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LOCAL 3028
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Tuesday, March 01, 2005

Program Executive Office, NSPS
Attn: Brad Bunn
1400 Key Boulevard, Suite B-200
Arlington, Virginia 22209-5144

COMMENTS ON PROPOSED NSPS REGULATIONS
PUBLISHED IN FEDERAL REGISTER ON FEBRUARY 14, 2005.

Dear Mr. Bunn:

As Mel Brooks once said, "its good to be the king." It must be nice to create a personnel system designed solely and totally for the benefit of the employer. It must be nice to get to overrule every FLRA, MSPB and court decision which didn't go your way. Decades of civil service laws enacted by Congress now disappear in "spirals" down the drain. You can pay employees what you want to pay them, without regard to the laws passed by Congress. You can promote them when you want to promote them, without regard to the laws passed by Congress. You can fire them when you want to fire them, without regard to the laws passed by Congress (and, judging by the proposed regulations, without regard to the United States Constitution either).

To trash the entire system in favor of a single-agency personnel system that can be changed whenever the agency head feels like it does not represent progress. The proposed NSPS is narrow-minded and petty. It will not have the effect of attracting and retaining a high quality workforce. You already have a high quality workforce. This new system will alienate them in droves.

COMMENTS:

Subpart B: Classification

Under this subpart, DOD would have the authority to establish a new pay system completely outside the GS and WG systems. No specifics are given. Instead, the system will be announced in an "implementing issuance" not published in the Federal Register for public comment.

DOD intends to establish "broad, occupational career groups" to replace positions and position descriptions. Accompanying this will be "pay bands" to replace pay grades and steps. The proposed regulations would provide for adjustments to pay bands to reflect local market conditions, which seems to contemplate cost-of-living increases though there is no indication as these adjustments will be determined or how often they will occur. Individual employee pay will be directly linked to performance ratings, so that two employees working next to each other on the same tasks could be paid the same wages, or different wages, from year to year. The proposed regulations would allow for other "goodies" like a "performance payout," an "extraordinary pay increase" or an "organizational achievement recognition."

The proposed regulations indicate that when an employee is reduced in pay due to a reduction in force, the employee may get some sort of pay retention but no details are provided. For a system that pretends to be so sensitive to employee morale, this is a terrible oversight. Without having to follow the grade and pay retention statutes anymore, DOD should assure its employees that if they are reduced to a lower pay band without personal fault (e.g., reassignment to a lower paying position to accommodate a disability), they will not suffer a loss in pay.

Another startling oversight is the lack of any specifics on premium pay. Like so many other fundamental aspects of the program, this is to be established in "implementing issuances" without publication in the Federal Register for public comment. What will happen to title 5 overtime? (Thank goodness Congress didn't allow DOD to repeal the overtime provisions of title 29- the FLSA). What will happen to compensatory time, Sunday pay, night pay, hazardous duty pay and holiday pay? As things now stand, DOD can abolish all these types of pay.

Subpart D: Performance Management

This subpart would eliminate 5 USC Chapter 43, with its requirements for valid performance standards and a good faith opportunity to improve before an employee is demoted or fired. Supervisors would be permitted to set performance expectations in such vague terminology as "teamwork" and "cooperation." No more than one progress review per year would be required. And performance ratings would be used by supervisors to "adjust" employee pay (presumably up or down). To top it off, performance ratings would not be grievable but could be challenged through some other procedure yet to be designed.

This represents a step backwards. In recent years, most federal agencies, including DOD came to realize that all the friction and misunderstandings caused by multiple-level performance ratings could be eliminated by a "pass/fail" system. This allows supervisors to separate the employees who should stay from those who should go, and use other tools such as performance awards and time off awards to recognize superior performance. Now its back to the personality pageant as employees grapple with supervisors over who has the best attitude or who is most appreciated in the workplace. And the stakes are even higher: basic pay and retention in a RIF are on the line. If you think this is going to contribute to a more productive workforce, well...wait and see.

Subpart F: Reductions in Force

It is difficult to understand what you are trying to accomplish with the proposed changes to the RIF regulations published by OPM at 5 CFR Part 351. The proposal is certainly not simpler or easier to administer. It does give considerably less of an advantage to veterans and disabled veterans in a RIF. It is also requires that performance ratings count for much more weight in retention standing than years of service.

Subpart G: Adverse Actions

The proposal would provide for "mandatory removal offenses" for which no reduction in the penalty would be allowed. No list is given. Instead, the proposal says that the Secretary can issue and change the list at will.

In contrast to the current law, which requires 30 days notice before an employee can be subjected to an adverse action, the new regulation would allow employees only 15 days notice, with only 10 days to submit a reply to the proposal letter.

Subpart H: Appeals

This subpart would establish a labyrinthine process for appealing adverse actions. Adverse actions would continue to be appealed to MSPB administrative judges, but the judge's decision could then be appealed to DOD, whose decision could then be appealed to MSPB headquarters, whose decision could then be appealed to the Federal Circuit. The employer therefore gets four guaranteed opportunities to have its decision upheld, as opposed to two guaranteed opportunities under current law. There is no indication as to who in DOD will review MSPB judges' decisions and the standards in this subpart would seem to allow that person or persons to disagree with the judge for almost any reason. And, throughout this whole ordeal the employee remains out of work, since "interim relief" cannot be granted until the appeal reaches MSPB headquarters.

Prompt adjudication of appeals is a worthy goal. However, there is a difference between promptness and excessive speed. Under the new regulations, MSPB judges would have only 90 days to issue a decision. Naturally, the regulations put no limit on how long the employer can take to investigate and gather evidence before proposing adverse action. Yet somehow the employee is expected to be able to complete his own investigation, complete discovery, identify and prepare all witnesses and complete his legal research in less than 90 days. As a practical matter, the employee will be allotted no more than a month for these tasks. The reason is that it usually takes 30 days for the agency to submit its appeal file to MSPB and no MSPB judge is going to allow a hearing to be held any later than one month before he has to issue a decision.

This subpart would also allow MSPB judges to issue "summary judgment," meaning a decision without a hearing. We've seen how this works at EEOC, with federal agencies bombarding mostly *pro se* complainants with legal documents they can't even understand much less reply to. Allowing a decision without a hearing is, in our opinion, unconstitutional. The Constitution assures that any public employee who can be removed only for good cause has a right to a hearing.

There is another constitutional problem in this subpart. It states that an adverse action may not be reversed based on the way the charge is labeled as long as the employee has been informed of the facts in sufficient detail to respond. The stated goal is to overrule the "Nazelrod" case. In that case, an agency charged an employee with theft. The employee admitted he took $10 from an envelope but said he put it back later. The court, unsurprisingly, said the employee was not guilty of theft if he did not intend to keep the $10. The notion that a public employer must prove what it alleges in the proposal letter is so fundamental that it is required by due process. If an employee has been charged with theft, falsification or insubordination and is not guilty of those charges, the action against him cannot be sustained. If the employer does not want to be required to prove those charges, it is free to select any other charges it likes.

The proposed regulations would also sharply narrow the grounds on which MSPB could mitigate a penalty, thus rejecting the "Douglas factors" which have been universally applied at MSPB and by arbitrators for a generation. The only basis for mitigating a penalty would be if it is "so disproportionate to the basis for the action as to be wholly without justification." The facts that the employee has 25 years of service, no prior discipline, an excellent performance record, the offense was inadvertent, the supervisor had personal animosity for him, everyone else who committed the same offense got less discipline—none of these things would justify mitigating the penalty. It is a mystery to us how it promotes the efficiency of the service for an agency to reserve the right to impose grossly unreasonable penalties on its employees.

The proposed regulations also attempt to ensure that employees who are successful in appealing adverse actions do not recover attorney's fees. The effort federal agencies devote to trying to make sure that attorney's fees are not awarded never ceases to amaze us. Federal employees are often unable to find attorneys. Attorneys represent appellants in less than half of all MSPB appeals. Moreover, the MSPB sustains agency actions over 80 percent of the time. Certainly fee awards cannot be an economic burden on the agencies. The hostility to fee awards seems to result from a belief that they are intended as a punishment to the agency. The proposed regulations confirm this, by narrowing the basis for recovering attorney's fees to those situations where the agency's action was clearly without merit based on the facts known to management at the time the action was taken. The purpose of a fee award is not to punish the agency but to encourage qualified attorneys to represent federal employees on meritorious cases. If the personnel action is unjustified, the employee should not have to bear the cost of clearing his name and his record. What the employer knew or did not know at the time it took the action, or whether it was acting out of malice or bad faith should not be the key factors in whether the employee can be reimbursed for his attorney's fees. What if the employee is simply innocent? The employer accused him of misconduct and thought its evidence and its witnesses would prove the accusation, but they didn't. It is not in the interest of justice to make that employee foot the bill for the employer's mistake. The proposed regulations would also lead to necessary, but protracted fact-finding by MSPB judges on what agency management did or did not know at the time it took the action.

Another objection to narrowing the basis for recovering attorney's fees is that it is not permitted by the law. One of the "non-waivable" sections of the law is 5 USC 5596, the

Backpay Act. This requires an award of attorney's fees if the standards established under 5 USC 7701 are met. Those standards are not as narrow as the proposed regulation, and those standards include the standards developed by the MSPB over the years in the "Allen factors."

Labor-Management Relations—Subpart I

This subpart is nothing but a wholesale assault on the concepts of collective bargaining and grievance/arbitration.

The definition of conditions of employment is modified so as to exclude determinations regarding pay. This will deprive unions of the ability to bargain over any aspect of pay and will deprive employees of the ability to grieve such fundamental matters as the denial of overtime or premium pay. Also, as noted earlier, the proposed regulations would forbid employees from grieving their performance ratings. DOD says it will come up with some other process for this in the future.

The definition of a grievance is modified so as to disallow any grievance alleging a violation of a law, unless that law was enacted for the purpose of regulating working conditions. The Privacy Act was not enacted primarily to regulate working conditions. The First Amendment was not enacted primarily to regulate working conditions. Yet, violations of those rights can have a profound affect on the working conditions of an employee. There is no reason why these violations should not be remediable in the grievance procedure.

After narrowing the grievance procedure, the proposed regulations go on to take away the employee's right to go outside the grievance procedure into court. They say that if an employee has the option to grieve any particular issue, he may not file a lawsuit on that issue. Congress obviously disagrees with the idea that federal employees should not have the same access to court as any other American citizens. That's why it amended 5 USC 7121 in 1994 to strike down exactly the same rule DOD now wants to revive. What motivation other than sheer pettiness can account for this?

The proposal would establish a new National Security Labor Relations Board (NSLRB) which would take over the functions now performed by FLRA. The only task left to FLRA would be holding representation elections. The NSLRB would decide all unfair labor practice issues and would rule on all appeals from arbitration decisions (except decisions involving adverse actions).

The management rights portion of the proposed regulations is breathtaking in its repudiation of collective bargaining. Under the proposal, management would not only retain the exclusive rights it now enjoys to make decisions without bargaining but it would also not be required to negotiate over the "impact and implementation" of most of its decisions. Put more bluntly, the agency could simply implement a decision, with no advance notice to the union and no opportunity for negotiations of any kind.

The proposed regulations contain a number of provisions about national-level bargaining. They state that there will no duty to bargain over national level issuances, such as DOD regulations or Air Force regulations. They state that DOD will decide, in

its sole discretion, when to bargain over anything at a level higher than the level of exclusive recognition.

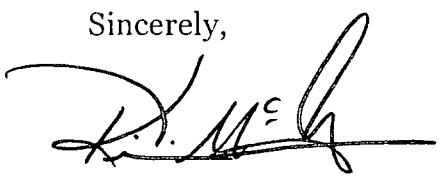
Bargaining impasses will no longer be resolved by the Federal Service Impasses Panel. Instead, the NSLRB will resolve them.

The proposed regulations take dead aim at two rights federal agencies have long resented- formal discussions and "Weingarten" meetings. A union would be entitled to attend a formal discussion only where a new personnel policy or working condition is being announced. The regulations would exclude formal meetings about EEO complaints from the coverage of formal discussions.

As far as "Weingarten" meetings are concerned, the new regulations would overrule the Supreme Court's decision that independent agencies acting on behalf of management, like the IG, must allow union representation. Perhaps the most disturbing part of DOD's explanation of its regulations appears here. DOD says that it will hold union representatives to the same standards of behavior in these meetings as any other employees. Then DOD goes further and says that its new regulations reject the "flagrant misconduct" doctrine developed over the years by the FLRA (and the NLRA as well). The message is that union representatives will have no protection for any kind of vigorous expression of their viewpoints. Since you can be disciplined for calling your supervisor a jerk in the workplace, you can now be disciplined for calling the labor relations officer a jerk when he rejects a perfectly timely grievance as untimely.

I hope that you as well as your colleagues and Secretary Rumsfeld truly take this opportunity and review these dishonest proposals for alleged necessary change. It would be refreshing if the GOP stated their true issues, such as "union busting" instead of the continued misleading doctrine need of management efficiencies.

Sincerely,



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