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TO: Our Union Clients and Friends
FROM: Dan Minahan and Barrie Shapiro
RE: NSPS: "They're here. . ."

Many of our union clients in the Department of Defense (DOD) have been flooded with inquiries from employees now that "spiral 1" of NSPS is actually being imposed on some DOD activities. Even though a federal judge has permanently enjoined DOD from implementing three major parts of its NSPS regulations (adverse actions, employee appeals and labor relations), DOD is determined to go ahead with the parts that were not enjoined, including parts with such inspiring names as "pay for performance" and "workplace shaping." If the same determination and "spend whatever it costs" attitude could be applied to post-Katrina efforts in New Orleans and on the Gulf Coast, they'd look like modern American cities and towns by now instead of Bangladesh.

Time for a quick review and a look ahead. Congress in 2003 authorized DOD to establish a "National Security Personnel System" (NSPS) under which DOD could waive just about any law in title 5 of the U.S. Code. The NSPS law is at 5 USC 9901 and 9902. Fairly significant topics such as basic pay, premium pay, hours of work,

annual and sick leave, workers compensation and retirement are in title 5 of the U.S. Code. DOD issued its final regulations on NSPS on November 1, 2005 (70 Federal Register 66116). These regulations are at 5 CFR Part 9901. [You can access the U.S. Code, the Code of Federal Regulations and the Federal Register at www.gpo.gov.]

DOD's NSPS regulations (5 CFR Part 9901) contain subparts A – I. On February 27, 2006, Judge Sullivan of the U.S. District Court for the District of Columbia permanently enjoined subparts G (adverse actions), H (employee appeals) and I (labor-management relations). This basically means that the corresponding portions of title 5 of the U.S. Code are still in full force and effect-- chapter 71 (labor-management relations), chapter 75 (adverse actions) and chapter 77 (employee appeals).

Earlier this month, DOD issued “implementing issuances” for the parts of NSPS that are still legal. You can access them at www.cpms.osd.mil/nsps. A relatively small group of DOD employees are now “spiraling” down the drain under these new “implementing issues.” Our comments on the draft implementing issuance for the NSPS pay system were sent to our union clients and friends in December 2005 (and that memo is reprinted in part at the end of this one). The final version hasn't changed much.

So, we now have a whole new pay system coming on line but all the NSPS regulations about collective bargaining and employee appeals are in the dumper. Obviously, the new pay system is real and it's happening. What can unions and employees do in the way or bargaining or appeals? Unless Congress finally decides to pull the plug on NSPS sometime soon, the answers to these questions may take years to work out.

The NSPS law, at 5 USC 9902(f)(4), says that the “collaboration” process in that law shall be “the exclusive procedures for the participation of employee representatives in the planning, development, implementation or adjustment of the NSPS.” Under the

NSPS regulations, at 5 CFR 9901.305, there is a “bar to collective bargaining” on any aspect of the NSPS pay system. The federal district court injunction issued on February 27, 2006, strikes down the NSPS regulations on collective bargaining and casts considerable doubt on whether 5 USC 9902(f)(4) can be interpreted to prohibit collective bargaining on any aspect of the NSPS that is established or changed by DOD.

The NSPS regulations establish “pay banding” under which all covered employees will be placed in broad pay bands, instead of General Schedule grades and steps. The pay bands have quite a range to them, typically about \$30,000 or more from the low end to the high end. Employees will be placed in a pay band at their current salary, but what happens after that could be quite a roller-coaster ride. Pay is linked to performance ratings, so that each year an employee is supposed to get a “performance payout” that will depend on his or her performance rating and on how much money DOD has put in the performance payout pool. Under 5 CFR 9901.343, a supervisor may decide to reduce an employee’s pay by up to 10 percent as often as once every year for “unacceptable performance or conduct or both.” Under 5 CFR 9901.361, DOD may decide to authorize such varieties of premium pay as overtime, compensatory time, standby pay, availability pay for criminal investigators, Sunday pay, holiday pay, night pay and hazardous duty pay. DOD’s “implementing issuance” has decided to authorize these types of pay; nothing prevents DOD from issuing another implementing issuance next month taking them away. For the rest of the federal workforce, these types of premium pay are still required by various sections in title 5 of the U.S. Code.

What are the rights of a union that is the exclusive representative of a group of employees now descending into “spiral 1”? Under the final NSPS regulations issued on November 1, 2005, the answer is “none.” With three of the nine legs of this monster cut off by the federal judge, the answer is “who knows?”

Our opinion is that the implementing issuances are no different than any new

DOD-wide regulation that's been issued since the Civil Service Reform Act of 1978. It is well-established that no regulation, not even a new Government-wide regulation, can be implemented in such a manner that it conflicts with an existing labor contract. Internal Revenue Service, 14 FLRA 243 (1984). If management proposes to implement a change in personnel policy or conditions of employment based on the issuance of an agency-wide regulation, management can, of course, refuse to bargain over any Union proposal that would conflict with its management's rights under 5 USC 7106. However, management has no other basis for refusing to bargain over what the agency-wide regulation says, unless management alleges a "compelling need" for a single, agency-wide regulation with no local variations. If management makes such an assertion it is the same as a "declaration of non-negotiability" and may be challenged by filing a "negotiability appeal" with FLRA within 15 days.

FLRA and the courts have not often agreed with management claims of "compelling need." In the famous "Ft. Stewart Schools case," the Supreme Court ruled that a union could negotiate over the actual pay and benefits of DOD school teachers since they were not set by law, and rejected DOD's "compelling need" argument. The reference to this case is: Ft. Stewart Schools v. FLRA, 495 U.S. 641 (1990) and you can access it at www.findlaw.com,

DOD will surely argue that the NSPS law, 5 USC 9902(f)(4), is blanket permission from Congress to limit the involvement of federal sector unions to "collaboration" instead of bargaining on the implementation of their NSPS regulations. After the February 27, 2006, federal court decision, this is not a convincing argument.

So who wants to be first? Any union representing employees who are about to spiral down the NSPS drain should consider a demand to bargain, and a grievance or an unfair labor practice charge if management refuses. This raises issues of national significance, so be sure to get advice and direction from your national Union

office before deciding what to do about bargaining concerning the implementation of whatever NSPS “spiral” is heading your way.

From our December 2, 2005, memo on the proposed “implementing issuance” on pay under the NSPS:

<http://minahan.wld.com>

We checked out the one called “compensation” to see how DOD employees are going to get paid. Except for the “pay for performance” part, the rest of it is pretty much the same as the existing pay laws for federal employees in title 5 of the U.S. Code. Why would the Secretary of Defense go to all this trouble to issue a whole new compensation system if it still contains Sunday pay, holiday pay, night pay, compensatory time, hazard pay and other familiar concepts from Title 5? To find out, read The Parable of the Caboose, at the end of this memo.

The pay for performance section of the draft is at “SC300.5.” For now, it would apply just to GS employees (or more accurately, employees who used to be GS employees).

It is your worst nightmare, whether you are a bargaining unit employee, a supervisor or a manager. Two fundamental facts set the stage: all employees will be in WIDE pay bands. For example, Pay Band 2 for “Technician/ Support” employees would range from GS-7, step 1 to GS-10, step 10. (Remember, that doesn’t mean the General Schedule pay system applies to you; only that DOD has decided, for now, to use the GS

pay scales as a benchmark). If you work for DOD in the Denver area, Pay Band 2 (using the 2005 GS pay scale) is \$36,087 at the low end and \$63,200 at the high end. Your “base pay” will be set somewhere in that range (most likely, to match the exact dollar amount you are making in salary as of the date of your conversion to NSPS). You will not know what your “performance payout” is going to be until after the end of each year, after you have been given your annual performance rating. The performance payout is figured like this:

- (1) Multiply your base salary X your “shares.” Your shares depend on your overall performance rating. Although there are 5 possible ratings, the supervisor can give an employee with a rating of 5: five or six shares; an employee with a rating of 4: three or four shares; an employee with a rating of 3: 1-2 shares; and an employee with a rating of 2 or 1: zero shares. It is reassuring to see, in section SC300.5.6, that “share assignments may not be influenced by personal bias or favoritism.” Almost as comforting as the road signs that say “litter may not be thrown out of cars.”
- (2) Take all the figures earned by all the employees in the unit (which could be a single office, an entire Base or a whole region of the country, or something else) and add them up. The result is the “total salary share product (TSSP).”
- (3) Identify the dollar amount in the pay pool. It can be zero; it can be \$5 billion; it can be anything.
- (4) Take the dollar amount in the pay pool and divide it by the TSSP. The result is the “share factor.”
- (5) Multiply your base salary X your number of shares X the share factor. The result is your performance payout for last year (which you don’t get

until this year, because you must first get your annual performance rating for last year).

Now let's play with some numbers. Assume there are 4 employees in your unit: Employee A, Employee B, Employee C and Employee D. Assume each employee's base salary is \$40,000 per year. Assume Supervisor Joe, based on the employees' annual performance ratings, gives Employee A six shares, Employee B two shares, Employee C one share, and Employee D zero shares. Assume DOD decides to put \$40,000 in the pay pool for this unit (pretty generous!). Here are the performance payouts for our alphabetical co-workers:

Employee A: \$17,136 (total salary for the year: $\$40,000 + \$17,136 = \$57,136$).

Employee B: \$ 5,712 (total salary for the year: $\$40,000 + \$ 5,712 = \$45,712$).

Employee C: \$ 2,856 (total salary for the year: $\$40,000 + \$ 2,856 = \$42,856$).

Employee D: \$ -0- (total salary for the year: $\$40,000 + \$0 = \$40,000$).

If you are Employee A, do you really think you're worth \$17,000 more than Employee D, who holds the same job as you? If you are Employee C, does anything bother you about the fact that Employee A earns more than \$15,000 more than you? If you are Joe Supervisor, are you really going to give one employee 6 shares and another employee 1 share, if one of them is a man and the other one is a woman? If you are Mary Manager, where do you think employee morale is going to be after five years of this, when the "A type" employees have now been paid \$71,000 more than the "C type" employees ?

DOD employees should take comfort that this draft NSPS "implementing issuance" retains so many "title 5" pay features, like Sunday pay, night pay, compensatory time and hazard pay; and that they are computed the same or almost the

same way as they are under the title 5 pay laws (the ones that the Secretary of Defense can now waive). It almost makes you feel like you'll still get within-grade increases, that you'll still get at least a 2-step pay increase when you are promoted, that you'll still get "saved grade" and "saved pay" if you are demoted in a reduction in force, and that you'll still be able to earn an unlimited amount of sick leave over a long career so that it becomes something like a disability insurance policy.

DOD employees who know The Parable of the Caboose will take no comfort.

There once was a long choo-choo train built by all the people together and the people were so happy with their train that they hooked the engine and all the cars together and hooked a caboose to the end, and they headed for the place they all wanted to go. After a while, some of the people decided they preferred to ride in the cars in the front. They made the other people move to the cars in the back. The other people didn't think much about it because a train car is a train car, and they believed it when the people who wanted to be in front said they would be just fine if they moved back there. "We all believe in freedom and equality," the people in the front told them. After a while, the people up front got more selfish and wanted most of the train cars for themselves, even though the people in the back outnumbered them 2-1. The people in the back went along.

Finally, the people in the front got all the people in the back to move to the caboose. The people in the back grumbled about it but they didn't do anything but cram themselves tighter into the caboose. "Its no big deal," said one of them. "We're all going to the same place anyway." Then the people in the caboose saw the other train cars pulling away from them, faster and faster. The caboose rolled to a dead stop, and then it started rolling backwards. The people in the caboose then realized that the train had been coasting downhill the all the while that the people in the front were making them move to the back, and the people in the front, who wanted to have all the other train cars for themselves, had unhooked the caboose while the entire train was coasting downhill. Now the rest of the train- the train built mostly by the people in the caboose- was chugging steadily uphill, toward the place everyone wanted to go. The people in the caboose were rolling backwards, faster and faster. . . .

Amen