

2005.03.14

Program Executive Office
National Security Personnel System
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Comments on Proposed NSPS Regulations--RIN 3206-AK76/0790-A1182

The Congress gave the DoD authority to develop a new personnel system in collaboration with the various stakeholders that was to be modeled on the successful features of the "Lab - Demo" programs.

The Lab Demos use "pay" as one of many tools to experiment with ways to increase the value that their Personnel Systems add in support of their inherently high-performing employees and managers. "Pay" pre se is used more or less as it is in the much deprecated Civil Service / General Schedule system with less friction from the procedural checks and balances that were accreted over the years to counter perceived abuses. Higher performance folks, now as then, advance more rapidly than others but not so fast that they have no place to go except to the private sector once they reached the ceiling or so fast that the others who are also part of the team are discouraged.

But pay is almost incidental -- the stones in the soup -- to such other features as extended probationary periods, more flexible starting salaries and more open collaboration between groups in setting the distributions of the fixed Pay Pool amongst all of the employees. Only rarely does an employee miss a minimum Cost Of Living equivalent or negotiate a movement to a less demanding assignment at a lower pay rate because everyone is part of a family with a shared sense of purpose and everyone knows the damage that could be done to the intangible bonds if a Darwinian struggle for pay or retention displaced the collegial spirit.

The present NSPS proposal focuses on pay and streamlined firing procedures without any evidence of insight into the potential unintended consequences or any awareness of how such a model might produce a system that is less effective than the current GS/CS model by reducing DoD employment to a short-term "shape-up" for piece work with neither continuity or cooperative spirit.

Please send these NSPS re-inventors back to the drawing board or/and find a better informed group of Organizational Development Psychologists who have advanced beyond the "Scientific Management" of the last century and can build on the measurable advantages of the Lab-Demo experiments.

More detailed comments are provided in the attachment.

Docket Number NSPS- 2005-001
Regulatory Information Number (RIN) 3206-AK76 or 0790- AH82

Comments Submitted 2005.03.14

The current National Security Personnel System (NSPS) is the Civil Service / General Schedule (CS / GS) that has evolved in response to the abuses of the Civil War era “Spoils” system (use of government jobs to reward political cronies) and the “Shoddy” materiel supplied to the Operating Forces by inept or corrupt acquisition officials. The idea was that a permanent competent staff holding relatively secure government jobs could avoid the past mistakes and abuses by acting impartially with concern only for the public interest. The CS / GS model worked exactly as intended through wars major, minor, hot and cold and it has evolved successfully to accommodate new technologies and theories of warfare.

The effectiveness of the CS / GS model has been questioned at regular intervals by folks who thought that the apparent successes of the “Private Sector” revealed lessons that ought to be carried over to the Defense Establishment and perhaps to the entire Federal Government. That the stakes in Defense are most grave and intolerant of miscalculation, or that there is no Quarterly Profit and Loss statement to measure intermediate results, has not inhibited the admirers of the private sector from drawing selective and ill-justified “lessons” and attempting to apply these to the “Re-Invention” of the Defense Personnel System. The transient gains of the Internet Bubble that have bedazzled the latest set of re-inventors have largely turned to vapor and the economic damage of information-enabled job deportation is draining our National Treasure just as the latest quest for short-term gains is threatening our long-term survival both Militarily and Economically.

To determine how much improvement the existing Personnel System needs and to measure how much the specific NSPS proposal presented here might produce tangible benefits that out-weigh the potential Unintended Consequences, one would expect to find quantitative Measures-of-Effectiveness (MoEs) presented as they have been over, say, the last decade, and how they are expected to result in a Net Improvement over the next decade. Although no such MoEs are offered in the justification of the peculiar NSPS offered here, the following are commonly recognized measures of “Personnel System” performance:

- **Retention:** portion of personnel available at the beginning of the “period” that are still on the job at the end; DoD’s current civilian retention is much higher than either the Military or the Private Sector – what are the specific numbers now and what improvement is expected? Or is the perception that Retention is too high and that more turn-over of experienced specialists would improve the Defense effort? Or that too many Civil Servants are remaining on the job long enough to recognize the goofy re-invention schemes as they are disinterred at regular intervals?

- **Recruiting:** number of qualified applicants for each vacancy; DoD now out-sources many menial or “Industrial Age” jobs and so should be most concerned about the more highly

productivity. Again this is supposed to attract a better class of Knowledge Worker than does the current system.

If there are other innovations to improve Retention, Recruiting and Responsiveness, they will be revealed after the proposed regulation is approved in Implementing Issuances which will (apparently) not be subject to an extended comment process.

The presentation in the Federal Register is not conducive to understanding the specific differences between the “old” and “new” system or the implied MoEs or the expected net benefit to the Defense Effort. The first part is self-congratulatory promotion of the proposed regulation and assertion of compliance with the Congressional Intent but the space would have been better spent if it accounted for each change with a straight-forward “before - after - expected benefit - MoE now - MoE then” analysis that would let the reviewer recognize the merit of the change based on what is proposed. While there is great potential for mischief in the yet-to-be-disclosed “issuances”, there are a number of revealing and concerning ideas to be found if one labors through the tedious and rather opaque process of comparing the current United States Code(USC), the proposed “Code” and enabling legislation. A few examples include:

- ***Behavior, Attitude and Manner of Performance*** become factors in a performance rating;
- ***Mandatory Removal Offense (MRO)*** is applied to anything the SECDEF finds offensive by any employee, not just actions by Law - Enforcement Officers that are damaging to National Security; and
- ***Sole and Un-Reviewable Discretion (SURD)*** of the SECDEF applies to any personnel matter, not just issues with an immediate impact on National Security.

The overall impression is one of a rather clumsy attempt to apply Industrial Age “Scientific Management” to Information Age “Knowledge Workers” that is not informed by more enlightened contemporaneous models based on communication, collaboration and consensus building or even by the “Military Model” as it exists in the same DoD. These themes are developed in the three attachments provide here:

- **The Military Model vs Pay for Performance:** Rigid grades and predictable “Seniority” - based pay increases produce admirable results for the Uniformed part of the DoD team, why not the Civilian side?
- **Explanatory Preface to the Proposed Rule:** The promotional front matter from the Federal Register notice with highlighting and footnotes to comment on the ill - informed concepts of Organizational Development Psychology and potential Un-Intended Consequences, and
- **The Proposed §9901 Verbiage:** The actual license the re - inventors are seeking to

The Military Model vs Pay for Performance

2005.03.08a

Our Military Personnel are widely admired while our Civilian Personnel are not.

The Military folks are brought into the service with no “Military” training or experience and are provided with the opportunity to enter well defined “Career Paths” with a Rigid Grade Structure (E-1 through O-10) and fixed Rates of Pay based their Grade and Years of Service. Premium Pay is provided only for well defined, usually Hazardous, “Duty” (Combat, Flight,..). The Measures of Effectiveness (MoEs) of this system, under the All-Volunteer Service are **Retention** (the percentage of folks that stay for a full career or, at least “Re-Up” for the next “Tour”) and **Recruitment** (the Number and “Quality” of Candidates that come forward for each open position). The Cumulative Training and Experience of the Military are considered to be Investments on the behalf of the Taxpayers and the premature departure of more senior personnel is considered to be an Asset Lost and a Failure of “Management”.

The Administration regularly proposes annual across-the-board percentage increases in Military pay that are at or above the Economic “Cost of Living” Increase (Inflation) while proposing less for the Civilians. They never suggest that Individual Service People should paid more than their comrades of the same Grade and Seniority because that would be destructive to “Unit Cohesion” and “Team Work”. The Military Bosses (Commissioned and Non-Commissioned Officers) have absolute authority to give “Lawful” Orders but are expected to exhibit “Leadership” qualities which earn them the Loyalty and Respect of their subordinates by their Example, Demonstrated Commitment to the Mission and concern for the Welfare of the Personnel under their care.

Civilians are viewed as a Commodity that can be purchased on the Open Market at the Prevailing Rate (Time and Locale), whose In-House Experience and On-the-Job Relationship Development is of minimal value to the Mission. They are expected to respond to the Single Stimulus of “Pay” with no Loyalty to their Organization or Colleagues, Respect for their Bosses or Commitment to the Government Service. If the Government (Administration, Congress, current Bosses,...) builds a system of rewards that is tailored to this class of employee, that is what the Government will attract and retain – only as long as “Government” service is the Employee’s only (or most lucrative) option.

Pay-for-Performance (P4P) is based on a Mental Model that says that the Value provided by an Employee to the Government Mission is a “Function” (in the Mathematical sense) of their “Pay” and that the “Government” – rather, the other Employees who encumber “Management” or “Supervisory” Positions – knows this Function and can manipulate the distribution of a “Fixed” (Cost-Neutral) amount of Pay amongst their Employees in order to Maximize the Total Value to the Mission. This Model descends from early 20th Century “Scientific Management” or “Taylorism” (After F. W. Taylor, its most notorious expositor (ca. 1910)) and is built on the Obsolete “Industrial Age” assumption that only the Bosses knew how a “Job” should be done – in its explicit step-by-step “Manner of Performance” – and that the “Worker” was only expected complete as many repetitions as physically possible per unit time or/and to be paid only for each countable repetition (“Piece Work”). This model would never be considered for our Esteemed

Non-Linear Product goes to zero and the Workers take their services to the Highest Bidder – unless the Government is the Best they can do Pay-wise – and then the Real Knowledge Worker turns his/her Creative Urges to Destructive Competition, Subtle Resistance to the Boss's objectives and Mute Insolence – just as they would in a Military Unit that has lost its Cohesion.

[Federal Register: February 14, 2005. (Volume 70, Number 29)¹]
[Proposed Rules]
[Page 7551-7603]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
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Part II

Department of Defense

Office of Personnel Management

5 CFR Chapter XCIX and Part 9901

National Security Personnel System; Proposed Rule

[[Page 7552]]

DEPARTMENT OF DEFENSE

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Chapter XCIX and Part 9901

RIN 3206-AK76/0790-AH82

National Security Personnel System

AGENCY: Department of Defense; Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Department of Defense (DoD) and the Office of Personnel Management (OPM) are issuing proposed regulations to establish the National Security Personnel System (NSPS), a human resources management system for the DoD, as authorized by the National Defense Authorization Act (Pub. L. 108-136, November 24, 2003). NSPS governs basic pay, staffing, classification, performance management, labor relations, adverse actions, and employee appeals. NSPS aligns DoD's human resources management system with the Department's critical

¹Comments added 2005.02.15 - 2005.03.14 {FR14fe05-30XX.wpd}

without change, as DoD and OPM receive them, unless the comment contains security-sensitive material, confidential business information, or other information whose public disclosure is restricted by statute. If such material is received, we will provide a reference to that material in the version of the comment that is placed in the docket³. The system is an "anonymous access" system, which means that DoD and OPM will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. Unless a comment is submitted anonymously, the names of all commenters will be public information. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked "late," and DoD and OPM are not required to consider them in formulating a final decision.

Before acting on this proposal, DoD and OPM will consider all comments we receive on or before the closing date for comments. Comments filed late will be considered only if it is possible to do so without incurring expense or delay. Changes to this proposal may be made in light of the comments we receive.

FOR FURTHER INFORMATION CONTACT: For DoD, Bradley B. Bunn, (703) 696-4664; for OPM, Ronald P. Sanders, (202) 606-6500.

SUPPLEMENTARY INFORMATION: The Department of Defense (DoD or "the Department") and the Office of Personnel Management (OPM) are proposing to establish the National Security Personnel System (NSPS), a human resources (HR) management system for DoD under 5 U.S.C. 9902, as enacted by section 1101 of the National Defense Authorization Act (Pub. L. 108-136, November 24, 2003). The following information is intended to provide interested parties with relevant background material about (1) the establishment of the National Security Personnel System, (2) the process used to design the NSPS, (3) a description of the proposed NSPS regulations, and (4) an analysis of the costs and benefits of those proposed regulations.

The Case for Action

"* * * a future force that is defined less by size and more by mobility and swiftness, one that is easier to deploy and sustain, one that relies more heavily on stealth, precision weaponry, and

³The Department of Homeland Security (DHS) Human Resources Management System (DHS HRMS) development process was given blow - by - blow visibility through a "Docket" (DHS-2004-0001) available on an Environmental Protection Agency (EPA) Web Site <http://docket.epa.gov/edkpub/index.jsp>. Although the "Docket" is now closed, an "Archival" copy of this "Public Record" is to be found, <http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d480222312>. Unfortunately, no similar "Docket" been found to document the formulation of the DoD "NSPS" as it evolved as opposed to the "Post Facto" comments to be received here.

acquire, and maintain our Nation's defense capability. Those responsible for defense transformation--including DoD civilian employees--must anticipate the future and wherever possible help create it⁹. The Department must seek to develop new capabilities to meet tomorrow's threats as well as those of today. NSPS is a key pillar in the Department of Defense's transformation--a new way to manage its civilian workforce¹⁰. NSPS is essential to the Department's efforts to create an environment in which the total force, uniformed personnel and civilians, thinks and operates as one cohesive unit¹¹. DoD civilians are unique in government:

should be provided, especially if distinct / separable functions are imaged) – can only be provided by those same “People”, some by their thoughts & example, some by the exercise of the Duties contained in their “Position”. A side discussion is needed regarding how these arguments apply to the Military folk in the DoD who have occasion to oversee (Manage, Lead,... ?) some of the civilians but whose performance is widely admired despite their personnel management system that has rigid pay grades & specialty specifications, awards annual pay increases based on longevity and provides premium pay only for hazardous duty. {7103(a)(10), title 5, United States Code: “*Supervisor*” means an individual *employed* by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term “supervisor” includes only those individuals who devote a preponderance of their employment time to exercising such authority;... (11) “*Management Official*”. A. . . an individual *employed* by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.}

⁹The future will come despite our best efforts to thwart it; Civilians (especially) must help anticipate surprise (Technological & Operational) while the Military folk are saluting their bosses and following their orders. The “Knowledge Work” that is necessary to maintain an openness to extreme possibilities must not be inhibited by confining task-by-task performance accounting or by fears that divergent thinking might be received as a negative “Attitude”.

¹⁰Different from the existing “Civil Service / General Schedule (CS / GS)” system perhaps, but familiar to students of such past fads as Taylor’s “Scientific Management” (ca 1910), “Management by Objectives” (ca 1980) ,...if not “Kaizen” (Japanese -style communication, cooperation & continuous improvement) or Deming’s somewhat more current & enlightened models. Again it is the Civilians (and occasional Military) people that will be doing the “Managing” (or Leading), just as they do (or don’t) under the current system.

¹¹This may be the *antithesis of what is needed*. Even on the Battlefield, “Unit Cohesion” is supposed to encourage individual initiative based on an appreciation of the “Commander’s Intent”, not blind unthinking “Following Orders” . In peace time or in preparing Materiel & Employment Concepts for the next war, cohesion is the least useful approach – competing ideas must be freely examined without fear of suppression if they don’t conform to the wisdom

costly, and ultimately, risky¹⁶. Currently, pay and the movement of personnel are pegged to outdated, narrowly defined work definitions¹⁷, hiring processes are cumbersome¹⁸, high performers and low performers are paid alike¹⁹, and the labor system encourages a dispute-oriented, adversarial relationship between management and labor²⁰. These systemic

than team - building, life-time learning (individual & organizational) & innovation?

¹⁶How is the Military model with its defined specialties, assured annual & longevity raises & rigid grade structure able to overcome these objections ?

¹⁷Would the problem be solved if we had only one Position Description (“Defense Servant”)?; Did we hire too many Buggy Whip Technicians in the 20's & did their bosses fail to guide them to the training & rotational assignments that would have allowed them to develop new skills ? Did we put too many folks in “Career” positions that should have been hired as “Term” employees or had their function “Contracted Out”... Will the threat of pay-cuts or dismissal make the current bosses more attentive under the new system ?

¹⁸The Cumbersomeness arises from the procedural checks & balances that have yet to be imposed on the “New System”. The concept of “*Hire in haste, Retain at Leisure*” could have been part of this scheme but it’s not to be found. Many of the “Demonstration” programs extend the “Probationary” period to three years instead of one; any employee with supervisory duties should be able to make an “On-the-Spot” offer to any apparently qualified person without prior coordination as long as the New Hire agrees automatic dismissal before the Probationary term is over unless their qualifications & performance have been accepted by the “System” by then.

¹⁹This is an *undocumented calumny* that should not be allowed to appear in an Official Document... The current system provides a number of tools to deal with “low” performers ranging from denial of With-In Grade Increases (WIGIs) to dismissal after due process. No person could (should have been allowed to) advance to a higher grade without demonstrating, not only satisfactory performance, but notable growth in Knowledge Skills & Abilities and, for the Higher Grades, the person would be expected to “Compete” for the advanced position. If the “Supervisor” allowed a “Low Performer” to advance to (or remain in) a Higher Grade, it is they who have failed to perform to a Fully Acceptable standard and should be dealt with accordingly. None of this will change under a “New System”.

²⁰Nothing proposed here helps to build a collaborative, sharing relationship – it just gives “Management” (just another group of Employees) a bigger club to bludgeon “Labor” into submission. Jobs done by persons who could still perform effectively under such conditions should probably have been “Contracted - Out” in the first place. What is needed is a better class of “Managers” who can build teams, find consensus & bring continuous improvement to the “Process” (Japanese Management Model) but if DoD had these, the “New System” would look a lot different than this one.

challenge through development and deployment of the NSPS.

More specifically, the law provides the Department and OPM--in collaboration with employee representatives--authority to establish a flexible and contemporary system of civilian human resources management for DoD civilians. The attacks of September 11 made it clear that flexibility is not a policy preference²⁷. It is nothing less than an absolute requirement and it must become the foundation of DoD civilian human resources management. NSPS is designed to promote a performance culture in which the performance and contributions of the DoD civilian workforce are more fully recognized and rewarded²⁸. The system will offer the civilian workforce a contemporary pay banding construct, which will include performance-based pay. As the Department moves away from the General Schedule system, it will become more competitive in setting salaries and it will be able to adjust salaries based on various factors, including labor market conditions, performance, and changes in duties²⁹. The HR management system will be the foundation for a leaner, more flexible support structure³⁰ and will help attract skilled, talented,

²⁷9/11 especially showed the importance of “Thinking Outside the Box” – the first criterion for any Personnel System should be that it fosters Individual Creativity & punishes “Group Think” & compliant / complacent attitudes.

²⁸Does this include all Employees or just those “Above Average”? Will there be a bigger “Award Pool” or just a bigger slice for the “Chosen Few”(“Demos were required to be “Cost - Neutral”, Management folks will be tempted to pay their Operational and Equipment replacement costs by squeezing the costs for Civilian Compensation – the best the Civilian might expect would be a “Zero - Sum Game” where Rewards for the Few will come from the Pay Checks of the Many) ?

²⁹The “Demos” found that the most useful feature was the ability to “Match” starting offers with Industry in a timely manner. The “Demos” have shied away from “Market” rates (More for a Computer Nerd whose once highly valued skills are now a glut on the market than for a PhD Chemist whose arcane work on Marine Corrosion has no commercial demand despite saving the Navy vast sums on a recurring basis ?) and have (almost) never cut the pay of an incumbent “Employee”(who is no longer an abstract statistic) even though the commercial demand for others in that Job Category has faded. (How will “Market Conditions” be compared if DoD has fewer, less specific, Position Descriptions? Does “Labor Market Conditions” mean the same as “Locality Pay” which has been recently denied to current DoD executives? Will there be a bigger “Pay Pool” or will every Increase have a corresponding Decrease (“Zero Sum Game” – as in Poker or the Stock Market) ? Will all Employees be allowed to apply or train for the more highly valued positions? Do Employees whose pay is cut also improve in Performance (ie everyone is always working at their minimum performance)? Do they degrade in Performance faster than the others improve?)

³⁰Fewer Personnelists or fewer Civilians? To what does “Support Structure” refer ?

involving management, employees, and employee representatives, and are inviting comments from a broader community of other interested parties³⁸. DoD leadership³⁹ will ensure that supervisors and employees understand the new system and can function effectively within it.⁴⁰ The system will retain the core values of the civil service and allow employees to be paid and rewarded based on performance, innovation, and results.⁴¹ In addition, the system will provide employees with greater opportunities for career growth and mobility within the Department.

Relationship to the Department of Homeland Security

In developing the National Security Personnel System, the Department of Defense has benefited greatly from the efforts of the Department of Homeland Security (DHS). After more than 2 years of work, DHS and OPM have recently issued final regulations establishing Homeland Security's new human resources (HR) system, and the Secretary and the Director were extensively informed by the DHS experience, in terms of both process and results, in designing, developing, and drafting these proposed regulations⁴². In this regard, the DHS regulations were analyzed by staff-level working groups, as well as senior leadership, and where it made sense--that is, where it was consistent with and supported DoD's national security mission, operations, and statutory authorities--we adopted many of the concepts and approaches, and even much of the specific language set forth in the DHS regulations. For example, both regulations provide flexibilities in pay, performance management, labor relations, adverse actions, and appeals, while preserving the important core merit principles required by law. Similarly, both regulations provide essential management⁴³ flexibilities to respond to mission and operational exigencies⁴⁴. At the same time, where there are differences between DHS and DoD--in terms of scope, mission, organizational culture, and human capital challenges, as well as the statutes that authorize the respective HR

France's Director General of Armament (DGA) (put "Civilians" in their own uniforms?),...)?

³⁸Commenting in response to these FEDREG notice is the first /only "Official" channel offered to the present correspondent.

³⁹Military, Appointed ? All Civilians should be "Leaders" by Action to their subordinates & by Example to all others.

⁴⁰Did they do this with existing system? Did they try & fail ?

⁴¹The implication that a meaningful number are rewarded on any other bias under the current system is unsupported.

⁴²What are the differences ? Which are traceable to mission differences (Coast Guard vs Navy)? How deficient would a "common" system be ?

⁴³Who is "Management" as distinct from "Employees" with Supervisory Duties ?

⁴⁴Deploy clerks to Iraq?

U.S.C. 2301 and 2302, respectively). The system must ensure that employees may organize and bargain collectively, subject to the provisions of chapter 99 of title 5 and other statutory requirements. The system must include a performance management system that incorporates certain elements listed in the law⁵². Also, in establishing the system, only certain provisions of title 5 may be waived⁵³ or modified by DoD and OPM:

Chapter 31, 33, and 35 (dealing with staffing, employment, and workforce shaping, as authorized by 5 U.S.C. 9902(k));

Chapter 43 (dealing with performance appraisal systems);

Chapter 51 (dealing with General Schedule job classification);

Chapter 53 (dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees);

Subchapter V of chapter 55 (dealing with premium pay), except section 5545b (dealing with firefighter pay);

Chapter 75 (dealing with adverse actions); and

of the “New System” are actually trying to accomplish & where potential conflicts with “Merit Principles” & “Prohibited Practices” are blocked by specific safeguards.

⁵²“Meaningful Distinctions” in performance ratings has been the “Code Word” for the requirement that “Half of the Performers must be Below Average” (the Inverse “Lake - Wobegon” Effect) even though the admirers of the Military Model are silent on the impact of the narrow range of near perfect “Fitness Reports” (FITREPs, 4.9 out of 5.0 is a serious slap) – again, an explicit enumeration of the requirements cross-referenced to the proposed provision & an assessment of the potential “Unintended Consequences” should be a prerequisite to approval of any “New Plan”. [MR England (Pentagon WebCast (op.cit..)) claimed that all would be expected to be able to perform at higher levels under the “New System” but rejected the notation that all would be eligible for an appropriate share of the “Pay Pool” – ie raises would go only to the High Performers under a forced Distribution or Ranking Scheme.]

⁵³The risk that “streamlined” appeals & new emphasis on “*Attitude*” will be used to stifle “Creative Dissent” needs to be weighed against the putative gains in “efficiency” & “responsiveness”. Participation of the “Knowledge Workers” at all levels in the debate about future “Policy”, Acquisition Priorities & Methods, &c is already not as Free & Open as it should be under the current system & the quest for lock-step, unquestioning (the Military Model?) obedience to “Management” may be more costly than the procedural friction that is to be eliminated. Like “Democracy”, the current “CS / GS” is the worst possible model – except for all others....

Arbitrary, capricious, an abuse of discretion⁵⁸, or otherwise not in accordance with law;
Obtained without procedures required by law, rule or regulation having been followed; or

Unsupported by substantial evidence. Subsection (k) of section 9902 provides that, in establishing and implementing the NSPS under subsection (a), DoD and OPM are not limited by any provision of title 5 or implementing regulations relating to—

The methods of establishing qualification requirements for, recruitment for, and appointments to positions;

The methods of assigning, reassigning, detailing, transferring, or promoting employees⁵⁹; and

The methods of reducing overall agency staff and grade levels, except that performance, veterans' preference, tenure of employment, length of service, and such other factors as the Secretary considers necessary and appropriate must be considered in decisions to realign or reorganize the Department's workforce.

Thus, subsection (k) authorizes the modification of chapters 31, 33, and 35 of title 5, U.S. Code (dealing with staffing, employment, and workforce shaping). However, in implementing subsection (k), DoD must comply with veterans' preference requirements in 5 U.S.C. 2302(b)(11).

Subsection (m) provides a separate authority (independent of subsection (a) and notwithstanding subsection (d)) for the Secretary of Defense and the Director of OPM to establish a DoD labor relations system. Subsection (m) establishes collaboration requirements to give employee representatives the opportunity to participate in developing, implementing, and adjusting the labor relations system⁶⁰. Subsection (m) provides authority to modify chapter 71. By law, the subsection (m) authority may not be used to expand the scope of bargaining. Also, by law, the DoD labor relations system supersedes all collective bargaining agreements for covered DoD bargaining units, except as otherwise determined by the Secretary. Finally, the law provides that the DoD labor relations system established under subsection (m) will expire 6 years after the date of enactment (i.e., November 24, 2009), unless extended by statute⁶¹. If subsection (m) expires, the provisions of chapter 71 of title 5, U.S. Code, would again apply. Subsections (i) and (j) in

⁵⁸Any action based on an Employee's "*Attitude*" would seem automatically to fit this category.

⁵⁹ie, these can be Arbitrary, Capricious, an Abuse of Discretion &c.

⁶⁰Collaboration need not result in something acceptable to the Employees or their "Representatives"

⁶¹Should the NSPS also revert back to the CS / GS model if there is no measurable improvement in quantitative results (Retention, Morale, ...) at the end of the same fixed period (Sunset?)?

and full implementation of NSPS⁶⁶. The PEO provides direction to and oversight of the Component program managers who[[Page 7555]]are dual-hatted under their parent Component and the PEO.

At OPM, the Director designated the Senior Advisor on the Department of Defense to lead agency activities in the joint development of the NSPS. The Director received frequent and regular briefings on the progress of NSPS and on the status of key policy options across the spectrum of authorities granted in the NSPS statute. Subsequently, in periodic reviews the Director exercised policy options, thereby providing guidance to the OPM team. Policy and regulatory development for NSPS are specifically vested in the Division for Strategic Human Resources Policy, and OPM's work teams and leadership cadres⁶⁷ were drawn largely from this Division. In addition, a Senior Level Review Group reviewed NSPS decision documents⁶⁸ to ensure consistency with the Director's priorities.⁶⁹

An integrated executive management team composed of senior DoD and OPM leaders⁷⁰ provides overall policy and strategic advice to the PEO and serves as staff to the Senior Executive. The PEO meets with and consults with this team, the Overarching Integrated Product Team (OIPT), 8 to 10 times a month. The Senior Executive convenes meetings with the PEO and OIPT at least twice a month to monitor and direct the process⁷¹.

Guiding Principles and Key Performance Parameters

In setting up the process for the design of the system, senior leadership⁷² adopted a set of Guiding Principles as a compass to direct efforts throughout all phases of NSPS development. They

⁶⁶Is this information included to demonstrate the appropriateness of the Final Solution to the Human Resources Development task or to excuse the Mechanistic, Demotivational, Operationally Unsuitable outcome ?

⁶⁷Who did they lead – each other ?

⁶⁸Are these “Decision Documents” part of the Public Record ?

⁶⁹Which are ?

⁷⁰Personnel perhaps,...

⁷¹Present Tense ? – Design effort should have been complete before it is published in the FEDREG ?

⁷²Presumptuous, arrogant,... Responsible Officials, Assigned Employees,... if they have to tell everyone that they're “Leaders”, then they're probably not....

Agile and Responsive: Workforce can be easily sized, shaped, and deployed⁸⁰ to meet changing mission requirements;

Credible and Trusted: System assures openness, clarity, accountability and merit principles⁸¹;

Fiscally Sound: Aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance, and managers will have flexibility to manage to budget⁸²;

Supporting Infrastructure: Information technology support and training and change management plans are available and funded⁸³; and

Schedule: NSPS will be operational and demonstrate success⁸⁴ prior to November 2009.

Working Groups

In July 2004, the PEO established Working Groups to begin the NSPS design process. Over 120 employees representing the Military Departments (Army, Navy, Air Force), the other DoD Components, and OPM began the process of identifying and developing options and alternatives

⁸⁰Is the intent to ship Civilians to Battle Field ? Will they be given pre-employment physicals, Basic Training & regular rotation to the Front to ensure that they don't become a liability in the Field?

⁸¹This would be measured by the trust & acceptance by those below the exclusive, highly rewarded "Leader"- grade folks – not awfully likely the way it's been created by fait & wielded as a tool to flog that half of the total under performers who happen to fall below the average.

⁸²"Managers" are the same Civilians that will be operated by this "System" – if rewards become subject to Budgetary Exigencies, the Pay - Out will become a "Zero - Sum Game" (at best) & the "Performance" of the Under Recognized Half will drop faster than the Over Recognized Leader - Manager - Hero Class can make up for the loss.

⁸³Did anyone think of trying the Training & Change Management thing before changing the Rules... We'll never know whether the "New System" or the better trained employees brought about the Improvement (Positive or Negative). Using "Spiral One" and the Rest as a "Test Sample" and "Control" with actual Measures of Effectiveness (MoE) would verify the Operational Effectiveness of the "New" System (or not).

⁸⁴Whether it is an actual, objectively measured, "Success" or not.... What are the MoEs in the TEMP ?? Is there a path back to the "Old System" if there are (inevitable) "Unintended Consequences"? Will there be a "Sunset" or "Renewal" date specified ?

resulting product was a set of options that covered a broad range of variations⁹¹ on the six areas of focus. Each option was evaluated against the Guiding Principles and Key Performance Parameters (KPPs).

To ensure that the options reflected the wide range of views and concerns expressed by various entities, the NSPS Working Groups did not attempt to reach consensus regarding the merits of the options. Consequently, none of the options necessarily represented a consensus view of the Working Groups. Some of the options integrate approaches to developing new HR systems across two or more of the six subject matter areas under consideration. This is especially true of the compensation architecture and pay-for-performance options, which were intended to illustrate how various classification, compensation, and performance system elements might work in combination. The performance and compensation/classification options also tended to cluster around several distinct themes, such as "function/occupation-focused," "performance-focused," and "contribution/mission-focused." The initial draft options were reviewed by the PEO and Senior Advisory Group (SAG) to capture feedback prior to finalizing them for submission to the Overarching Integrated Product Team (OIPT) for review⁹².

Outreach

A comprehensive outreach and communications strategy is essential for designing and implementing a new HR system. Outreach facilitates employee awareness and understanding of NSPS⁹³; [[Page 7556]] it's the primary strategy for sharing the NSPS vision⁹⁴. In April 2004, the PEO developed and implemented a communications strategy. The objectives of DoD's communications strategy are to (1) demonstrate the rationale for and benefits of NSPS⁹⁵; (2) demonstrate openness and transparency in the design⁹⁶ and process of converting to NSPS; (3) express DoD's commitment to ensuring NSPS is applied fairly and equitably; and (4) address potential criticism of NSPS.

⁹¹Where is this "Documented" ? Was the "Status Quo" (CS / GS) included as a Baseline ? Where the unique "Gains" expected of the NSPS separated from the Baseline by more than the Statistical Uncertainty?

⁹²Is there a Public Record of who these folks were? Were all Government Employees (exempt from FACA)?

⁹³Is this instead of "Collaboration, Participation" & actual "Enrollment" or a precursor to such.

⁹⁴Hype... when does the collaboration begin ?

⁹⁵Promoting the answer is not the same as Collaboration & Participation.

⁹⁶Putting the "Process" in the Public Record (as did the DHS "Docket" ?) would be a first step to "Openness".

In keeping with DoD's commitment to provide employees and managers an opportunity to participate in the development of NSPS, the PEO sponsored a number of Focus Group sessions and town hall meetings at various sites across DoD. Focus Group sessions began in mid-July 2004, and continued for approximately 3 weeks. A total of 106 focus groups were held throughout DoD, including overseas locations. Separate focus groups were held for employees, civilian and military supervisors, and managers and practitioners from HR, legal and EEO communities. Bargaining unit employees and union leaders were invited to participate. Each focus group was conducted by a trained facilitator. For the major system design elements, focus group participants were asked what they thought worked well in the current HR systems and what they thought should be changed. Over 10,000 comments, ideas and suggestions received¹⁰¹ during the Focus Group sessions were summarized and provided to NSPS Working Groups for use in developing options for the labor relations, appeals, adverse actions, and human resources design elements of NSPS.

In addition, town hall meetings were held in DoD facilities around the world during the summer of 2004, providing an opportunity to communicate with the workforce, provide the status of the design and development of NSPS, and solicit thoughts and ideas¹⁰². The NSPS Senior Executive, Secretary Gordon England, conducted the first town hall meeting at the Pentagon on July 7, 2004. The format for town hall meetings included an introductory presentation by a senior leader followed by a question and answer session where anyone in the audience was free to ask a question or make a comment. Some of the town hall meetings were broadcast live, as well as videotaped and rebroadcast on military television channels and Web sites to facilitate the widest possible dissemination.¹⁰³

The focus group sessions and town hall meetings, as well as the Working Groups and union consultation sessions, underscore the Department's commitment to ensuring an open, transparent design process. The sessions assured that civilian employees, managers, supervisors, union leadership, and other key stakeholders were involved in the design and implementation of NSPS and had ample opportunity to provide input¹⁰⁴.

Outreach to Other Stakeholders

In addition to reaching out to DoD employees and labor organizations, DoD and OPM met with

¹⁰¹Where is the Public Record available ??

¹⁰²How were the "Invitations" distributed ?

¹⁰³Is there a currently accessible "Archive" with the full "Two - Way" discussion?

¹⁰⁴Which, if any, of the Initial Features were modified in response to comments, suggestions, concerns received from these fora ? Who determined what is "Ample" ?

being waived with respect to DoD.

Purpose

The purpose of the proposed regulations is to establish a system designed to meet the statutory requirements, the NSPS KPPs and Guiding Principles.

Eligibility and Coverage

All DoD employees currently covered by the classification and pay systems established under chapter 51 or 53 of title 5, U.S. Code, are eligible for coverage¹⁰⁹ under one or more of subparts B through I of this part, except to the extent specifically prohibited by law (e.g., Executive Schedule officials, who, by law, remain covered by subchapter II of chapter 53). DoD will transition to the NSPS human resources system beginning with its General Schedule (GS) employees (and equivalent). Other categories of employees, including those covered by other systems outside of title 5, will be phased in as appropriate. SES members and certain other similar types of DoD employees will be eligible for coverage under the new DoD pay system. However, the proposed regulations provide that any new pay system covering SES members must be consistent with the performance-based features of the new Governmentwide SES pay-for-performance system authorized by section 1125 of the National Defense Authorization Act (Pub. L. 108-136, November 24, 2003). If DoD wishes to establish an SES pay system that varies substantially from the new Governmentwide SES pay-for-performance system, DoD and OPM will issue joint authorizing regulations consistent with all of the requirements of the National Security Personnel System, as set forth in 5 U.S.C. 9902. In addition, DoD and OPM will involve SES members and other interested parties in the design and implementation of any new pay system for SES members employed by DoD¹¹⁰.

Scope of Authority

Subject to the requirements and limitations in 5 U.S.C. 9902, the provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified¹¹¹:

The rules governing staffing, employment, and workforce shaping¹¹² (as permitted by 5 U.S.C. 9902(k)) established under chapters 31, 33, and 35;

¹⁰⁹**Liability** for coverage ? Can one “opt - out” as when (ca 1979) Super Grade folk could choose not to be part of the SES “System” with all of its Opportunities & Rewards?

¹¹⁰Does this mean that there will be no changes in the SES scheme before a separate development process is completed ?

¹¹¹Provided that such waivers don’t detract from Merit Principles &c....

¹¹²As in cutting down to size ...(Section refers to “Buy - Outs”)

and agreement before an issue is so submitted.¹¹⁶

When a matter requiring OPM coordination pursuant to the coordination requirements established in these regulations, is to be submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/nonconcurrence into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of its effective date. Thereafter, the Secretary and the Director may take such action(s) as they deem appropriate, consistent with their respective statutory authorities and responsibilities.¹¹⁷

Continuing Collaboration

The NSPS law requires that the implementation of a new HR system for DoD will be carried out with the participation of, and in collaboration with, employee representatives¹¹⁸. The law spells out the specific process for involvement of employee representatives in the establishment of the system, known generally as the "30/30/30" process. These proposed regulations will be subject to that statutory process, which includes a comment period of 30 days, a minimum of 30 days for DoD and OPM to "meet and confer" with employee representatives on their recommendations, and a final 30 days for congressional notification prior to implementation. The NSPS law also provides that the Secretary and the Director develop a process to involve employee representatives in the further planning, development, and/or adjustment of the system¹¹⁹. To that end, Sec. 9901.106 establishes a process by which employee representatives will be provided an opportunity to review, comment, and participate in discussions regarding proposals for further adjustments to the system, including DoD implementing issuances. This process is called "continuing collaboration" and is a separate and distinct process from the provisions found in subpart I, Labor-Management Relations. While the proposed NSPS regulations establish the overall NSPS human resources management system, there are several areas that will require DoD to promulgate implementing directives, instructions, manuals, and other issuances that provide the detailed procedures needed to implement the system¹²⁰. For example, the proposed regulations provide for an administrative process in which employees may seek reconsideration of their

¹¹⁶Do folks beneath the "Staff" level get to provide their input also ??

¹¹⁷Subject to the limitations imposed by other statutory requirements (Defend "Merit Principles",...) – same under Old or New system.

¹¹⁸Are all employees "Represented" or just Union Members ?

¹¹⁹Why not all employees through a "Docket" or other "Modern" (Information Technology) Tool ?

¹²⁰This is where the "Mischief" & "Un-Intended Consequences" will appear.

Secretary to make the final determination as to the content of implementing issuances, it offers the opportunity for employee representatives to participate meaningfully in the process and influence the further development and refinement of NSPS.

Relationship to Other Provisions of the Law

Paragraph (a)(2) of Sec. establishes a rule of construction requiring all provisions of this part be interpreted in a way that recognizes the critical national security mission¹²⁶ of the Department. Each provision must be construed to promote the swift, flexible, and effective day-to-day accomplishment of that mission, as defined by the Secretary. DoD's and OPM's interpretation of these regulations must be accorded great deference.¹²⁷

Paragraph (b) of Sec. 9901.107 describes the relationship between the proposed part 9901 and laws that are not waivable or modifiable under the NSPS law. For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under the waivable or modifiable chapters (i.e., chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 of title 5, U.S. Code), the referenced provisions are not waived but are modified consistent with the corresponding regulations in part 9901, except as otherwise provided in that part or in DoD implementing issuances. For example, physicians' comparability allowances under 5 U.S.C. 5948 are limited to physicians in certain listed pay systems, including the General Schedule. To ensure that DoD physicians continue to be eligible for physicians' comparability allowances when they convert from the General Schedule to the NSPS pay system, they will be deemed to be covered by the General Schedule for the purpose of applying section 5948. In addition, in applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart H of these proposed regulations (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with Sec. 9901.807(h).

Classification--Subpart B

Subpart B provides DoD with the authority to replace the current GS and FWS classification and

really troubling the current "System"....

¹²⁶Please be more specific about what liberties must be taken with DoD Employee working conditions that are not common to DHS or other Federal Agencies that contribute to "National Security". If the intent is to "Deploy" / "Rotate" civilians as Military Personnel are now, please be specific & provide details as to how this will be incorporated in to the "Conditions of Employment", Physical Qualification & Training,... & how this will enhance Recruiting & Retention of highly qualified "Knowledge Workers"...

¹²⁷To the extent that they do not violate other law or regulation (EEO, Hostile Workplace,...) or they create a counterproductive atmosphere which might degrade the Harmony & Collegial Support necessary to an effective Knowledge Work Environment....

the private sector, and appropriate incentives and recognition * * * for excellence in performance." Employees will be permitted to request reconsideration of the classification (career group, pay schedule, occupational series, or pay band) of their official positions of record at any time with DoD and/or OPM, as they can today under the GS system. The system described here, together with the new pay system described below, will provide DoD with greater flexibility to adapt the Department's job and pay structure to meet present and future mission requirements.

Pay and Pay Administration--Subpart C

This subpart contains proposed regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V. This new system links pay to employees' performance ratings and is designed to promote a high-performance culture within DoD.

National Security Compensation Comparability

In accordance with the NSPS law, to the maximum extent practicable, for fiscal years 2004 through 2008, the aggregate amount allocated for compensation of DoD civilian employees under NSPS will not be less than if they had not been converted to the NSPS. This takes into account potential step increases and rates of promotion had employees remained in their previous pay¹²⁸ schedule.

In addition, NSPS implementing issuances will provide a formula for calculating the aggregate compensation amount, for fiscal years after fiscal year 2008. The formula will ensure that, to the maximum extent practicable, in the aggregate, employees are not disadvantaged in the overall amount of pay available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization, changes in the mix of employees performing those functions, and other changed circumstances that might impact pay levels.

Setting and Adjusting Rate Ranges

Setting Rate Ranges and Local Market Supplements: The proposed regulations establish a pay system that governs the setting and adjusting of covered employees' rates of pay. The system will have a rate range, with a minimum and maximum rate, for each band in each career group based on factors such as labor market rates, recruitment and retention information, mission requirements, operational needs, and overall budgetary constraints. The bands will have open pay ranges, with no fixed step rates. DoD will also set local market supplements (a supplement to basic pay in lieu of locality pay) for rate ranges based on geographic and occupational factors. DoD will coordinate setting and adjusting rate ranges and local market supplements with OPM.

¹²⁸Everybody antes up to build the pot that will fund pay outs to Meaningfully Distinct folks...

least three rating levels and identifies a range of performance shares that can be assigned for rating levels. An example of a possible rating methodology is provided by Table 2. This example illustrates a five-level rating methodology with associated share ranges in which level five signifies the highest level of performance. The rater will prepare and recommend the rating, number of shares, and the distribution of the payout¹³¹ between basic pay increase and bonus, as applicable, for each employee. These recommendations will then be reviewed by the pay pool panel to ensure equitable rating criteria and methodology have been applied to all pay pool employees. The final determination of the rating, number of shares, and payout distribution will be a function of the pay pool panel process and will be approved by the pay pool manager. The criteria used to determine the number of shares to assign an employee may include assessment of the employee's contribution to the mission, the employee's type and level of work, consideration of specific achievements, or other job-related significant accomplishments or contributions.

Table 2.--Sample Rating Methodology

Rating level	Share range ¹³²
5.....	6-8
4.....	3-6
3.....	1-2
2.....	0
1.....	N/A

Performance Pay Pools: Performance pay pools will be established by combining organizational elements, functional groupings, or other categories of employees. Distinctions may also be made using criteria such as location or mission. Each pay pool will be managed by a pay pool manager in concert with appropriate management officials. The pay pool manager is the individual charged with the overall responsibility for rating determinations and distribution of the payout funds in a given pay pool. The funding of a performance pay pool consists of the money allocated for performance-based payouts for a defined group of employees. The amount of money available within a pay pool is normally based on the money that would have been available for

¹³¹These discussions seem to be the most useful feature of the “Demos”; Bosses must argue for special rewards for their noteworthy achievers that might make less money available for the other groups’ achievers – in practice, money rarely shifts between the proportionate share of the “Sub-Pool” and the Bosses overseeing more than one “Pool” never shift the pre-set allocation between Pools to recognize a Group Achievement or a difference in the Operational Value of the various efforts.

¹³²How does this compare to the actual practice under the “Demos”? How many Level 5 folks got 8 times what a Level 3 Employee got (the COLA component of the pool is usually the “Floor” for “Acceptable” performance)

skills, and knowledge and on the basis of performance or contributions to mission. The new system is capable of adapting to changing circumstances and mission requirements.

Initial Conversion: Upon implementation of the new system, employees will be converted based on their official position of record. Initial entry into NSPS will ensure that each employee is placed in the appropriate pay band without loss of pay.

New Appointments/Reinstatements: When an employee is newly appointed or reinstated to a position in NSPS, management may establish pay at any rate up to the maximum of the pay band in accordance with implementing issuances. The hiring official will determine starting pay based on available labor market considerations; specific qualification requirements; scarcity of qualified applicants; program needs; education or experience of the candidate; and other criteria as appropriate. When an employee moves to a pay band with a higher earning potential, pay will be set in accordance with implementing issuances.

Temporary Promotion: Employees on temporary promotions will be returned to their official position of record prior to conversion. GS employees will be converted at their current rate of basic pay, including any locality payment, adjusted on a one-time, pro-rata basis, for the time spent towards their next within-grade increase.

Career-ladder Positions: Employees in career-ladder positions below the full performance level will be placed in the appropriate career group, pay schedule, and entry or developmental band.

Promotion: Promotion pay increases (from a lower band to a higher band in the same cluster or to a higher band in a different cluster) generally will be a fixed percent of the employee's rate of basic pay or the amount necessary to reach the minimum rate of the higher band, whichever is greater. This amount is roughly equivalent to the value of a promotion to a higher grade within the GS system.

Reassignment: An employee who moves to a position in a comparable pay band will have pay set depending on whether the move is voluntary or involuntary as a result of unacceptable performance and/or conduct. If the move is voluntary or involuntary and not due to unacceptable performance and/or conduct, pay will generally be set at the existing rate of pay; however, pay may be set at a higher rate within limitations specified in DoD implementing issuances. If the move is involuntary due to unacceptable performance and/or conduct, there may be a reduction in basic pay of up to 10 percent as provided in these proposed regulations and in DoD implementing issuances. Pay may not be set lower than the minimum of the pay band level or exceed the maximum of the pay band level.

Reduction in Band: When an employee moves to a lower pay band, pay will be set depending on whether the move is voluntary or involuntary. If the move is voluntary, pay may generally be set anywhere within the pay band within limits specified in the implementing issuances. If the move is involuntary due to an adverse action based on unacceptable performance and/or conduct, there may be a reduction in basic pay within the limits specified in these proposed regulations and in

administrative law judges and presidential appointees, will not be eligible for coverage. Certain categories of employees are currently excluded from chapter 43 by OPM administrative action, as authorized by 5 CFR 430.202(d). Such employees are eligible for coverage under the new DoD[[Page 7562]]performance management provisions. DoD will decide which of those categories of otherwise eligible employees are covered by the Department's new performance management system or systems. The proposed regulations also allow DoD to develop, implement, and administer systems tailored to specific organizations and/or categories of employees.

Performance and Behavior Accountability

Typically, poor behavior or misconduct has been addressed only through the disciplinary process. Little attention has been paid to the impact of behavior, good or bad, on performance outcomes of the employee and the organization. DoD has determined that conduct and behavior affecting performance outcomes (actions, attitude, manner of completion, and/or conduct or professional demeanor) should be a tracked and measured aspect of an employee's performance¹³³. The NSPS regulations provide for consideration of employee behavior as a performance factor, element, or objective, such as "teamwork/cooperation."

When an employee's behavior enhances or impairs task/job accomplishment, it should affect the employee's performance appraisal¹³⁴. Behavior that significantly enhances the mission should also be noted.

This does not change a supervisor's responsibility to take prompt corrective action in the event of actionable misconduct; it merely recognizes the fact that behavior can and does affect an employee's overall performance and should be recognized. For example, an employee may receive corrective action at the time of misconduct. The nature of that misconduct has an impact on the successful execution of duties¹³⁵ and should therefore impact the employee's performance assessment at the conclusion of the performance rating period. The impact of misconduct on the employee's performance rating will depend on its seriousness, evidence of correction, and any other relevant factors.

Though behavior must be addressed in the performance management system, it need not be a

¹³³This is an explicit statement of the "Go along to get along" performance factor that could easily be abused to stifle dissent or discourage innovative thought.

¹³⁴"Behavior" needs to be closely defined – it is neither a Competency nor a Contribution & Safe Guards are need to ensure that the threat of punishment for an "Eye Roll" in response to a goofy idea is not part of program to stifle dissent or limit the exploration of alternative visions during the creative phases of any Defense Policy Formulation, System Design Trade - Off, Acquisition Strategy Development ,...

¹³⁵"If the nature..." ? Many "Behaviors" may be essential to the "Successful Execution of Duties" even if they annoy the immediate "Bosses"...

distinctions¹⁴⁰ in support of DoD's new performance-based pay system, as well as identifying and addressing unacceptable performance and misconduct.

Further, supervisors and managers will have a broad range of options for dealing with unacceptable performance¹⁴¹. These include but are not limited to remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action defined in subpart G of these proposed regulations, including a reduction in rate of basic pay or pay band. Resolution of employment difficulties¹⁴² must utilize appropriate methodologies, using remedial and corrective actions, when appropriate, prior to consideration of taking an adverse action. The range of adverse actions will include the involuntary movement of an employee to a lower pay band, giving supervisors and managers another means of dealing with unacceptable performance. These proposed regulations lay the foundation for a performance management system that is fair, credible, and transparent, and that holds employees, supervisors, and managers accountable for results. However, a performance management system is only as effective as its implementation and administration¹⁴³. To that end, DoD is committed to providing its employees, supervisors, and managers¹⁴⁴ with extensive training on the new performance management system and its relationship to other HR policies and programs.

Setting and Communicating Performance Expectations

Supervisors and managers must establish performance expectations and communicate them to employees. Performance expectations must align with and support the DoD mission and goals. Performance expectations may take the form of goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level, and may include observable or verifiable descriptions of manner, quality, quantity, timeliness, and cost effectiveness¹⁴⁵. Performance expectations will be communicated to the employee prior to holding

¹⁴⁰Sample (objective, meaningful, quantifiable,...) Yardsticks (Metersticks?) for Behavior Distinctions would be help here if only to clarify the author's intent...

¹⁴¹That do not violate Merit Principles or other provisions of the "Code" – Since the formulation of the "Options" could create the most counterproductive aspects of the "New" System, these should delimited here rather than deferred to a less visible instantiation...

¹⁴²Please include a definition....

¹⁴³Duh... if the CS / GS System was effectively implemented & administrated, we wouldn't be laboring through all of this verbiage...

¹⁴⁴"Supervisors & Managers" are a "Subset" of Employees to be controlled by the same "System"...

¹⁴⁵"May" or "Must" ?? Is the intent to "Rate" some "Employees" by "Unobservable", "Unverifiable" "Descriptions" ?? (Please add "Observable", "Verifiable",... to the definition

merit based upon facts known to management when the action was taken¹⁴⁷. The proposed regulations also continue to require attorney fees if a prohibited personnel practice was committed by the Department.

9. Alternative Dispute Resolution

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7. Management Rights

To carry out its national security mission, the Department must have the authority to take actions quickly when circumstances demand; it must be able to develop and rapidly deploy resources to confront threats in an ever-changing national security environment; and it must be able to act without unnecessary delay¹⁴⁸.

Actions such as these involve the exercise of management's reserved rights and lie at the very core of how DoD carries out its mission¹⁴⁹. Under chapter 71 of title 5, the obligation to notify the union well ahead of any changes in the workplace and complete all negotiations before making any changes can seriously impede the Department's ability to meet mission demands. To ensure that the Department has the flexibility it needs, the Department and OPM propose to revise the management rights provisions of chapter 71. Expanding the list of nonnegotiable subjects in section 7106 to include what are now permissive subjects of bargaining--the numbers, types, and grades of employees and the technology, methods, and means of performing work--is proposed. The proposed regulations prohibit bargaining over the exercise of these rights and over other rights enumerated in chapter 71, including the right to determine mission, budget, organization, and internal security practices, and the right to hire, assign and direct employees, and contract out.

¹⁴⁷This would have chilling effect on the employee's decision to appeal mistreatment – management has a duty to know the pertinent facts before taking action; especially if the employee has directed management's attention to these facts in the course of discussion of ratings, punitive objectives, unattainable standards &c.

¹⁴⁸Except in dynamic / live-fire combat situations, very few DoD activities (Policy Definition, Material Acquisition, Research,...) proceed on time scales that are short compared to any Personnel Actions under traditional Civil Service rules. Use of Warfighting Dynamics as a justification for short cuts in dealing with civilian employees bring into questions the underlying motivation of the designers of the "New" system.

¹⁴⁹"Management" is merely another category of Employee that has duties including the direction or oversight of other employee, not a transcendent caste of super-being with extra legal privileges; their ability to motivate their subordinates, provide necessary resources & support &c are factors in their Performance Rating, not a reflection on the subordinates' abilities, effort or potential...

efficiency and inhibit communication and problem solving.

The proposed language redefines formal discussions as discussions or announcements of new or substantially changed personnel policies, practices, or working conditions. It specifically excludes discussions on operational matters where discussions do not involve the establishment of new policies or practices.

An exclusive representative is entitled to attend discussions regarding grievances filed under its negotiated grievance procedure. Moreover, these proposed regulations resolve any uncertainty resulting from litigation about whether unions have an institutional right to be present during EEO proceedings, to include mediation efforts, after a formal EEO complaint has been filed or other matters appealed by employees. Under these proposed regulations, unions do not have such a right unless the complainant raises the matter in the negotiated grievance procedures.

Where an employee elects to use a procedure outside the negotiated grievance procedure (such as EEO), the employee has the choice of personal representatives (including, at the employee's option, a union official acting as personal representative). However, the union has no institutional right to represent the employee or attend meetings related to the resolution of the employee's issues. Where a resolution impacts the bargaining unit as a whole, the union will be fully advised and afforded the opportunity to exercise applicable rights. This change strikes an appropriate balance between the union's institutional rights and employee privacy and, with regard to complaint processes other than negotiated grievance procedures.

- The proposed regulations also preserve what has come to be known as the "Weingarten" right, which permits union representation at the employee's request when management examines an employee during an investigation and the employee reasonably believes that discipline will follow. However, the proposed regulations exclude investigations conducted by the Offices of the Inspectors General and other independent Department or Component investigatory organizations, such as U.S. Army Criminal Investigation Command and the Air Force Office of Special Investigations; "Weingarten" representation rights do not apply in such investigations. These exclusions were identified to ensure that independent bodies can conduct truly independent investigations. Further, this change ensures that investigations involving criminal matters are not affected by unnecessary delay, harm to the integrity of the investigation, or issues of confidentiality.

Under these regulations, the Department will hold employee representatives to the same conduct requirements as any other DoD employees. The proposed regulations clarify that the Department may address the misconduct of any employee, including employees acting as union representatives, as long as the agency does not treat employees more severely because they are engaging in union activity. The Department will no longer be bound by FLRA's "flagrant misconduct" standard or any other test developed through case decisions which may immunize union representatives engaged in otherwise actionable misconduct. However, the proposed

The National Defense Authorization Act for Fiscal Year 2004 provides that the development and implementation of a new HR system for DoD will be carried out with the participation of, and in collaboration with, employee representatives. The Secretary and the Director must provide employee representatives with a written description of the proposed new or modified HR system. The description contained in this Federal Register notice satisfies this requirement. The Act further provides that employee representatives must be given 30 calendar days to review and make recommendations regarding the proposal. Any recommendations must be given full and fair consideration. If the Secretary and Director do not accept one or more recommendations, they must notify Congress of the disagreement and then meet and confer with employee representatives for at least 30 calendar days in an effort to reach agreement. The Federal Mediation and Conciliation Service may provide assistance at the Secretary's option, or if requested by a majority of employee representatives who have made recommendations. If there is no objection to or recommendation on a proposal, it may be implemented immediately. Similarly, when the Secretary and the Director accept any recommendation from employee representatives, the revised proposal may be implemented immediately. If the Secretary and the Director do not fully accept a recommendation, the Secretary may implement the proposal (including any modifications made in response to the recommendations) at any time after 30 calendar days have elapsed since the initiation of congressional notification, consultation, and mediation procedures. To proceed with implementation in this circumstance, the Secretary must determine (in his/her sole and unreviewable discretion) that further consultation and mediation are unlikely to produce agreement. The Secretary must notify Congress promptly of the implementation of any such contested proposal. The Secretary and the Director must develop a method under which each employee representative may participate in any further planning or development in connection with implementation of a proposal. Also, the Secretary and the Director must give each employee or representative adequate access to information to make that participation productive. DoD plans to make the new labor relations provisions effective 30 days after the issuance of final regulations, and notification to Congress as required by the law. At this time, DoD intends to implement the new HR system in phases, or spirals. The tentative schedule for implementing the spirals is outlined as follows:

In the first spiral, up to 300,000 General Schedule (GS and GM), Acquisition Demonstration Project, and certain alternative personnel system employees will be brought into the system through incremental deployments.

After the assessment cycle and certification of the performance management system are completed, the second spiral will be deployed.

Spiral two will consist of Federal Wage System employees, overseas employees, and all other eligible employees.

E.O. 12866, Regulatory Review

DoD and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is a significant public interest in revisions of the

incur an initial payroll cost related to the conversion of employees to the pay banding system. This is often referred to as a within-grade increase (WGI) "buyout," in which an employee's basic pay, upon conversion, is adjusted by the amount of the WGI earned to date. While this increase is paid earlier than scheduled, it represents a cost that would have been incurred under the current system at some point. However, under the NSPS proposed regulations,[[Page 7574]]WGIs no longer exist; once under NSPS, such pay increases will be based on performance¹⁵³. Accordingly, the total cost of the accelerated WGI "buyout" should not be treated as a "new" cost attributed to implementation of NSPS, since it is a cost that DoD would bear under the current HR system in the absence of NSPS authority and implementing regulations. The portion of the WGI buyout cost attributable to NSPS implementation is the marginal difference between paying out the earned portion of a WGI upon conversion and the cost of paying the same WGI according to the current schedule. In the absence of NSPS, WGIs would be spread out over time instead of being paid "up front." The marginal cost of the accelerated payment of earned WGIs is difficult to estimate, but is not a significant factor in the benefit cost analysis for regulatory review purposes.

DoD estimates the overall costs associated with implementing the new DoD HR system--including the development and implementation of a new human resources management system and the creation of the NSLRB--will be approximately \$158M through FY 2008. Less than \$100 million will be spent in any 12-month period.

The primary benefit to the public of this new system resides in the HR flexibilities that will enable DoD to attract, build, and retain a high-performing workforce focused on effective and efficient mission accomplishment¹⁵⁴. A performance-based pay system that rewards excellent performance will result in a more qualified and proficient workforce and will generate a greater return on investment in terms of productivity and effectiveness. It is also expected that new flexibilities and improved processes in labor management relations, adverse actions, and appeals will result in more efficient and faster resolution of workplace and labor disputes, timelier and less costly bargaining processes, and quicker implementation of workplace changes needed to carry out the national security mission of the Department, while preserving basic employee rights. Taken as a whole, the changes included in these proposed regulations will result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust,

¹⁵³"Such" increases have always been contingent on satisfactory performance; if persons failed to perform their management functions effectively, it is not an inherent fault in the current Civil Service system nor one that would be fixed by the "New" system...

¹⁵⁴This is the fundamental premise supposed to be motivating the dismantling of the current Civil Service system; it is unsupported by any empirical evidence from the various "Personnel Demonstration" programs that is distinguishable from statistical fluctuations or changes in the underlying economic conditions; many of the overt & implied features are relics of Industrial Age "Piece Work" that have been largely discredited by forward thinking scholars of Management Psychology & have been identified as de-motivating to "Knowledge Workers" of the Information Age..

Kay Coles James,
Director.

Accordingly, under the authority of section 9902 of title 5, United States Code, the Department of Defense and the Office of Personnel Management are proposing to amend title 5, Code of Federal Regulations, by establishing chapter XCIX consisting of part 9901 as follows:

{new §9901 to separate file}

**CHAPTER XCIX--DEPARTMENT OF DEFENSE NATIONAL SECURITY
PERSONNEL SYSTEM (DEPARTMENT OF DEFENSE--OFFICE OF PERSONNEL
MANAGEMENT){Section9901X.wpd}**

**PART 9901--DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL
SYSTEM¹**

Sec. 9901.103 Definitions.

In this part:

Band means pay band.

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by law or regulation. For the specific purposes prescribed in Sec. 9901.332(c), basic pay includes any local market supplement.

Career group means a grouping of one or more associated or related occupations. A career group may include one or more pay schedules. Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics that an individual needs to perform a particular job or job function successfully.

Contribution means a work product, service, output, or result provided or produced by an employee or group of employees that supports the Departmental or organizational mission, goals, or objectives.²

Day means a calendar day.

Department or DoD means the Department of Defense.

Director means the Director of the Office of Personnel Management.

Employee means an employee within the meaning of that term in 5 U.S.C. 2105³.

¹Comments on selected sections to illustrate potential concerns – neither time nor patience available to labor through all the line-in / line-out / justification / intention / potential un-intended consequence etc – 2005.03.14

²Is this sufficiently broad to recognize “Knowledge Work” contributions (Process Innovations, Contrarian Visions, Team Building, Mentoring / Coaching ,...)?

³Includes SECDEF

Rating of record means a performance appraisal prepared–

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) As needed to reflect a substantial and sustained change in the employee's performance since the last rating of record as provided in DoD implementing issuances.

Reassignment means the movement of an employee from his or her position of record to a different position or set of duties in the same or a comparable pay band under DoD implementing issuances on a permanent or temporary/time-limited basis. This includes the movement of an employee between[[Page 7577]]positions at a comparable level of work in NSPS and a non-NSPS Federal personnel system.

Reduction in band means the voluntary or involuntary movement of an employee from one pay band to a lower pay band under DoD implementing issuances. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a lower level of work in NSPS.

Secretary means the Secretary of Defense.

SES means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

SL/ST refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term "SL" identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term "ST" identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

Unacceptable performance means the failure to meet one or more performance expectations.

Sec. 9901.104 Scope of authority.

The authority for this part is 5 U.S.C. 9902. The provisions in the following chapters of title 5, U.S. Code, and any related regulations⁵, may be waived or modified in exercising the authority in 5 U.S.C. 9902:

(a) Chapters 31, 33, and 35, dealing with staffing, employment, and workforce shaping (as authorized by 5 U.S.C. 9902(k));

(b) Chapter 43, dealing with performance appraisal systems;

⁵Need to enumerate these rather than provide a Carte Blanc "*any*"...

(b) Any classification system prescribed under this subpart will be established in conjunction with the pay system described in subpart C of this part.

Sec. 9901.202 Coverage.

(a) This subpart applies to eligible DoD employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary under Sec. 9901.102(b)(2).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to Sec. 9901.102(d); and

(5) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

Sec. 9901.203 Waivers.

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Sec. 9901.406 Setting and communicating performance expectations.

(a) Performance expectations will support and align with the DoD mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Supervisors and managers will communicate performance expectations, including those that may affect an employee's retention in the job. Performance expectations will be communicated to the employee prior to holding the employee accountable for them. However, notwithstanding this requirement, employees are always accountable for demonstrating professionalism and standards of appropriate conduct and behavior, such as civility and respect for others.

employee performance and to address poor performance.

(b) If during the appraisal period a supervisor determines that an employee's performance is unacceptable⁸, the supervisor will—

(1) Consider the range of options available to address the performance deficiency, which include, but are not limited to, remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action defined in subpart G of this part, including a reduction in rate of basic pay or pay band; and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences⁹.

(c) As specified in subpart H of this part, employees may appeal adverse actions (e.g., suspensions of more than 14 days, reductions in pay and pay band, and removal) based on unacceptable performance.

Sec. 9901.409 Rating and rewarding performance.

External Recruitment and Internal Placement

Sec. 9901.511 Appointing authorities.

(a) Competitive and excepted appointing authorities. DoD may continue to use excepted and competitive appointing authorities and entitlements under chapters 31 and 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals will be given career or time-limited appointments, as appropriate.

(b) Additional appointing authorities. (1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including noncompetitive appointments, and

⁸Supervisor must ensure that the Employee has been provided with Resources & Authorities necessary to perform up the expectations & that the expectations are commensurate with the Employees qualifications & experience; Supervisor's own Performance Rating must reflect his / her effectiveness in obtaining resources, matching performer to task & providing adequate guidance & coaching throughout the performance period.

⁹And that the responsibility for the unacceptable performance & consequences rests entirely on factors under the Employees control.

(1) The Secretary may prescribe the procedures for appointing employees, the duration of such appointments, and the appropriate uses of time-limited employees.

(2) The Secretary will prescribe implementing issuances establishing the procedures under which a time-limited employee (e.g., an individual employed on a temporary or term basis) serving in a competitive service position may be converted without further competition to the career service if—

(i) The vacancy announcement met the requirements of Sec. 9901.515(a) and included the possibility of noncompetitive conversion to a competitive position in the career service at a later date;

(ii) The individual was appointed using the competitive examining procedures set forth in Sec. 9901.515(b) and (c); and

(iii) The employee completed at least 2 years of continuous service at the fully successful level of performance or better.

Sec. 9901.512 Probationary periods.

The Secretary may establish probationary periods as deemed appropriate for employees appointed to positions in the competitive and excepted service covered by the National Security Personnel System. DoD will prescribe the conditions for such periods, including creditable service, in implementing issuances. A preference eligible who has completed 1 year of a probationary period¹¹ is covered by subparts G and H of this part. An employee who fails to complete an in-service probationary period established under Sec. 9901.516 will be returned to a position and rate of pay comparable to the position and rate of pay he or she held before the probationary period.

Sec. 9901.513 Qualification standards.

DoD may continue to use qualification standards established or approved by OPM. DoD also

¹¹One of the more useful features of the various LAB DEMO programs is the 3 - year extended Probation which, if coupled with reduced pre-employment “Checks & Balances”, could increase the responsiveness of the NSPS (reduce the delays) in making offers to New Employees. Any “Supervisor” could extend an immediate offer to a plausible candidate at or beneath the Supervisor’s Rate of Pay provided that the New Employee agreed to accept summary termination if the designated approving official determined that the New Employees qualification were sub-standard, that the Supervisor failed to examine a wide enough pool of candidates, considered factors other than merit,... or if the Supervisor (or anyone in the Chain of Command) determined that the New Employee’s On - The - Job Performance failed to meet Expectations at any time during the (extended) Probationary Period .

(c) Review of competitive area determinations. The Department will make all competitive area definitions available for review.

(d) Change of competitive area. Competitive areas will be established for a minimum of 90 days before the effective date of a reduction in force. In implementing issuances, DoD will establish approval procedure requirements for any competitive area identified less than 90 days before the effective date of a reduction in force.

(e) Limitations. The Department will establish a competitive area only on the basis of legitimate organizational reasons, and competitive areas will not be used for the purpose of for targeting an individual employee for reduction in forces on the basis of nonmerit factors.

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Sec. 9901.611 Reduction in force appeals.

(a) An employee who believes the Department did not properly apply the provisions of this subpart may appeal ¹⁵the reduction in force action to the Merit Systems Protection Board as provided for in 5 CFR 351.901 if the employee was released from the retention list and was—

- (1) Separated by reduction in force;
- (2) Reduced in band by reduction in force; or
- (3) Furloughed by reduction in force for more than 30 consecutive days.

(b) Paragraph (a) of this section does not apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

Subpart G--Adverse Actions

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Sec. 9901.711 Standard for action.

¹⁵Employee may appeal under other “Titles” (eg: 42 – Equal Employment Opportunity,...) if Employee *perceives* that action was applied unfairly to him / her based on Age, *Attitude*, Whistle - Blowing, Liberal Politics,...as a result of a Hostile Work Place,...

employees consistent with the provisions of Federal Rule of Civil Procedure 23.

Harmful error means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

Mandatory removal offense (MRO) has the meaning given that term in Sec. 9901.103.

MSPB means the Merit Systems Protection Board.

Petition for review (PFR) means a request for full MSPB review of a final Department decision.

Preponderance of the evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue¹⁹.

Request for review (RFR) means a preliminary request for review of an initial decision of an MSPB administrative judge before that decision has become a final Department decision.

Sec. 9901.805 Coverage.

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Sec. 9901.909 Powers and duties of the Federal Labor Relations Authority.

(a) To the extent provided in this subpart (pursuant to the authority in 5 U.S.C. 9902), the Federal Labor Relations Authority, in accordance with conforming regulations prescribed by the Authority, may—

(1) Determine the appropriateness of bargaining units pursuant to the provisions of Sec. 9901.912; and

(2) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer 5 U.S.C. 7111 (relating to the according of exclusive recognition to labor organizations), which is not waived for the purpose of this subpart.

(b) In any matter filed with the Authority, if the responding party believes that the Authority lacks jurisdiction, that party will timely raise the issue with the Authority and simultaneously file

¹⁹ie. a nearly 50% probability of error...

(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 promotion²⁴ or from any other appropriate source.

(b) Management is prohibited from bargaining²⁵ over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section.

(c) Notwithstanding paragraph (b) of this section and at the request of an exclusive representative, management will consult as required under Sec. 9901.917²⁶ over the procedures it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section. Consultation does not require that the parties reach agreement on any covered matter. The parties may, upon mutual agreement, provide for FMCS or another third party to assist in this process. Neither the Board nor the Authority may intervene in this process.

(d) If an obligation exists under Sec. 9901.917 to bargain or consult regarding any authority under paragraph (a) of this section, management will provide notice to the exclusive representative concurrently with the exercise of that authority. However, at its sole, exclusive, and unreviewable discretion, management may provide notice to an exclusive representative of its intention to exercise an authority under paragraph (a) of this section as far in advance as practicable. Further, nothing in paragraph (d) of this section establishes an independent right to bargain or consult.

(c) When an obligation exists under Sec. 9901.913, management will provide the exclusive representative an opportunity to present its views and recommendations regarding the exercise of an authority under paragraph (a) of this section, and the parties will bargain at the level of recognition (unless otherwise delegated below that level, at their mutual agreement) over otherwise negotiable--

(1) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and

²⁴From 5 USC §7106(a)(2)(C)(I) & ...(ii)... Could have been referenced -- But some "Demos" had features intended to Streamline Hiring which may be impeded by the "ranking & certifying" overhead...

²⁵"*Prohibited from*" replaces "*Nothing...shall Preclude*" {§7106(b)} – seems to betray some special anti-labor agenda; reasons for not allowing "Management" the choice (may?) should be examined.

²⁶"Exclusive Representative" – a Organization that has received "Exclusive Recognition" as a result of an election under the Federal Service Labor - Management Relations Statute (§7111)

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