February 27, 2005

I submit my comments on the Department of Defense (DoD) National Security Personnel System (NSPS), 5 CFR Part 9901. The agency names are the Department of Defense and the Office of Personnel Management. The docket number is NSPS-2005-001. The Regulatory Information Number is 3206-AK76. The proposed rule appeared in the February 14, 2005 Federal Register, starting at page 7552.

This proposed rule is objectionable on several grounds. Most significantly, it seems to rely on the assumption that only management can recognize national security problems, and that the only way to effectively respond to those problems is by giving management disproportionate and unchecked power. However, the mission of DoD is not the mission of management alone; it is the mission of every employee. Employees at all levels need flexibility, and the protection of their basic rights, to ensure that they have the ability to accomplish their mission. Employees need to know that when they do their jobs correctly and well, they will not face retaliation for a politically unpopular stance; they will not be railroaded on flimsy or inflated charges; they will not face disproportionate penalties in disciplinary matters; and they will be paid in a fair, equitable, and consistent manner.

In the area of labor-management relations, NSPS tilts the playing field so extremely toward management that it opens the door to abuses of power. Abuses of power can adversely affect employee morale, endanger the public that is served by this department, and waste the public's money.

The "pay-for-performance" system is incorrectly named, because it does not guarantee pay for performance, but rather opens the door to favoritism. Even where managers might use the principles of this system to successfully identify outstanding performers, there is never any guarantee that sufficient funds will be available to reward those employees accordingly. Without guaranteed and predictable funds, the system is not an incentive toward outstanding performance.

Specific comments on specific parts of the proposed rule follow.

Subpart A

Section 9901.106: In (a)(2)(ii), the Secretary has the sole and exclusive discretion to determine the number of employee representatives to be engaged in the collaboration process. In (a)(3)(i), the Secretary specifies the time frame for employee representatives to comment on implementing issuances. In (a)(3)(ii), the Secretary determines to what extent it is necessary for employee representatives to engage in discussion or comment. This allows management to control the collaborative process. Management is supposed to be seeking employee input in this process, and yet these limits–all tilted toward one party in the process–do not allow the parties to engage in a true dialogue.

In Section 9901.106(a)(3)(6), the Secretary can "determine the content of implementing issuances" and "make them effective at any time." It seems this could occur regardless of employee or public input. This is most worrisome given the issues in the proposed NSPS that are left vague and unspecified, deferred to "implementing issuances." One example is that of premium pay (Section 9901.361). Another is the classification of career groups (Section 9901.211), which, under the NSPS, determine an employee's pay. Another example is the specifics of the pay system (Section 9901.311). Another example is the method by which employees can challenge ratings of record–their only recourse in a system where so much rests on the rating of record (Section 9901.409(g)). Another example is how DoD will set starting rates of pay (Section 9901.351). Another example is the multi-level rating system that will be used to rate performance (Section 9901.409(a)). Another example is the establishment of probationary periods (Section 9901.512). There is no demonstration that national security depends on the ability of the Secretary to develop all these policies unilaterally.

Section 9901.107: This part waives, modifies and replaces portions of 5 U.S. Code. In (a)(2), provisions are supposed to be "construed to promote the swift, flexible, effective day-to-day accomplishment of the mission, as defined by the Secretary." There is no evidence that the existing provisions of 5 U.S. Code do not already accomplish this. The existing code already guarantees management rights to an extent not seen in the private sector. Curtailment of employee rights can only lead to lower employee morale; employees who fear to disclose waste, fraud, and abuse; and employees whose national-security concerns can be more easily dismissed by a management that will now be more difficult to engage in true dialogue. Management's accountability will be decreased, not increased. The employees who carry out the mission of the department may have extremely valuable things to say about the way in which the department is run. The department's goal ought to be to make it easier, not harder, for employees to do their jobs.

In 9901.107(b), it seems that DoD implementing issuances can be used to modify portions of the U.S. Code. Issuances should not be used to supersede statute.

Subpart B

Section 9901.201 states that the NSPS meets the principles that "equal pay should be provided for work of equal value" and that "appropriate incentives and recognition should be provided for excellence in performance." However, Subpart B does not meet these principles.

In Section 9901.222, employee classifications are not subject to further review or appeal beyond DoD management and OPM. Those classifications are to be based on criteria that have not even been described yet, but are promised in "implementing issuances." Similarly, in Section 9901.212, the definitions of pay bands are left to "implementing issuances." This does not assure "openness, clarity, accountability" as required by Subpart A, Section 9901.101(b).

Subpart C

Section 9901.303(c) allows DoD to establish and administer a student loan repayment program. This would contribute to employee morale and could also be a hiring or retention incentive.

In Section 9901.322, DoD management has the "sole and exclusive discretion" to set and adjust pay band rate ranges. There is no requirement that the pay be consistent with that of other agencies, or other employers in the same area; these are merely things the department "may consider." This does not ensure fairness or accountability, nor does it ensure DoD's competitiveness as an employer.

In Section 9901.333, DoD management has the "sole and exclusive discretion" to set and adjust local market supplements. There is no requirement that the supplements be consistent with that of other agencies, or other employers in the same area; these are merely things the department "will consider." This does not ensure fairness or accountability, nor does it ensure DoD's competitiveness as an employer.

Section 9901.342 fails to meet the requirement in Subpart A, Section 9901.101(b), for a system that meets the principles that "employees and supervisors are compensated and retained based on their performance and contribution to mission," and "adherence to the public employment principles of merit and fitness." For example, 9901.342(a)(1) states that the pay-for-performance system relies on distribution of "available" funds, and that the payout is "a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees."

First, if management underfunds the pool, or does not fund it at all, even outstanding performers will receive inadequate or no raises. It is impossible to see how this rewards excellence or provides an incentive for good performance. "Pay-for-performance" only works if the "pay" is there.

Furthermore, this system places employees in competition for a pool of limited funds. Employees would be competing against workers with whom, if the mission of the department is to succeed, they should cooperate. A workplace where employees are encouraged to support one another, recommend each other for awards, and acknowledge each other's contributions should perform better than a workplace in which workers know that raises or awards for fellow employees may decrease their own raises or awards.

Similarly, Section 9901.342(d)(3) states that DoD may establish control points limiting increases in basic pay. And Section 9901.342(d)(4) limits performance payouts based on the maximum pay band range rate. Here again, performance pay may be undercut by restrictions that have nothing to do with performance.

Section 9901.342(a)(2) allows a rating official to suddenly change an employee's rating of record: the rating that determines performance pay increases. Under Section 9901.409(b), this is only supposed to happen in the event of a "substantial and sustained change in the employee's performance." However, "substantial and sustained" is not defined. Furthermore, Section

9901.409(g) states that the rating can only be challenged "through a reconsideration procedure as provided in DoD implementing issuances. This procedure will be the sole and exclusive method for all employees to challenge a rating of record." This whole process is open to abuse by management. The employees' only recourse would be through an as yet undefined process defined exclusively by management. This is a decrease, not an increase, in accountability.

Subpart D

Subpart D, Section 9901.401(b) states that the performance management system will include a "fair, credible, and transparent employee performance appraisal system" and "means for ensuring employee involvement" and "ensuring ongoing performance feedback and dialogue" and "safeguards to ensure that the management of the system is fair and equitable and based on employee performance." Subpart D does not meet these goals. Section 9901.406(e) states that supervisors will "involve employees, insofar as practicable," in the development of performance expectations, and "final decisions . . . are within the sole and exclusive discretion of management." This is not fair or credible, does not ensure dialogue, and does not provide any safeguards to the employee. Section 9901.409(a) states that the multi-level rating system will be "described in the DoD implementing issuances." This is not transparent, does not ensure dialogue, and does not provide safeguards. Section 9901.409(g) states that a rating of record may only be challenged through a process yet to be described in DoD implementing issuances. This is not credible or transparent, does not ensure employee involvement, does not ensure ongoing dialogue, and does not provide a safeguard.

Subpart E

Section 9901.512 allows the Secretary to establish probationary periods, seemingly without limit. This does not reflect a fair, accountable, or equitable system. It does not even reflect much faith in the judgment of federal managers, since it implies that they need indefinite terms in which to get to know their own employees. The current one-year probationary period should be sufficient for managers to evaluate a new employee's suitability.

Subpart G

Section 9901.712 (also Section 9901.808): The Secretary has the "sole, exclusive, and unreviewable discretion" to identify mandatory removal offenses and to mitigate their penalties. 9901.712(d) is the most troubling of all: The department can also remove employees for additional offenses. Essentially, it appears that the department can remove employees for any offense of its choosing. This offers no protection to employees, or to the public they serve, against abuses of power.

In Section 9901.714(b), the department cannot remove an employee based on evidence that cannot be disclosed to the employee, the employee's representatives, or physician. This protection is essential and ought to be retained in the final NSPS.

In Section 9901.715(b), the employee is not afforded the right to a formal hearing with examination of witnesses. The employee should have such a right.

Subpart H

In Section 9901.807(c)(1), the department has the "sole, exclusive, and unreviewable discretion" to determine whether an employee's return to the workplace is "impracticable" or "unduly disruptive." This determination ought to be reviewable by the AJ and MSPB.

Section 9901.807(d)(2) states that a department's action cannot be reversed based on the way the charge is labeled or the conduct characterized. This unnecessarily and unfairly limits the employee's rights. It provides no protection against exaggerated, obfuscated, and mislabeled charges, and does not guarantee the employee sufficient information to prepare a defense.

Section 9901.807(d)(3) prevents a reversal of departmental action based on the way a performance expectation is expressed. In the event of misleading, misstated, impossible, unfair or unachievable expectations, the action should be reversible.

Section 9901.807(e) allows the Director of OPM to "intervene" in any proceeding at any time. This gives powers so broad and vague as to be open to abuse. Similarly, in 9901.807(f), the Director can petition for MSPB review with excessively broad and vague powers.

Section 9901.807(k)(6) is grossly unjust. It states that the department's determination regarding penalties will be "given great deference" and cannot be modified unless it is "wholly without justification." In other words, if a penalty is wrong and quite substantially without justification, it cannot be mitigated while the slightest kernel of justification exists. This also places the burden of proof on the employee, where it does not belong. The department ought to have the burden of proof not only on whether an adverse action is justified, but what that adverse action should be. Because codes of conduct and discipline already allow management wide latitude in imposing penalties, sometimes ranging from a mild reprimand to removal for the same offense, the department ought not to be allowed to sustain the harshest penalty where the mildest penalty is appropriate and proportionate.

Section 9901.807(k)(8)(ii) states that any decision issued by the department is precedential unless the department determines that it is not precedential. This holds the department to no standard whatsoever and is contradictory to the standards of being "fair" and "accountable."

Section 9901.807(k)(8)(iii) allows the department to reverse AJ decisions. If management has acted erroneously or unjustly, it ought not to have to power to exempt itself from consequences.

Section 9901.808(d) allows the department, if it fails to show an MRO has occurred, to keep using the same evidence to try to sustain a lesser penalty. This appears to give the department as many bites at the apple as it wishes, or to keep throwing charges at an employee to see what

sticks. Aside from being unfair, this is also a waste of public money because there is no incentive for the department to make its best case and pick a proportionate penalty at the outset. Rather, it encourages managers to pick the severest penalties, whether justified or not, and to keep refiling charges if the original charges don't succeed.

Subpart I

Subpart I is the most objectionable part of the NSPS and ought to be stricken in its entirety. There is no need to replace the provisions of 5 USC 7101 through 7135. Under that code, management already has clearly defined rights exceeding those afforded managers in the private sector. Management already has the right to take swift action for reasons of national security. The provisions of Subpart I do not make the department more flexible, nor do they advance its mission. Rather, they tilt the balance of power between labor and management most extremely in the direction of management. This is based on the false assumption that only management has the public interest and departmental mission at heart. Subpart I provides the employees and the public little to no protection against abuses of power by management. One of the stated goals of NSPS is increased flexibility. If this is truly the goal, NSPS ought to expand the scope of collective bargaining, not narrow it.

Section 9901.903 defines "conditions of employment" as excluding employee pay and pay adjustment determinations. This should not be an exclusion.

Section 9901.905 allows the department to unilaterally void collective bargaining agreements or provisions therein. Collective bargaining is meaningless when one party can unilaterally set aside agreements that have taken considerable time and effort to establish. The value of bargaining is that it brings the interests and concerns of multiple parties into play, rather than focusing on one side to the exclusion of important issues raised by the other. Bargaining-unit employees who carry out the day-to-day operations of the department know things about the way the department can function more safely, efficiently, and securely; things that may not occur to the supervisors who must take a broader, more removed, view. The employees' ideas are extremely beneficial to management and to the department's customers. If the employees are not allowed to have a sufficient voice, the department and the public lose out as well.

Section 9901.907 establishes a labor relations board appointed solely and exclusively by management. The creation of such a board, with the lopsided powers given to it by this and other sections of the NSPS, should not happen at all. However, at a minimum, if this board is to be created, labor ought to have a voice, an actual bargaining voice and not just a consultation role, in the makeup of the board.

Under Sections 9901.907(d)(1), 9901.908, and 9901.920, just to name a few, the labor relations board addresses all matters of negotiability, including unfair labor practices, negotiability disputes, and bargaining impasses. But the board is appointed solely by management. Collective bargaining is meaningless when one party has the power to unilaterally decide a dispute in its

own favor. The judicial review of such decisions as described in Section 9901.907(f) does not begin to address this injustice, since the Authority is severely limited in its review and can only differ with the board in extremely narrow circumstances. For example, the Authority must accept the board's findings of fact and its interpretations of this part of the regulation. Again, a party to the dispute is being allowed to unilaterally establish the facts of the case. These sections ought to be wholly stricken.

Section 9901.908(a)(4) gives the board, which is appointed solely by management, the power to resolve exceptions to arbitration awards. Arbitration is the only avenue through which employees can receive a neutral, impartial hearing of grievances. Giving management the power to override the arbitrator makes a mockery of this process. When two parties are in dispute, the power to resolve the dispute should not rest solely with one of the parties.

Section 9901.908(a)(7) limits the ability of parties to obtain status quo ante remedies. Wronged parties should be able to obtain fair and appropriate remedies. There is no need to make blanket restrictions on status quo ante remedies, especially since one goal of the NSPS is flexibility.

Section 9901.909 gives the labor relations board, which is appointed solely by management, the right to determine jurisdiction, and this determination is "final and not subject to review by the Authority." This opens the door to abuses of power.

Section 9901.910(a)(2) gives management the right to make determinations with respect to contracting out, and to determine the personnel by which operations may be conducted, etc.; 9901.910(b) prohibits management from bargaining over exercising that authority. This overlooks the fact that the labor force may have valuable proposals about these issues, which may be superior in cost-effectiveness, efficiency, safety, and ensuring national security. Furthermore, the NSPS which grants management so many powers in so many areas suddenly, here, shows a lack of faith in managers to be able to select and negotiate on useful proposals. If management is not required, or even at a minimum allowed, to negotiate over these issues, the public loses out.
The employees only have the ability to "consult" (Section 9901.910(c)), and "Consultation does not require that the parties reach agreement on any covered matter." Employees need some recourse if management commits wasteful or dangerous acts. Employees should be able to help improve the organization.

Section 9901.910(e)(2)(i) and Section 9901.917(d)(2) require that bargaining over appropriate arrangements for adverse effects and changes in conditions of employment can only occur if the effects are "foreseeable, substantial, and significant in terms of both impact and duration." This imposes an unnecessary burden on employee representatives, and will lead to parties wasting time arguing over whether an effect is foreseeable, substantial, and significant. An adverse effect is an adverse effect; it ought to be left at that.

Section 9901.910(e)(2)(ii) excludes the routine assignment to specific duties, shifts or work from

appropriate arrangements within the duty to bargain. This is unfair, since such assignments are at the heart of conditions of employment. The length of a shift, its starting and ending hours, and the length of overtime (for example) can seriously affect employees, their families, and the customers they serve. Furthermore, this exclusion is not necessary for the flexibility of the department for reasons of national security, because it addresses not emergency work assignments but routine assignments.

Section 9901.910 (g), (h), and (i) gives more "sole, exclusive, and unreviewable discretion" to management in the exercise of these rights. Again, this opens the door to abuses of power. There should be checks and balances to prevent management from being able to enact dangerous, wasteful, inefficient, or unsafe programs.

Section 9901.912(b)(4) excludes attorneys from the right to be represented by a labor organization. There is no reason to make such a sweeping generalization; in fact, sweeping generalization is contrary to the NSPS's goal of flexibility. No national-security goal is served by depriving these employees of representational rights.

Section 9901.913 gives the determination of consultation rights to the management-appointed labor relations board. One party ought not to have the power to determine whether the other party deserves consultation rights. True dialogue cannot occur when one party holds all the power.

Section 9901.914 exempts from formal discussions a meeting where personnel practices are being "reiterated," or are "incidental" or "peripheral." This overlooks the fact that managers who are unfamiliar with their own department's contracts often make statements that are not reflective of the contract, believing they are "reiterating" existing practices. This also overlooks the fact that, although management's intent may be for a personnel issue to be "peripheral" (a definition that is in itself open to debate), the matter may become less than incidental in the course of discussions at the meeting,. There is absolutely no national-security or mission-related goal that is served by barring employee representatives from such discussions. Simply notifying a representative of a meeting and allowing him or her to participate is hardly burdensome or threatening to national security.

If Section 9901.914(a)(2)(iii) is going to exclude investigations conducted by the IG or other criminal investigators from the right to employee representation, then such investigations ought not to be allowed to be conducted on the premises of, at the direction of, or in the presence of management. Otherwise, Weingarten rights should apply.

Section 9901.914(a)(4) imposes a new burden upon employee representatives. When an employee representative meets with management in the representational capacity, that representative is on equal footing with management and is not acting in his or her subordinate role. The representative is entitled to engage in robust discussion. Section 9901.914(a)(4) would seek to keep the representative in the subordinate role. The public is not served when

representatives of the employees who serve the public can't speak freely in challenging abuses of power by management.

Section 9901.914(c) places new limits on the information that employee representatives are entitled to. These restrictions are not only unnecessary but unfair. Employee representatives should be entitled to information that management has and that is necessary to conduct informed bargaining, grievances, etc. It is not appropriate for management to decide what the employees need to know; rather, it opens the door to abuses of power. When there is a dispute between two parties, one party cannot have all the power to determine what the other party gets to know. In fact, these new restrictions give the parties more to argue about. A system that truly seeks to be more flexible and efficient, and to enhance collective bargaining, would reduce the restrictions.

Section 9901.916 gives the management-appointed board the ability to determine what is an unfair labor practice. This involves management policing itself in the face of an accusation that it has not acted fairly and in accordance with the law. This is contrary to the public interest.

Section 9901.917(b) and (c) set time limits on collective bargaining, and allow the management-appointed board to have the final say on whether bargaining can continue. Section 9901.917(e) gives the management-appointed board the right to decide whether management has a duty to bargain in good faith. This is contrary to the true spirit of collective bargaining and to the public interest.

Section 9901.919(b)(2) prevents "further negotiations with the labor organization for any purpose" except at the Secretary's exclusive discretion. This does not lead to flexibility or efficiency, and it limits the ability of employee representatives to bring proposals. This is contrary to the essence of collective bargaining.

Section 9901.920 gives the management-appointed board the ability to resolve negotiation impasses. Since management is a party to the negotiations, it is impossible to see how good-faith collective bargaining can proceed when one party can unilaterally resolve impasses in its own favor.

Section 9901.922 excludes from grievability matters such as insurance, certification, ratings of record, mandatory removals, and pay. It is harder to imagine issues more central to conditions of employment. Honestly, it is difficult to see why the department or any agency would need to keep employees from being able to grieve such matters. Such restrictions reduce, rather than enhance, accountability. The ability to file grievances does not threaten the flexibility or mission of the department, since (except in disciplinary cases) the burden of proof is generally on the grieving party, and contracts provide mutually acceptable timetables over which the matter is resolved.

Under Section 9901.923, the management-appointed labor relations board can not only determine its own jurisdiction in exceptions to arbitrator awards, it has the power to grant them. It is

contrary to the public interest to have an erring party able to overturn a decision against it.

Section 9901.923(b) says that exceptions may be filed "based on the arbitrator's failure to properly consider the Department's national security mission or to comply with applicable NSPS regulations and DoD issuances." Notwithstanding that the mission is the interest of every employee, not just management, management has the latitude to define the mission in whatever way it wants in order to overturn an arbitrator's award. Also, DoD issuances, if not subject to rulemaking, should not be accorded such deference.

Section 9901.924(c): The ability to use official time for representational matters should not be restricted, especially in hearings before the board. (After all, the board will now be settling just about every representational matter there is, if the proposed regulations become final as written.)

Respectfully submitted,

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