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August 18, 2022

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

The Honorable Jack Reed
Chairman
Senate Armed Services Committee
228 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Michael Rogers
Ranking Member
House Armed Services Committee
2216 Rayburn House Office Building
Washington, D.C. 20515

The Honorable James Inhofe
Ranking Member
Senate Armed Services Committee
228 Russell Senate Office Building
Washington, D.C. 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 and the Armed Services Committees begin pre-Conference work on the National Defense Authorization Act for Fiscal Year 2023 (NDAA FY 2023), we write to urge your support on the following issues:

1. Please strike S. 4543, Section 1107, Modification of the effective date of repeal of two-year probationary period for employees. The whole point of a probationary period is to allow management an initial evaluation period during which an unsatisfactory employee can be terminated without cause and with minimal process. To suggest that an extended probationary period 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 governmentwide 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.¹ AFGE has compiled and provided

¹ “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



the Committee with examples 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. 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 can affect share value. The Department's business model seems to go in the opposite direction of emphasizing non-competitive hiring to expedite the hiring process and – because turnover costs apparently do not matter as much within DoD – seek an extended probationary period to remedy errors from careless hiring. One cannot extol the virtues of human capital planning and at the same time follow such practices. The Department's rationale for extending probation appears to be based on businesses with a less skilled workforce where turnover is much higher compared to more professional organizations. We understand that the pretext being used to reverse what was agreed to in last year's conference negotiations is the failure of the Under Secretary of Defense, Personnel and Readiness USD (P&R) to provide the required report to Congress. Rather than withholding funds from the USD (P&R) similar to what the SASC has done in other areas of their markup for delinquent reports, this provision simply rewards and incentivizes continued delays in reporting for those elements of the USD (P&R) who want to retain the two-year probationary period out of administrative convenience and lassitude. There is no justification for such a blatantly anti-civilian workforce provision which rewards management lapses and is contrary to enlightened management practices for leading, motivating, recruiting and retaining a quality workforce. It is counterproductive to suggest that a highly qualified job candidate would seek to work for the Department of Defense with a two-year probationary period when they have options to work in other federal agencies with a one-year probationary period, or for private sector employers who are motivated to reduce turnover costs and have a commitment to retaining employees.

2. Please support H.R. 7900, Section 5705, "Limitation on exception of competitive service requirements" and clarify H.R. 7900, Section 1533, "Comprehensive review of Cyber Excepted Service" and S. 4543, Section 1114, "Report on Cyber Excepted Service" so that these logically connected reporting requirements expose the failures of the Cyber Excepted

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."

Service to address skills gaps needed to meet the National Defense Strategy. The placement of logically connected provisions in separate NDAA titles perpetuates the fragmented approach to federal government employee management issues that systematically weakens federal hiring. A central insight that both the Biden Administration in the “Strengthening the Federal Workforce” portion of the President’s Budget for this year and the Defense Business Board exemplified in its DoD civilian workforce talent management study is the importance of hiring and doing human capital planning based on broad skill competencies rather than merely to jobs narrowly tailored to specific individuals and silos. The Cyber Excepted Service was established in the Fiscal Year 2015 National Defense Authorization Act but has largely failed to meet its objectives of recruiting and retaining cyber talent, failures amply documented by the National Security Commission on Artificial Intelligence and the Government Accountability Office.² The deficiencies in the Cyber Excepted Service resemble the widely condemned Schedule F excepted service proposed by the last administration, which would have politicized wide segments of the civil service. It begs belief that the following features of the Cyber Excepted Service attract highly skilled applicants to work for the Department of Defense:

- The Cyber Excepted Service only allows veterans, but not others, to appeal adverse actions to the Merit Systems Protection Board;
- The Cyber Excepted Service has a three-year probationary period; and
- The Cyber Excepted Service is exempt from the Classification Act of 1949, which the GAO has found has generally done a better job in avoiding gender discrimination than obtains in the private sector.³

Accordingly, we urge that Section 1114 and 1533 be merged together and clarified to include a confidential survey of federal government employees performing Cyber functions in both the Cyber Excepted Service in DoD and competitive service positions throughout the federal government, as well as job applicants from the private sector, on whether the peculiar features of the Cyber Excepted Service encourage or discourage job applicants, compared to normal title 5 terms and conditions. The Advance Policy Questions the SASC has been using for Department of Defense nominees paradoxically seem to suggest that these features of the excepted service are helpful to recruiting and retaining employees with these skills. Until

² 10 U.S.C. 1599f (added by National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-92, div. A, title XI, section 1107 (Nov. 25, 2015).

³ A Government Accountability Office (GAO) study confirmed that the federal pay system does a far better job of avoiding pay discrimination by gender than private sector pay systems that allow broad discretion in pay-setting and pay adjustments. The GAO study (<https://www.gao.gov/assets/720/711014.pdf>) found that the gender pay gap in the federal government was \$.07 on the dollar as of 2017; similar studies of private sector gender pay gaps that adjusted for occupation and education show the gap at 61% higher than the federal government’s gap: \$.18 on the dollar as of 2018 vs. \$.07. To take this out of the realm of pennies on the dollar: on average, for every \$35,000 earned by males, women in the private sector are paid \$28,700 and in the federal sector are paid \$32,550. Of course, these are broad averages and should not exist at all. But the differential in pay equity between the federal pay system and private sector discretionary pay systems is stark.

this structural defect is directly addressed, the root cause of the failures of the Cyber Excepted Service will continue to remain unexamined.

3. Please support H.R. 7900, Title LVIII, Subtitle B, “Rights of the TSA Workforce Act of 2022”, that includes sections 5931 that would enhance the security operations of the Transportation Security Administration (TSA) and stability of the transportation security workforce by applying the personnel system under title 5, United States Code, to employees of the TSA. The TSA workforce is among our first lines of Homeland defense, and recruitment and retention of a quality workforce is greatly enhanced by affording this workforce the same title 5 personnel rights as the federal government and most of the workforce in the Department of Defense. This is a bipartisan bill that reflects TSA input. These provisions honor Transportation Security Officers’ dedication to America’s transportation security by:
 - Statutorily repealing the TSA Administrator’s authority to maintain a separate and unequal personnel system that applies only to the TSO workforce.
 - Ending the current TSA personnel directives that have allowed TSA to be the prosecutor, judge, and jury, with no neutral third-party review, in workforce disciplinary matters and providing statutory access to the Merit Systems Protection Board.
 - Requiring TSA to follow the labor-management statutes that provide workplace rights and protections to most federal employees under title 5 of the U.S. Code; and
 - Putting TSOs on the General Schedule pay scale with regular step increases, under which most federal employees’ pay is determined. While it takes 18 years to advance to the top step in the GS system, it takes **30 years to advance through a TSA pay band.**
4. Please clarify H.R. 7900, Section 5867, “Department of Defense Cyber and Digital Service Academy,” and S. 4542, Section 1111, “Department of Defense Cyber and Digital Service Academy,” by changing the title of these sections to more accurately describe these provisions as scholarship programs that may be used in a full array of institutions throughout the country rather than limited to a single location for a government-run “Digital Academy.” It is premature to create a framework for a Digital Academy like the military academies until the existing three-year cyber scholarships are improved to emulate the successful ROTC scholarship programs for the military. While both provisions move in this direction by extending the scholarships to five years, the Senate provision’s initial appointment is to the Excepted Service for the duration of the five-year service commitment, arbitrarily cutting scholarships off at five years rather than covering complete undergraduate, and potentially graduate and professional degrees as done in the ROTC program. This will yield far less diverse candidates than a typical ROTC program.
5. Please strike S. 4542, Section 1112, “Civilian Cyber Security Reserve Pilot,” and H.R. 7900, Section 1112, “National Digital Reserve Corps.” There are three primary defects with both proposals. The scope of the actual requirement has not been rigorously justified in the same

way requirements for reserve component military are justified specifically linked to workload and threat-based simulation models used to develop force structure. And centering the requirement's determination in the General Services Administration (GSA) rather than the Executive Agencies responsible for the mission, as posed by the House bill is particularly wasteful, as GSA's only proper role should be to administer the program. Second, the duration of the assignments, particularly if they are predominantly less than a couple of months, are insufficient to provide any meaningful benefit to the government and are of more benefit to the so-called "reservist" and their private sector employer who are gaining access to governmental programs by their participation. Third, the Senate bill punts on the ethical conflict of interest concerns through reporting that the House version at least minimally addresses by requiring private sector "reservists" to be appointed as "special government employees," who have disclosure requirements for any potential conflicts of interest. However, it is our view that non-public disclosure requirements are insufficient to ensure full compliance. The only good feature of the Senate version of section 1112 is that it is limited in scope as a pilot and given the immature state of defining the actual scope and cost of these requirements, additional analysis and reporting needs to occur first. The House bill is drafted as if we are dealing with a mature, well-developed program, for government-wide implementation.

6. Please strike H.R. 7900 section 631, "Prohibition on sale of Chinese goods in commissary stores and military exchanges." The key flaw in section 631 is that it fails to impose the same restrictions on private sector competitors to the Exchanges, thereby effectively destroying the financial viability of the Exchanges and ultimately upending the jobs of much of the Nonappropriated Fund workforce performing functions in the Exchanges as well as other Morale, Welfare and Recreation functions that profits from the exchanges have benefited. It does little to curb the sale of Chinese goods, since these would remain readily available from private sector retailers. The Statement of Administration Policy also strongly opposes this provision pointing out that it would affect about 70 percent of the goods sold in the Exchanges.
7. Please strike H.R. 7900 section 2814, "Privatization of Navy and Air Force transient housing," that would require the Navy and Air Force to privatize transient military lodging facilities within the United States over a four-year period beginning 11 years after enactment. The Congressional Budget Office scored this provision as "increasing direct spending by more than \$5 billion in the ten year period beginning in 2022," stating "CBO considers military lodging run by private entities to be a governmental activity that uses a private-sector financial intermediary to serve as an instrument of the federal government. In CBO's view, investments by those entities to improve the lodging facilities be treated as governmental expenditures because most of the income for the project would be paid from appropriated funds such as per diem payments to service members. Because those investments would not be contingent on the availability of appropriated funds at the time they are made, CBO classifies them as direct spending. Using information [from the GAO] on the reported costs to improve privatized Army lodging, CBO estimates that enacting section

2814 would increase direct spending by more than \$5 billion ...” See H. Rpt 117-397, Part 2, pp. 5-6. Nonappropriated fund employees represented by AFGE would also lose their jobs if this provision is enacted.

8. Please make the requested adjustments to the Operation and Maintenance, Defense-Wide Funding tables in H.R. 7900 addressed in the July 12, 2022, Statement of Administration Policy which states that “[t]hese reductions would necessitate the use of a Reduction in Force in certain Defense Agencies and Field Activities, to include the Office of the Secretary of Defense and the Joint Chiefs of Staff.” It would seem that a more appropriate place to make offsets would be the object classes throughout the Department relating to spending on contract services, particularly in light of the directive report language in H.R. 7900 related to “Total Force Management” (pp. 238-9) expressing concerns about the failure of the Department to provide an implementation plan and programming guidance as required by Section 815 in the Fiscal Year 2022 NDAA for “over one quarter of the Department’s topline...[that] goes to services contracts.” The HASC asked the Department to account for services contracts supporting OSD headquarters, and to report for whether these were included in management headquarters accounts.⁴ The Department failed to comply with this reporting requirement for services contracts supporting headquarters, largely for the same reasons stipulated in this year’s directive report language on “Total Force Management.” Accordingly, AFGE recommends clarification of implementation of the reductions in the funding tables addressed in the SAP, and perhaps withholding funds rather than reducing them to address these non-compliance issues.
9. Please support H.R. 7900 Section 804, “Life cycle management and product support,” which requires improvements to strategic workforce planning and decisions on accessing intellectual property prior to milestone decision points for major weapon system acquisitions. Our only suggestion is to clarify that concerns for identifying the proper mix between military (both active and reserve component), civilian employee, host nation support and contract support for operating, training and sustaining a system should take into account not just “core logistics” requirements but also other total force management categories in section 129a of title 10 related to functions requiring military performance, inherently governmental and closely associated with inherently governmental and critical functions. It is our understanding that some within the Department have misinterpreted the scope of the requirement because of the singular reference to “core logistics” without addressing the other total force management categories of concern.

⁴ HASC Readiness Subcommittee FY2022 NDAA markup directive report language (pp. 227-8): “The committee notes that civilian oversight and control of the Armed Forces is essential to ensure accountability, readiness, and the deployment of the Armed Forces in the national interest. A strong civilian workforce in the Office of the Secretary of Defense (OSD), particularly in the Office of the Under Secretary of Defense for Policy (OUSDP), is essential to maintain this principle of civilian control of the military. However, hiring freezes and attrition in OUSDP have led to a manpower reduction of almost 27 percent over the last 11 years. This has resulted in an inappropriate reliance on contractors and undermined OUSDP’s ability to carry out robust civilian control and oversight of the Armed Forces.”

10. Please support H.R. 7900, Section 367, “Clarification of calculation for certain workload carryover of Department of Army.” As the GAO has noted, “Each year, billions of dollars of work is ordered from maintenance depots that cannot be completed by the end of the fiscal year. The Department of Defense (DOD) refers to this funded but unfinished work as carryover. For fiscal years 2007 through 2018, the Navy, Marine Corps, and Air Force depots averaged less than 6 months of annual carryover worth \$1.0 billion, \$0.2 billion, and \$1.9 billion, respectively. The Army depots averaged 10 months of annual carryover worth \$4.3 billion. Reasons for unplanned carryover include issues with parts management, scope of work, and changing customer requirements.” See GAO 19-452. Section 367 directs the Army to exclude materiel costs from its calculations like the other services. AFGE recommends that section 367 be further clarified so that the budget process does not arbitrarily reduce depot carryover based on an arbitrary six-month metric.
11. Please clarify H.R. 7900 Section 831, “Key experiences and enhanced pay authority for acquisition workforce excellence,” to ensure that participation in “public-private talent exchanges” remains voluntary and does not become another artificially created impediment to promotion or hiring otherwise qualified persons to fill acquisition positions. The National Security Commission on Artificial Intelligence pointed out how education and training credentials and certification requirements had become major barriers to hiring qualified AI candidates, resulting in severe skills gaps within the Department. The problem is no different in the case of the acquisition workforce where each NDAA adds new requirements, with the unintended effect of further limiting and impeding the Department’s ability to hire highly qualified candidates from diverse sources. The conference bill should clarify that participation in public-private talent exchanges remains voluntary, and that despite any numerical goals, participation is not a requirement for being hired or promoted.
12. We hope it is possible to clarify H.R. 7900, section 802 and S. 4542 Section 822 on “Data requirements for commercial item pricing not based on adequate price competition,” given the similarity of both provisions. The technical data section is little more than a paper exercise that will allow contractors to come up with novel justifications for why the data rights belong to them. The provision maintains the status quo, albeit with more contractor justifications required for their otherwise often unjustifiable claims. The cost data section remains a serious problem. The fact that 10 U.S.C. § 3455 explicitly allows major weapons system to qualify as “commercial items” illustrates the absurdity of the entire exercise. Until such time as so-called “commercial items” acquired on a sole source basis require a strong market qualification requirement, the abuses with the commercial items definition will continue. AFGE notes the inclusion of a weak provision allowing contracting officers, in limited circumstances, to obtain uncertified cost data following supervisory approval, provides the government with no protection whatsoever from defective pricing when the data are not current, complete or accurate. We would much prefer an approach similar to the commercial items definition and pricing provisions originally proposed by Senator Warren and Representative Garamendi, which actually addressed the root cause of the pricing issues.
13. Please support S. 4542, Section 827, “Progress payment incentive pilot.” This provision creates a pilot program to both control and incentivize progress payment rates and reward contractors with higher percentages of incurred cost payments if they are more reliable, do

higher quality work, and meet the other criteria specified in Section 827. It is a forward-looking provision that uses traditional progress payment concepts to motivate higher levels of contractor performance.

14. Please support H.R. 7900, Title LXII, “District of Columbia National Guard Home Rule” reflected in Sections 6251 through 6255. These provisions would give the mayor of the District of Columbia the same authority over the National Guard (NG) that the governors of states and territories have. This provision is critical to maintaining the rule of law during periods of civil unrest such as the events of January 6.
15. Please support H.R. 7900 Section 5907, “Presumption of cause of disability or death due to employment in fire protection activities.” Section 5907 would expand eligibility for federal workers engaged in fire protection who have certain diseases and conditions to receive medical, wage replacement, and death benefits under the Federal Employees’ Compensation Act (FECA).
16. Please support H.R. 7900 Section 5107, “Elimination of Asset and Infrastructure Review Commission.” The VA Asset and Infrastructure Review Commission was authorized in the 2018 VA MISSION Act. The Commission was tasked with approving a series of misguided recommendations to close or downsize almost one-third of Department of Veterans Affairs (VA) medical centers, with no assurance that replacement facilities would ever be built. The recommendations were developed based on discredited, pre-pandemic data on the availability of private care. The law limited Congressional authority to modify these ill-conceived recommendations and would have a catastrophic effect on veteran health care, particularly in rural and underserved communities. This provision eliminates the Commission and helps to reestablish Congressional responsibility for overseeing and funding VA’s essential infrastructure. This House provision is consistent with the recent action by 12 bipartisan senators who acted to block confirmation proceedings for all the AIR commissioners, as well as House and Senate FY 2023 appropriations bills that defund the AIR Commission.
17. Please support H.R. 7900, Section 609E, “Pay for DoD and Coast Guard child care providers: studies; adjustment.”
18. Please support H.R. 7900, Section 1107, “Inflation bonus pay for certain Department of Defense civilian employees.”
19. Please support H.R. 7900, Section 1109, “GAO study on Federal Wage System parity with local prevailing wage rate.”
20. Please support H.R. 7900, Section 5127, “Competitive pay for health care providers of the Department of Veterans Affairs.”
21. Please support H.R. 7900, Section 868, “Prohibition on contracting with employers that violated the National Labor Relations Act;” as well as Section 5817, “Prohibition on

contracting with persons with willful or repeated violations of the Fair Labor Standards Act of 1938.”

22. Please strike S. 4543, Section 525, “Prohibition on considering State laws and regulations when determining individual duty assignments.” While this provision does not directly apply to DoD civilian employees, in a workforce with military mixed together with civilian employees, the draconian nature of this provision will impede military members and their families from access to legal abortions and other health care. This provision will only serve to exacerbate the military’s recruitment and retention problems and demoralize the entire DoD workforce.
23. Please repudiate the directive report language in S. 4543 that suggests DoD should not continue its efforts to root out extremism in the ranks. Most recently, a former military member with extremist beliefs violently attacked the Cincinnati FBI office. The Department has been slow to hold accountable violent extremists involved in the January 6th events at the Capitol. There are a number of excellent provisions in H.R. 7900 addressing this issue that should be included in the final bill, including Section 1036, “Report on threat posed by domestic terrorists” and Section 5814, “Interagency report on extremist activity.”

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

Sincerely,

A handwritten signature in black ink that reads "Daniel M. Horowitz". The signature is written in a cursive, slightly slanted style.

Daniel Horowitz, Ph.D.
Deputy Director of Legislation