action was clearly without merit based upon facts known to management when the action was taken." Section 9901.807(h)(1).

The proposed rule would establish an onerous standard that virtually no litigant could meet. There are only 12 prohibited personnel practices under 5 U.S.C. §2302. Not only do these prohibited personnel practices occur infrequently, but they are extremely difficult to prove. Moreover, it is hard to imagine any employee successfully proving what exactly an agency knew when it took the personnel action. If an employee is found innocent on appeal, management could argue that facts that came out during the hearing, "were not known when management took the action."

III. MANDATORY REMOVAL OFFENSES

The Secretary of Defense, under the proposed rule, has the authority to identify a series of offenses that have a "direct and substantial adverse impact on the Department's national security mission." Though the mandatory removal offenses are not listed in the proposed rule (§9901.712), we are pleased to see that they will be identified in advance in departmental regulations, and we would urge that they go through the normal notice and comment period.

The need for mandatory removal offenses, however, is unclear in light of the fact that the Secretary already has authority under the regulations to suspend an employee without pay when he considers suspension to be in the interest of national security. After investigation and review, if the Secretary determines that the removal is necessary for national security, the determination of the Secretary is final. It is unclear why is it necessary to duplicate 5 U.S.C. §7532, which outlines the procedures for the suspension and removal of employees for the purposes of national security.

IV. PAY FOR PERFORMANCE

Employee expectations and evaluations are critical elements of this new system. Yet DOD regulations do not specify that employee expectations must be in writing, only that they are communicated. Section 9901.4059(5). Specifically, the regulations state that performance management system requirements, "specify procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance."

It is unclear how managers or employees can be held *accountable* in a fair manner for their performance, if performance expectations are not documented in writing. To the extent that performance expectations are only conveyed orally, how will disputes or misunderstandings between supervisors and employees be resolved? This provision allows for "flexible" performance standards but does not set the foundation for a pay system that is *fair and credible.* This is troublesome because an employee's pay will be directly linked to these performance expectations.

The Committee on Government Reform, Subcommittee on Federal Workforce and Agency Organization held a hearing on the Department of Homeland Security's (DHS) personnel regulations. DHS has a similar provision in its regulations, and the Comptroller General was specifically asked to comment on the value of putting employee expectations in writing. The Comptroller General was unequivocal in stating that to maintain a fair and transparent pay-for-performance system, employee expectations and competencies should be in writing.

Concern over unprecedented agency flexibility with minimum accountability is warranted. In 2003, Congress gave federal agencies the flexibility to give performance-based pay to Senior Executive Service (SES) employees. Congress stated that an employee's pay would be "based on individual performance, contribution to the agency's performance or both." In January, DOD decided to award a 2.5% pay increase to political appointees and other non-career SES members who performed at the "fully successful" level and a 2% raise to career SES members who also performed at the "fully successful" level. There is no evidence of performance being a factor in the determination that political appointees would receive larger raises than career SES personnel.

To hold managers and employees accountable and to prevent further deterioration of DOD's credibility in this regard, we urge that the final regulations specifically state that employee expectations be documented in writing.

Section 9901.922(c)(4) prohibits bargaining over the procedures for grieving a performance rating. Instead, §9901.409(g) provides for a yet-to-be determined internal "reconsideration" process that will be the "sole and exclusive method for all employees to challenge a rating of record." The provision further states that, "a payout determination will not be subject to reconsideration procedures."

This section provides no independent review of an employee's performance rating and no review of what the employee is paid in relation to his or her rating. Therefore, an employee who receives a high rating but a low payout (a minimal salary increase or bonus) has no credible way of grieving his or her determination. This, again, calls into question the transparency and accountability of this proposed regulation.

V. CONTINUING COLLABORATION AND COORDINATION

Section 9902(a) of P.L. 108-136 provides that the Secretary of Defense may, in regulations prescribed ***jointly*** with the Director of Office of Personnel Management (OPM), establish and, from time to time, adjust a human resources management system. Congress did not intend for DOD only to "advise and/or coordinate" with OPM or for OPM to contribute to the implementing directives only if they have governmentwide implications (§9901.105). The law is very clear that OPM should be a full and equal partner in the development of DOD's human resources management system. We expect that the final regulations will conform to §9902(a) of the statute.

Section 9902(f)(D) of the statue provides that the Secretary and the Director of OPM shall "develop a method for the employee representatives to participate in any further planning or development which might be necessary and give the employee representatives adequate access to

information to make the participation productive." This provision is not adequately addressed by the regulations. Is §9901.106 of the proposed regulations intended to address this statutory requirement? If yes, we would disagree. Section 9901.106 of the proposed regulations only outlines the process for development of "implementing issuances" and not for the "further planning or development" of National Security Personnel System. Please explain how you intend to adhere to §9902(f)(D) of the statute.

Collaboration is meaningless unless employee views are reflected in the final regulations. We urge you to modify the proposed rule and strive for an approach that better balances the interests of the Department and its employees and is truly fair, credible, and transparent.

Sincerely,

Henry A. Waxman
Ranking Minority Member

Danny K. Davis
Ranking Minority Member
Subcommittee on Federal Workforce
and Agency Organization

Major R. Owens

Elijah E. Cummings

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