



CONGRESSIONAL TESTIMONY

**STATEMENT FOR THE RECORD
BY**

**J. DAVID COX, SR.
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO**

BEFORE

COMMITTEE ON ARMED SERVICES SUBCOMMITTEE ON PERSONNEL

ON

DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL REFORM

March 23, 2017

On behalf of the almost 700,000 federal and District of Columbia employees, including 270,000 in the Department of Defense (DoD), who are represented by the American Federation of Government Employees, AFL-CIO (AFGE), thank you for the opportunity to submit this Statement for the Record on DoD Civilian Personnel Reform. Our members' experience and dedication ensures reliable and cost-efficient support for our nation's warfighters—from maintaining weapons to overseeing contractors to guarding installations.

AFGE has had numerous occasions to study and testify on proposed changes to the DoD civilian personnel system. We are all too familiar with various efforts within the Defense establishment to further the agenda of placing all DoD civilian personnel within a Title 10 framework, and removing the Office of Personnel Management (OPM) from any meaningful role with respect to DoD civilian personnel. AFGE opposes these efforts. Neither DoD nor any defense "studies" have made a coherent case for shifting civilian employees from civil service coverage under the well-developed framework of Title 5 to a DoD driven Title 10 system that shortchanges the pay and rights of federal workers.

The Threat to Revive the Discredited NSPS: Performance Pay and Force of the Future

The federal government's disastrous experience with the National Security Personnel System (NSPS) in the Department of Defense during the George W. Bush administration is a cautionary tale on the dangers of abandoning an objective "rank-in-position" system like the General Schedule for federal agencies. From 2006 to 2009, 225,000 civilian workers in DoD were subject to a system that based salaries and annual salary adjustments on supervisors' assessments of employee performance. NSPS also granted managers tremendous "flexibility" on classification of jobs, hiring, assignments, promotion, tenure, and "performance management." The system's only additional funding relative to the General Schedule payroll base was for outside consultants who had a large role in designing, implementing, and training DoD managers in their new system.

It was not surprising that even in its brief three-year reign, NSPS damaged the federal government's excellent record of internal equity on race and gender. Data on salaries, performance ratings, and bonuses showed marked advantages to being white and male, and working in close geographic proximity to the Pentagon. Those in the Office of the Secretary of Defense, the Defense Finance and Accounting Service and Tricare were found to be higher performers, on average, than civilian employees in the Departments of the Army, Navy or Air Force.

NSPS was a system conceived in a highly politicized context. The Department of Homeland Security (DHS) had been established two years earlier, in 2002, and its secretary was granted broad personnel authorities, construed by the agency to include the right to unilaterally abrogate provisions of collective bargaining agreements and replace them with agency directives. The rationale for DHS' grant of authority to create

a new pay and personnel system was the war on terror and the administration's belief that union rights and national security were mutually exclusive. So in 2003, Defense Secretary Rumsfeld used the same rationale to seek personnel authorities similar to those granted to the Secretary of the Department of Homeland Security.

In early 2016, the Defense Department began exploring NSPS 2.0 under the rubric of "Force of the Future." Early drafts of the Force of the Future proposals for civilians included the notion of moving virtually all DoD civilians from Title 5 to Title 10. This was the original plan for NSPS. Title 10 governs the Department's uniformed personnel, but includes a few provisions for civilians in intelligence and Defense universities. A move from Title 5 to Title 10 would eliminate most civil service protections, and give the hiring authority complete discretion to set and adjust pay. AFGE strongly opposes any and all efforts to restore NSPS, whether under the guise of Force of the Future or by any other name, including the just released report of Bipartisan Policy Center. The flaws of that system were well-documented and there is certainty that a revival would reproduce all the discriminatory effects of its earlier incarnation.

DoD has often argued that it needs a more "flexible" personnel system in order to manage its workforce than is contemplated or permitted under Title 5. However, if experience is any guide, DoD rarely, if ever, simplifies much of anything, even when given broad latitude by Congress. More recent examples include DoD's implementation of the broad-banded Senior Executive Service pay system, or implementation of the Defense Acquisition Workforce Improvement Act. In each case, the Department developed and grew its own dedicated systems that blunted any alleged flexibilities that were sought. The net effect is an even more bureaucratic and internally rule driven process than the old system that the putative "flexibilities" were designed to replace.

At the Department of Homeland Security, AFGE prevented that agency's proposed new personnel system, called MaxHR, from ever getting off the ground, thanks to a lawsuit that successfully argued that its undermining of collective bargaining rights violated the law. But at DoD, NSPS did move forward in part because its focus was not on eliminating the union per se, but rather on creating a pay system that allowed managers to reward themselves and their cronies, and punish others. NSPS could only have continued if Congress had been indifferent to its discriminatory outcomes. Fortunately, when faced with data that showed NSPS gave systemic advantages to white employees and other relatively powerful groups at the direct expense of other DoD civilians, and that the venerated Merit System Principles had been undermined, Congress voted to repeal the system in 2009.

But the architects of NSPS never gave up on the dream of a subjective pay system for the federal government, one in which managers can decide each employee's salary and whether and by how much that salary will be adjusted each year. Prior to the 2016 iteration of Force of the Future, the contractor Booz Allen Hamilton (\$5.41 billion in revenue in FY 2016, 98 percent of which is from the federal government) endowed the publication of a report under the imprimatur of the Partnership for Public Service.

The report trod the well-worn path of those seeking lucrative contracts to revamp the federal personnel system. It employs many of the hackneyed tropes that have become all too familiar among the enemies of fair pay for federal employees: the General Schedule is "stuck in the past," "broken," "rigid," and "fragmented." It conveniently neglects to acknowledge the fact that numerous flexibilities and modernizations have been enacted over the past few decades. In the 1990's, the General Schedule went from having one nationwide annual cost-of-living adjustment to a city-by-city, labor market-by-labor market cost-of-labor salary adjustment system. Special rates were authorized as well. In the 2000's, Congress passed legislation that introduced broad new hiring authorities, managerial flexibilities in salary-setting, and a program for substantial bonuses for recruitment, relocation, and retention. Congress enacted legislation to allow student-loan repayment, new personnel system demonstration projects, and phased retirement. The list of new flexibilities is long, and in many cases, these new authorities have improved the General Schedule. In any case, the list stands as a refutation of the myth that the General Schedule is a relic, untouched by modernity or that Congress has failed to address needed changes in the civil service system for decades on end.

Congress has been careful, however, not to go so far as to undermine the Merit System. Unlike a private firm, the federal government is spending the public's money in ways that are meant to promote the public interest. NSPS was an object lesson in what happens when a Booz Allen Hamilton plan is implemented in a federal agency. Despite good intentions, the Merit System Principles are undermined, particularly the principles that promise "equal pay for work of substantially equal value," and that "employees be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." Veterans Preference in hiring, retention and promotions is also inevitably undermined. These are the lessons of NSPS.

Now we see that what is old is new again under the title "Building a F.A.S.T. Force: A Flexible Personnel System for a Modern Military" (hereinafter the "FAST Report") issued by the Bipartisan Policy Center. While most of the FAST Report deals with military personnel policy on which AFGE does not take a position, the sections addressing civilian personnel policy look like they were cribbed from previous reports and proposals, including last year's Force of the Future proposal.

AFGE does not suggest that either the Partnership, the architects of Force of the Future, or the FAST Report, advocate discrimination in pay. They likely have good intentions. But we also know that the road to hell is paved with good intentions, and federal employees have no desire to revisit the hell of NSPS. To be clear: Force of the Future and/or the FAST Report blueprint are not just cut from the same cloth as NSPS, they are NSPS redux.

While NSPS and its would-be successors fail the internal equity test, there is no question that when it comes to external equity, Congress and the Clinton, Bush, and Obama administrations all failed to perform their role. It is preposterous to blame the current system for failing to produce external equity. External equity is a funding issue,

and the General Schedule cannot fund itself. It relies on budget authority and appropriations. To pretend that Congress would magically provide billions more each year to fund a new civil service system identical to one it repealed in 2009 on the grounds that it was discriminatory is folly.

The cost of living has risen 10 percent from 2010 to the present. So even before the salary reductions for new employees of 2.3 percent and 3.6 percent (i.e., the increase in employee contributions to FERS), the purchasing power of federal salaries had declined by 4.6 percent. The degree to which they lag the market varies by city, but the nationwide average is 34.92 percent according to the most recent estimates from OPM, using data from BLS. And that number includes current locality payments which were frozen for five long years. <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/pay-agent-reports/2015report.pdf>

Inequality, the Decline of the American Middle Class, and Wages and Salaries of Federal Employees

The decline in living standards for America's middle class and the ongoing misery of the poor have been much in the news recently. Even as the rate of unemployment has dropped, wages continue to stagnate as do household incomes. On one side are those who deny the numbers, attribute changes in the distribution of income and wealth to changes in educational attainment or willingness to exert effort. On another side are those who recognize that the decline of unions, the rise of outsourcing and global free trade agreements, and the deregulation of the 1990s and other factors are better explanations. Median incomes for middle class American families, adjusted for inflation, are lower than they were in the 1970s and the very rich have benefited so disproportionately from economic growth over the decades that America is now more unequal than it was in the 1920s. Both middle incomes and the incomes of the poor are now higher in several European countries and Canada than they are in the U.S. After adjusting for inflation, median per capita income in the U.S. has not improved at all since 2000.

Federal employees are typical middle class Americans. They work hard and have historically received modest, but fair pay from their employer. It has been recognized that the nation benefited from having an apolitical civil service governed by the merit system principles. The pay and benefits that derived from those principles were supposed to be adequate to recruit and retain a high-quality workforce, capable of carrying out important public sector functions, from law enforcement to guaranteeing care for wounded warriors to protecting public health.

The government would not be a bottom-of-the-barrel employer, paying the lowest possible wages and forgoing health care and retirement benefits, like so many of today's most profitable corporations. Likewise, the government would not be a place where anybody went to get rich at taxpayer's expense (that role is assumed by government contractors like Booz Allen Hamilton). The government as an employer would be a model when it came to ideals of internal equity and non-discrimination,

promoting both fairness and seeking employees devoted to the public interest. And on pay and benefits, it would aim at "comparability," defined in the pay law as no less than 95 percent of what private and state and local government pays on a locality basis.

While some brave politicians have held fast to these principles over the past several years when there has been immense political pressure to reduce government spending no matter what, many more have succumbed to the notion that America should reconcile itself to declining living standards for all but the very rich. As such, they supported the pay freeze, the 1 percent pay adjustments, the federal retirement benefit cuts, which have cut purchasing power of some federal paychecks by an additional 2.3 or 3.6 percent; and they have supported the Budget Control Act's discretionary spending caps, which have meant temporary layoffs and could mean permanent job loss for thousands.

We recognize the politics behind the pressure to constantly reduce federal spending. We understand the vast power of those who would protect the low tax rates of the wealthy at any cost. Regardless of one's position on austerity and sequestration, both Force of the Future and FAST Report proposals deserve strong opposition because they introduce subjectivity and politicization into federal pay, undermine veterans' preference and violate the merit system principles. These plans are also objectionable because they would reallocate salary dollars away from the lower grades toward the top, increasing inequality and decreasing opportunity for advancement. Even if the direct attacks on federal employees' pensions were to stop and funding for salaries were enhanced, it would be important to reject Force of the Future and the FAST Report approach, because they quite explicitly advocate greater inequality between the top and the bottom of the federal pay scale.

The elitism of Force of the Future and the FAST Report is striking. They ignore the federal government's hourly workforce altogether. Apparently blue collar workers are so bereft of the qualities DoD and its contractors want to reward in their pay schemes that they are not worth notice. The implied segmentation of the General Schedule or salaried workforce is also highly elitist. Employees in the lower grades, like hourly workers, are excluded entirely, again because, presumably, trying to measure their contribution to excellence would be a pointless exercise. But excluding the lowest paid federal workers is only one part of the inequality enhancement exercise that Force of the Future and the FAST Report propose for DoD. Like their NSPS forbearer, the plans would divide the workforce by occupational category, reserving the highest raises for the highest earners. Those in the midlevel occupations would stagnate or decline, while their betters would be provided with both higher salary increases and a larger pool of funds from which to draw performance-based adjustments.

Force of the Future and its government-wide twin from the Bipartisan Center should also be opposed because they both would undo the tremendous achievement of the current system with respect to eliminating discrimination in pay. AFGE urges Congress to treat the findings of the OPM study on pay equity as important accomplishments worth protecting. We should be celebrating this success, not

considering replacing the system that produced it. And that celebration must include full funding, so that federal employees can restore their status in the middle class.

Maintaining a Merit-Based Civil Service and Due Process Rights

A “merit-based” civil service system forms the cornerstone of all modern Western democracies. It ensures that technical expertise is brought to bear on performing agency missions, without the threat of overt partisan agendas driving day-to-day operations.

When the FAST Report at recommendation A-5 states: “Create a separate and unique personnel system for all Defense Department civilian employees,” we at AFGE ask, will due process rights be maintained? The FAST Report further comments on page 27: “Another issue with the civilian personnel system is the lack of flexibility to hire and fire employees in a timely manner. Since the system’s primary rationale is fairness and impartiality, it is exceedingly difficult to remove low performers.”

These code words and the outright contempt for civil service due process rights they express should be opposed by all those who care about maintaining a nonpartisan career civil service. The notion that poor performers and those who commit acts of misconduct cannot be disciplined or removed are myths that have been perpetuated by advocates for an “at will” civil service.

The FAST Report ignores that the Civil Service Reform Act (CSRA) provides that all Title 5 employees, including DoD employees, may be removed for either misconduct or poor performance. The employee merely needs to be informed of his or her alleged deficiency and the reason that management proposes to take an action against him or her (removal, demotion, suspension, etc.).

An employee is subject to a final adverse action by an agency 30 days after receiving an adverse proposal. An employee may file an appeal to an adverse action to the Merit System Protection Board (MSPB), a third-party agency that hears and adjudicates civil service appeals. MSPB administrative judges (AJs) hear the matter in an adversarial setting and decide the case in accordance with established legal precedents. If dissatisfied with the AJ’s decision, either the agency or the employee may appeal the decision to the full three Member MSPB.

The MSPB appeal process is highly efficient and expeditious. Most AJ decisions are rendered within 70 days of the filing of an appeal. On appeal to the full MSPB from an AJ decision, agencies win 80 - 90% of the time. Meanwhile, the agency’s decision, e.g., removal of the employee from the payroll, remains in effect during the entire appeals process.

The importance of maintaining a nonpartisan, apolitical civil service in an increasingly partisan environment cannot be overstated. First, most federal jobs require technical skills that agencies simply would not obtain through non-merit based

appointment. Second, career employees must be free to perform their work in accordance with objective professional standards. Those standards must remain the only basis for evaluating employee performance or misconduct.

Calls to make it easier to fire a federal employee by decreasing due process rights or speeding up the removal process are “dog whistles” for making the career service subject to the partisan or personal whims of a few supervisors or political appointees.

The drafters of the FAST Report may find it politically unpopular to admit this, but federal managers are already fully empowered under existing law to take appropriate action when employees are underperforming or engaged in misconduct. There is no group of people who object more to the continuing presence in the workplace of those who are not performing well or who may engage in misconduct than fellow federal employees. When someone doesn’t perform up to speed, it simply means more work for the rest of the people who do perform well. Similarly, an individual’s misconduct hurts all employees in the workplace, and it is usually fellow employees who are the first to shine light on misconduct.

A premise of both DoD’s “Force of the Future” proposal and the FAST Report seems to be that federal managers lack adequate authority and tools to discipline those who engage in misconduct or who are poor performers. Thus, they argue, shifting employees from existing Title 5 processes and protections to a new Title 10 system for all DoD civilian employees is warranted. Despite the various protestations of some managers, management-associated think tanks, and so-called bipartisan groups, the Government Accountability Office (GAO), the Merit Systems Protection Board (MSPB) and the Office of Personnel Management (OPM) have all issued reports and analyses that have come to pretty much the same conclusion: When poor performers are not dealt with it is never because the civil service laws or procedures are too difficult to navigate, but rather because some managers (or their managers) either do not want to take the time and effort to properly document poor performance and remove or demote poor performers, or because they lack the knowledge, skills, and ability to do this.

A recent GAO report, “Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance,” (GAO-151-191), February 6, 2015, found four principal reasons why agencies do not use the already substantial tools they have available to them to remove the relatively few poor performers. All four reasons related to management failures and/or unwillingness to properly identify and document poor performance. AFGE would urge this Subcommittee to review GAO’s well thought-out recommendations and its careful analysis of relevant statutes and regulations.

The premise that the procedural hurdles for removing poorly performing employees are too high is simply not borne out by the facts. When an employee invokes his/her rights to a formal adjudicatory hearing before the MSPB, the agency almost always prevails. For example, in 2013, only 3% of employees appealing their

dismissal to the MSPB prevailed on the merits. In contrast, agencies were favored at a rate five times that of employees when formal appeals were pursued. The notion that the MSPB makes it impossible to fire a federal employee is simply not true. Perhaps we should call it an "alternative fact."

There are well-established and fully adequate processes and procedures for removing problem federal employees. This is true for performance or conduct reasons. In fact, the standards for removing underperformers were specifically developed so that poorly performing employees may be more easily dismissed than employees committing conduct-related offenses. Even more important, the burden of proof is lower for removing a poor performer -- it is only the "substantial evidence" test, so that reasonable supervisors are given leeway to determine what constitutes unacceptable or poor performance.

A Better Way Forward

Already federal workers, including DoD civilian employees, have contributed over \$182 billion to deficit reduction during the past 8 years. Employee pay adjustments during this period have been very small (and in quite a few years there were no adjustments at all), and inflation-adjusted federal employee compensation has actually decreased. Rather than continuing to punish and vilify DoD civilian workers, Congress should consider giving DoD supervisors appropriate tools to reward high performers. Freezes in pay, promotions and awards, and decreases in benefits whether directly or through more employee cost-sharing, do nothing to improve quality.

History is replete with examples of public service corrupted by unfettered, politically-based employment decisions. That's why we continue to support a merit-based civil service system with appropriate due process, and checks and balances to ensure that both hiring and firing decisions be merit-based, and subject to meaningful review.

AFGE strongly supports improvements in agency performance management systems, such as the Defense Department's New Beginnings approach. We look forward to working with lawmakers and others to see this carried-out. AFGE also supports better training of both supervisors and employees so that clear expectations are established, performance is measurable, and appropriate steps are taken to either remedy performance problems, or to remove the small number of poor performers from the workplace. AFGE also recommends that Congress focus more on empowering and improving the quality of the workplace for the 99% of DoD employees who perform well. While we understand the need to deal with the 1% who may be problem performers, we must not allow the other 99% to be tarred and feathered with the same brush. Improving the lot of the 99% will further reduce the influence and tolerance for the 1% to remain employees. This starts with more proactive management.

AFGE opposes virtually all of the proposals set forth in the FAST Report as they may affect civilian DoD workers. They are simply a replay of NSPS, and its destructive

tone. AFGE does support the call in the FAST Report for improving educational opportunities for civilian DoD employees. However, these authorities already exist. It is a lack of funding that is responsible for the dearth of career development of civilians at DoD.

Impact of Hiring Freeze on Military Readiness

As many of you are aware, the current freeze on hiring and promotion of federal employees has had and is continuing to have a negative impact on operations at DOD. While wide swaths of employees have received permission for exemptions on an individual basis, such as depot maintenance employees, others, who have a direct impact on the ability of the “unfrozen” employees to conduct their jobs, are still caught in the freeze even though their jobs have a direct impact on national security. For example, many of the engineers and systems integrators that plan and direct workload at depots across the country remain firmly caught in the freeze. Additionally, other key and equally important areas of the organic industrial base, such as arsenals, supply depots, and DLA are still caught in the freeze even though their workload and workforce have a direct impact on military readiness. Further, working capital fund employees, who work on funded orders from customers, are still caught in the freeze, which is simply unreasonable and makes no sense when current statute clearly states that their work and manning should be tied to workload. AFGE believes that the Armed Services Committee, the Senate and all of Congress should act to ensure that the freeze on civilian employees at DoD – and across government – are removed from the freeze on hiring and promotions. The current freeze is the most inefficient method of managing employees and has a tremendously negative impact on morale.

As you will recall, a recent GAO study identified that the military services are failing to meet core requirements under 10 U.S.C. 2464 at several locations across the organic industrial base. These gaps in core requirements were identified at the lower tier levels and create skill gaps that are critical to maintaining weapons systems that are necessary for war fighting. Increased funding is needed in some cases to ensure that backlogs are covered. In other cases, there is a need to transfer workload to the organic depots. Regardless, these core skills must be preserved to ensure military readiness. Failure to enforce the law is not a good option. This is an area that must be addressed by this Committee. GAO made recommendations that we hope the Committee will enact.

AFGE would like to bring to the attention of this Committee an issue that has an impact on retention and hiring at some facilities, particularly DoD organic industrial facilities. At a limited number of facilities across the country, there is a great unfair disparity between the wages of the GS employees and wage grade employees based on illogical decisions that were made in the past or failure to make logical decisions. For example, the salaried employees at Tobyhanna Army Depot in Pennsylvania are in the New York locality pay area, while the hourly employees are in the Scranton, Pennsylvania area for purposes of locality-based pay. This differential treatment of salaried and hourly employees results in enormous disparities in pay. Both hourly and

salaried workers at the Tobyhanna Army Depot should be in the New York locality pay area, as commuting patterns for both workforces show that the relevant labor market for all occupations employed at the Depot is most closely aligned with New York. The Federal Prevailing Rate Advisory Committee has recommended this unification, but OPM has not implemented the change. We urge the Committee to enact legislation to correct this unjustifiable inequity.

At some of our depots, AFGE Locals and management have worked together on innovative ideas and programs to improve workload leveling and to implement skills enhancement programs that will also increase pay for employees. One such example is the Multi-Trades Demonstration Pilot Program that Congress has authorized and re-authorized to allow all of the military services to enter into agreements where certain skilled journeymen level artisans could be trained in another skill and work in both skills for a higher grade and higher pay. The Air Force Materiel Command (AFMC) has worked diligently on a program at Ogden Air Logistics Complex to implement a pilot program. This pilot demonstration project has been years in planning. It has been approved and promoted through the 4-Star Commanding General at AFMC multiple times and forwarded to the Air Force, DoD and OPM. And yet, in spite of the coordination and agreement between labor and management and despite the solid business case analysis, the plan is caught in a bureaucratic nightmare at DOD and OPM. AFGE needs your help to get this pilot program moving and approved so we can implement the demonstration program to determine whether it is a good model for the future.

Conclusion

We would urge this Subcommittee to reject any movement of DoD's civilian workforce from coverage under Title 5 to a system run by the Department under the authorities of Title 10. This was tried under NSPS only a few years ago, and was rightly abandoned when the gross inequities of the system became apparent.

Although it is easy to focus on the small number of employees in any organization who create problems, it is important to remember that the vast majority of federal employees perform very well, and that agency systems and the laws and regulations governing employee performance serve the public interest in an apolitical, transparent, and accountable civil service. We do not need new laws or authorities regarding public administration. We need to make sure that agency managers and supervisors (and the supervisors of supervisors) have the training and will to implement current rules effectively. In this, we share the concern of this Subcommittee, and we will work with you as we strive to ensure that our civil service system motivates and maintains high quality employee performance at DoD. Due process rights, including union rights, for civil servants at DoD or other agencies provides accountability to the public for both managers and political appointees and is a cornerstone of our system of democracy and should not be treated as expendable.