



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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Program Executive Office
National Security Personnel System
Attn: Bradley B. Bunn
1400 Key Boulevard, Suite B-200
Arlington, VA 22209-5144

RE: Comments on Proposed NSPS Regulations—RIN 3206—AK76/0790—AH82

Dear Mr. Bunn:

It is difficult to communicate how deeply outraged we are by the anti-worker, anti-union, anti-American values proposed National Security Personnel System (NSPS) regulations that were published in the *Federal Register* February 14, 2005. We have joined together with other labor unions representing Department of Defense (DOD) civilian employees to oppose these regulations. Together we formed the United Defense Workers Coalition (UDWC), and submitted joint comments detailing our profound disappointment with and objection to the proposed regulations. We are a signatory to those joint comments and take this opportunity to reiterate our complete support for them. A copy of those comments is attached.

At the outset, we find it necessary to state the obvious; that the front line civilian men and women that AFGE represents in DOD are, have been, and will continue to be fully committed to our nation's physical defense as well as the defense of our freedoms and values. Many are veterans and some have even served in Afghanistan and Iraq. They want to know why their pay is being undermined and their rights to fair treatment, due process, and to bargain over an already limited scope of subjects are being attacked by DOD.

These regulations are not about improving national security. Throughout the proposed regulations, DOD has devastated employee rights and protections while exempting itself from accountability at every turn. DOD has failed to demonstrate that there are conditions or specific problems that would justify our government diminishing our freedoms and rights and compromising our values in such a way. Our members believe, and we believe, that the proposed regulations will create turmoil and undermine the morale of the workforce, having

a negative impact on the mission for years to come. Recruitment and retention of a highly-skilled, committed and loyal workforce will suffer in the years ahead.

DOD has failed to put any real details about its pay, performance management and classification systems into the regulations. Instead, the Department says it will develop these systems in the future through internal issuances, thus evading its accountability to the statutory collaboration process Congress required for involving the Unions and the public regulatory process. We know this is intentional. In a March 9, 2004 letter from former OPM Director Kay Coles James to Secretary Rumsfeld, OPM advised DOD to put few details into the regulations so that the Department would have the flexibility to develop and change the system in the future without having to deal with the unions or the public. This is a blatant avoidance of DOD's responsibility under the law.

DOD wants to be able to set pay for its employees, vary that pay from occupation to occupation and location to location, and divert funds from payroll to other endeavors, free from accountability and oversight. Its proposals allow it to avoid congressional scrutiny, OPM oversight, and meaningful union involvement. Instead of determining annual increases out in the open between the Executive and Legislative branches of government, a process in which employees can participate through their Members of Congress and their unions, DOD wants to avoid accountability and make this a unilateral Department decision.

DOD wants to be able to vary individual pay based on performance, but it doesn't want to be held accountable for the accuracy of its determinations. DOD has removed performance appraisals from employees' negotiated grievance procedures, thereby removing the independent avenue of appeal that bargaining unit employees have enjoyed for decades. In its place, DOD proposes an undefined reconsideration process, totally subservient to the Department. Payouts based on those ratings will have no appeal process at all – DOD does not want to be held accountable for its decisions that affect its employees' income.

DOD wants to be able to hold its employees accountable for meeting performance expectations, but it does not want to hold itself accountable for setting and communicating those expectations. The proposed regulations do not require DOD to think those expectations through carefully and put them in writing. Rather, employees will be held accountable for knowing that there are expectations for them that will affect their pay, scattered throughout various manuals, handbooks, instructions – anything DOD wants to call an expectation. DOD also allows itself to change these expectations throughout the rating period, making it confusing for employees and hard for them to keep up with their priorities. Their supervisors, however, will not be held accountable for reading, understanding, tying to mission goals, and communicating a usable set of expectations in writing to their employees.

DOD employees have been told that NSPS will reward them for their good performance. In reality, the system sketched out in the proposed regulations might give a superior employee a small or large performance payout depending upon how much money is in that employee's pay pool, how many shares his or her supervisor assigns, how many other superior ratings are given out in that pay pool, and what the pay pool manager ultimately decides to give. That same employee may be in a band that gets little or no annual increase and may be in a career group that gets little or no local market supplement. This superior employee may get a small or large performance payout due to circumstances beyond his or her control. That employee may get little or no annual increase due to circumstances beyond his or her control. And, that employee may or may not get a local market supplement due to circumstances beyond his or her control. There will be multiple determinations, varying throughout the country that will make pay confusing and subject to inequity. It will take a huge investment of money, time and personnel to make these determinations accurately and perform the ongoing validations necessary to ensure that DOD employees receive equal pay for equal work throughout the nation.

DOD wants to be able to hire employees and put them on probationary periods of unknown length. This is akin to at will employment, which denies workers any rights. DOD does not want to be held accountable for using a one-year probationary period wisely to determine whether or not an employee should remain on the job or be let go. DOD does not want to be held accountable for the actions it takes against employees, but wants to give itself a period of undefined length during which it can terminate an employee without having to prove its case.

DOD wants to be able to target employees when it has a reduction in force, by exempting itself from the civil service rules, which were originally instituted to balance the interests of affected workers with the legitimate mission requirements of agencies. DOD wants to set its own rules, take away employee rights to bump and retreat, create its own targeted competitive groups, and give performance ratings, which are notoriously inaccurate, much greater weight than long and loyal service.

DOD thinks that it should be able to take whatever disciplinary actions it wants against employees without being held accountable for the accuracy of its determinations or the appropriateness of its penalties. The proposed regulations would separate DOD from other employers who must be able to show that the penalty they imposed on an employee is reasonable based on factors that are generally understood and accepted, such as how long the employee has worked on the job, what his or her record has been in the past, and what kind of penalties have been given to other employees accused of the same misconduct. DOD does not want to be second-guessed, however, so MSPB or an arbitrator will not be able to mitigate a penalty unless it was so disproportionate as to be wholly without justification. It would not be enough for the judge or arbitrator to

believe it was an unreasonable penalty – “wholly without justification” is an almost impossible standard to overcome, but DOD does not want to be held accountable for its disciplinary decisions.

DOD thinks it should be able to take actions against employees based on their performance or misconduct, but it doesn't want to be held accountable for how well it investigates a case, how well it characterizes and communicates the charges, or how well it explains performance expectations to employees. DOD does not want to be held accountable to the standards of other employers, who have to accurately frame the charges against an employee – it wants to require MSPB or an arbitrator to ignore what it actually told the employee was the reason for discipline if its managers were too incompetent to do it right. How does an employee defend him or herself against accusations that get withdrawn and replaced with others at the last moment? DOD also does not want to be held accountable for how well its managers tell employees what they are expected to do – it wants to require MSPB or an arbitrator to ignore what it actually told an employee about his or her performance expectations if its managers were too incompetent to do it right. How does an employee defend him or herself against discipline based on performance if DOD can withdraw what it actually told the employee and replace it with what it say it meant to say?

DOD wants to be able to avoid its responsibilities to pay attorney fees when it loses a case and an arbitrator or judge say its managers were wrong to have disciplined an employee. Instead of agreeing to be accountable for its actions and the actions of its managers, DOD wants to excuse itself from its responsibility to pay reasonable attorney fees when it loses a case if the finding was based on facts supposedly not known when managers took the disciplinary action. In other words, DOD wants not to be held accountable for its own incompetency in investigating and formulating the charges it brings against employees.

DOD wants to be able to take whatever actions it wishes without being held accountable for being fair and equitable to its own employees or ensuring that any harm it causes them is redressed. We understand that from time to time DOD will need to act quickly and may need to use different procedures than those in the collective bargaining agreement and may not have time to negotiate new procedures. We have offered ways to meet DOD's needs while protecting our bargaining unit employees. But, in its proposed regulations, DOD makes it clear that it not only wants to avoid any responsibility for negotiating these procedures at all, it wants the right to unilaterally develop rules and deviate from them. DOD is not content with exempting itself from the obligation to negotiate with its employees' union over the procedures it will follow in carrying out its actions, it wants to be able to set its own rules and then violate them at will.

This refusal to bargain over procedures and appropriate arrangements for employees who are harmed by management's actions puts our members at risk. While DOD has always had the right to assign work, including work at a location away from an employee's regular duty station, managers have had to follow rules, including negotiated procedures. These include such things as procedures for selecting employees for details, overtime, or other assignments that preserve management's right to determine the qualifications needed, but provide a fair and equitable method for selecting among the qualified employees. Such a system could call for asking for volunteers first, and then selecting based on seniority, a lottery, or other method if more people are needed than volunteered. Other things frequently negotiated today include advance warning, whenever possible, before an employee is deployed away from home and requirements to cover expenses incurred by the employee that would not be incurred at the regular duty station.

Without these rules, managers can give favorable assignments to their friends and unpopular assignments as reprisals to employees they don't like. A single parent, who is needed at home, could be sent overseas even though there were equally qualified employees who volunteered to go. Employees could be told to go home, pack their bags, and get on a plane that afternoon, with no time to arrange for their children or close up their homes. These are civilian employees, not military. They understand that their job is to support our troops and protect our nation. They know that this may mean being away from home at times. But they expect to be treated fairly and with respect for themselves and their family responsibilities. Under NSPS, DOD has proposed not only that it will not negotiate the procedures and appropriate arrangements that help to ensure fairness and dignity on the job, but that it retains the sole, exclusive, and unreviewable discretion to determine the procedures it will use and to deviate from those procedures. Employees will have no protections. It is hard to imagine that talented people will consider DOD an attractive employer when it values its workers so little and refuses to be held accountable for its actions.

DOD wants to be able to do whatever it wants in the workplace and not be accountable to union representatives who can stand up and challenge its managers. The proposed regulations would require union representatives, even when acting in that capacity, to be held to the same standards as other employees. In general, non-management employees are held to a standard that expects deference to superiors. A non-management employee, who firmly says, "No! That makes no sense!" could be accused of insubordination. It is for this very reason that a body of law and precedent developed to level the playing field and protect the representational activity of union officials. But DOD doesn't want to be accountable to union representatives who stand on equal footing with its managers.

DOD wants to be able, at its own discretion, to deal with its employees' unions (in those very limited areas it proposes to deal with us at all) at the national level or multi-unit level. In its regulations, DOD explicitly prohibits ratification of any agreements reached by the members of the union or unions involved. We do not believe that DOD has any authority to determine how a union makes its decisions. We are a member organization that does not operate in a command and control manner. DOD may believe that it has the right to exempt itself from accountability but we do not. We intend to continue to be accountable to our members and to involve them in the decisions that affect their work lives, including the ability to ratify or turn down agreements with DOD.

DOD's unwillingness to be accountable is especially hypocritical in light of its own Guiding Principle to ensure accountability at all levels. DOD does not seem to realize that being held accountable means more than just saying it. It means being willing to subject your decisions to scrutiny by forces outside of yourself that are able to require you to change or punish you.

During the comment period for these proposed regulations, we have been assured by DOD officials, including Secretary England, that DOD employees were authorized to read the regulations and comment on them on duty time, using Department computers. Furthermore, we have been assured that AFGE would have access to our bargaining unit members to educate them about NSPS and encourage them to comment. Instead, in facility after facility, our activists have been reporting that managers denied employees the right to comment on duty time; threatened employees, telling them that they were not supposed to say negative things about NSPS; and refused to allow the union to post and distribute AFGE NSPS materials. We have had our worst fears realized. DOD apparently, cannot or will not control its managers. We have no confidence whatsoever that DOD will do a better job controlling its managers when they have even more authority and less accountability.


In its rhetoric, DOD paints NSPS as a "modern, flexible and agile human resource system that can be more responsive to the national security environment, while enhancing employee involvement, protections and benefits." We believe the proposed NSPS is regressive, rather than modern, and so complex as to call into question how flexible and agile it can be. And, in almost every section of these proposed regulations, employees lose – they lose pay stability; employment stability; protections from erroneous, discriminatory, or vengeful management actions; and a meaningful voice in their work place through collective bargaining.

AFGE and our members, who are the committed civilian employees of the Department of Defense, had hoped to be true partners in creating a new system that would meet any and all National Security needs, while remaining fair but flexible. Sadly, DOD has chosen not to collaborate with the employee representatives. DOD chose to not have the statutorily required meaningful

discussions with AFGE or other employee representatives which could have led to a greatly improved system. Instead, DOD has chosen to thumb its nose at the employee representatives, the employees themselves, even at mandates Congress imposed, and created a fundamentally flawed system that has generated the intense opposition of all of the effected employee representatives and thousands upon thousands of employees in their individual comments. Real collaboration with the employee representatives could have produced a model system, but DOD chose not to have a partnership. Instead we now have a proposed personnel system that employees widely oppose and that has the potential to devastate employee morale. At this critical stage in the war on terror, is it seriously in the national security interest to have DOD managers and employees distracted by the training necessary to implement these new personnel rules? Is it currently cost effective to forgo urgently needed supplies for our overseas troops, forgo state of the art medical care for our injured veterans, or forgo just benefits for the families of troops who made the ultimate sacrifice, simply so that DOD can implement a new personnel system that is already widely discredited? The patriotic and dedicated employees of the Department of Defense who work to keep America free deserve better.

In making these comments, AFGE does not waive any of its rights or claims under 5 U.S.C. 9902 or any other statutory or legal rights to which it or its members might be entitled now or in the future.

We continue to stand ready to work with you in the hopes that we can remove the flaws in the proposed NSPS and, together, create a truly modern system that is good for the Department, good for its employees, and good for our nation.

Sincerely,

John Gage
National President

Attachment