COMMENTS RE: PROPOSED NATIONAL SECURITY PERSONNEL SYSTEM

Introduction

In most instances, we have drawn the Department's attention drawn to the proposed regulatory provisions identified below because it has chosen, at critical junctures, to carry over certain critical terms and phrases from the Federal Service Labor Management Relations Statute, 5 U.S.C. 7101, *et seq.*, (FSLMRS) in such a manner as create an inference that they be construed as the Federal Labor Relations Authority (FLRA) has construed the same language in the FSLMRS in the past. *See, e.g.*, Greenwood Trust Co. v. Com. of Massachusetts, 971 F.2d 818, 827 (1st Cir. 1992) ("It is...a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two should be interpreted in the same way.")

Section 9901.902

A global approach to reducing the elucidating litigation which is, certain to flow from the Department's borrowing in this regard unless the specific recommendations regarding the amendments described below are adopted would be to amend section 9901.902 by adding the following:

> "Where Department has carried over the terminology of the Federal Service Labor Management Relations Statute, 5 U.S.C. 7191, *et seq.* (FSLMRS), in drafting the regulations in this subpart, the Board and the FLRA must construe such provisions in light of the paramount interest of the public in the effective and efficient operation of DoD and its Components without regard for the case law which the FLRA deems controlling when interpreting and applying analogous provisions of the FSLMRS. "

Section 9901.903 - Definitions

"Conditions of employment"

DHS was careful, when drafting the revised definition of "grievance," to provide--consistent with the D.C. Circuit's ruling in Customs Service v. FLRA, 43 F.3d 682 (1994)--that this term was limited to grievances over "[a]ny claimed violation, misinterpretation, or misapplication of any law, rule, regulation, or DoD issuance issued for the purpose of affecting conditions of employment." Unfortunately, it was not equally careful to ensure that the logic behind this limitation was also followed when it defined the phrase "conditions of employment," which, as explained at page 7569 of the Federal Register for February 14, 2005, departs from the definition set out in section

7103(a) of the FSLMRS only insofar as to exclude all "pay" and "classification" matters."

That is, if, as the D.C. concluded, "Congress could not have contemplated, let alone intended, that all or part of American law would be definitively interpreted by the FLRA on review of one or a series of cases originally put to arbitration" (Customs, *supra* at 689-90), it necessarily follows that it also could not have intended that the interstices of such laws be viewed as negotiable. However, based upon its interpretation of the term "conditions of employment" as limited by section 7103(a)(14)(C) of the FSLMRS which excludes only "matters... specifically provided for by law"-- the FLRA does not agree. *See* DoJ, INS, 56 FLRA 351, 355 (2000).

Thus, notwithstanding the Fourth Circuit's decision to the contrary in U.S. INS v. FLRA, 4 F.3d 268, 273-74 (1993), the FLRA maintains that the fact that "conditions of employment" is defined in the FSLMRS as excluding, *inter alia*, only "matters...specifically provided for by Federal statute"-- it follows that unions may (unless otherwise barred) negotiate regarding the content of agency regulations which interpret and implement laws which they administer which are carried out by, and, thus, "affect" unit employees.

As the language of the union proposal at issue in that case--which would have defined the extent to which the Government is liable under 42-USC 2000e-16(e) for the discriminatory acts of its employees--illustrates, hoever, the FLRA's position in this regard is simply absurd. Further, it even flies in the face of section 7117(a)(1) of the FSLMRS which bars negotiation over proposals which are "inconsistent" with any Federal law[s]...," whether on their face, or as subject to interpretation . *See, also*, GSA, National Capitol Region v. FLRA, 86 F.3d 1185 (D.C. Cir. 1996) (wherein the Court found that only management could decide, based upon its interpretation of the statute authorizing Federal Protective Service officers to carry firearms, when and where the officers should be authorized to carry weapons).

Nonetheless, the FLRA has not only persisted in this view, but extended it in several cases involving union proposals which sought to dictate which Immigration and Naturalization Service employees were authorized to use force--including deadly force--and how they go about conducting body searches" of illegal aliens. Thus, in DoJ, INS, New York, N.Y., 55 FLRA 228 (1999), the FLRA found that, because the language of 8 U.S.C. 1357(a)--which directed the Attorney General to issue regulations governing the use of force by INS employees--was not specific regarding the content of those regulations, it followed that the Attorney General had "discretion" to determine the content of the rules, and, accordingly, that management could be required to negotiate regarding their content.. *Id. 232.* In other words, the FLRA holds that unions may negotiate regarding the content of "legislative" rules having the "force and effect of law" such as 8 CFR 287.8(a)(2), and 8 CFR 287.9(b).

The FLRA's rational for agreeing with the ruling in Customs, *supra,* that unions are barred from prosecuting grievances through the negotiated grievance/arbitration procedures regarding alleged violations of laws (including "legislative" rules) which were not promulgated for the purpose of affecting employees' "conditions of employment"-- while holding, at one and the same time, that they may, nonetheless, require management to negotiate regarding the content of such legislative rules, is indefensible. That is, the FLRA asserts that, because the D.C. Circuit's ruling in Customs turned on the meaning of the phrase "conditions of employment" as it is used to define a grievance" in section 7103(a)(9)(C)(2), not on the definition of the phrase itself as it is limited by section 7103(a)(14)(C), it may interpret that phrase differently when adjudicating negotiability issues under section 7117. *See, e.g.,* 55 FLRA, *supra,* at 331 (concerning who should be authorized to carry and use pistols, and employ deadly force) .and DOJ, INS, 56 FLRA 351, 355 (2000) (same issue). Note that this not only flies in the face of the purpose of expressly defining the terms employed in drafting a statute, but, more generally, the general rule of statutory interpretation which holds that, absent evidence to the contrary, a term used in one part of a statute should be presumed to have the same meaning when used in another.

Further, the idea that Congress, or Federal agencies authorized by Congress, can grant unions-- which represent a private interest, not the public interest--the power to require agency management to negotiate to impasse regarding the content of services which their agencies are obliged by law to provide to the public not only flies in the face of the D.C. Circuit's ruling in Customs, supra, but art. II, sec. 3 of the Constitution which specifies that the Executive Branch is responsible for "faithfully execut[ing] the law[s]." Indeed, most state courts have long recognized that policies which directly define the content of a public service may not, regardless of the extent to which they also "affect" unionized public employees," be considered to be negotiable "conditions of employment or "working conditions." *See, e.g.,* Ridgefield Park Education Assoc. V. Ridgefield, 393 A.2d 278, 287 (1978) and Peace Officers v. City of San Jose, 78 Cal. App.3d 995, 144 Cal Rptr 638)1978).

Accordingly, DoD not only should not, but may not, by adopting essentially the same language as appears in section 7103(a)(14)(C) of the FSLMRS--endorse the FLRA's erroneous, and unconstitutional, interpretation, by defining "conditions of employment" as excluding only "matters specifically provided for by Federal statute" from the definition of "conditions of employment (at least as that limitation has been misconstrued by the FLRA).

Thus, the fourth exception to "conditions of employment set out in 9901.903 should be amended to make it crystal clear that this phrase excludes "Any matters [covered] by Federal statute, whether expressly, or by case law, or by means of implementing agency issuances."

"Issuances"

The proposed definition of "issuances" in this section, as used not only in section 9901.903 regarding the definition of "grievance, but in section 9901.917(d)(1) to preclude bargaining, may, as a practical matter, serve to reduce the damage to DoD's ability to carry out its mission effectively, efficiently, and quickly even if the definition of "conditions of employment" were not amended as recommended above. That is, it is clear that the intent of these provisions is to eliminate the ability of unions to challenge the non-negotiability of regulations/policies/issuances promulgated at the Component as well as the Department level on a no "compelling need" grounds (as they could under section 7117(a) and (b) of the FSLMRS) regardless of whether or not they were, or were not, "issued for the very purpose of affecting the working conditions of [unit] employees." Customs, *supra.*, 43 F.3d at 689-90.

However, as used in section 9901.917(d)(1) to bar negotiations, this definition of "issuance" applies only to "Department" and "Component" level issuances," not to "issuances" promulgated at the level of recognition to implement Departmental and Component "issuances" in particular fact situations--including those issuances intended to execute the laws which define the missions of the Department and its Components rather than to "affect employees' conditions of employment."

Accordingly, while a conforming amendment to section 9901.917(d)(1) will also be necessary to correct this defect, the definition of "issuance" should be amended to add the following phrase: "...; and documents/policies issued by management at any level below the Component level which are not promulgated for the very purpose of affecting unit employees conditions of employment, but, rather, to define the content of the service[s] which the unit concerned is obliged by law an implementing Departmental and Component issuances to provide to the public.

Section 9901.910(e)(1) and (2)

Section 9901.910(e)(1) - Re: "procedures"

The latter half of section 9901.910(e)(1) obliges management to negotiate regarding the "procedures which management officials and supervisors will observe in exercising any authority" under paragraph (a)(3) of this section." This wording, while more specifically identifying supervisors as part of management," does not differ materially from that used to express the same obligation in section 7106(b)(2) of the FSLMRS. Accordingly, it is to be expected that unions will assert, and the Board and the FLRA be inclined to agree, that DoD intended that the FLRA case law interpreting section 7106(b)(2) should be viewed as persuasive when they are called upon to interpret and apply section 9901.910(e)(1).

This means, among other things, that the Board (and, if not the Board, then FLRA when called upon to review Board decisions) will be inclined to adopt the FLRA's "acting at all" test in judging the negotiability of union proposals regarding the procedures which management will observe in carrying out the personnel authorities reserved by paragraph (a)(3). See DoD, Army-Air Force Exchange v. FLRA, 659 F.2d 1140 (d>c> Cir. 1981) In other words, if the language of this obligation is not amended, it is more likely than not, that it will be intereted so as to require DoD managers to continue to bargain to impasse, and potentially adopt, union proposals characterized as "procedures" which, in fact, tend to be outcome determinative. *See, e.g.*, Department of Defense, National Guard Bureau, 57 FLRA 475 (2001) wherein the FLRA ordered the agency to bargain over proposals which would require selecting officials to: (1) separately consider inside candidates before external candidates, and: (2) evaluate candidates using KSA's drafted by the union along with the applicable agency KSA's.

Nor has the FLRA limited its loose reading of "procedures" so as to permit unions to bargain to impasse on proposals which significantly impair management's ability to exercise its reserved authorities to proposals that favor "inside" candidates over "outside" candidates for selection. *See* DoD, *supra.*, 659 F.2d at 1161-62 where the D.C. Circuit reluctantly deferred to the FLRA's presumed "expertise" regarding the negotiability of a proposed "procedure" which specified that when management chooses to fill positions by reassignment, it must do so on the basis of seniority among qualified employees unless it uses "competitive procedures."

Accordingly, the language of section 9901.901(e)(1) as it concerns the obligation to negotiate regarding "procedures" should be amended to add the following sentence. "However, such procedures may not: operate to favor candidates for appointments to positions from one source over those from another; require the use of competitive procedures to fill positions by means of reassignments; or significantly delay the exercise of the other authorities reserved by this subparagraph."

Section 9901.910(e)(1) - Re: "appropriate arrangements"

The FLRA recognized, during the first 5 years the FSLMRS was in effect, that Congress had intended to preclude negations over any proposals which would affect the substance of a decision reserved by section 7106(a) of the FSLMRS, or of a decision reserved by section 7106(b)(1) if management did not "elect" to bargain regarding such matters. However, in 1985 it adopted the D.C. Circuit's erroneous position, first expressed in AFGE, Local 2782 v. FLRA, 702 F.2d (1983), that management could be required to bargain over substance of such reserved decisions. KANG, 21 FLRA 24 (1985). That is, it found that management was obliged to negotiate over proposals which would amend such decisions where the proposals having such an effect concern "appropriate arrangements" for employees adversely affected by such actions within the meaning of section 7106(b)(3) and would not "excessively interfere" with the exercise of such

authorities. *Id.*

DoD's proposed action in carrying over essentially the same terminology as employed in section 7106(b)(3) of the FSLMRS regarding management's duty to negotiate over "appropriate arrangements" creates the opportunity for unions to assert, and the Board, the FLRA and/or a federal appellate court to agree, that this demonstrates an intention to adhere to the FLRA's interpretation of that duty. That is, if this language is not amended, it will open the door to Board/FLRA/appellate court rulings which will require management to negotiate over proposals which seek to eliminate or ameliorate the "adverse" effects flowing from the exercise of the personnel authorities reserved by section 9901.910(a)(3) by changing the substance of decisions reflecting the exercise of those authorities.

For example, management could be required to negotiate over proposals which would interfere with the authority to "suspend" for 14 days or less, or "take other disciplinary action . *See, e.g.,* U.S. Department of Commerce, PTO, 53 FLRA 539 (1993) (where proposals requiring "progressive" discipline and barring the use of written reprimands or written records of oral admonishments older than one year from being used to support later disciplinary actions). *See, also,* the same ruling regarding the negotiability of a proposal specifying the two out of three members of rating and ranking panels be unit employees with particular experience and come from an organizational location other than the organization in which the vacant position is located.

Moreover, such proposals may include those which are based not only upon a reasonable expectation that some or all of the employees who will be affected by the exercise of a reserved authority will, in fact, be affected "adversely," but "prophylactic" measures based upon the assumption that employees may be harmed if management acts with bad motive. *See, e.g.,* Veterans Administration, VAMC, Department of Memorial Affairs, 40 FLRA 657 (1991) (provision which would empower arbitrators to decide whether particular work assignments were distributed "equitably" held to be an "arrangement" because it would prevent supervisors from, "arbitrarily or capriciously," or as a form of "harassment" assigning a "disproportionate amount" of work to particular employees.

Accordingly, the language of this subparagraph of section 9901.910 should be amended to read as follows:

> "Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section unless such an arrangement would require management to amend decisions which reflect the exercise of such authorities.

Note, this would still permit negotiations over such arrangements prior to the exercise of such authorities in mid-contract bargaining situations.

Section 9901.910(e)(2)

The literal wording of section 9901.910(e)(2) regarding the obligation to negotiate over "appropriate arrangements" for DoD employees adversely affected by the exercise of the authorities reserved by sections 9901.910(a)(1) and (2), should--particularly when construed together with the more general limitations set out in sections 9901.910(d), (g) and (h), 9901.917(3)--be more than sufficient to persuade the Board/ FLRA that even though DoD used essentially the same language employed in section 7106(b)(3), it did not intend for the obligation to be construed as carrying over the FLRA's "excessive interference."

Thus management is given the discretion to provide notice of changes in conditions of employment which trigger the obligation to negotiate "concurrently" with the exercise of the authorities reserved by section 9901.910(a)(1) and (2), and section 9701.910(g) provides that "nothing in this section [presumably including previously negotiated "arrangements"] will delay...management from exercising its authority." It would seem difficult, therefore, for the Board, the FLRA or the appellate courts to conclude, nonetheless, that "appropriate arrangements" as used in this paragraph may include provisions which would require management to amend decisions reflecting the exercise of such authorities before they are exercised.

Further, even if were assumed that the Board or the FLRA could, somehow, avoid the obvious conclusion to be drawn from these related provisions as they would apply to contract renegotiation situations (where management is not the moving party), the language of section 9901.910(g) -- which provides that "[a]ny agreements reached with respect to paragraph (e)(2) of this section will not be precedential or binding on subsequent acts, or retroactively applied, except at the Department's, sole, exclusive, and un-reviewable discretion"--would seem to eliminate any doubt as to DoD's intent.

Nonetheless, amending the language of section 9901.910(e)(2) regarding the negotiation of "appropriate arrangements" in the same manner as suggested with regard to section 9901.910(e)(1), would demonstrate, conclusively, that the "excessive interference" test is not applicable in judging the negotiability of any "appropriate arrangements" proposed under the NSPS.

Section 9901.914(a)(2)

"Working conditions"

DoD has defined "conditions of employment" in section 9901.903 of the proposed NSPS regulations, and has then used that term when: (1) defining the terms "collective bargaining" and "grievance" in that same section: (2) explaining the scope of the

Department's obligation to engage in "national consultation" in section 9901.913(b)(1)(i), and: (3) in explaining the scope of the duty to bargain when management proposes to change employees' "conditions of employment" during the term of an existing agreement, or in the absence of an agreement in section 9901.917(c). This usage would seem to indicate that management's obligation to negotiate applies to employees' "conditions of employment," whether as management proposes to (or, in fact, does) change them, or in contract re-negotiation situations, where it is unions who are proposing changes.

However, when DoD describes the extent of an exclusive representative's right to be notified in advance of, and attend, "formal discussions" in section 9901.914(a)(2), it does not use the term "conditions of employment" with regard to the "changes" which may trigger that right (as the otherwise analogous section 7114(a)(2)(A) of the FSLMRS does). Rather, the proposed regulations speak to "personnel policies, practices, or working conditions. Since the phrase "working conditions" is only part of the definition of term "conditions of employment" as defined in section 9901.903, it would appear to follow that it has a narrower meaning. *See*, Chairman Cabaniss' concurring opinion in U.S. Department of Veterans Affairs, Medical Center, Sheridan, Wyoming, 59 FLRA93, 95 (2003) in which she attempts to explain the difference between the same two terms as they are used in the FSLMRS and its case law.

It seems unlikely that the Department, in fact, intended the phrase "working conditions" to mean anything less or more than "conditions of employment." Accordingly, given the fact that it has, by using this phrase, compounded the ambiguity which exists under the FSLMR regarding the difference between these two phrases by substituting "working conditions" for the phrase "conditions of employment" used in the analogous section of section 7114(a)(2)(A) of the FSLMRs, it should move to preclude any attempts to exploit this ambiguity by amending section 9901.914(a)(2) to substitute the phrase "conditions of employment" for the phrase "working conditions."

"Operational Matters"

The phrase "operational matters" used in section 9901.914(a)(2)(i)(A) is not defined. However, given the context in which it is found, it appears to refer to matters involving the exercise of the authorities reserved by section 9901.910(a)(1) and (2), and more particularly to policies/practices which are not promulgated or followed to "affect" "conditions of employment," but, rather, to carry out a component's mission. If this is indeed, the Department's intent, it should be expressed more clearly by amending this paragraph to read, in pertinent part "....operational matters [reflecting the exercise of the authorities reserved by section 9901.910(a)(1) and (2)] where any....etc."

Section 9901.914(d)(5)

Consistent with the recommendation above to amend the phrase ":conditions of employment," this paragraph should be amended in pertinent part as follows: ".....determines they are contrary to Federal law,.....Component issuances, [or lower organizational issuances which are intended to implement laws and higher level issuances which are not promulgated to change employees' conditions of employment, but rather, to define services provided to the public], or the regulations of this part."

Section 9901.916(f)

The language of second sentence of section 9901.916(f), which bars parties from filing a grievance and an unfair labor practice complaint regarding the same "issue" does not differ in any material respect from that used to frame the same limitation set out in section 7116(d) of the FSLMR. Accordingly, this creates a presumption that DoD intended to endorse the FLRA's construction of section 716(d) in this regard.

However, if DoD will examine the FLRA's most recent case law on this subject, U.S. Department of Labor, 59 FLRA 112 (2003) it will find that its interpretation of "issue" is so narrow as to effectively read section 7116(d) out of the FSLMRS. That is, under the FLRA interpretation, a union will typically be free to file a "contract repudiation" ULP asserting a violation of section 7116(a)(1) and (5) of the FSLMRS while--based on exactly the same facts--pressing a grievance to arbitration on the grounds that management committed a contractual violation of the same provision which formed the predicate for the "repudiation" charge.

Accordingly, if DoD wishes to have section 9901.916(f) construed so as to preclude "two bites at the apple," it should amend it to read, in pertinent part, as follows: "...but not under both procedures, including situations where a violation of the same agreement provision, based upon the same set of facts, formed the predicate for both the ULP and the grievance .

Section 9901.922(b)(2)

This provision appears to be intended, like section 7121(b)(2)(A)(ii) of the FSLMRS, to empower arbitrators to direct management to take disciplinary action, up to and including removal action, against employees whom they deem responsible for engaging in "prohibited personnel actions." It would appear, at first glance, to be aimed at supervisors and other managerial personnel since they are the only employees usually empowered to take actions which may be found to have been carried out for prohibited reasons, and section 1215(a)(3) of Title 5 certainly contemplates parallel actions by the Special Counsel against supervisors/managers.

However, section 9901.922(b)(3) of the NSPS regulations which immediately follows speaks of an "employee" who is subject to such action right to appeal it as if the Department had taken the action on its own motion, and section 9901.9034(b)(3) excludes managers and supervisors from the coverage of subpart--including, presumably, section 9901.922(b)(2).

Regardless, however, whether the power conferred upon arbitrators in this regard was intended to apply only with respect to "employees" covered by Subpart I, or rather, to encompass supervisors and managers as well, it is not consistent with the procedural "due process" requirements emanating from the First Amendment. *See, e.g,* Cleveland Board of Education v. Loudermill, 470 U.S. 532 , 546 (1985). Indeed, it is clear that even if the Department were not to immediately take the ordered action, but, rather, provide the subjects of such arbitral orders with prior notice and an opportunity to respond, management could not give good faith consideration to the employee's reply. That is, it could not, without violating the award, cancel or reduce the penalty proposed based upon information provided by the employee in his/her reply which would, absent the arbitrator's order, have persuaded it to do so. (Note, particularly, that the employees/supervisors subject to such an arbitral order will not have been a party to the arbitration proceeding from which it emanated.)

Accordingly, this paragraph should be eliminated.

Section 9901.924(d)

This paragraph essentially duplicates section 7131(d) of the FSLMRS. Accordingly, as with most of the provisions identified above, the Department's action in this regard will create a presumption that its intent was to endorse the FLRA case law interpreting and applying section 7131(d). This means that unions may be expected to assert, and the Board and FLRA inclined to agree, that management's obligation to negotiate regarding the use of official time--particularly as it concerns negotiations over the use of such time "in connection with any other matter covered by this subpart"--must be viewed as a "carved out" with respect to management's authority to exercise the authorities otherwise reserved by section 9901.910(a)(1)-(3). *See, e.g.*, SSA, 59 FLRA 415 (2004) and Chairman Cabaniss' dissent in that case. Further, unions will be encouraged to assert and the Board and the FLRA to find, that DoD intended that the FLRA case law emanating from this general holding which requires management to bargain over provisions which authorize union representatives to leave their duty stations without supervisory approval to take care of such "other matters," also applies.

Accordingly, paragraph 924(d) should either be eliminated, or significantly amended.

Sections 9901.902, 908(a)(5), 910 (a)(2), and 920

We have saved are comments regarding these provisions of the proposed NSPS regulations identified above until the end of this document because they concern a subject which the Department should have been able to address, but did not, presumably because it appears that it was precluded from doing so by 5 U.S.C. 9902(d)(1). That subject is the extent to which the obligation of Federal agencies to bargain with the exclusive representatives of their employees regarding the establishment, disestablishment, or exclusion of particular employees or employee groups created by the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. 6120-32 (FCWSA) continues to apply to the Department's organized employees.

It would appear, given the care which it has taken in drafting section 9901.910 of the NSPS regulations with regard to retaining the discretion to make decisions which determine staffing patterns, that the Department is very aware that decisions regarding "when" government employees will perform the work assigned to them--particularly when that work is performed in direct support of our armed forces in the field--are often critical if its mission is to be carried out effectively and efficiently. However, there is nothing in the proposed regulations which indicates that the Department has attempted to minimize the adverse effect which application of the FCWSA to its organized employees will have on its ability to do so. Accordingly, unions can be expected to certain assert that the FLRA's assumption that the FCWSA trumps the reservation of authorities set out in sections 7106(a) and (b)(1) of the FSLMRS applies as well to those reserved to the Department's managers by section 9901.910 of the NSPS regulations. *See, e.g.*, U.S. Department of Labor, 59 FLRA 131 (2003).

We submit, however, that, while the FCWSA, indeed, provides for negotiations regarding the establishment or disestablishment of such work schedules, Chairman Cabaniss' concurring opinion in Department of Labor, *supra*, reveals that the FCWSA need not be read (as the FLRA';s majority reads it) to require negotiation of decisions involving the "administration" of such schedules. This leaves the door open in this regard to the application of the reservations of authority set out in section 9901.910.. .

If, indeed, the absence of any reference to the FCWSA in the proposed regulations was the result of an inadvertent omission, and the Department intended the reservations of authority set out in section 9901.910 re: staffing patterns to be applied with regard to the administration of flexible and compressed work schedules insofar as possible, then this purpose should be reflected by clarifying amendments to the NSOS regulation sections referenced above.

Further, section 9901.908(a)(5) should be amended to read as follows: "Resolve negotiation impasses [except those otherwise subject to resolution by the FSIP pursuant to 5 U.S.C. 6131(c)(2)], in accordance with Sec. 9901.920."