AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Eric Bunn Sr.
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December 4, 2021

The Honorable Adam Smith
Chairman
House Armed Services Committee
2216 Rayburn House Office Building
Washington, DC 20515

The Honorable Jack Reed
Chairman
Senate Armed Services Committee
Russell Senate Building, Room 228
Washington DC 20510

The Honorable Mike Rogers
Ranking Member
House Armed Services Committee
2216 Rayburn House Office Building
Washington, DC 20515

The Honorable James Inhofe
Ranking Member
Senate Armed Services Committee
Russell Senate Building, Room 228
Washington DC 20510

Dear Chairman Smith, Chairman Reed, Ranking Member Rogers, and Ranking Member Inhofe:

On behalf of the American Federation of Government Employees, AFL-CIO (AFGE) which represents over 700,000 federal and District of Columbia employees who serve the American people in 70 different agencies, including approximately 300,000 in the Department of Defense (DoD), we appreciate your support of a strong national defense and your recognition of the importance of a professional, apolitical civil service supporting our uniformed servicemen and women. As you work to finalize H.R. 4350, the National Defense Authorization Act for Fiscal Year 2022 (NDAA FY 2022), we write to urge your support for AFGE's position on the following issues:

Please include in the final NDAA the House language, H.R. 4350 section 361, "Inclusion of information regarding borrowed military manpower in readiness reports." The June 1994 Defense Science Board study on readiness "concluded that in order to achieve and sustain readiness it was essential to consider, not just the amount of hardware but key manpower issues such as the active-reserve mix, retention, training, ***and the sufficiency of supporting government civilians***. The task force also concluded that borrowed military manpower results in a loss of unit cohesiveness, reduced training efficiency, and lowered readiness" (emphasis added).[1] This same issue was recently documented by the National Security Commission on Military Aviation Safety. "The Services are not adequately tracking PERSTEMPO for units and individuals . . ."[2] The House language revives the Defense Readiness Reporting System to Congress of the impact

[1] See Fiscal Year 2020 National Defense Authorization Act House Armed Services Committee Report (June 2019), p. 255.

[2] "Diverting aviation professionals from their primary aviation duties with additional duties adds to an unsustainable workload. Due to personnel cuts, military aviation units have experienced cuts in administrative support over the past two decades, forcing aviators and maintainers to undertake additional administrative duties that interrupt their primary aviation tasks and contributed to fatigue and burnout." National Security Commission on Military Aviation Safety, "224 Lives, $11.6 Billion, 186 Aircraft" (Dec. 2020), pp. 47-48.

on readiness of borrowed military manpower, focusing particularly on when military are working outside of their occupational specialties and replacing civilian employees and contractors.

Please recede to Senate section 413, "End strengths for military technicians (dual status)." AFGE supports Senate S. 2792 Section 413, "End strengths for military technicians (dual status)" that freezes Air National Guard dual status military technician end strengths to FY 2021 levels and prohibits involuntary conversions of dual status mil techs to AGR status, based on reported abuses of these conversions to AGR status in a coercive manner in the Air National Guard in Ohio. The Senate language properly addresses those abuses consistent with prior Congressional direction.

Please include in the final NDAA the House language, H.R. 4350 section 554, "Expansion and codification of matters covered by diversity training in the Department of Defense." This provision would require comprehensive diversity training for the total force, Active and Reserve military, the civilian workforce, contractors and sub-contractors, ensuring that all forms of discrimination are addressed, which are sometimes omitted if the training is primarily focused on military components only: racism, discrimination on the basis of sex, age, religion, national origin, color, parental status, and disability. The training also covers topics such as reasonable accommodation, reprisal, harassment, hostile environment, whistleblowers, and the different procedures for reporting and obtaining relief and appealing discrimination which differ in some respects between military and the civilian workforces. This provision would remedy defects in the often siloed training focusing only on one component of the workforce where different components of the workforce are co-located and work together and are supervised by each other. Finally, this provision also addresses the oath of office or oath of enlistment and its significance.

Please oppose inclusion in the final NDAA the House language, H.R. 4350 Section 811, "Extension of authorization for the defense civilian acquisition workforce personnel demonstration project" and recede to the Senate that includes no extension of this project, AFGE has repeatedly documented its concerns that such pay for performance demonstration projects merely replicate the abuses of the discredited National Security Personnel System that Congress repealed. A RAND review of AcqDemo in 2016 documented that "[f]emale and non-white employees in AcqDemo experienced fewer promotions and less rapid salary growth than their counterparts in the GS system." RAND further noted that its survey of participants reflected concerns with a lack of transparency over how ratings are calculated and translated to pay, how the pay pool process works, and how pay pool results are shared. Only about 40 percent of respondents to RAND's survey perceived a link between their contributions and their rating and compensation. Finally, RAND documented a perception from many survey interviews and write-in responses that AcqDemo was overly bureaucratic, administratively burdensome and interfered with mission performance.

Please include in the final NDAA the House language, H.R. 4350 Section 814, "Standard guidelines for evaluation of requirements for services contracts." This provision would require senior officials to complete and certify a checklist ensuring that statements of work and task orders submitted to contracting officers comply with longstanding statutes that prevent replacing DoD civilian employees with contractors, subject to annual DoD Inspector General reviews, and requires that service contract budgets comply with these requirements. This

provision addresses several key Government Accountability Office (GAO) findings that are the basis for including contract services management and budget submissions on its high risk list and addresses a GAO audit not addressed by the corresponding Senate language which focuses only on one GAO audit.[3] We would only suggest that the House language be clarified to ensure that it is clear that these "standard guidelines" be addressed through the Under Secretary of Defense for Personnel and Readiness who has responsibilities for "total force management" policies involving the appropriate use of military, civilian employees and contractors from a requirements standpoint. Otherwise, this will default to the acquisition community of the Department which is primarily focused on "better buying practices" rather than challenging the underlying requirement and appropriateness of use of contractors. The Senate markup language in Section 802 has one very small area of overlap with the House language focusing solely on a single GAO audit pertaining to improving "the use of available data to manage and forecast service contact requirements." We believe the House language is clearer, more comprehensive, and accordingly strongly urge receding to the House language.

Please include in the final NDAA the House language, H.R. 4350 Section 1104, "Civilian personnel management." AFGE opposes the Senate companion, S. 2792 Section 1101 on civilian personnel management. The Senate language would walk away from the problem that personnel caps pose to adequate human capital planning by simply deleting any mention of personnel caps. The House language eliminates contradictory language currently in section 129 of title 10 that would seem to suggest personnel caps are sometimes appropriate, although generally problematic, and clarify their harmful effects. The twin effects of personnel caps are twofold: (1) caps lead to substantial levels of civilian pay under-execution that over the course of FY 2015-2019 timeframe averaged $1.8 billion within the Department, a key impediment to human capital planning and hiring of the civilian workforce; and (2) caps on civilian employees just lead to shifting of work from the civilian workforce to contractors or military, at greater cost and to the detriment of readiness, lethality and stress on the military force.[4] Additionally, the

[3] Section 814 addresses the findings of two GAO audits: GAO-16-46, "DOD Inventory of Contracted Services: Actions Needed to Ensure Inventory Data Are Complete and Accurate (Nov. 18, 2015)." (Only the Army identified a reasonably accurate percentage of "closely associated with inherently governmental" high risk contracts in its inventory reviews through the use of its checklists compared to other Defense Components which inaccurately identified an incredibly low number of such contracts when compared to contracts deemed by OMB and the GAO to be the most likely to include "closely associated with inherently governmental" functions.); and GAO-16-119, "DOD Service Acquisition: Improved Use of Available Data Needed to Better Manage and Forecast Service Contract Requirements (Feb. 18, 2016). (DoD spends more on services contracts than weapon systems contracts; "DoD's budget exhibits on contract services provide limited visibility to Congress on planned spending, and the primary exhibit for contract services does not meet statutory reporting requirements." The Director of Cost Assessment and Program Evaluation (CAPE) should issue programming guidance to Defense Components to capture what they plan to spend on services contracts. The data exists at the field level and is simply not asked for when developing programs and budgets.) The Senate language at Section 802 purports to address only the latter GAO audit, but focuses its direction on the Navy and Air Force only and ignores the central responsibility of the Director of CAPE and USD (Comptroller) for issuing guidance on and overseeing development of program and budget data.

[4] The current Deputy Secretary of Defense aptly described this situation as follows: "Predictably, for example, even though Congress directed the Defense Department to cut $10 billion through administrative efficiencies between 2015 and 2019, the Pentagon failed to substantiate that it had achieved those savings. The reason these efforts rarely succeed is that they merely shift the work being done by civilians to others, such as military personnel or defense contractors." Deputy Secretary of Defense Kathleen Hicks, "Getting to Less: The truth About Defense Spending" Foreign Affairs (March 2020) p. 56.

Senate language is completely silent on the way personnel caps have created massive incentives to mis-use term and temporary hiring authorities for "enduring functions," a practice we commented on at length in a May 5, 2021 letter.[5] In that letter, we focused on the misuse of personnel caps at the Defense Language Institute-Foreign Language Center at Monterey, CA., where highly trained foreign language faculty are discarded as if trash whenever an increased requirement occurs in a different language skill, notwithstanding that funding for foreign language training was recently identified by Senate Appropriators as an area of special Congressional interest and enhanced funding. This is why we say that the use of personnel caps is completely contradictory to any concept of treating employees as if they are valuable human capital with skills that have an enduring value.

Please include in the final NDAA the House language, H.R. 4350 Section 1107, "Guidelines for reductions in civilian positions." The corresponding Senate provision is S. 2792 Section 1102, "Consideration of employee performance in reductions in force for civilian positions in the Department of Defense." Section 3502 in title 5 currently provides the following order of retention in Reductions in Force (RIFs) across the entire federal government: (1) tenure status; (2) veterans' preference; (3) seniority; and (4) performance. Congress deviated from the government-wide standard in section 1101 of the National Defense Authorization Act for Fiscal Year 2016 (P. L. 114-92) (codified at title 10 U.S.C. § 1597(f)) by changing the order of retention for RIFs in the Department of Defense to be primarily based on performance. There is nothing in the legislative history that provided the business case for this change from longstanding and continuing government-wide norms. In fact, subsequent Readiness and Depot Maintenance hearings before the House Armed Services Committee on February 7, 2017 and the Senate Armed Services Committee on February 8, 2018 by senior military leadership specifically testified about the detrimental effects on readiness from losing "experienced" civilian employees in the depots and shipyards who work on maintenance and repair backlogs, as well as the costs and time lag associated with training less experienced workers to backfill against the losses of more senior federal employees. President Biden specifically rejected Trump Administration efforts to expand the DoD RIF retention rules through an Office of Personnel Management proposal. *See* EO 14003 of January 22, 2021, "Protecting the Federal Workforce." AFGE's concern is that so-called "performance" is far more subjective than the categories of seniority and veterans' preference and can much more easily be manipulated to improperly displace employees during a RIF. Additionally, most work is performed in teams in the modern workplace with performance outcomes affected by how the team works together on a project; and the Department has sometimes improperly used forced distributions or bell curves in performance ratings rather than rating employees on their actual contributions against an objective standard. Accordingly, when "performance" is used as the primary rating during a RIF over the more objective categories of seniority and veterans' preference, which cannot be manipulated, there is a high risk of favoritism in devising determining RIF retention registers, defeating any notions of reasonable expectations of what to expect during a RIF.

[5] According to GAO analysis of DOD data, during fiscal years 2016 through 2019: "approximately 35 percent of DOD term and temporary personnel were converted to permanent civilian positions within the federal government [after DoD had] increased term personnel by 40 percent." See GAO 20-532: "DEFENSE WORKFORCE: DOD Needs to Assess Its Use of Term and Temporary Appointments" (Aug 2020).

The Senate Armed Services Committee markup of the Fiscal Year 2022 National Defense Authorization Act in section 1102 would change title 10 United States Code section 1597(f) by providing that "performance" is one of the factors that may be used in calculating retention during a RIF. A reasonable interpretation of this change would revert to the government wide title 5 order of retention that takes performance into account along with seniority, and after a determination of veterans' preference. But we understand that the DoD is not going to interpret this change in the manner just described. Accordingly, during Conference negotiations, we ask that you support the more clearly articulated House version of the order of retention for RIFs that clearly specifies use of the longstanding government-wide RIF policies. We need clear rules that accord with the reasonable expectations that most federal workers, excepting DoD, are afforded during RIFs.

Please include in the final NDAA the House language, Section 1108, "Repeal of 2-year probationary period." The whole point of a probationary period is management does not have to prove that there was a performance problem at all and can terminate an employee with little cause. To suggest that this is necessary to retain a quality workforce is both specious and an insult to the DoD workforce. When Congress changed the probationary period at DoD in 2016 from the government wide title 5 standard of one year to two years, there was no business case made for introducing this inconsistent practice. Moreover, the Department has held back and not submitted a report on abusive practices during the extended probationary period that was requested in section 1102 of the FY 20 NDAA.[6] AFGE has compiled examples from its members of abusive uses of the extended probationary period being applied in a discriminatory manner against protected Civil Rights categories (particularly persons with disabilities) and whistleblowers and provided them to committee staff. The idea that Department management needs an extended probationary period is a reflection of a management philosophy that does not recognize the high costs of turnover that for profit businesses need to take into account. Enlightened businesses that properly value human capital and the effect of turnover on the bottom line focus more on performing highly selective merit-based hiring from diverse sources of the best and the brightest, and seek to retain such employees once they hire them because the costs of turnover on the bottom line can affect share value. The Department's business model seems to go in the opposite direction of emphasizing non-competitive hiring to expedite the

[6] "Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall – (1) conduct an independent review on the probationary periods applicable to Department of Defense employees under section 1599e of title 10 United States Code, and (2) submit a report on such review to the Committees on Armed Services and Oversight and Reform of the House of Representatives and the Committees on Armed Services and Homeland Security and Governmental Affairs of the Senate. (b) The review and report under subsection (a) shall cover the period beginning on the date of the enactment of such section 1599e and ending on December 31, 2018, and include the following: (1) An assessment and identification of the demographics of each Department of Defense employee who, during such period, was on a probationary period and who was removed from the civil service, subject to any disciplinary action (up to and including removal), or who filed a claim or appeal with the Office of Special Counsel or the Equal Employment Opportunity Commission. (2) A statistical assessment of the distribution patterns with respect to any removal from the civil service during such period of, or any disciplinary action (up to and including a removal) taken during such period against, any Department employee while the employee was on a probationary period. (3) An analysis of the best practices and abuses of discretion by supervisors and managers of the Department with respect to the probationary periods. (4) An assessment of the utility of the probationary period prescribed by such section 1599e on the successful recruitment, retention, and professional development of civilian employees of the Department, including any recommendation for regulatory or statutory changes the Secretary determines to be appropriate."

hiring process and because turnover costs apparently do not matter as much within DoD, seek an extended probationary period. One cannot extol the virtues of human capital planning and at the same time follow such practices. The business practices that those in the Department advocating an extended probationary period seem to be emulating are for businesses with less skilled workforces where turnover is much higher than the more selective hiring practices of professional cutting-edge organizations.

Please include in the final NDAA the House language, Section 1111, "Treatment of hours worked under a qualified trade-of-time arrangement." This provision would allow federal firefighters to trade shifts across multiple pay periods without decreasing their regular pay or triggering overtime pay requirements, ensuring that firehouses maintain staffing requirements and can keep communities safe while enabling firefighters to meet personal obligations without having to use annual leave.

Please include in the final NDAA the House language, Section 1114, "Limiting the number of local wage areas defined within a pay locality." The Senate bill S. 2792 has corresponding directive report language similar to last year's Conferee language on this issue.[7] Within the federal workforce, hourly and salaried workers are paid using different pay-setting systems. Hourly workers fall under the Federal Wage System (FWS) while salaried workers fall under the General Schedule (GS) pay system. Both systems allow for workers' compensation to be adjusted based on their work location to account for differences in regional economic conditions. However, current law does not require the boundaries used to set locality pay for hourly and salaried workers to align. Consequently, at some federal facilities, GS employees are included in more generous locality pay areas while FWS employees are not, despite working in the same location. This system is inequitable. At these federal facilities where these disparities exist, salaried GS and hourly FWS employees live and work in the same areas and are similarly affected by the cost of living in the area, but the GS employees receive greater relative compensation than the FWS employees. As repeatedly stated in this directive report language from last year's Conferees and in this year's Senate Armed Services Committee markup, "since 2010, the Federal Prevailing Rate Advisory Committee (FPRAC) has voted three times to recommend that the Office of Personnel Management (OPM) align Federal Wage System (FWS) wage areas with General Schedule locality pay areas across the country."[8]

Please oppose inclusion in the final NDAA the House language, Section 1115, "National Digital Reserve Corps." AFGE supports a modified version that Senator Rosen/Representative Panetta had earlier agreed to with respect to Section 1109 of the Senate markup bill, creating a Civilian Cybersecurity Reserve pilot project at US. Cyber Command. Modifications were agreed to by Senator Rosen and Representative Panetta including public disclosure and an expanded

[7] National Defense Authorization Act for Fiscal Year 2022, Report No. 117-39 to accompany S. 2792, pages 242-243, and the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 Conference Report 116-617 to accompany H.R. 6395, pages 1772-3.

[8] The CBO estimated that roughly 10,250 DoD employees and 3,400 employees of other federal agencies would be affected by the change in wage calculations and that average annual pay would increase by $4,400 per employee. CBO estimated this would increase DoD costs by $175 million over a five year period from FY 2022 through 2026 and other federal agencies' costs by $55 million over the same period.

term of deployment to two years. However, none of these modifications are currently included in the Senate bill. While there is confidential disclosure of employees of contractors mobilized as civilian digital reservists in section 1115 of the House bill, the absence of public disclosure lacks needed incentives for meaningful identification of potential conflicts of interest and enforcement of ethics rules. Relying on reservists and agencies to police themselves in these kinds of arrangements without the sunshine of public disclosure is meaningless. The current Section 1109 of the Senate bill does not have any disclosure requirement at all, confidential or public, for which we have grave concerns. However, it is far better than the House section 1115 because it is a limited pilot with further opportunities built into its implementation to make improvements that would address concerns with conflict of interests. Additionally, the identification of the scope of any mobilization requirement is centered in DoD, which if they use the robust methods and workload modeling they currently use with the Reserve Components for military end strength requirements, will be far less wasteful than section 1115 of the House bill which establishes a government-wide enduring program where the General Services Administration will be driving the scope of the "requirement," a highly wasteful practice.

Please include in the final NDAA the House language, Section 1119, "Repeal of crediting amounts received against pay of Federal employee or DC employee serving as a member of the National Guard of the District of Columbia."

Please include in the final NDAA the House language, Section 1122, "Parental bereavement leave for Federal employees." AFGE supports the expansion of paid parental leave in this section to allow federal employees to take paid time off to grieve the death of a child.

As a general matter, we have already expressed in detail our concerns with several Senate amendments not in the markup version of the Senate bill in a November 15 letter and will only reference our concern with one that was included in a managers' package. Amendment No. 4461 by Senator Warner involving "The Intelligence Authorization Act for Fiscal Year 2022" is troubling. We are very concerned with its provisions on security classification determinations and appeals which have finality provisions that preclude any external appeals by any official outside the agency, including judicial review. These provisions allow for the administrative record to be established with summaries by the agency of proceedings rather than exclusive reliance on verbatim transcripts and sworn testimony. There is also no language in this provision restricting application of these procedures to situations where the person is truly required to have access to classified information, as these procedures have been misapplied in the past by the Department to situations where no access to classified information was involved. We believe the Administrative Conference of the United States should be requested to review these provisions and develop recommendations to improve their fairness and accuracy. We also believe a Federally Funded Research and Development Center should perform a demographic survey of how security clearance adjudications have been applied throughout the federal government with respect to whistleblowers and the various protected categories under civil rights laws, and interview stakeholders affected by the application of these procedures ranging from lawyers and unions representing federal employed who lost their clearances, to current managers

and employees. This is a significant departure form fundamental norms of due process being codified in law with little opportunity for proper vetting of its shortcuts.

As a final general comment, we strongly oppose expansion of excepted service, direct hire authorities, or other forms of non-competitive hiring that weaken the competitive service and merit system principles. We are also concerned about what appear to be veiled attacks on the General Schedule pay system and pay equity, attempts to bypass or weaken consistent job classifications. We cannot anticipate every kind of further inclusion of previously discredited ideas in the final bill, but we have throughout this NDAA cycle, provided ample documentation of our concerns and reference our May 5, 2021 letter that gives a detailed description and rationale for our opposition to these concepts. We have attached that letter as an enclosure to this letter

For additional information or questions, please contact John Anderson, (703) 943-9438, john.anderson@afge.org.

Sincerely,

Julie N. Tippens
Director of Legislation

Cc: House Members
Senate Members