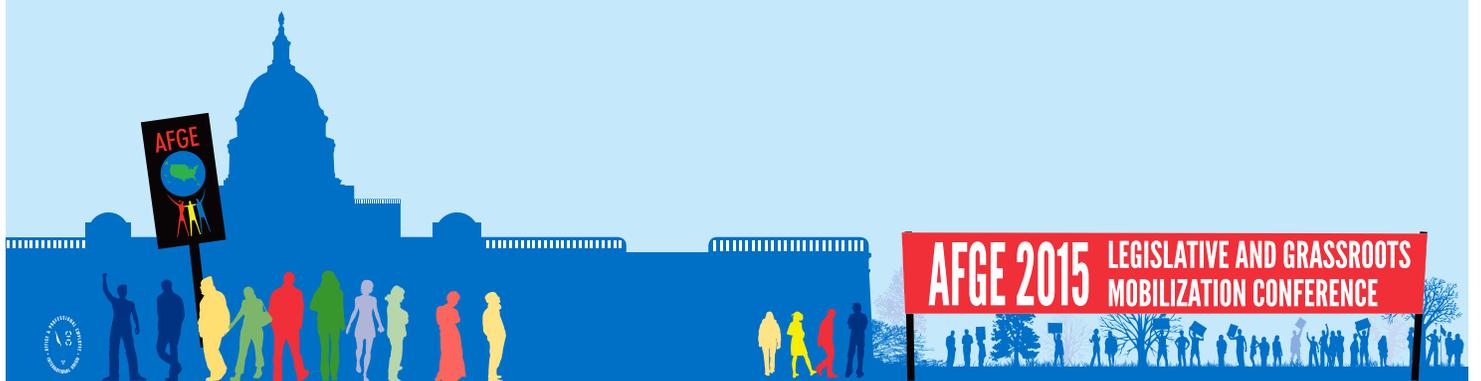


2015 ISSUE PAPERS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO



AFGE 2015 Issue Papers
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Federal Pay – General Schedule

Federal pay is affected not only by the annual adjustments authorized by law and almost always altered by Congress. It is also determined by many administrative decisions involving the boundaries that define local pay areas and how market comparability is calculated. During the three-year pay freeze, the administration refused to implement any of the changes recommended by the two statutorily-mandated advisory committees on federal pay, arguing that since some might result in higher pay for some employees, implementation would violate the “spirit” if not the “letter” of the laws imposing the freeze. This administrative “freeze” continues two years after the end of the regular pay freeze.

In the meantime, federal wages and salaries continue to lag those in the private sector and state and local government. Although federal pay adjustments are, by law, supposed to reflect changes in the cost of labor rather than the cost of living, it is important to note how much the purchasing power of federal pay has declined as federal employees have become an all-purpose ATM for budget austerity. Since 2010, the inflation-adjusted value of federal wages and salaries has fallen by 6.5 percent, leaving all federal employees with a lower standard of living than they had just five years ago.

The “Federal Adjustment of Incomes Rate (FAIR) Act of 2015” was introduced in both the House and Senate by Representative Gerry Connolly (D-VA) (H.R. 304), and Senators Brian Schatz (D-HI) and Ben Cardin (D-MD) (S. 164) to help restore federal employees' standard of living and pay after three years of pay freezes and the past two years of 1% increases which have been well below the recommended baseline increase. The FAIR Act proposes a 3.8% pay increase in FY 2016 for all General Schedule and wage grade employees. AFGE strongly supports this legislation.

Pay Adjustments for General Schedule: The Market Comparability Standard

Under the Federal Employees Pay Comparability Act (FEPCA), federal employees who are paid under the General Schedule are supposed to receive salaries that are roughly 95 percent of “market comparability.” This bipartisan law, enacted in 1990, established the principle that federal pay should be governed by the market, and salaries set at levels just five percent less than those in the private sector and state and local government.

FEPCA required that the government produce a measure of market comparability on a regional basis, and provide annual adjustments that simultaneously close any measured gaps and make certain that no existing gap become larger. This was to be accomplished by providing federal employees with annual pay adjustments that had two components: one nationwide adjustment, and one locality-based gap-closing adjustment. The nationwide adjustments are based on the Bureau of Labor Statistics (BLS) Employment Cost Index (ECI), a broad measure of changes in private sector wages and salaries from across all industries and regions (the FEPCA formula is ECI – 0.5 percent). The locality adjustments are based on measures of pay gaps that

use Bureau of Labor Statistics (BLS) data from surveys that compare, on a job-by-job basis, salaries in the federal government and those in the private sector and state and local government.

The relevant nationwide measure for January 2016 is the 12-month period ending September 30, 2014, during which time the ECI rose by 2.3%. The law governing the General Schedule pay system calls for an annual across-the-board adjustment to base salaries equal to the ECI measure minus 0.5 percentage points. Thus, the January 2016 ECI adjustment should be 1.8%.

Locality adjustments are meant to close gaps between federal and non-federal pay on a regional basis. The Federal Salary Council, the advisory body established in law to make recommendations to the President's Pay Agent on locality pay, uses a weighted average of the locality pay gaps, based on a BLS model using data from both the National Compensation Survey (NCS) and the Occupational Employment Statistics (OES) to measure the average disparity between federal and non-federal salaries for the jobs federal employees perform. As of March 2014, the overall remaining pay gap was 35.18%, based on the BLS model.

Had the schedule for closing the pay gaps put forth in FEPCA been followed, comparability would have been realized more than a decade ago in 2002. But in each year since 1995, Congress and successive presidents have found reason to reduce or freeze the size of both the nationwide (ECI-based) and locality adjustments dictated by the law, variously citing economic emergency and deficit-cutting as rationales. The most recent data from BLS show the 2014 average remaining pay gap is 35.18%, compared to 35.37% for 2013 (the relevant year for the January 2015 adjustments). In spite of the repeated use of alternatives to the terms of FEPCA, there has been strong, consistent and broad bipartisan support for the goal of paying federal salaries that are comparable to those paid by private firms and state and local governments that employ people for the same kinds of jobs. AFGE will work to maintain support for the principle of pay comparability that uses job-by-job salary comparisons for all federal pay systems.

The Federal Salary Council's Recommendations

In addition to measuring regional pay gaps and calculating the annual nationwide (ECI-based) adjustments under FEPCA, the Federal Salary Council makes recommendations regarding data, and changes to the boundaries of existing pay localities and the establishment of new localities. These changes reflect new data from the decennial census and focus on changes in commuting patterns and rates, the most important criteria in defining a local labor market. In each of the past four years, the Federal Salary Council has recommended some or all of the following:

- Establish 13 new pay localities with federal-non-federal pay gaps that are least ten points above the average gap in the "Rest of U.S.," (the catch-all locality that covers areas outside major metropolitan area localities). The areas are: Albany, New York; Albuquerque, New Mexico; Austin, Texas; Charlotte, North Carolina; Colorado Springs, Colorado; Davenport,

Iowa, Harrisburg, Pennsylvania; Laredo, Texas; Las Vegas, Nevada; Palm Bay, Florida; St. Louis, Missouri; Tucson, Arizona; and Kansas City, Missouri.

- Add the small number of counties that are or would become entirely surrounded by non-RUS localities to existing localities.
- Drop from the criteria for establishment or maintenance of a GS locality any reference to the number of GS employees, since concentration of GS employment does not define a local labor market or indicate economic linkage among counties in a commuting area.
- Restore full funding for the BLS National Compensation Survey (NCS), particularly the wage survey portion that was specifically designed to match private sector and state and local government jobs to federal jobs.
- Use all commuting pattern data collected under the American Community Survey in determining areas for inclusion in locality pay areas.
- Use new criteria for evaluating counties adjacent to Core Based Statistical Areas (CBSAs) (7.5% employment interchange) and adjacent single counties (20%).
- Use micropolitan areas if they are part of any Combined Statistical Area, whether or not of a Metropolitan Statistical Area was included, and recognize multi-county micropolitan areas for locality pay.

The President's Pay Agent has not implemented any of these recommendations. They promised to establish the new localities in January 2014, and have not done so for undisclosed reasons. AFGE urges adoption of all of these Council recommendations, as they will improve the market sensitivity of the pay system, and align the boundaries of pay localities with contemporary commuting patterns. In addition, responding positively to the recommendations of the Federal Salary Council would demonstrate respect for the law governing federal pay, a law intended to de-politicize federal pay setting.

Past, Present, and Future: the Three-Year Freeze and Two Years of 1%

How did a three-year freeze on the wages and salaries of federal employees – and threats of continued freezes or even outright pay reductions -- become our nation's response to the collapse of the housing bubble, the financial crisis caused by this collapse, the bailout of large banks, insurance companies, and Wall Street firms? Politicians coalesced around the notion of budget austerity, the illogical and thoroughly discredited idea that reducing government spending in the face of recessions and inadequate private investment would prompt increases in private sector investment. The Budget Control Act of 2011 enshrined the principles of austerity into a ten-year law, and it has only worsened the living standards of 90% of the population and depressed economic growth. As 2015 dawns, it is hoped that the false economies of austerity will be acknowledged, and a more productive set of macroeconomic

policies will be embraced. Lowering federal employee living standards by freezing pay and shifting the costs of retirement onto federal workers needs to come to an end. Such policies do not improve the economy; they only impose harm on the civilian employees who serve our nation and make it more difficult for federal agencies to hire and retain the workforce necessary to carry out the mission of federal agencies and programs.

Nobel Laureate in Economics and Princeton University Professor Paul Krugman once referred to the freeze as “cynical deficit reduction theater” that was “a literally cheap trick that only sounds impressive.” He also confirmed that “federal salaries are, on average, somewhat less than those of private sector workers with equivalent qualifications.” But none of these facts seemed to matter to President Obama or the members of Congress who voted repeatedly for the freeze and now two consecutive years of 1% adjustments. They have been, to some degree, responding to a well-orchestrated campaign by certain media outlets and the Heritage Foundation, the Cato Institute, and Booz-Allen that use a combination of sophistry and outright lies to make a case that federal employees are overpaid relative to their private sector counterparts.

One way these anti-federal government and anti-federal employee groups seek to create an impression that federal salaries are too high is by highlighting the number of federal employees at the highest federal salary level, even though almost all of them are accomplished physicians and scientists working at the National Institutes of Health or the Food and Drug Administration. A tiny few are the top lawyers and auditors at the Federal Deposit Insurance Corporation (which is not financed by taxpayers) and the Securities and Exchange Commission. Nevertheless, screaming headlines about federal “bureaucrats” raking in quarter-of-a-million dollar salaries have had an impact, helping to solidify the false belief that federal employee pay far surpasses the pay of ordinary taxpayers. In fact, about 600,000 federal employees earn less than \$50,000 per year, and approximately 900,000 federal employees make under \$60,000 per year, according to the most recent data from the Office of Personnel Management (OPM).

The Federal Salary Council (FSC), a statutory body responsible for examining objective data that compares what private sector and state and local government employers pay for the jobs federal employees perform to what the federal government pays, has found consistently that federal employees are underpaid. The Federal Prevailing Rate Advisory Committee (FPRAC), which performs a similar function for the blue collar FWS system, finds the same result. The amounts of underpayment vary by locality and other factors, but the advantage in all places goes to the private sector.

Distorting the Truth on Federal Pay

Since the summer of 2010, some news outlets have published article after article that twist the facts surrounding federal pay to pretend that federal employees are overcompensated. The articles have compared gross averages in the private sector to average salaries of the current federal workforce, manufactured data on the dollar value of private sector fringe benefits and compared it to distorted data on the cost of federal benefits, and sensationalized the fact that a

growing number of federal salaries have exceeded \$100,000 per year. The Washington Post helped to promote the myth of overpayment by commissioning a poll that asked Americans whether they believed that federal employees were underpaid or overpaid, implicitly giving support to the notion that such issues are a matter of opinion rather than fact. The results of the poll reflected only how well the misinformation campaign had worked.

To bolster the false impression of federal employee overcompensation even more, the Heritage Foundation's James Sherk published a deeply flawed econometric study (<http://www.heritage.org/research/reports/2010/07/comparing-pay-in-the-federal-government-and-the-private-sector>) with a headline-grabbing claim that the government "overtaxes all Americans" by providing federal employee pay and benefits "on the order of 30 percent to 40 percent above similarly skilled private sector workers." Heritage claimed that federal salaries are "22 percent above private sector workers." In an odd coincidence, Heritage's numbers are the mirror opposite of the calculations performed by the economists and pay experts from the Bureau of Labor Statistics (BLS) and the Office of Personnel Management (OPM), whose data for the same year showed federal pay lagging behind the private sector by 22 percent.

Why do Heritage and OPM/BLS come up with opposite numbers? The simple answer is that the Heritage study has highly politicized assumptions, and is based on data that are entirely inappropriate for use in salary comparisons. The BLS and OPM results derive from objective calculations and high quality data from the BLS's National Compensation Survey (NCS), a survey designed specifically for use by private and public employers to gauge salary rates and differences by occupation and location. Heritage used Current Population Survey (CPS) data from interviews with random individuals who were asked how much they made, how much their employer spent on their benefits, and what their occupation was. Another source of data used by purveyors of the myth of the overpaid federal employee is the Bureau of Economic Analysis (BEA), part of the Commerce Department. The BEA itself warns the public not to use its data for comparing federal and non-federal salaries, noting on its website that "federal compensation estimates include sizable payments for unfunded liabilities that distort comparisons with private-sector compensation. For 2006, for example, the value of these payments for unfunded liability were \$28.6 billion or 10.7 percent of total federal civilian compensation" (http://www.bea.gov/faq/index.cfm?faq_id=320&start=0&cat_id=0). The "unfunded liabilities" refer to liabilities of the now-closed Civil Service Retirement System (CSRS), not the current Federal Employees Retirement System (FERS). Further, both these data and Heritage's are "bounded" at the top and bottom and exclude private salaries lower than \$21,544 and higher than \$190,119. Thus, even though salary and bonuses for those working in Wall Street securities and financial industries routinely run into the millions, the BEA dataset artificially caps salaries at under \$200,000.

CBO Study of Federal vs. Private Sector Pay Compensation

The Congressional Budget Office published a report in 2012 with an extremely misleading title. “Comparing the Compensation of Federal and Private Sector Employees” does not tell us whether federal salaries are too high or too low. It answers the highly peculiar question: If the current federal workforce were replaced with a new one with the same demographic profile as the current one, and the new one were paid average private sector rates for this group’s demographic profile, how much would it cost?

From this question came an answer that was a foregone conclusion. If taken one at a time and categorized by race, gender, education, and other “demographic traits,” of course some of them will appear “overpaid” compared to private sector averages. Why? Because the private sector wage data show large variations by “demographic trait” and for the most part, federal pay systems avoid this kind of discrimination.

The CBO study used what’s called a “human capital model;” basically a “capital asset pricing model” that applies the logic of finance to human beings. Wages, salaries, and benefits are the “price” and the worker is the “asset.” The “asset” has attributes upon which the market places a value, either negative or positive. In such a model, being white, male, and/or highly educated are positive sources of value, while the absence of these attributes means a relatively lower value.

When CBO assessed the accuracy of the “capital asset pricing” of the conglomeration of human capital known as the federal workforce, it was clear that they would find the price too high. This is because, on average, the private sector pays men more than women, whites more than blacks, old more than young, and higher rates in big cities than in rural areas. But the federal government does not reproduce all of these differentials, because in its pay systems, demographic traits are irrelevant. Federal pay is an attribute of the job, not of the demographic traits of the individual holding the job. As a result, men and women with the same federal job are paid roughly the same amount. The demographic traits that comprise a human capital model’s independent variables are completely irrelevant to the salary and benefit package the federal government applies to any given federal job.

Had CBO used the proper method for making the comparison, the one used by the Federal Salary Council, its conclusions would have lined up with the Council’s findings, that federal employees are underpaid whether they are top professionals like doctors or lawyers, technical experts like engineers and scientists, health care providers like VA nursing assistants and dieticians, or administrative workers who handle claims for Social Security or Veterans’ benefits.

The Federal Salary Council is required by law to measure the gap between federal salaries and salaries in the private sector as well as state and local government, together referred to as the “non-federal sector.” On average, the Council’s method finds the nationwide gap between federal and non-federal pay remains about 34 percent in favor of the non-federal sector, but

varies by locality. This is largely because the job comparison methodology used by the Council requires finding comparable positions before making pay comparisons, and many jobs found in the federal government are uniquely governmental. Useful pay comparability measures require data from job matches. The Federal Salary Council/BLS/OPM approach actually matches jobs and level of work.

The CBO study is flawed not only because it relies so heavily on “demographic traits”, but also because it uses broad occupational categories and industrial categories as proxies for job matches. And that error compounds the noxious comparison by race, gender, and age. Indeed, the headlines describing the findings of the CBO study emphasized pay differences by education, and the most attention was given to the claim that the federal government allegedly overpays those whose highest level of education is a high school diploma. But consider some of the numerous federal jobs that have similar educational requirements, and are in similar broad industrial categories as those in the private sector, but which do not have nearly the same level of responsibility, or day to day duties or risks.

- A federal Correctional Officer might be compared with someone who works in the broadly defined, private sector “security services industry”: But a “mall cop” does not perform the same function as an officer guarding convicted felons/dangerous inmates in our federal prisons. Same industry, same education, different job.
- A VA Nursing Assistant caring for a wounded warrior suffering a Traumatic Brain Injury might be compared with someone who works in a doctor’s office, calling prescriptions into pharmacies. Same industry, same education, different job.
- An electrician working at an Army Depot who builds and repairs sophisticated electronic weaponry might be compared with an apprentice learning how to run wires at a construction site. Same industry, same education, different job.

CBO called its own benefits comparisons “uncertain.” That was an understatement, because not only are their data shaky, as they acknowledge, but their human capital methodology is spectacularly inappropriate for assessing health and retirement benefits. The federal government provides health insurance and retirement benefits to all its employees on the same terms – regardless of education, race, pay system, occupation, or tenure. And a huge part of the alleged benefits gap the CBO calculated derives from the employer cost for the defined benefit pension. As is well known, many of America’s largest and most profitable corporations (such as Wal-Mart) do not provide defined benefit pensions at all. It was inappropriate for CBO to include data from such corporations, as they are not the standard to which the government should be compared. If CBO had restricted its comparison to federal and private sector workers performing similar jobs (e.g. aerospace engineers at NASA compared to aerospace engineers at Boeing), they would have found no gap.

The CBO study on federal pay does a great disservice to those who seek objective analysis on questions related to federal pay and benefits. Except for a brief footnote buried in the middle

of the report, the study neglected the work of the Federal Salary Council, which provides an accurate measure of difference between federal and non-federal pay using BLS data and adjusting for the specific characteristics of federal jobs, including the level of work required by the jobs federal employees actually perform. The demographic traits of the federal workforce are irrelevant to the adequacy of their pay, and irrelevant to any measure of pay comparability.

One Bright Spot for Federal Pay and a Threat to Extinguish It

In April 2014, the Office of Personnel Management (OPM) published a report entitled *“Governmentwide Strategy on Advancing Pay Equality in the Federal Government.”* It is the most informative, objective, and important examination of the federal pay system published by any entity in several years and deserves close attention, especially in light of the fanfare given over to the many extremely poorly-performed “studies” of federal pay from conservative think tanks. The OPM report was prepared in response to the President’s request for a gender pay-equity analysis of federal pay systems that paid close attention to the General Schedule’s classification system and its transparency. The President also asked for recommendations for administrative or legislative action that would promote “best practices” that were found to minimize inequities.

Although the report focused on just one outcome of the federal pay system – its success in advancing gender pay equity – the study provides important insight into the General Schedule system’s strengths as a whole. Any pay and job classification system must be judged on attributes such as internal and external equity, as well as transparency and effectiveness. External equity refers to whether a pay system meets market standards. We know that the General Schedule fails the external equity test, but not because of any kind of systemic flaw but rather because successive Congress’ and administrations have not funded it even before the pay freezes. We have the annual reports of the Federal Salary Council since 1995 to prove that.

But this OPM report on one aspect of internal equity, gender equity, is extremely telling. It compares data on federal employment over the past two decades and finds great progress on the part of women in ascending to higher-graded positions. But the most important finding was that there is no significant gender pay differences by grade level among GS workers. That is, at each pay grade, there was no real difference between the salaries paid to women and men doing the same jobs. This is a great virtue of the federal pay system.

The study showed that, depending on methodology used, from 76 to 93 percent of the observed pay gap between federally employed men and women is attributable to women being concentrated in lower-graded occupations. Indeed, the only real observed inequities arose where managerial discretion operates, such as in the awarding of quality step increases, promotions, and starting salaries. While women are more frequent recipients of promotions and quality step increases, managers have exercised discretion in providing higher starting salaries to men. But even starting salaries were mostly equivalent; it was in just four occupational categories that male starting salaries exceeded those provided to women by more

than ten percent. Among members of the non-General Schedule Senior Executive Service, women's salaries were 99.2 percent of men's, a remarkable achievement.

These findings constitute a ringing endorsement of the current pay system, a system that assigns salaries to the position, not the individual. In the jargon of pay-setting, the General Schedule is oriented more toward a "rank-in-position" rather than a "rank-in-person." And that orientation is the secret to having a pay system that avoids discrimination.

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.

The Department of Homeland Security's personnel system, named MaxHR, never really got off the ground, thanks to a lawsuit that successfully argued that its undermining of collective bargaining rights violated the law. But 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 have not given up 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. The most recent attempt to revive NSPS came this spring, when the contractor Booz Allen Hamilton (\$5.76 billion in revenue in 2013, 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 the 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.

To make its plan sound less "scary," Booz Allen Hamilton assumes dramatic increases in funding for federal pay so that no one would be any worse off than they would be with the protections of the General Schedule. As naïve and unrealistic as this assumption is, it is also based on a profound misunderstanding of the Merit System Principles. It is not enough to ensure that no one would be worse off. It remains wrong to distribute the system's hoped-for additional monies in a way that favors some demographic groups over others on the flimsy grounds of a manager's subjective assessment of performance. In the public sector, there is too much risk of political favoritism, and too much risk that unconscious bias will result in greater rewards for those with good connections or the preferred gender or skin color. And the General Schedule's

pay and classification system, as the most recent OPM report amply demonstrates, bests the private sector and any other type of split, “rank-in-person” system on equity time and again. AFGE does not suggest that the Partnership advocates discrimination. Its intentions in this area are unquestioned. 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: the blueprint Booz Allen Hamilton has submitted is not just cut from the same cloth as NSPS, it is 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 have 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 8.5 percent from 2010 to the present, a period which includes the three years of frozen federal pay plus two years of one percent adjustments. So even before the salary reductions for new employees of 2.3 percent and 3.6 percent, the purchasing power of federal salaries had declined by 6.5 percent. The degree to which they lag the market varies by city, but the nationwide average is 35.18 percent according to the most recent estimates from OPM, using data from BLS. And that number includes current locality payments which have been frozen for four, long years.

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 for many workers. 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 1990’s and other factors are better explanations. Median incomes for middle class American families, adjusted for inflation, are lower than they were in the 1970’s 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 1920’s. 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 and later the 1 percent adjustments for federal workers, 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, the Booz Allen Hamilton plan deserves strong opposition because it introduces subjectivity and politicization into federal pay and undermines veterans' preference and the merit system principles. The plan is also objectionable because it reallocates 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 the Booz Allen Hamilton approach, because it quite explicitly introduces greater inequality between the top and the bottom of the federal pay scale.

The elitism of the Booz Allen Hamilton plan is striking. It ignores the federal government's hourly workforce altogether. Apparently blue collar workers are so bereft of the qualities it wants to reward in its performance pay scheme that they are not worth notice. The plan's 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 Booz Allen Hamilton proposes for the government. Like its NSPS forbearer, the plan 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.

The Booz Allen Hamilton plan should also be opposed because it can only undo the tremendous achievement of the current system with respect to eliminating discrimination in pay. I urge you 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.

The Federal Salary Council Approach

The Federal Salary Council uses BLS data gathered by trained data collectors who visit businesses and government agencies and record detailed information about the job duties assigned to workers at each salary level and at each location. The dataset used by Heritage asks individuals to identify their occupations by broad industrial categories; e.g., a lawyer would have an occupation called “legal services” as would many others with jobs in that industry. In contrast, the BLS data records, for example, a salary for a “senior attorney with at least ten years of experience in administrative law and litigation in the area of securities law.” The legal profession includes a broad range of salaries, with the majority of lawyers earning modest salaries for providing routine services such as title searches, real estate closings, preparation of simple wills, and representation in small claims court. While some attorneys employed by the government perform similarly routine functions, many more are responsible for complex litigation and regulatory oversight. The data in the National Compensation Survey capture these differences and apply them to the calculation of the gap between federal and private sector pay exactly according to their weight in the overall distribution of federal jobs.

Another difference that explains the opposite results of Heritage and the BLS and OPM is methodological. Heritage uses the “human capital” approach, comparing the pay of individuals on the basis of personal attributes such as age, industry, geographical location, gender, race, ethnicity, educational attainment, occupation and tenure. One appalling result of Heritage’s approach is the interpretation of the fact that the federal government is less likely to discriminate against women and minorities in terms of pay than the private sector: It is viewed as evidence that the government “overpays” relative to the private sector, rather than the other way around.

In contrast to Heritage, the BLS and OPM use a method that matches federal jobs with jobs in the private sector that are similar not only in terms of occupation but also that match levels of responsibility, and levels of expertise required. The personal attributes of the job holder are not included in the calculation, only job description, duties, and responsibilities. In this careful analysis, which focuses on the jobs of the actual federal workforce, the universal and consistent finding is that federal employees are underpaid relative to their counterparts in both the private sector and state and local government.

While the human capital approach is a valid way to reveal patterns of discrimination against individuals, it is not appropriate for pay-setting. Unfortunately, it has proved to be extremely

valuable for scoring cheap political points, as the pay freeze and subsequent budget deals' cuts to federal retirement attest.

Conclusion

On paper, the General Schedule pay system is a model of market sensitivity and budget prudence that upholds the government's merit system principles and guards against discrimination. It has extensive flexibility that allows recognition for exceptional performance and special rates for jobs that are hard-to-fill. But what's on paper and what occurs in practice have become two very separate things. The three-year pay freeze followed by two years with meager one percent adjustments made a mockery of market sensitivity. Budget prudence became an all-purpose excuse for a reluctance to implement any kind of change to federal pay that might result in higher pay for anyone. And there remains a steady drumbeat from those who would dismantle all but a small number of federal agencies and programs that federal pay should match that of the worst private employers, and that subjectivity should replace objectivity in structuring a new system.

The federal payroll played no role in the creation of the economic crisis that required massive government spending to resolve. Federal employees did not cause the housing bubble either to inflate or to burst. Federal employees did not engage in speculative investments in derivatives of mortgage securities. Federal employees did not mislead investors, did not outsource jobs to China or Mexico, and did not destroy the financial system. The three-year pay freeze, and subsequent 1% adjustments, were nothing more than symptoms of the mania for austerity and a pointless effort at appeasement to those who oppose the missions of almost every executive branch agency and program. It is likely that some in Congress will vote to freeze federal pay again, and the response must be an emphatic rejection of their effort to drive down living standards for federal employees, now and in the future. Federal employees deserve better than the role of pawn in the war against the middle class and the war against government.

Federal Pay – Blue Collar

Another Unfulfilled Promise of Market Comparability

The Federal Wage System (FWS), the federal government's pay system for hourly workers in the skilled trades, is supposed to be a "prevailing rate" system that matches federal and private sector rates on a locality basis. For almost four decades, this system has been ruthlessly distorted by the application of a pay "ceiling" that prevented any annual adjustments from exceeding the average GS adjustment. In the past ten years, Congress matched the "ceiling" with a "floor" so that the government's hourly and salaried workers receive the same annual locality and nationwide adjustments. They recognized that the hourly and salaried employees of the federal government work side by side for the same employer, commute together on the same roads, share health insurance, pension, and other non-pay compensation, and should be treated equally.

There remain substantial disparities between the GS system for salaried workers and the FWS. Almost all of these disparities disadvantage blue collar workers. In particular, the blue collar system has only five steps for recognizing the added-value and skills that tenure and experience bring to the workplace, while the General Schedule has ten steps. In addition, the FWS uses extremely outdated systems for gathering data to measure the pay gaps between federal and private sector wages. Finally, the FWS includes 132 local wage areas (plus 118 non-appropriated fund wage areas) with boundaries drawn to reflect blue collar employment in the federal government dating from as far back as 1965 and 1972, rather than the contemporary commuting data used by the GS locality system.

In October 2010, the Federal Prevailing Rate Advisory Committee (FPRAC) voted to end the practice of treating blue collar and white collar federal employees differently with regard to the drawing of local labor market boundaries. The effect of the FPRAC-supported regulation would be to limit each non-Rest of U.S. General Schedule (GS) locality to one Federal Wage System (FWS) local wage area. The new policy awaits approval by the administration. Once it is approved, it must be submitted for public review as a proposed regulation before final adoption. The administration has cited the pay freeze as an explanation for the long delay in approval of the regulation; the lifting of the freeze will eliminate this justification, and we look forward to its publication.

Unifying FWS and GS Locality Boundaries Brings the FWS into the 21st Century

One important argument in favor of unifying FWS local wage areas and GS localities is that it modernizes the prevailing rate system's recognition of what constitutes a local labor market. Chapter 53 of Title 5 directs OPM to maintain "a continuing program of maintenance and improvement designed to keep the prevailing rate system fully abreast of changing conditions, practices, and techniques both in and out of the Government of the United States." When the prevailing rate system's current local wage area boundary-drawing criteria were established 50

years ago, the white collar pay system did not yet vary salaries on the basis of local labor markets. The boundaries were drawn around federal facilities that employed large numbers of blue collar federal employees. Many of those federal blue collar jobs and facilities no longer exist, but the separate facility-based wage areas do still exist. These old wage areas also reflect a time before the expansion of metropolitan areas and the establishment of new highways and public transit systems.

In addition, the enactment of FEPCA in 1990 led to the establishment of modern criteria for defining the local labor markets, putting an emphasis on commuting data from the decennial census. These data are widely used by employers in both the public and private sectors to define local labor markets. In contrast, the FWS continues to draw boundaries on the basis of custom, tradition, and often out-of-date information on concentrations of blue collar workers in the private and federal sectors. It is time for FPRAC to recognize that the commuting patterns recognized by the GS system are the most relevant factors for local labor market definitions.

Congress Just Re-affirmed its Support for Treating FWS and GS Equally for Purposes of Annual Pay Adjustments

In December 2014, Congress voted to provide the same pay adjustment for FWS employees as the President provided GS employees with his Executive Order. Prior to the freeze, the Congress had voted to treat the federal government's blue and white collar employees the same with regard to annual locality pay adjustments. Recognizing that all FWS employees within a given GS locality deserve to be treated as if they worked in the same local labor market, the Congress has directed federal agencies to provide the same annual percentage pay adjustment to all blue collar workers within a given GS locality. Congress has recognized that this is an important element of the internal equity that it wants federal pay systems to maintain. Indeed, almost all federal agencies with non-GS pay systems that grant locality differentials have voluntarily adopted the GS locality boundary definitions for non-GS employees, including the Transportation Security Administration's PASS system, the repealed National Security Personnel System (NSPS), and numerous others.

Maintaining Different Local Labor Market Boundaries for Blue and White Collar Workers is Inequitable

Treating blue collar workers as if they are in one local labor market for purposes of annual pay adjustments and as if they are in a different local labor market for purposes of setting underlying base pay is inconsistent and inequitable. It violates basic standards of fairness. The policy makes an invidious distinction among federal employees in pay-setting. Blue collar workers are treated differently from white collar workers for reasons entirely unrelated to the work that they do. It is not and should not be acceptable to treat workers of different races or genders or ages who work in the same location as if they were in different local labor markets; likewise, it should not be acceptable for any employer, and especially not the federal government, to make this distinction on the basis of blue collar vs. white collar work.

Disparate Treatment Creates Internal Conflict at the Workplace

Continuation of the current practice of treating different federal employees in the same federal workplace as if they work in different localities creates massive inequities and disunity. For example, the Tobyhanna Army Depot is located in the New York City GS locality, but the Scranton FWS locality. The resulting pay inequities are extremely troubling and indefensible. At Tobyhanna, WG-11 Electronics Mechanics and Production Machinery Mechanics are responsible for highly complex electronics weapons manufacture, repair, modification, configuration, installation, and testing. They are responsible for equipment and machinery that is worth hundreds of millions of dollars and directly affects the progress of war and the well-being of warfighters. The skilled tradesmen and women who perform these jobs work directly with GS personnel, side-by-side, day after day. The blue collar annual pay ranges from \$45,843 to \$53,498. In the same building at the same time, GS-9 Process Improvements Specialists earn between \$54,576 and \$70,945 and GS-7 Secretaries earn between \$44,617 and \$57,997 with a career ladder that makes them eligible for GS-8 salaries of between \$49,421 and \$64,240. No one is questioning the appropriateness of the Federal Salary Council's designation of Tobyhanna within the New York City commuting area; it is a well-established observable fact, as described by census data. What is questioned is pretending that the blue collar workers at Tobyhanna work in a different location than the white collar workers there.

Unifying FWS and GS Locality Boundaries is Not New, Just Overdue

In 2008, the Federal Prevailing Rate Advisory Committee (FPRAC) undertook a comprehensive examination of the criteria for defining FWS wage areas. At that time, numerous updates were adopted, including the requirement that wage area boundaries would not split Metropolitan Statistical Areas (MSAs) as defined by the Office of Management and Budget (OMB). The unification of MSAs was justified on the basis of a recognition that the FWS wage areas reflected outdated notions about how far workers in the skilled trades would commute to jobs. Census data that are used to define MSAs proved that commuting patterns in large metropolitan areas that include urban cores, suburbs, and "exurbs," are similar for workers in all occupations. The next step was to unify the FWS and GS locality boundaries, since the latter are determined by a combination of MSA definitions, commuting patterns, and concentrations of federal employment. However, the Bush administration would not allow the unification of FWS and GS boundaries to go forward, and that is why this element of the modernization of FWS boundary criteria remains to be addressed.

Conclusion

There is no rationale for maintaining different local pay area boundaries for the federal government's salaried and hourly workforces. No private employer follows such a practice. It is a relic of the past, of a time that preceded the existence of large suburban and ex-urban housing and commuting patterns affecting not only those in the skilled trades, but workers in professional and administrative jobs as well. The census data demonstrate clearly that workers in all kinds of occupations, blue and white collar, travel the same highways, ride the same

trains, and work in the same buildings. Some are paid by the hour, some are paid an annual salary. It is indefensible for the federal government to continue to classify them as though they live, travel, and work in different locations when they live, travel, and work in the exact same place. Congress already recognizes the importance of equity in pay adjustments between the hourly and salaried federal workforces. It is time to recognize equity in local pay area definitions as well.

Federal Retirement

Federal Employees Have Made Substantial Sacrifices Since 2011

Since 2011, federal workers have contributed more than \$159 billion towards deficit reduction, including an unprecedented three-year pay freeze, a 2.3% increase in pension contributions by employees hired in 2013, and a 3.6% increase in pension contributions by employees hired after 2013. This figure of \$159 billion does not include the hardship that resulted from delayed paychecks, threats to credit ratings, and general disruption to the lives of federal employees and their families caused by the 16-day government shutdown in 2013.

<i>3-year pay freeze (2011, 2012, 2013)</i>	<i>\$98 billion</i>
<i>2012 UI extension which increased retirement contributions for 2013 hires to 3.1%</i>	<i>\$15 billion</i>
<i>2013 lost salaries of 750,000 employees furloughed because of sequestration</i>	<i>\$1 billion</i>
<i>2013 Murray-Ryan increased retirement contributions for post-2013 hires to 4.4%</i>	<i>\$6 billion</i>
<i>2014 pay raise of only 1%; lower than baseline of 1.8%</i>	<i>\$18 billion</i>
<i>2015 pay raise of only 1%; lower than baseline of 1.9%</i>	<i>\$21 billion</i>
<i>Total</i>	<i>\$159 billion</i>

Federal employees hired after 2013 already pay 4.4% of their salaries toward their defined benefit pension and 6.2% to Social Security which will make it all but impossible for them to fund their Thrift Savings Plan (401(k) equivalent) accounts. The result will be a serious shortfall in their retirement income security, and a substantial lowering of their standard of living. Federal employees hired after 2013 already pay 4.4% of their salaries toward their defined benefit pension and 6.2% to Social Security which will make it all but impossible for them to fund their Thrift Savings Plan (401(k) equivalent) accounts. The result will be a serious shortfall in their retirement income security, and a substantial lowering of their standard of living.

AFGE rejects the notion that there should be a trade-off between funding the agency programs to which federal employees have devoted their lives, and their own livelihoods. None of this would be occurring were it not for the perverted logic of austerity politics. The Budget Control Act was a grave mistake, and the spending cuts it imposes year after year have been ruinous for our economy and for the government services on which all Americans depend. Spending cuts hurt the poor and the vulnerable, and they also hurt military readiness, medical research,

enforcement of clean air and water rules, access to housing and education, transportation systems and infrastructure, and homeland security.

Background

In 2013, federal retirement was attacked on several fronts. The House Budget Resolution for FY 2014, authored by House Budget Committee Chairman Paul Ryan (R-WI), proposed draconian cuts to federal employee pensions, by requiring current employees to increase their contributions to retirement by 5.5% of salary. Federal Employees Retirement System (FERS) employees would have gone from paying 0.8% of salary to their pension to 6.3% of salary to their pensions. Civil Service Retirement System (CSRS) employees would have gone from paying 7% of their salary to 12.5% to their pension. The Ryan pension cuts were estimated to save \$132 billion over ten years. These cuts “score” (in budget parlance) as tax increases. By contrast, the Senate version of the FY 2014 Budget Resolution, authored by Senate Budget Committee Chairman Patty Murray (D-WA), made no recommendation to cut federal employees pay or benefits and criticized the House Budget Resolution’s proposals in these areas.

At the end of 2013, Chairman Ryan and Chairman Murray negotiated over a budget that would repeal sequestration for two years in order to restore most agencies’ funding levels above sequestration levels. Their primary differences were on which offsets should be used to pay for the two year repeal of sequestration. Eventually, they agreed that one offset would be a \$6 billion hit to federal employee retirement, which was achieved by increasing pension contributions for employees hired after 2013 to 4.4%.

It is important to view all proposals to cut federal retirement in the proper context. The federal retirement systems play no role whatsoever in the creation of the deficit, and reducing benefits to federal workers has made no positive effect on the budget or the economy. These proposals have no justification other than to scapegoat federal employees and retirees for an economic crisis they had no part in creating. No other group of middle-class Americans has contributed to deficit reduction the way federal employees have, and it is time to find other ways to reduce the deficit than continually taking from working and middle-class workers who have dedicated their lives to federal service. AFGE will continue to oppose any additional efforts to undermine the statutory retirement promises on which federal employees rely, and Congress should focus its efforts on repealing the Budget Control Act.

Recent Developments

President Obama’s FY 2015 request did not recommend increased federal employee retirement contributions. While the Senate did not take up a budget resolution, the House 2015 Budget Resolution again proposed increasing federal employee retirement contributions by 5.5%.

At the end of 2014, Representative Paul Ryan (R-WI) and Representative Darrell Issa (R-CA) requested a report from the Congressional Budget Office (CBO) on the long-term savings from

their proposed cuts to federal employees' retirement benefits. Specifically, the Congressmen requested a CBO report that will examine the budgetary impact of different options for reforming FERS based on changes made in recent years to other large pension plans, both public and private. The request stated the following:

"...The report should include, but not limit itself to, adjusting the retirement contributions of federal employees, altering the formula for computing pension benefit payments, and expanding the defined contribution component while reducing the defined benefit component..."

Despite extraordinary efforts to ward off additional cuts to federal employee pensions by Members of Congress who support federal employee pay and retirement, this request from Representative Ryan and Representative Issa is evidence that increasing federal employee retirement contributions is a priority in the 114th Congress. AFGE will fight against all attempts to reduce the defined benefit contribution to federal employee pensions.

Retirement Benefits for Federal Firefighters and Law Enforcement Officers

Under present law, a federal employee who receives a distribution from a qualified retirement plan such as the Thrift Savings Plan (TSP) prior to age 59 ½ is subject to a 10% early withdrawal penalty, unless an exception applies. Among other exceptions, the early withdrawal penalty does not apply to TSP distributions made to a federal employee who separates from government service after age 55. However, present law provides that federal firefighters, Bureau of Prisons (BOP) correctional officers and staff, and other federal law enforcement officers, who complete 20 years of service in a "hazardous duty" firefighter or law enforcement position are eligible to retire at age 50. This provision is intended to help the agencies recruit and retain a young, physically fit workforce.

Despite federal firefighters and law enforcement officers having the option to retire at age 50, with 20 years of service, they cannot under present law withdraw their TSP funds without incurring the 10% early withdrawal penalty. These retirees must wait until age 55 to withdraw their TSP funds if they want to avoid incurring this penalty. This is grossly unfair to the federal firefighters who save lives and property, the BOP correctional officers and staff who handle the most dangerous offenders behind bars, and the other federal law enforcement officers who patrol our nation's borders and secure our federal buildings' safety. When they retire many will rely on TSP as a significant portion of their retirement income, and therefore their TSP should not be subject to any early withdrawal penalty.

Until a few years ago, police, firefighters, and emergency medical technicians (EMTs) who worked for State and local governments experienced a similar problem. Those who retired after age 50 but before age 55 were unable to withdraw money from their defined benefit plans without incurring a 10% additional penalty. However, section 828 of the Pension Protection Act

of 2006 (P.L. 109-280) resolved the problem by exempting these public safety employees from the 10% early withdrawal penalty.¹

AFGE strongly urges the Obama administration and the 114th Congress to enact legislation that will modify the Internal Revenue Code of 1986 to ensure that federal firefighters, BOP correctional officers and staff, and other federal law enforcement officers may retire at age 50 without their TSP being subject to a 10% early withdrawal penalty. Such legislation could be based on two bills introduced in the 113th Congress: S. 2257, a bill which would have exempted from the 10% early withdrawal penalty BOP correctional officers who retire at age 50, and H.R. 4634, a bill which would have exempted federal law enforcement officers and firefighters who retire at age 50 from the 10% early withdrawal penalty.

Conclusion

AFGE will seek legislation to repeal the draconian increase in employee contributions to retirement for those hired in 2013 and afterward and will continue to vigorously oppose any retirement cuts for employees hired before 2013. Additionally, AFGE will work to have legislation reintroduced to eliminate the 10% withdrawal penalty for federal firefighters and law enforcement officers who retire at age 50.

¹ Section 828 of the Pension Protection Act of 2006 eliminated the 10% early withdrawal penalty tax for state and local public safety workers. The section amended 72(t) of the Internal Revenue Code of 1986, by adding the following new paragraph:

“(10) Distributions to qualified public safety employees in governmental plans.

- (A) In general.-In the case of a distribution to a qualified public safety employee from a governmental plan (within the meaning of section 414(d) which is a defined benefit plan, paragraph (2)(A)(v) shall be applied by substituting “age 50” for “age 55.”
- (B) Qualified public safety employee.- For purposes of this paragraph, the term “qualified public safety employee” means any employee of a State or political subdivision of a State who provided police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision.”

Federal Employees Health Benefits Program

The Federal Employees Health Benefits Program (FEHBP), which covers more than eight million federal employees, retirees, and their dependents, is the nation's largest employer-sponsored health insurance program. FEHBP was affected by the Patient Protection and Affordable Care Act, otherwise known as Obamacare. FEHBP is also a target of those who would force federal employees to forfeit their earned benefits to finance deficit reduction. The President's failed 2011 deficit commission, led by Morgan Stanley Director Erskine Bowles and former Republican Senator Alan Simpson recommended dismantling FEHBP and turning it into a voucher program. During the 112th Congress, the House of Representatives passed Budget Committee Chairman Paul Ryan's (R-WI) plan to apply the Bowles-Simpson FEHBP voucherization idea to Medicare as a prelude to voucherizing FEHBP. The attacks on FEHBP are likely to continue with the 114th Congress. AFGE strongly opposes dismantling either FEHBP or Medicare by replacing the current premium-sharing financing formula with vouchers. In the President's FY 2014 budget proposal and subsequently, the administration has floated several controversial initiatives that would have a harmful effect on many of FEHBP's most vulnerable enrollees. Although no legislation to effect these changes has been introduced, AFGE has testified in opposition to the package.

Coverage of Applied Behavioral Therapy for Autism in FEHBP

After years of pressure from AFGE and organizations representing the families of those with autism spectrum disorders, OPM finally agreed in 2013 to allow FEHBP plans to cover the most widely used and most effective treatment for autism, Applied Behavior Analysis (ABA). Thirty-seven states require health insurance plans operating in their state to cover autism treatments and interventions. OPM's action still falls far short of this standard, because it only permits and does not require FEHBP plans to cover treatments such as ABA. In 2014, 19% of participating plans offered ABA. In 21 states and Puerto Rico, coverage will be offered in some regions. All state-specific plans in Arkansas, Minnesota, and New Mexico will provide the coverage. The landscape in 2015 is similar with 21 states offering at least some plans with coverage, however coverage is still spotty within states and there have been no major advances in expanding the offering of this benefit in FEHBP.

Neither of the largest FEHBP plans, Blue Cross/Blue Shield Standard Option or Basic Option, will cover ABA in 2015. These nationwide plans cover 63% of all FEHBP participants, and the regional plans that cover ABA do not begin to include the remaining 37%. Thus, if OPM is at all serious about providing coverage for the most effective and widely used intervention for autism, it must require plans to cover ABA. AFGE will continue to press OPM to require this coverage in every FEHBP plan.

Obamacare and FEHBP

Neither the enactment of the Affordable Care Act in 2010, nor the inception of the individual mandate has solved all of our nation's problems associated with health care cost and insurance coverage, as millions of Americans remain uninsured or underinsured, and we still spend almost twice as much per capita as other advanced industrialized countries with nationalized health care. This is true despite the fact that almost half of all American health care spending is funded by the U.S. government through Medicare and Medicaid which are not drivers of cost. The country's problems with prices and coverage derive from the other "half" of health care spending, the portion controlled by private insurers and pharmaceutical companies and where policies and rates are set by the private sector rather than government regulation.

The phase-in of benefits from Obamacare began in 2011 with extension of coverage to dependents up to age 26, no copayments for preventive care, and smoking cessation benefits, again without charging any copayments. Several other provisions of Obamacare affect federal employees and retirees who participate in FEHBP. Three will have a direct cost impact. The most promising is the rule on medical loss ratio limitations. Insurers have to spend at least 80 percent of premiums on medical care or functions that improve the quality of care. For those covered by large group policies, insurers must spend an even higher amount -- 85 percent. Insurers who fail to meet this standard must provide policyholders with a rebate instead of pocketing the extra premiums as profit.

Those covered by Medicare and an FEHBP plan pay nothing for one annual well patient visit to a doctor, and can request a personalized illness prevention plan at no cost. Medicare beneficiaries are also able to get immunizations and screenings for cancer and diabetes without any copayments. Those who participate in Medicare Part D are eligible for a 50 percent discount on brand-name drugs and a seven percent discount on generic drugs if the plan has a coverage gap (also known as a "donut hole"). These discounts will increase each year until the donut hole is completely eliminated by 2020.

In 2014, the income-based government subsidies for individuals to purchase health insurance from state-run "exchanges" became available. Unfortunately, tens of thousands of federal employees who should qualify for these subsidies because their incomes are so low will not be eligible because they have access to FEHBP plans which are partially paid for by their employer. Obamacare's subsidies are calculated partially to limit the share of family income paid out in premiums, and partially on the basis of family size, but FEHBP's employer contributions do not vary by family size or income level. Thus, federal employees who cannot afford FEHBP premiums will not be able to obtain subsidies to purchase insurance on the exchanges.

FEHBP already had some of the consumer protections that the Affordable Care Act extends to everyone in 2014. First among these are rules to prevent insurance companies from discriminating against those with a pre-existing or existing health problem. Second, insurance companies are now prohibited from placing lifetime limits on the amount they will pay for benefits for a patient (the law raises the limit and eventually eliminates it). Restrictions on

insurance companies' ability to cancel coverage when an enrollee falls ill also came into effect in 2014.

However, Obamacare contains a time bomb provision, set to go off in 2018, that is likely to be very damaging to federal employees. The most punitive will be the 40 percent excise tax on "high cost" or "Cadillac" plans that will make FEHBP far less affordable for many federal employees and retirees than it already is. Most disturbing is the fact that this tax will fall on many FEHBP plans whose high costs are not at all a reflection of a rich benefit package. In fact, the highest cost plans in FEHBP are not those with the most comprehensive benefits. The highest cost plans are those that exploit FEHBP's structural weaknesses by encouraging those with the highest health risks to congregate, and thus their costs reflect the risk group rather than the actuarial value of the benefits offered. Additionally, many FEHBP plans become high cost because of their political power and the Office of Personnel Management's long history of exempting them from cost accounting standards, and acceding to their demands for large annual premium increases.

FEHBP contracts are fixed price re-determinable type contracts with retrospective price redetermination. This means that even as the insurance companies receive only a fixed amount per contract year per "covered life", they are allowed to track their costs internally until the end of the year. The following year, they can claim these costs and recoup any amount they say exceeded their projections from the previous year. They are guaranteed a minimum, fixed profit each year regardless of their performance or the amount of claims they pay. The cost "estimates" on which they base their premium demands are a combination of what they report as the prior year experience plus projections for the coming year plus their minimum guaranteed profit. Clearly, there is no ability for federal employees to alter the "high cost" of these plans. It is in the FEHBP's insurance companies' interests to keep costs and profits high, and benefits low. And to subject the result of this inefficient system to a "Cadillac" tax, when its high costs have nothing to do with benefits, just adds insult to injury.

The excise tax is a heavily regressive tax on federal workers, especially those whose incomes are too high to be eligible for the exchange subsidies but are too low to afford employee premiums in excess of \$3,000 per year. While the 40 percent tax is levied on the insurance company and is paid on incremental costs over \$10,200 for individuals and \$27,500 for families, there are already FEHBP HMOs whose rates already meet the 2018 thresholds.

The Administration's Proposed Changes to FEHBP

Discounts for Wellness

The first proposal is to provide "discounts for wellness." This Orwellian label barely masks its true purpose -- to impose surcharges on those deemed "unwell." The unwell have relatively higher health insurance claims than those identified as "well." Would OPM also propose lower salaries for those deemed "unwell"? Would OPM propose to charge those in "wellness programs" more for their retirement benefits on the belief that those with good health are

likely to live longer, and therefore cost the retirement system more? This proposal is nothing more than a pay cut imposed on the basis of health status.

The latest medical research strongly suggests that weight is as much a function of genetics as is height, and obesity will be one of the primary disqualifiers for the wellness discount. Illness is a misfortune, not a moral defect. Genetic traits do not respond to financial incentives. According to the latest data from the Centers for Disease Control, obesity rates vary tremendously by race and ethnicity, with 58.5% of non-Hispanic black women and 41.4% of Hispanic women classified as obese, while just 32.2% of non-Hispanic white women were labeled as such. The legal definition of discrimination involves disparate treatment on the basis of immutable characteristics, and one protected class has to do with physical disability. There are numerous conditions that are physical disabilities that might make a federal employee ineligible for the “wellness discounts” related to obesity, rendering the initiative discriminatory. We understand that this form of discrimination is legal under ERISA and other laws, but it remains offensive to our sense of fairness. As such, AFGE opposes the premium differentials tied to “wellness” initiative.

As an alternative, we propose requiring all FEHBP plans to cover up to \$750 per year for gym memberships, fitness classes, or fitness devices. This would provide a positive incentive to pursue fitness, and it is a practice that is far superior to penalizing those with obesity or other conditions that render them ineligible for preferred rates. The Government should provide a positive inducement to pursue wellness. This is similar to the practice that AFGE uses for its employee health insurance program. For many of AFGE’s employees, a fitness subsidy has been instrumental in the decision to pursue fitness classes that would otherwise have been unaffordable.

Regional PPOs

The next idea from OPM for FEHBP is one its proponents call “expansion of FEHBP plan types.” In practice, this means allowing regional Preferred Provider Organizations (PPOs) to compete against the national PPOs such as Blue Cross/Blue Shield (BCBS) standard and basic options. The “Blues” are FEHBP’s most popular plans, and currently cover more than 60 percent of enrollees. Like other proposals that claim to lower costs by increasing competition, this one will deliver much less than promised by OPM. First, OPM has a miserable track record when it comes to “arms-length” negotiations with health insurance carriers. Indeed, the carriers are regularly referred to as OPM’s “partners” while we, the enrollees on whom OPM wants to shift more and more costs, are kept at a distance. OPM never seems to understand that as a purchaser, they have a different set of interests from the carriers and it is not their role to follow and accommodate and approve any and all demands by the carriers. Thus their assurance that they would pursue a “negotiations” strategy “not only advantageous to the FEHBP Program but to carriers as well” does not bode well for enrollees, and neither does the \$600 million they think they will save from this initiative. Health care costs (prices and utilization) are not going down. When OPM claims FEHBP savings of \$600 million here and \$6 billion there, it can only mean that enrollees are paying the difference.

Like all of OPM's proposals, this one would have both winners and losers. Who wins and who loses is important to know in advance; the \$600 million savings implies more losers than winners or that the amount of savings for the winners exceeds the losses of the losers. In short, what will be the impact on FEHBP enrollees? How many will migrate out of other plans into these regional PPOs? How many will shift out of other plans that are affected by the migration to regional PPOs? What will be the impact on premiums and benefits? OPM has not answered any of these questions.

OPM suggests that BCBS plans have too much market power, and that a dose of competition from regional PPOs will lower costs for both. But we know from experience that is not how things go in FEHBP. What will likely happen is that BCBS will end its national plan and the various state BCBS organizations will compete against the regional PPOs, depriving federal employees of the most popular national plan. More risk segmentation will plague FEHBP. There may be less competition, not more, as a result of this change.

If there is one thing FEHBP carriers oppose more than anything, it is the reform long championed by AFGE: one standard benefits package that would require plans to compete on the basis of cost and quality, rather than compete by segmenting the market. Without the national BCBS plans, the regional plans will construct dissimilar benefits packages designed to cherry pick, and the ensuing increase in risk segmentation will worsen FEHBP's existing flaws. AFGE will continue to fight against the creation of regional PPOs.

Direct Contracting with one Pharmacy Benefit Manager

Another OPM initiative, put forth under the heading of "increasing contracting discretion" would involve carving out prescription drug benefits and allowing OPM to negotiate directly with one Pharmacy Benefit Manager (PBM). The logic behind this is identical to AFGE's arguments in favor of reducing the number of carriers in order to consolidate buying power and encourage the kind of competition that drives down costs, rather than that which merely segments the market and shifts costs. AFGE would be supportive of this proposal if OPM had not let slip that it contemplated this in the context of full "voucherization" of FEHBP, as recommended by Messrs. Simpson and Bowles, but not endorsed by the commission they led. The notion that the carve out would mean a voucher to purchase prescription drugs, and would, eventually, be part of a fully-voucherized cafeteria-type structure for all of FEHBP makes AFGE extremely wary of OPM's initiative.

In addition, since it seeks to save \$1.8 billion over ten years, it is not clear whether OPM's strategy would lead to the adoption of a formulary (i.e. a list of covered drugs) that would leave out a particular drug or brand of drug that a patient needs. It is also far from clear that OPM would be successful in choosing a PBM that would provide the best prices. There is an almost inevitable trade-off between the restrictiveness of the formulary and the overall cost of the prescription drug benefit. Further, plans such as Blue Cross/Blue Shield may have more buying power than OPM, as they cover more than eight million when their non-federal customers are

counted. It remains for OPM to demonstrate how it intends to lower its costs without a cost-shifting voucher or problematic restrictions on the formulary.

Alternatively, AFGE strongly supports H.R. 1367, introduced in the 113th Congress by Representative Stephen Lynch (D-MA), the FEHBP Prescription Drug Integrity, Transparency, and Cost Savings Act. The bill is meant to lower FEHBP's prescription drug costs by putting restrictions on the activities of PBMs, the entities that negotiate with drug manufacturers and supply prescription drug benefits to health insurance plans of all types. The legislation prohibited PBMs from switching a person's prescription without prior approval from the prescribing doctor (currently PBMs do so if switching to a different drug is more profitable for them). It also required a PBM to return to insurance plans almost all rebates and incentive payments they receive from manufacturers, and creates disclosure requirements for information about such rebates and incentive payments.

Same-sex Spousal Benefits

With the Supreme Court decision of *US v. Windsor* that struck down a portion of the *Defense of Marriage Act* (DOMA) in 2013, same-sex spouses are eligible for benefits just like opposite-sex spouses. In addition, the children of same-sex spouses are also eligible for coverage. This policy change from recognizing domestic *partners* to recognizing same-sex *wives* also changes the tax penalty for coverage since the Supreme Court ruled that same and opposite-sex marriages must be treated the same under the law; however, domestic partners are no longer a recognized relationship for federal benefits. While the changes are positive for same-sex marriages, AFGE continues to support the full coverage for domestic partners of both same- and opposite-sex couples and their children under FEHBP.

The 2011 Deficit Commission's Proposal to Dismantle FEHBP

The recommendations of the co-chairs of the President's National Commission on Fiscal Responsibility called for "transforming the Federal Employees Health Benefits Program (FEHBP) into a defined contribution premium support plan that offers federal employees a fixed subsidy that grows by no more than GDP plus 1 percent each year." Although the commission failed to achieve the supermajority vote necessary to send its recommendations to Congress for fast track consideration, the recommendations remain alive in current attempts to reduce the deficit on the backs of federal employees.

The voucher plan would change FEHBP by having the government provide a fixed amount of cash each year that employees could use to buy insurance on their own, instead of paying a percentage of average premiums charged by the insurance companies, as is currently the case. Under the existing statutory system, if premiums go up by 10 percent, the government's contribution goes up by around 10 percent. The FEHBP financing formula requires the government to pay 72 percent of the weighted average premium, but no more than 75 percent of any given plan's premium. Under the Commission proposal, the government's "defined contribution" or voucher would go up by an amount totally unrelated to the rise in premiums.

For example, between 2012 and 2015, FEHBP premiums went up by an average of 3.5 percent (3.2% for 2015). The government's contribution largely kept pace with the employee contribution, although for 2015, the government contribution will be .2% lower than the contribution from employees. If the voucher proposal would have been in effect, the government's "contribution" or voucher would have gone up by GDP + 1%. During periods of slow growth, the voucher program would not cover premiums; for example, GDP in 2011 was estimated to have been 2%. Adding an additional percentage point to that and the voucher would have risen by 3%, not enough to cover the average rise in premiums.

Last year, House Budget Committee Chairman Paul Ryan (R-WI) and the House Republicans voted not to wait for the FEHBP pilot, and but to voucherize Medicare immediately. Of course, the voucher plan only holds down costs for the government, shifting the burden to federal workers or the elderly. Clearly the objective is to reduce government spending and impoverish workers. While this provision was not included in the 2015 budget, it is not known whether this plan will be part of future budgets.

Conclusion

During the three-year pay freeze, federal employees' health insurance contributions grew by more than 16 percent. The cost to employees of participating in FEHBP continues to rise by more than either the general rate of inflation or the rate of growth of their ability to pay (i.e. cola growth for retirees or pay adjustment rates). For 2015, federal employees will pay 3.2% more on their healthcare premiums, but only realize a 1% raise in their salaries. In addition, while the employee percentage will rise 3.2% in 2015, the average increase in the government share of the premiums will be only 3.0%, which indicates a policy to further pass off costs to federal employees. While the consumer protections included in Obamacare have allowed all Americans to enjoy some of the positive elements of the FEHBP, federal employees' main benefit has been the extension of coverage to dependents up to age 26. AFGE supports efforts to lower FEHBP's prescription drug prices, but will closely monitor any impact on the formulary. We oppose differential in FEHBP premiums based on health status, and will oppose regional PPOs until more information on the impact on enrollees is provided. AFGE supports full equality in the provision of health insurance for all families, including those that are comprised of domestic partnerships. Finally, AFGE will seek to protect federal employees from the new taxes Obamacare will impose starting in 2018, because it would punish enrollees for the failure of OPM to negotiate premiums that are a fair reflection of the benefits contained in FEHBP's plans.

Arbitrary Cuts in Civil Servants

Summary

Congressional Republicans introduced many bills in the previous Congress that would have imposed arbitrary reductions in the number of civil servants in all federal agencies. Only one of those bills was marked up, and it was never considered on the floor. The House Budget Resolution would have prevented federal agencies from replacing two out of every three federal civil servants. A bill to arbitrarily reduce the size of the Department of Defense's (DoD) civilian workforce attracted much attention, but ultimately garnered just nine cosponsors.

We will see proposals for arbitrary cuts considered by the Congress in 2015. Moreover, as a result of political brinkmanship over the debt ceiling, the problematic regular appropriations process, and the eventual return of sequestration, we may see agencies impose their own arbitrary constraints on funding for civil servants.

The civil service should be managed by budgets and workloads. If agencies have work to perform and funding to pay for that work to be performed, then they should be allowed to use civil servants to perform that work, depending on the usual criteria of law, cost, policy, or risk. Agencies should not be prevented from using civil servants because of arbitrary constraints—i.e., cuts, caps, freezes, or attrition/replacement ratios.

Congress' Arbitrary Downsizing Schemes

Many supporters of downsizing bills claim to draw inspiration from a recommendation made by the co-chairs of the Bowles-Simpson Deficit Commission that the civil service be arbitrarily reduced by 200,000 federal employees, or 10%, by 2015. Of course, the commission co-chairs also recommended reducing the number of contractors outside DoD by 250,000 and doubling the reductions in contractors made by DoD as part of its "Efficiency Initiative." However, only one of the civil service downsizing bills introduced in the 113th Congress would have also imposed arbitrary reductions in the number of service contractors, and this one exceptional bill would have done so only because of the unexpected inclusion of a last-minute amendment offered at markup.

All of the civil service downsizing bills in the previous Congress were completely arbitrary. No workload analysis was conducted to determine why the number of federal civil servants should have been reduced by the amounts required. Similarly, none of the bills made the tough decisions of identifying services that agencies should downsize after significant numbers of civil servants have been eliminated. Instead, the bills' supporters assumed, with a child-like simplicity, that nothing else would change.

Supporters of these bills couldn't even explain why arbitrary reductions in civil servants were necessary. The civil service workforce should be managed by budgets and workloads: if there is

work to be done and money to pay for that work, then managers should not be prevented from using civil servants. Supporters of these arbitrary downsizing bills have, as noted earlier, chosen not to reduce workload (i.e., identify services that should be downsized or eliminated). However, the austere budget environment will likely result in severe budget cuts in many federal agencies over the next decade, which will inevitably lead to reductions in the number of civil servants.

Before We Cut, Let's Remember that Civil Servants are Cheaper Than Contractors

The federal government's overall workforce consists of civil servants and contractors. If agencies are prevented from using civil servants, they will use contractors instead, even though contractors usually cost significantly more. For example, DoD reports that there are approximately as many civil servants as service contractors in its overall workforce. As the leaders of the House Armed Services Committee declared in 2012, the Department now spends a greater portion of its budget purchasing services than it does purchasing weapons systems, hardware, and other products. In fact, the Department spends more on contracted services than it does on pay for military and civilian personnel combined.

Moreover, senior DoD officials have consistently acknowledged that contractors cost significantly more than civilian employees. In 2010, then-Defense Secretary Robert Gates told the Washington Post "that federal workers cost the government 25 percent less than contractors." Comptroller Robert Hale acknowledged to a Senate subcommittee in June that contractors are two to three times more expensive than civilians. In a September House hearing, the Army chief of staff echoed Hale's remark.

Contractors generally cost significantly more than civil servants, according to impartial experts. The Project on Government Oversight (POGO), which compared the cost of federal employees and contractors in a seminal 2011 study—*Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*—determined that "on average, contractors charge the government almost twice as much as the annual compensation of comparable federal employees. Of the 35 types of jobs that POGO looked at in its new report—the first report to compare contractor billing rates to the salaries and benefits of federal workers—it was cheaper to hire federal workers in all but just 2 cases."

2014 Proposal to Arbitrarily Cut the Civilian Workforce Rejected Because of Bipartisan Opposition

Legislation (H.R. 4257) was introduced in the House of Representatives in 2014 that would have arbitrarily cut the DoD civilian workforce by 15%, or almost 120,000 jobs. The legislation would not have reduced the Department's workload—instead, DoD would simply have been told to do the same with less—and it would not have required any cuts in service contract spending, which has doubled over the last ten years.

Just to put the immensity of DoD service contract spending in perspective, consider the bipartisan report language in the Senate FY12 NDAA: *“Over the last decade, DoD spending for contract services has more than doubled from \$72.0 billion in fiscal year 2000 to more than \$150.0 billion (not including spending for overseas contingency operations), while the size of the Department’s civilian employee workforce has remained essentially unchanged.”*

The Size of the Civilian Workforce is Already Being Arbitrarily Cut

Over the objections of the White House and the Pentagon, the FY13 NDAA included a provision (Section 955) that by 2017 requires DoD to cut civilians and contractors by the same percentage as it will reduce military personnel. Because of Section 955 and the Department’s own cuts, DoD is actually cutting civilian personnel at a faster rate than military personnel, but it is not cutting contractors. Through FY19, according to the Comptroller, civilian personnel are being reduced by 9.1% and military personnel by 8.7%. No long-range reductions are available for contractor personnel. However, spending for contractors is scheduled to increase slightly in FY15, particularly on Operations and Maintenance.

Increases in the Size of the Civilian Workforce Are Justified—and Have Saved Money for Taxpayers

DoD's civilian workforce grew approximately 17% from FY01 to FY12, or from 700,000 to 800,000. According to the Office of Personnel and Readiness, the civilian workforce now consists of 772,332 employees. The growth in the size of the civilian workforce is essentially the result of five factors, according to reports from the Department and the Government Accountability Office (GAO):

1. Secretary Donald Rumsfeld oversaw the mid-decade conversion of 50,000 military positions to civilian employees in order to relieve stress on the military workforce and return military members to operational duties. DoD has acknowledged that “civilians typically prove to be a more cost effective source of support than their military counterparts.” Moreover, the Congressional Budget Office recommended that 70,000 military positions be converted to civilian positions, which it said would save taxpayers \$20 billion in less than 10 years. In other words, the largest part of the increase in the civilian workforce complained of by federal employee-bashers came from switching positions from military to civilian, which reduced both the size and the cost of the Department's overall workforce!
2. After years of counter-productive in-house cuts that essentially allowed contractors to be supervised by other contractors, 20,000 civilians were also added to the acquisition workforce.
3. Another 8,000 civilians were hired to bolster the Department's increasingly-important CYBER/IT capacity.

4. 7,000 civilians were added to the medical workforce in order to care for wounded warriors.
5. Insourcing also increased the size of the civilian workforce. In FY10 and FY11, DoD created 28,000 positions through insourcing. More than one-half of those positions were, according to the Department, created in order to save money. The rest were created because the work was too important or sensitive to privatize, also per the Pentagon.

Imposing Arbitrary Cuts on One of the Department's Three Workforces is Self-Defeating

If the Congress wants the Department to cost less, then the Congress must reduce the Department's responsibilities. It is incumbent upon the Congress to determine which functions the Department should no longer perform, so that the relevant workforce(s) can be downsized commensurately.

The Department should perform its mission on the basis of budgets and workloads. If it has work to do and money to pay for that work to be done, then there is no reason why DoD managers should be prevented from using civilian employees, contractors, or military personnel. Rather, performance decisions should be based on law, cost, policy, and risk.

However, through 2019 the civilian workforce is supposed to be no larger than it was in 2010—it is arbitrarily capped. The imposition of a unique constraint on the size of the civilian workforce drives work that had been performed by civilians towards the other two workforces, regardless of law or cost.

DoD told the Senate Homeland Security and Governmental Affairs Committee in 2012 that

"(t)his 'civilian cap' has reduced the flexibility of the Army to utilize the types of manpower it sees as most beneficial to the performance of its mission...The current caps on federal employees hiring have hampered agencies from actually making cost-analysis based decisions when contracting...In practical terms, if the Army cannot hire civilians, then it must turn to other sources of labor--like contracting--when it needs to execute missions..."

DoD officials have admitted that contractors cost more than civilian employees. Former DoD Comptroller Robert Hale acknowledged in 2013 testimony before the Senate Defense Appropriations Subcommittee that service contractors generally cost two to three times what in-house performance costs, particularly for long-term functions, a view subsequently affirmed by the Army Chief of Staff.

In fact, civilian employees are now in such short supply that the Department is, increasingly, using more expensive military personnel to perform routine functions that could be performed more efficiently by civilian personnel, which, as was pointed out in FY14 NDAA report language

by the House Armed Services Committee, is increasing costs and diminishing readiness. In other words, imposing further arbitrary reductions on the civilian workforce will actually cause DoD to rely even more on more expensive contractors and military personnel, significantly increasing costs to taxpayers.

Sourcing: Complying with the Law

Summary:

- 1. EXTEND THE GOVERNMENT-WIDE SUSPENSION AGAINST STARTING UP ANY NEW OMB CIRCULAR A-76 STUDIES:** Roll over the suspension on the use of the OMB Circular A-76 privatization process until much-needed reforms have been implemented and functions performed by contractors are finally targeted for insourcing. The Office of Management and Budget (OMB), by its own admission, has made no reforms to an A-76 process it acknowledges to be flawed. Schemes to repeal the A-76 suspensions were unsuccessful in 2013, but contractors will no doubt be back again this year.
- 2. ENFORCE PROHIBITIONS AGAINST DIRECT CONVERSIONS:** Consistent with the law, no work last performed by federal employees should be contracted out without first conducting a full and fair public-private competition. The Department of Defense (DoD), the largest department in the federal government, acknowledging that the risk of direct conversions increases significantly during downsizing, issued guidance to ensure compliance with the law. OMB has issued guidance for the non-DoD agencies, but that guidance is not reaching the folks who matter the most—i.e., front-line managers and the acquisition workforce. OMB committed to AFGE that it would issue additional guidance, and now it needs to follow up. OMB is in the process of issuing detailed and complicated guidance to protect contractor employees from legal violations perpetrated by their employers—when will OMB issue the additional necessary guidance to protect federal employees from agencies' illegal privatization schemes?
- 3. THROUGH INSOURCING, REQUIRE AGENCIES TO GIVE FEDERAL EMPLOYEES OPPORTUNITIES TO PERFORM NEW AND OUTSOURCED WORK:** Consistent with the law, agencies should insource functions that were contracted out without competition or are being poorly performed. Significant savings are possible from insourcing. An independent group determined that contractors are generally twice as costly as federal employees. DoD has claimed significant savings through insourcing. However, that effort was shut down when DoD imposed a cap on the size of its civilian workforce, but not its contractor workforce. And OMB is late, almost six years late, in issuing guidance that would allow agencies to regularly and systematically insource functions for cost reasons. OMB committed to AFGE that it would finally issue this guidance, and now it needs to follow up.
- 4. COMPILE SERVICE CONTRACT INVENTORIES:** Consistent with the law, agencies should compile inventories of their service contracts so that we know, among other things, how much contractors cost, how many employees are performing each contract, and how well they are performing. It is imperative that agencies be able to identify and control contractor costs to the same extent that they can already identify and control federal employee costs if downsizing is not to disproportionately impact the less costly civil service. After overcoming OMB opposition, DoD has made progress, and, reportedly, is

still two years away from integrating its contractor inventory into its budget process. However, GAO reports that non-DoD agencies are far behind, principally because OMB allows agencies not to collect from contractors important cost information required by law.

5. **LIFT CAPS ON AGENCIES' IN-HOUSE WORKFORCES WHICH FORCE WASTEFUL PRIVATIZATION:** There is no question that work performed by federal employees is being contracted out in defiance of the law because of personnel ceilings. And there is no question that personnel ceilings are being used to deny federal employees opportunities to perform new work and outsourced work. AFGE appreciates that OMB committed in 2014 to issue government-wide guidance to address these very serious concerns.
6. **REDUCE COMPENSATION FOR THE HIGHEST-PAID CONTRACTORS:** The cap on annual taxpayer subsidies to contractors in all agencies has recently been cut almost in half, slashed from \$952,308 to \$487,000. However, that's still way too high. With very few exceptions, it is difficult if not impossible to justify forcing taxpayers to compensate particular contractor employees more than the Vice-President, who earns an annual salary of \$230,700, particularly when rank-and-file federal employees in the acquisition workforce have had their pay frozen or only marginally increased and their agencies starved of vital resources because of sequestration and austerity.
7. **PROTECT THE PROCUREMENT PROCESS FROM POLITICS:** AFGE opposed the Bush Administration's attempt to politicize the federal procurement process in order to favor contractors, and AFGE will also oppose attempts to use the source selection process to favor certain contractors in exchange for commitments to "labor-friendliness". AFGE supports efforts to improve the lives of contractor employees that would follow favorable precedents and build on earlier reforms, including preventing scofflaw contractors from bidding on new contracts, requiring all contractors to boost pay and benefits for contractor employees, making it easier for all contractor employees to be organized, and making the pay and benefits of all contractor employees public knowledge. Such reforms would benefit all contractor employees, command unanimous support from the labor movement, and truly put the federal procurement process on a "high road."

Details:

1. ***EXTEND THE GOVERNMENT-WIDE SUSPENSION AGAINST STARTING UP ANY NEW OMB CIRCULAR A-76 STUDIES***

The prohibition first included in the FY09 Financial Services Appropriations Bill that would prevent new A-76 reviews from being launched by any federal agency remains in effect—and,

for several very sound reasons, according to the Government Accountability Office (GAO) and the DoD Inspector General (IG).

The OMB Circular A-76 process can't show savings: Even after years and years of costly and disruptive privatization studies across the federal government, GAO reported in 2008 that supporters of the OMB Circular A-76 could not demonstrate any savings:

"We have previously reported that other federal agencies—the Department of Defense (DoD) and the Department of Agriculture's (USDA) Forest Service, in particular—did not develop comprehensive estimates for the costs associated with competitive sourcing. This report identifies similar issues at the Department of Labor (DoL). Without a better system to assess performance and comprehensively track all the costs associated with competitive sourcing, DoL cannot reliably assess whether competitive sourcing truly provides the best deal for the taxpayer..."

The OMB Circular A-76 process is also severely flawed: According to GAO and the DoD IG, the A-76 privatization process

- a. Failed to keep track of costs and savings,

DoD IG: "DoD had not effectively implemented a system to track and assess the cost of the performance of functions under the competitive sourcing program...The overall costs and the estimated savings of the competitive sourcing program may be either overstated or understated. In addition, legislators and Government officials were not receiving reliable information to determine the costs and benefits of the competitive sourcing program and whether it is achieving the desired objectives and outcomes..."

GAO: "[The Department of Labor's (DoL)] savings reports...exclude many of the costs associated with competitive sourcing and are unreliable...(O)ur analysis shows that these costs can be substantial and that excluding them overstates savings achieved by competitive sourcing...DoL competition savings reports are unreliable and do not provide an accurate measure of competitive sourcing savings...Finally, the cost baseline used by DoL to estimate savings was inaccurate and misrepresented savings in some cases, such as when preexisting, budgeted personnel vacancies increased the savings attributed to completed competitions..."

- b. Resulted in the actual costs of conducting the privatization studies exceeding the guesstimated savings, and

GAO: "For fiscal years 2004 through 2006, we found that the Forest Service lacked sufficiently complete and reliable cost data to...accurately report competitive sourcing savings to Congress...(W)e found that the Forest Service did not consider

certain substantial costs in its savings calculations, and thus Congress may not have an accurate measure of the savings produced by the Forest Service's competitive sourcing competitions...Some of the costs the Forest Service did not include in the calculations substantially reduce or even exceed the savings reported to Congress."

- c. Included fundamental biases against the in-house workforce.

DoD IG: "...In this OMB Circular A-76 public/private competition—even though (DoD) fully complied with OMB and DoD guidance on the use of the overhead factor—the use of the 12 percent (in-house) overhead factor affected the results of the cost comparison and (DoD) managers were not empowered to make a sound and justifiable business decision...In the competitive sourcing process, all significant in-house costs are researched, identified, and supported except for overhead. There is absolutely no data to support 12 percent as a realistic cost rate. As a result, multimillion-dollar decisions are based, in part, on a factor not supported by data...Unless DoD develops a supportable rate or an alternative method to calculate a fair and reasonable rate, the results of future competitions will be questionable..."

Until the implementation of the reforms listed below, AFGE strongly believes that this temporary suspension on new A-76 reviews should be continued:

- a. The establishment of a reliable system to track costs and savings from the A-76 process that has been implemented, tested, and determined to be accurate and reliable, over the long-term as well as the short-term.
- b. Consistent with the law, the establishment of contractor inventories so that agencies can track specific contracts as well as contracts generally.
- c. Consistent with the law, the development and implementation of plans to actively insource new and outsourced work, particularly functions that are closely associated with inherently governmental functions, that were contracted out without competition, and are being poorly performed.
- d. Consistent with the law, the enforcement of government-wide prohibitions against direct conversions.
- e. The development and implementation of a formal internal reengineering process that could be used instead of the costly and controversial A-76 process.
- f. Revision of the rules governing the A-76 process to make it more consistent with agencies' missions, more accountable to taxpayers, and more fair to federal employees.

i. Increase the minimum cost differential to finally take into account the often significant costs of conducting A-76 studies, including preliminary planning costs, consultants costs, costs of federal employees diverted from their actual jobs to work on privatization studies, transition costs, post-competition review costs, and proportional costs for agencies' privatization bureaucracies (both in-house and out-house). It is accepted in the A-76 circular that it makes little sense to shift work back and forth without at least a guesstimate that savings will be more than negligible. "The conversion differential precludes conversions based on marginal estimated savings..." Unfortunately, the conversion differential—the lesser of 10% of agency labor costs or \$10 M, which is added to the non-incumbent provider—captures only "non-quantifiable costs related to a conversion, such as disruption and decreased productivity".

ii. Double the minimum cost differential for studies that last longer than 24 months—from the beginning of preliminary planning until the award decision. The biggest selling point for the revised 2003 A-76 circular was that standard privatization studies were supposed to last no longer than a year. Of course, OMB insists that a standard competition has not started until it has been formally announced, even though preliminary planning, the work conducted on an A-76 study before formal announcement, can last several years. Even excluding preliminary planning A-76 studies now routinely take longer 12 months. In fact, OMB reports that the average A-76 study takes 13.6 months to complete. Worse, the length is gradually increasing over time. In other words, the more the A-76 process is being used, the longer it is taking. The A-76 circular is based on standard competitions lasting no longer than a year except in unusual circumstances. Clearly, the conversion differential should be increased to take into account the growing length of A-76 studies.

iii. Eliminate the arbitrary 12% overhead charge on in-house bids. All in-house bids are slapped with an overhead charge, which works out to 12% of personnel costs. This significant impediment to in-house bids should be eliminated. As the DoD IG reported about the now infamous A-76 privatization review at the Defense Finance and Accounting Service, "We do not agree that the standard factor for overhead costs is a fair estimate for calculating overhead. We believe that DoD must develop a supportable rate or alternative methodologies that permit activities to compute reasonable overhead cost estimates." Neither reform has been undertaken. Consequently, most if not all in-house bids are unfairly biased against federal employees.

BOTTOM LINE: Office of Management and Budget (OMB) officials acknowledge that the A-76 process is flawed and that the moratorium on its use should not be repealed. In January 2014, the federal government's top procurement official told *The Washington Post* that he "agrees with the congressional moratorium on a contracting-out process known as A-76, because he

says it uses flawed methodology.” Even DoD, the agency most supportive of the A-76 process historically, also opposes efforts to repeal prohibitions against its use.

The existing suspensions on the use of the OMB Circular A-76 privatization process should remain in place until the circular has been fixed; federal employees are managed by budgets and workloads, instead of arbitrary constraints; direct conversions have actually been stopped; reliable systems for tracking and controlling service contractor costs have been implemented, including completion of contractor inventories; and insourcing can occur as easily as outsourcing always has been.

2. ENFORCE PROHIBITIONS AGAINST DIRECT CONVERSIONS

Despite the extensive use of the OMB Circular A-76 privatization process (and the resulting proof of the superiority of in-house workforces—federal employees won 80% of the time during the Bush Administration, despite a process that independent observers insisted is biased against them), much work is still contracted out without any public-private competition, i.e., without any proof that giving work to contractors is better for taxpayers or better serves those Americans who depend on the federal government for important services.

The Congress, on a bipartisan basis, has, repeatedly, prohibited agencies from perpetrating “direct conversions”—the term used to describe instances in which agencies give work performed by federal employees to contractors without first conducting full cost comparisons. This prohibition has applied regardless of the number of positions involved.

In December 2011, DoD, the largest department in the federal government, issued guidance to its managers to guard against direct conversions. This guidance was not issued to protect federal employees, but because of concern “that the Department not become overly reliant on contracted services.” As downsizing goes forward, DoD’s guidance warns that “we must be particularly vigilant to prevent the inappropriate conversion of work to contract.” The DoD guidance protects bargaining unit work from illegal privatization because it covers positions, not jobs. Therefore, according to DoD, positions need not be occupied and current federal employees need not be adversely affected in order for management to defy the prohibition.

OMB has issued acceptable guidance: “Pursuant to 41 U.S.C. 1710 and 10 U.S.C. 2461, agencies are precluded from converting, in whole or in part, functions performed by federal employees to contract performance absent a public-private competition (a practice known as “direct conversion”). The conversion of work from in-house to private sector performance may only occur through public-private competition. Appropriations acts since 2009, however, have prohibited agencies from using funds to “begin or announce a study or public-private competition regarding the conversion to contractor performance of any function performed by Federal employees pursuant to Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy. The President’s Budget has proposed continuing this moratorium in FY 2013.”

Unfortunately, it is hidden in the middle of a 700 page document entitled Circular A-11: Preparation, Submission, and Implementation of the Budget, which is read by a tiny handful of budget officials, but not by the acquisition workforce and not by the front-line managers.

In past AFGE meetings with OMB over the last six years, various hurdles were established—including waiting for DoD to issue its own guidance and requiring proof that direct conversions are actually occurring—all which have been surmounted. AFGE is pleased that OMB has committed to issuing additional guidance.

During the Bush Administration, OMB imposed arbitrary numerical privatization quotas on agencies (e.g., agencies were required to review for privatization by the end of the fiscal year 5% of full-time equivalent employees who were classified as “commercial”) and reduced funding for agencies that failed to achieve satisfactory progress. In enforcing this agenda, OMB identified for agencies particular positions for privatization and judged how agencies carried out particular privatization studies. AFGE members are very familiar with the extent to which OMB has historically involved itself in specific agency outsourcing efforts. There is no reason OMB can’t use its influence to promote compliance with the law against direct conversions.

Among the contingencies that need to be addressed in that guidance—or myths to be “busted”—are:

“No harm, no foul” myth: we can wait until federal employees retire or are reassigned and then contract out their work—without having to follow the law.

“Focus on core” myth: we want federal employees to focus on their core responsibilities and then contract out everything else—without having to follow the law.

“More of the same is somehow new” myth: when an agency gets more of the same work or wants to do differently work already designated for performance by federal employees, we can call that work new—so we don’t have to follow the law.

BOTTOM LINE: *OMB spares no expense to educate the federal workforce in ways that benefit contractors, e.g., the acquisition process. However, it has expended the bare minimum when it comes to protecting taxpayers from illegal privatization. Either OMB should issue guidance to enforce statutory prohibitions against direct conversions to a broader audience, or it should be required to do so by the Congress. Direct conversions are not just illegal, they undermine the interests of taxpayers and all Americans who depend on agencies for reliable and efficient service. And the danger of direct conversions increases dramatically during downsizing, particularly when cuts in funding or workforce are imposed arbitrarily, e.g., sequestration. DoD has already issued such guidance, and the Army has followed up with a comprehensive checklist, which has been endorsed by the Congress—both of which should be adapted by OMB for the non-DoD agencies.*

The Administration has styled itself as the champion of federal contractor workers through the issuance of the fair pay and safe workplaces executive order. However, while the Administration is striving to protect contractor workers from scofflaw employers, laws which forbid the arbitrary privatization of work designated for performance by its own reliable and experienced workforce are laxly enforced. That the Administration is more inclined to police contractors than its own agencies raises a host of serious questions.

3. THROUGH INSOURCING, REQUIRE AGENCIES TO GIVE FEDERAL EMPLOYEES OPPORTUNITIES TO PERFORM NEW AND OUTSOURCED WORK

All agencies are now required to develop insourcing policies for new work and outsourced work, in particular outsourced work that is inherently governmental and wrongly contracted out, work contracted out without competition and presumably more expensive than it should be, and work contracted out that is poorly performed. Nevertheless, insourcing, particularly in non-DoD agencies, is proceeding slowly. In fact, OMB has failed to issue guidance that would allow agencies to use insourcing to save money for the taxpayers by bringing in-house functions solely for cost reasons.

Given the results of the 2011 study by the Project on Government Oversight (POGO), which compared the costs of federal employees and contractors, taxpayers may well wonder why the Obama Administration would want to shield from scrutiny the army of contractors who are responsible for so much documented waste, fraud, and abuse. According to POGO's study—*Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*—"on average, contractors charge the government almost twice as much as the annual compensation of comparable federal employees. Of the 35 types of jobs that POGO looked at in its new report—the first report to compare contractor billing rates to the salaries and benefits of federal workers—it was cheaper to hire federal workers in all but just 2 cases."

We know that insourcing works—albeit for the brief time it was faithfully undertaken by DoD. According to GAO, DoD officials reported that the Department saved \$900 million through insourcing in fiscal year 2010. As the Department patiently explained to GAO: *"Insourcing has been, and continues to be, a very effective tool for the Department to rebalance the workforce, realign inherently governmental and other critical work to government performance (from contract support), and in many instances to generate resource efficiencies."*

It was not until Senator Claire McCaskill's (D-MO) March 2012 Contracting Oversight Subcommittee hearing that it became clear just how successful insourcing had been. The Army, which had conducted the most robust insourcing effort in DoD, reported savings from between 16 and 30 percent. More significantly, *"During the much smaller period from Fiscal Year 2008 to 2010 when the Department instituted an active insourcing program in conjunction with its service contract pre-award approval process and contractor inventory review process, contract service obligations not identified to Overseas Contingency Operations funding decreased from \$51 billion in Fiscal Year 2008 to \$36 billion in Fiscal Year 2010."* The increase in civilian

personnel costs from insourcing was slight in comparison with the steep reduction in service contract costs.

However, insourcing has been essentially shut down by DoD because of the imposition of a cap which prevents the civilian workforce from being larger than it was in 2010. Now, insourcing can only occur if proposals are signed off on by senior officials after going through a daunting and cumbersome approval process. DoD imposed no comparable size constraint on the contractor workforce and required no additional authorization before entering into new contracts or expending on existing contracts.

Little insourcing for cost reasons is occurring in non-DoD agencies. OMB committed to AFGE and Senator McCaskill that it would issue guidance to promote cost-based insourcing by mid-2012. Given that OMB has said that this guidance is merely the first installment, and more likely to be thoughts and ruminations, rather than a full-blown costing methodology, there is no reason why it should not be issued sooner rather than later. The administrative and statutory frameworks governing the outsourcing process took years to be developed. Not every contingency nor every challenge associated with insourcing can be anticipated. Let OMB establish broad guidelines for cost-based insourcing, so that agencies can begin to systematically look for possibilities to insource, as the authors of the law intended, and then improve upon and expand upon that initial guidance as agencies gain valuable experience.

From AFGE's discussions with agencies, it is clear that managers are waiting for OMB's endorsement before they insource. Although agencies understand that the savings from insourcing are significant, so are the controversies from taking on contractors. It's been almost six years since the insourcing law for agencies other than DoD was enacted. Surely, that's a long enough interval before the issuance of an initial guidance. Moreover, OMB should make it clear that this guidance explicitly allows agencies to take on additional staff to perform insourced work and that contractors not be rewarded in any cost comparison process for providing health care and retirement benefits less generous than that of the federal government.

The insourcing law for non-DoD agencies was enacted in an FY09 funding measure; Jeff Liebman, a former senior OMB official, told AFGE in 2009 that costing guidance would be issued; in early 2012, Jeff Zients, another former senior OMB official, told Congress and AFGE that the guidance would be issued soon; and during his tenure, former Office of Federal Procurement Policy Administrator Joe Jordan told AFGE more than once that issuance of the guidance was imminent.

In the meantime, DoD, the agency which does the most service contracting and the most complicated service contracting, has issued detailed costing guidance which has withstood the scrutiny of GAO and a few skeptical lawmakers. DoD stands by its guidance and claims that insourcing has resulted in significant savings. To the extent that guidance is flawed, those problems come disproportionately at the expense of civilian employees, according to GAO. Nevertheless, AFGE supports the guidance because it is better than nothing; and the

guidance can be improved if it is actually used. OMB should not reinvent the wheel—instead, OMB should take DoD’s guidance and adapt it for use by non-DoD agencies. OMB should not let private interests that might lose from insourcing obstruct the public interest in giving agencies opportunities to consider cost-efficient in-house alternatives for the provision of services currently outsourced.

BOTTOM LINE: *Insourcing saves money and ensures public control over important and sensitive functions. That is no longer subject to dispute. DoD needs to re-start its insourcing program. It makes no sense for DoD to limit the size of the civilian workforce if that means paying contractors more to perform functions that civilians could perform more efficiently. OMB needs to finally start cost-based insourcing in the non-DoD agencies by issuing guidance. In an austere budget environment, no agency can afford to leave billions of dollars in the pockets of contractors that, thanks to insourcing, might be better directed towards urgent programs or deficit reduction.*

4. COMPILE CONTRACTOR INVENTORIES

Because the federal government’s service contract workforce is more expensive than its civil service workforce, any effort to achieve savings in how agencies provide services necessarily requires subjecting service contractors to severe scrutiny. In order to allow for such scrutiny, a law was enacted in 2009 that required non-DoD agencies to develop inventories of service contracts, which copied a 2007 law that required DoD to establish an inventory of service contracts.

Senate Armed Services Committee Chairman Carl Levin (D-MI) was the first to identify compliance with the inventory requirement and integration into the budget process as necessary if downsizing is to be done intelligently: *“In the past, we’ve found that proposed cuts to contract services are nearly impossible to enforce because expenditures for service contracting are invisible in the department’s budget.”* As House Armed Services Committee Chairman Buck McKeon (R-CA) and Ranking Member Adam Smith (D-WA) noted, sagely, *“A credible inventory that is fully integrated into the budget submission is necessary to identify and control contract costs, particularly in this time of fiscal constraints.”*

After years and years of delays caused by contractors and their cronies in the executive branch, DoD is moving forward with its inventory. Throughout most of 2012, OMB blocked progress by insisting that the inventory imposed onerous paperwork burdens on DoD’s service contractors. Thanks to Congressional pressure and DoD’s determination, the Department finally prevailed, issuing guidance in November that emphatically required contractors to routinely provide information needed to complete the inventory for their contracts. DoD now estimates that it will finally be compliant with the inventory in two years.

In DoD, the “manpower” experts have an investment in the completion of the inventory because they are responsible for developing and coordinating policy for the Department’s entire workforce of military, civilian, and contractor personnel. In the non-DoD agencies, there

is no influential constituency pressuring from within to complete the inventories, even though it is understood that they would more than pay for themselves by identifying excessively costly contracts.

During downsizing, it is especially important that all agencies be able to identify and control their service contract costs. Failure to do so will incentivize agencies to impose disproportionate cuts on in-house workforces, particularly during downsizing, because their costs can actually be identified and controlled.

Nevertheless, non-DoD agencies regard the contractor inventories as box-checking exercises, rather than tools that can help them to budget and manage more efficiently. Most agencies rarely review contracts aggressively to identify those that cost too much or include illegal or inappropriate functions. OMB has allowed agencies to submit non-standardized information and not required them to collect vital cost data from contractors.

BOTTOM LINE: Congress should continue to pressure DoD to finish its inventory of service contracts and then integrate it into the budget process so that service contracting costs can be identified and controlled as easily as civilian personnel costs already are. Congress should require that OMB ensure that agencies collect all required information from contractors and use their inventories in order to reduce the costs of service contracting so that in-house workforces aren't forced to make disproportionate sacrifices during downsizing.

5. LIFT CAPS ON AGENCIES' IN-HOUSE WORKFORCES WHICH FORCE WASTEFUL PRIVATIZATION

There is no question that work performed by federal employees is being contracted out in defiance of the law because of personnel ceilings. And there is no question that personnel ceilings are being used to deny federal employees opportunities to perform new work and outsourced work. AFGE appreciates that OMB committed in 2014 to issue government-wide guidance to address these very serious concerns.

Contracting out functions performed by federal employees in order to comply with a personnel ceiling is contrary to law; and at a time when OMB is calling on agencies to economize it makes no sense for agencies to insist that they can spend money on contractors, but not federal employees, to perform particular functions.

In seeking reform, OMB is obviously not trying to arbitrarily increase the size of the federal workforce. Rather, AFGE simply asks that federal agencies govern by budgets and workloads—if they have functions to be performed and funding to pay for performance of those functions, then agencies should be able to use federal employees or contractors, depending on the law, policy, cost, and risk. It makes no sense for agencies to insist that they cannot use federal employees for the performance of functions precisely because they are federal employees, regardless of the law or cost and policy considerations.

AFGE accepts OMB's assurances that it does not establish personnel ceilings for agencies. Nevertheless, agencies perceive that OMB is imposing such constraints, although in many instances agencies are probably blaming OMB for their own misconduct. OMB's guidance can therefore disabuse agencies of their misperceptions about OMB and also direct agencies not to establish their own personnel ceilings, unless specifically required by law.

Among the myths that can be "busted" in OMB's guidance are these:

Agencies can spend money on contractors to perform functions, but not federal employees, because of freezes or caps on in-house workforces, or because of the Anti-Deficiency Act.

Agencies can't use federal employees for the performance of new work, let alone insource work, because of constraints on the number of federal employees on the payroll, even if the functions in question should be performed in-house for cost or performance reasons.

For truly temporary functions, agencies can only use contractors, never temporary or term federal employees.

Money is not fungible—funding for service contracts cannot instead be used to pay for performance by federal employees.

BOTTOM LINE: *OMB should follow up on its commitment to issue guidance to ensure agencies discontinue the imposition of caps and freezes on the size of their civil service workforces. If work needs to be done and there is funding available, all agencies should be able to use in-house staff as well as contractors in order to perform that work. If OMB fails to fulfill its commitment, then it should be directed to do so by Congress.*

6. REDUCE COMPENSATION FOR THE HIGHEST-PAID CONTRACTORS

The cap on annual taxpayer subsidies to contractors in all agencies has recently been cut almost in half, slashed from \$952,308 to \$487,000. However, that's still way too high. With very few exceptions, it is difficult if not impossible to justify forcing taxpayers to compensate particular contractor employees more than the Vice-President, who earns an annual salary of \$230,700, particularly when rank-and-file federal employees in the acquisition workforce have had their pay frozen or only marginally increased and their agencies starved of vital resources because of sequestration and austerity.

Contractor defenders will inevitably complain that it is too soon to impose additional cuts in taxpayer subsidies to contractors. Tell that to federal employees—whose pay and benefits are subject to attack, year after year. For at least as long as the federal budget is constrained, contractor compensation will be a worthy target for savings.

We will also hear that contractors will be unable to recruit and retain the top scientists and engineers, and that this failure will compromise the federal government's capacities. Other than the self-interested protestations of contractors, no evidence has ever been provided to support this assertion.

Moreover, lowering the cap on taxpayer subsidies for contractor compensation doesn't cut the earnings of contractor employees. Contractors are free to pay contractor employees as much as they want. However, excessive compensation should be paid for by contractors, not the taxpayers.

The question is not whether contractors will be able to recruit and retain valuable scientists and engineers with more modest but still quite generous taxpayer subsidies, but whether contractors, many of whom continue to generate significant profits, should be required to use those profits to supplement the salaries of those they deem their best and brightest employees, instead of imposing that burden on taxpayers.

The integrity of the acquisition process can be strengthened by reducing the cap to either \$400,000 with no exceptions or \$230,700 with exceptions for certain specialized professions. Specialized professions which are not subject to the cap should be regularly audited to determine if the exceptions are used appropriately and whether the work could be performed more cost-effectively by in-house staff.

BOTTOM LINE: Budget austerity is forcing millions of Americans to make significant sacrifices, particularly those who depend on the federal government for important services as well as the dedicated and experienced civil servants who provide so many of those services. The highest-paid contractors, the top 1%, should also be required to sacrifice. Contractor compensation must continue to be reduced as long as millions of other less wealthy Americans are being told to sacrifice because of federal spending constraints.

7. PROTECT THE PROCUREMENT PROCESS FROM POLITICS

AFGE opposed the Bush Administration's attempt to politicize the federal procurement process in order to favor contractors, and AFGE will also oppose attempts to use the source selection process to favor certain contractors in exchange for commitments to "labor-friendliness".

AFGE supports efforts to improve the lives of contractor employees that would follow favorable precedents and build on earlier reforms, including preventing scofflaw contractors from bidding on new contracts, requiring all contractors to boost pay and benefits for contractor employees, making it easier for all contractor employees to be organized, and making the pay and benefits of all contractor employees public knowledge. Such reforms would benefit all contractor employees, command unanimous support from the labor movement, and truly put the federal procurement process on a "high road."

Unfortunately, there are some who insist on a different sort of “high road” for federal procurement, one that would allow certain contractors who are deemed labor-friendly or who merely commit to eventually becoming labor-friendly to receive special political preferences for federal contracts. Under at least one recent iteration of this proposal, agencies would outsource to the Department of Labor responsibility for determining the value of contractors’ special political preferences, based on, among other things, their pay and benefits. To ensure that agencies actually use the special political preferences as proponents intend, contracting overseers in all agencies would be able to vary these labor preferences in specific procurements to ensure they are determinative.

Of course, there would be no need for such special political preferences if all contractors were held to the same standards. Moreover, all federal contractor employees would benefit if all contractors were held to the same standards. As even the proponents of this controversial proposal concede, there are no favorable precedents, whether at the federal level, the state level, or the local level. Many jurisdictions try to make procurement more humane, but they don’t use the source selection process to favor certain contractors.

The use of procurement preferences increases the risk of subjectivity, politics, and corruption. The Congress, when it was controlled by Republicans, outlawed the use of the “best value” process in competitions between federal employees and contractors because of how it would have made those competitions more subjective and political.

Preferences for small and disadvantaged businesses have consistently been abused. They are fraudulently obtained and they are often used to pass on work to contractors that don’t have preferences. Of course, under this proposal, the federal government would be using the procurement process, for the first time, to explicitly favor large contractors—because those are the firms most capable of qualifying for special political preferences—at the expense of small contractors. Consequently, the possibility for waste, fraud, and abuse would increase substantially. Indeed, one contractor attorney suggested that her first advice to clients if this proposal were implemented would be to set up a modest subsidiary to qualify for the special political preference so that it could then pass work on that could be performed by other facilities that don’t abide by the special political preference.

Ultimately, the procurement process is designed to allow federal agencies to efficiently and expeditiously secure services from the private sector. AFGE is proud to represent tens of thousands of acquisition personnel, who work under two immutable imperatives: do it fast (because program officers almost always needs contracts awarded in a hurry) and do it cheap (because resources are always finite). The cost to the nation when, say, an uninsured contractor employee’s child is treated in the emergency room is obviously a valid concern, one that could be addressed through a variety of methods—from implementing real health care reform to requiring contractors generally to contribute an appropriate amount towards their employees’ health care costs as a precondition of bidding—but not through specific federal procurements.

AFGE is also obviously concerned about “high road’s” potential adverse impact on federal employees and bargaining unit work. The special political preference could be used in a public-private competition to award work performed by federal employees to a contractor even when federal employees are more efficient. Moreover, the special political preference could be used to prevent work from being insourced, even when the contractor is less efficient. Worse, the special political preference could be used to directly convert work last performed by federal employees outside of a public-private competition, i.e., a direct conversion.

The Administration has already issued the Fair Pay and Safe Workplaces Executive Order to promote contractor compliance with more than a dozen important labor laws. Contractors have vowed to use the legislative and judicial processes to negate this executive order, and it will take immense political pressure from the White House for the federal government’s pro-contractor acquisition establishment to issue a rule to implement the executive order by 2016.

The imposition of a high road regime on federal procurement, which would reward contractors who commit to actions not required by law, is significantly more complicated and controversial than the executive order, which merely promotes compliance with the law. Pro-high road lawmakers should understand that contractor employees are best served by a resolute defense of the executive order. Indeed, that executive order would already be securely in place had it been issued at the beginning of the Administration, as AFGE and others suggested; instead, time and resources were wasted in futile attempts to secure the issuance of a high road executive order after it became apparent that there was virtually no support in Congress, even when controlled by Democrats, for a high road law.

BOTTOM LINE: *The legislative and executive branches should resist efforts to politicize the procurement process to benefit certain contractors who commit to actions not required by law. Instead, all contractors should be held to the same statutory requirements.*

Official Time for Federal Employee Union Representatives

Introduction

As part of a systematic attack on working and middle class Americans, some Members of Congress have advocated cutting the salaries and benefits of federal employees. Federal workers are the individuals who keep the government functioning through times of political crisis or deadlock. They are the people who get the Social Security checks out on time, ensure a safe food supply, go after those who pollute our water and air, and care for our wounded veterans, but they and other federal employees have been unfairly painted as the cause of our country's economic troubles.

Standing in the way of those who would drastically cut back on the pay, health insurance and retirement benefits of these federal employees are the democratically-elected unions that represent these patriotic public servants. Those who would dismantle vital government programs know that they must silence federal workers' voices in order to achieve their goals. It is not fiscal conservatism that motivates this attempt to prevent effective union representation by attacking the use of official time by employees. Use of reasonable amounts of official time has been supported by government officials of both political parties for some 50 years.

Current Legislative Situation

In January 2013, Representative Phil Gingrey (R-GA) introduced H.R. 107, which would eliminate official time for all federal employee union representatives throughout the government. On June 10, 2014, Representative Gingrey filed an amendment to the Transportation-HUD Appropriations bill to eliminate official time for all federal employee union representatives in the agencies covered by that bill. The House of Representatives soundly rejected the amendment by a vote of 167-254, with 60 Republicans voting against the elimination of official time for federal employee union representatives.

Last year, companion bills to eliminate official time were also introduced in the Senate by Rand Paul (R-KY) and Tom Coburn (R-OK), S. 785 and S. 1312, respectively. While the bills were not the subject of any hearings, it is likely that similar legislation will be introduced during the 114th Congress.

Policy Background

By law, federal employee unions are required to provide representation for all employees in units that have elected union representation, even for those who choose not to pay dues. Federal employee unions are also forbidden from collecting any fair-share payments or fees from non-members for the services which the union must provide.

In exchange for the legal obligation to provide the same services to those who pay as well as those who choose not to pay, the Civil Service Reform Act of 1978 allowed federal employee

unions to bargain with agencies over official time. Under this law, federal employees who volunteer as union representatives are permitted to use official time to engage in negotiations and perform representational activities while on duty status.

Legally permitted representational activities are limited to:

- Creating fair promotion procedures that require that selections be based on merit, so as to allow employees to advance their careers
- Establishing flexible work hours that enhance agencies' service to the public while allowing employees to properly care for their families
- Setting procedures that protect employees from on-the-job hazards, such as those arising from working with dangerous chemicals and munitions
- Enforcing protections from unlawful discrimination in employment
- Developing systems to allow workers to perform their duties from alternative sites, thus increasing the effectiveness and efficiency of government, and relieving traffic congestion in metropolitan areas
- Participating in improvement of work processes
- Providing workers with a voice in determining their working conditions

The law provides that the amount of time that may be used is limited to that which the labor organization and the agency agree is reasonable, necessary, and in the public interest. As pointed out in a Congressional Research Service report, "(a)ny activities performed by an employee relating to the internal business of the labor organization must be performed while in a non-duty status."

Activities which may not be conducted on official time include:

- solicitation of membership
- internal union meetings
- elections of officers
- any partisan political activities

To ensure its continued reasonable and judicious use, all federal agencies track basic information on official time, and submit it annually to the Office of Personnel Management (OPM), which then compiles a government-wide report on the amount of official time used by agencies. In September 2014, OPM reported that the number of official time hours used per bargaining unit employee decreased from 2.82 hours in FY 2011 to 2.81 hours in FY 2012, and that official time costs represented 1/10 of 1 percent of the total of federal employees' salaries and benefits for FY 2012.

Official Time Makes the Government More Efficient and More Effective

Through official time, union representatives are able to work together with federal managers to use their time, talent, and resources to make our government even better. Gains in quality, productivity, and efficiency--year after year, in department after department -- simply would not have been possible without the reasonable and sound use of official time.

Private industry has known for years that a healthy and effective relationship between labor and management improves customer service and is often the key to survival in a competitive market. The same is true in the federal government. No effort to improve governmental performance--whether it's called reinvention, restructuring, or reorganizing--will thrive in the long haul if labor and management maintain an adversarial relationship. In an era of downsizing and tight budgets, it is essential for management and labor to develop a stable and productive working relationship.

Union representatives and managers have used official time to transform the labor-management relationship from an adversarial stand-off into a robust alliance. If workers and managers are really communicating, workplace problems that would otherwise escalate into costly litigation can be dealt with promptly and more informally.

Official time under labor-management partnerships or forums is used to bring closure to workplace disputes between the agency and an employee or group of employees. Those disputes would otherwise be funneled to more expensive, more formal procedures – the agency's own administrative grievance procedures, EEOC complaints, appeals to the Merit Systems Protection Board, and federal court litigation.

Healthier Labor-Management Relations in the Federal Government Also Produce Cost Savings in Reduced Administrative Expenses

Union representatives use official time for joint labor-management activities that address operational mission-enabling issues in the agencies. Official time allows activities such as designing and delivering joint training of employees on work-related subjects; and introduction of new programs and work methods that are initiated by the agency or by the union. As examples, such changes may be technical training of health care providers in the Department of Veterans Affairs; or, introduction of data-driven food inspection in the Food Safety and Inspection Service.

Union officials use official time for routine and unusual problem-solving of emergent and chronic workplace issues. For example, union representatives use official time when they participate in agency health and safety programs operated under the Occupational Safety and Health Administration (OSHA). Such programs emphasize the importance of effective safety and health management systems in the prevention and control of workplace injuries and illnesses.

Official time is also used by union representatives participating in programs such as LEAN Six Sigma, labor-management collaborative efforts which focus on improving quality of products as well as procedural efficiencies. Recently, union representatives have participated on official time by working with the Department of Defense to complete a department-wide performance management and recognition system and accelerate and improve hiring practices within the department.

Conclusion

Official time under the Federal Service Labor-Management Relations Statute is a longstanding, necessary tool that gives agencies and their employees the means to expeditiously and effectively utilize employee input to address mission-related challenges of the agency, as well as to bring closure to conflicts that arise in all workplaces. It has enjoyed bipartisan support for decades. Overseen by the agencies on a day-to-day basis and by OPM in an aggregated way, official time is used as provided by law, and only for the purposes specified in statute.

AFGE strongly opposes any legislative effort to erode or eliminate the ability of elected union representatives to use official time to represent both dues and non-dues paying members of collective bargaining units in federal departments and agencies.

Elimination of Federal Employees' Right to Payroll Deduction of Union Dues

Background

Anti-union legislators have increased efforts at the local, state, and federal levels to ban employees from choosing to have their union dues deducted from their paychecks. It is both the right and choice of federal employees, who have chosen to join the union, to have their dues deducted through the automatic payroll system. The deduction of union dues is no different from the current list of automatic payroll deductions available to federal employees that range from health insurance premiums to contributions to charitable organizations.

Federal agencies throughout the country operate under an open shop collective bargaining arrangement, established first by Executive Order under President Kennedy in 1962, reaffirmed by Executive Order under President Nixon in 1969, and finally established by statute, the 1978 Civil Service Reform Act. Under the law, if a labor union is elected by the non-supervisory employees of a federal agency, then the union is legally obligated to represent *all* the employees in that bargaining unit, whether they join the union or not. *The employees in that bargaining unit are under no obligation whatsoever to join the union, nor are they under any obligation to pay for representation or pay any other fee to the union.* When federal employees choose to join the union, they sign a form called an "1187" which establishes their union membership and sets up the payroll deduction. When federal employees choose to pay union dues, they utilize a process that was established by the agencies for purposes other than just collecting union dues.

Recent Legislative Efforts

During the 113th Congress, legislation was introduced to amend current law by making it illegal for federal agencies to allow federal employees who are union members to pay their dues through automatic payroll deduction. The legislation was introduced by Representative Mark Meadows (R-NC) (H.R. 4792) and Senator Tim Scott (R-SC) (S. 2436). In 2013, Senator Scott also offered a Senate floor amendment to eliminate payroll deduction of union dues. This amendment was soundly rejected, 43 to 56.

Opposition to payroll deduction of union dues is rooted in the false premise that there is a cost savings if the collection of union dues is eliminated. Since payroll deductions are no longer done by hand, but electronically, there is no actual financial cost to the government to deduct union dues. The federal government currently provides payroll deductions for the following:

- Combined Federal Campaign
- Federal, state, and local taxes
- Federal Retirement System annuity funding
- Thrift Savings Plan (TSP) contributions and TSP loan repayments

- Federal Employees Health Benefits (FEHBP) premiums
- Supplemental private dental, vision, and long-term care insurance (these are not financed at all by the government, just facilitated through payroll deductions for premiums)
- Court-ordered wage garnishment for alimony and child support
- Flexible spending accounts for payment of health costs not covered by insurance

If it is wrong to provide employees with electronic payroll deductions for dues, then it is just as wrong to provide the service for these other worthy goals.

Conclusion

Any legislative attempt to eliminate payroll deduction of union dues is a blatant political attack on federal employees' wages, benefits, collective bargaining rights, and jobs. They are designed to silence the collective voice of federal employees who carry out the work of federal agencies and programs on behalf of the American people. AFGC strongly opposes any efforts in the House or Senate to eliminate the ability of federal employees to choose to have their union dues deducted from their paychecks.

Department of Defense (DoD): Keeping Our Nation Safe and Secure

AFGE is proud to represent 270,000 civilian employees in the Department of Defense (DoD), whose experience and dedication ensures reliable and cost-efficient support of our nation's warfighters—from maintaining weapons to overseeing contractors to guarding installations. According to the Pentagon, of the Department's three workforces—military, civilian, and contractor—the civilian workforce costs the least and has grown the least but is being cut the most. AFGE is honored to represent civilian employees on a wide range of issues, both on Capitol Hill and within the Department.

1. NO MORE ARBITRARY CUTS: REDUCTIONS IN DOD CIVILIANS SHOULD BE BASED ON CUTS IN WORKLOAD AND BUDGET

That the civilian workforce has been cut the most does not stop some lawmakers from proposing to impose additional arbitrary reductions. DoD should manage its civilian workforce by workloads and budgets—if there is work to be done and money to pay for that work to be done, then managers should be free to use civilians, consistent with law, cost, policy, and risk-mitigation. Arbitrary cuts in civilians don't save money because work shifts to more expensive contractors and military personnel.

2. RETAIN THE PROHIBITIONS ON USE OF FLAWED OMB CIRCULAR A-76 PRIVATIZATION PROCESS

The Office of Management and Budget (OMB) Circular A-76 privatization process was outlawed because of documented problems identified by the Government Accountability Office (GAO) and the DoD Inspector General (IG). DoD is specifically barred from using A-76 until it has finally completed an inventory of service contracts. The A-76 process has not been fixed, as OMB and DoD both acknowledge, which is why they oppose repealing the prohibitions on its use.

3. SCRAP THE CAP: FREE THE CIVILIAN WORKFORCE FROM ARBITRARY CONSTRAINTS ON ITS SIZE

Through 2019, the size of the civilian workforce is capped at its 2010 level, which prevents managers from assigning work on the basis of law, cost, policy, and risk-mitigation. Work which could be performed more efficiently by civilian employees is sometimes transferred to contractors or military personnel, both of which DoD acknowledges cost more. Scrapping the cap doesn't increase costs, but it does allow managers to use the least costly workforce. Reductions in DoD spending should come from the legislative and executive branches deciding which functions DoD should no longer perform—and then dismissing the relevant workforce, whether it be military, civilian, or contractor.

4. ENSURE DOD COMPLIES WITH PRIVATIZATION SAFEGUARDS

Thanks to longstanding, bipartisan safeguards, DoD is required to at least guesstimate that conversion to contractor performance would result in marginal savings before privatizing work performed by civilian employees. Nevertheless, either out of ignorance or defiance, our work

continues to be illegally privatized without regard to the impact on taxpayers. DoD has promulgated guidance but doesn't enforce it effectively. DoD should expand on that guidance and enforce it through a requirement that acquisition personnel review a checklist of relevant sourcing and workforce management laws prior to outsourcing our work.

5. CIVILIAN-TO-MILITARY CONVERSIONS MUST BE COST-EFFICIENT

The cap on the size of the civilian workforce is so onerous that DoD is using military personnel to perform functions long carried out by civilians, even though the Pentagon acknowledges that we are significantly cheaper. DoD must be required to establish an occupational link between incoming military personnel and the civilian positions that they will take over in order to promote readiness and ensure that any conversions are cost-efficient. At a time when force structure is being dramatically reduced and defense dollars are precious, replacing civilian personnel with military personnel must only be done if it makes fiscal sense.

6. IDENTIFY AND CONTROL SERVICE CONTRACT COSTS

Service contract costs exceed the costs of civilian personnel and military personnel combined. Despite the \$200 billion billed annually to taxpayers by service contractors, DoD has little visibility into and control over their costs because it has failed to comply with a longstanding requirement to compile an inventory of service contracts and then integrate the results into the budget process. According to GAO, DoD could control service contract costs if it finally finished the inventory and complied with a statutory cap on service contract spending. However, DoD is defying senior level commitments and several laws by suspending work on the inventory and considering junking a proven methodology for data collection. And the Department's compliance with the cap is spotty.

7. USE INSOURCING TO SAVE TAXPAYER DOLLARS AND IMPROVE PERFORMANCE FOR WARFIGHTERS

DoD is required to give "special consideration" to using civilian employees to perform privatized functions if the work costs too much, is poorly-performed, or is too important or sensitive to have ever been outsourced, using a methodology approved by GAO, although no insourcing is actually required. Despite the Pentagon's acknowledgement that contractors are significantly more expensive, the Department essentially no longer insources because of its cap on the size of the civilian workforce, which makes it difficult to add new staff no matter how much money might be saved. According to DoD, insourcing efforts from FY10 and FY11 resulted in significant savings.

8. "ACQUISITION REFORM" SHOULD SAVE MONEY FOR TAXPAYERS, NOT BOOST PROFITS FOR CONTRACTORS

Contractors cost too much because they over-promise and under-deliver. However, rather than reform the acquisition process to promote more oversight and more transparency, contractors are using the "acquisition reform" debate to undermine the integrity of the acquisition process. Based on recommendations from the dedicated civil servants charged with overseeing an army of rapacious contractors, AFGE has developed an agenda that promotes reform that will emphasize savings for taxpayers, not more profits for contractors.

9. SAVE THE COMMISSARY BENEFIT FOR AMERICA'S WARFIGHTERS

The Defense Commissary Agency (DeCA) enjoys broad support—from the private-sector vendors which supply the commissaries to the military families who can balance their budgets because of less expensive DeCA products to the hard-working and dedicated civilian workforce represented by AFGE that makes the agency an integral part of the compensation package for our warfighters and their families—and it must be saved from the Pentagon's false economies.

10. PRESERVE DFAS TO KEEP FINANCIAL MANAGEMENT COSTS DOWN

The Defense Finance and Accounting Service (DFAS) was created to reduce DoD overhead costs by consolidating financial management functions in one agency, and its workforce is represented by AFGE at several installations across the nation. The Army is determined to bust up DFAS by creating its own financial management capability, using more expensive military personnel. Congress has slowed down the Army's efforts with report and review requirements, but more forceful action is required. Additionally, DFAS is abusing the Department's own personnel rules by using untrained and more expensive military personnel to fill vacancies in the agency's civilian workforce.

11. RETAIN THE A-10 WARTHOG AND ENSURE CLOSE AIR SUPPORT

The A-10 Warthog, which is maintained and supported by AFGE members at several installations, has been and continues to be the principal plane in the Air Force for close air support. Wherever close air-ground cooperation has occurred, close air support has been overwhelmingly successful in saving the lives of troops in contact with the enemy, greatly reducing the "friendly fire" events that devastate units, and achieving operational victory. Nevertheless, the Air Force is determined to scrap the plane, despite intense Congressional opposition.

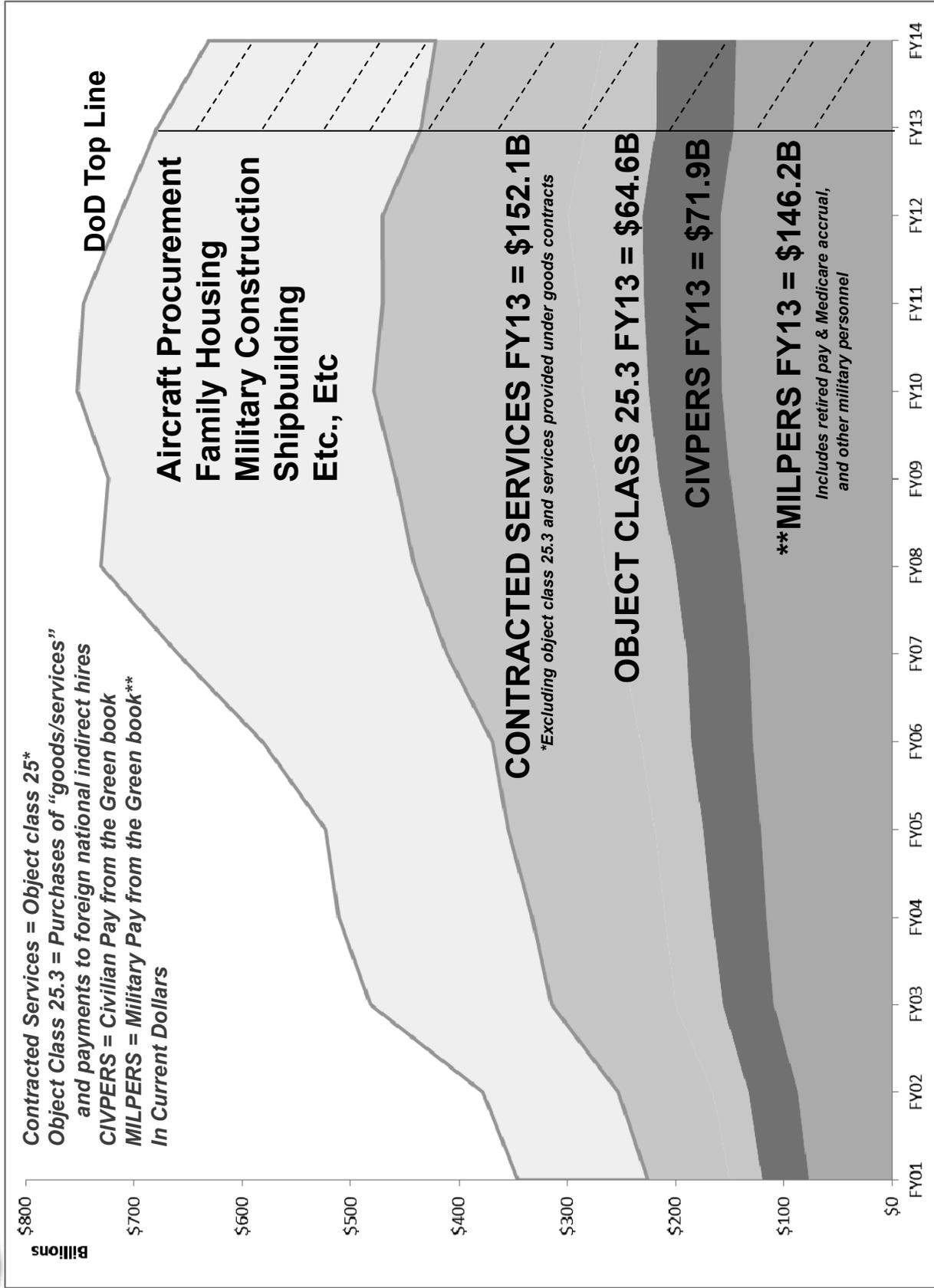
12. CAREFULLY CONSIDER THE CONSEQUENCES BEFORE UNDERTAKING NEW ROUNDS OF BRAC

BRAC is not the answer to the military's budget dilemma; causes real harm to civilians, military and communities; and has a history of mixed results in terms of reducing infrastructure and costs, especially based on the results of the most recent BRAC. Congress should avoid passing a BRAC resolution that repeats past mistakes when the calculated savings were scheduled to appear far into the future, while DoD spent enormous sums up front, increasing the national debt, disrupting the lives of our nation's hardworking civilians and military, and in some cases destroying the livelihood of communities in the name of savings that never truly materialize.

The Pentagon must resist the temptation to pre-determine BRAC sites through selective and arbitrary reductions of civilian personnel through reorganizations, Reductions-in-Force and budget starvation so that the military value of an installation is diminished in advance of a review by an impartial panel. Further, the retirement benefits of civilian personnel must be protected to prevent creation of a double hardship for those who may be forced to retire early due to unforeseen and unavoidable job losses caused by a BRAC action or budget generated downsizing.



The Total Force and the Top Line



13. PRESERVE AND PROTECT DOD'S INDUSTRIAL FACILITIES

Congress and the Administration must ensure preservation of our organic industrial base—our nation's government-owned and government-operated depots, arsenals and ammunition plants—as DoD shifts military strategy and embarks on a major drawdown of force structure. The Administration's stated commitment to preserving the defense industrial base must extend to the organic industrial base. It is vital that the House and Senate protect and enforce Title 10 statutory provisions that assure the viability of an organic logistics and fabrication capability necessary to ensure military readiness—that the Armed Forces of the United States are able to meet training, operational, mobilization and emergency requirements without impediment.

The statutes that require this core capability and others, such as designation of a 50% floor for depot maintenance work by civilian employees of DoD, and protection of the organic industrial manufacturing base through the Arsenal Act, have kept our nation secure and our core defense skills protected, and they should continue to be supported and strengthened. Review and engagement with the required core and 50/50 reports will be key to preserving the long-term viability of the organic depot systems. Arsenals must work with the Congress to ensure that minimum capability to support the warfighter and preserve key capabilities are assigned to the facilities at efficient levels to maintain readiness. Lawmakers must be vigilant as DoD and the Armed Services Committees pursue Acquisition Reform to maintain government control of organic depot maintenance, key pathways for bringing new systems into the depots and efficient utilization of organic industrial facilities.

NO MORE ARBITRARY CUTS:

REDUCTIONS IN DOD CIVILIANS SHOULD BE BASED ON CUTS IN WORKLOAD AND BUDGET

THE FOLLY OF ARBITRARILY SLASHING THE CIVILIAN WORKFORCE: Legislation (H.R. 4257) was introduced in the House of Representatives in 2014 that would have arbitrarily cut the civilian workforce by 15%, or almost 120,000 jobs. Although it attracted much attention, the bill itself garnered only nine cosponsors. The legislation would not have reduced the Department's workload—instead, DoD would simply have been told to do the same with less—and it would not have required any cuts in service contract spending, which has doubled over the last ten years.

Just to put the immensity of DoD service contract spending in perspective, consider the bipartisan report language in the Senate FY12 NDAA: *“Over the last decade, DoD spending for contract services has more than doubled from \$72.0 billion in fiscal year 2000 to more than \$150.0 billion (not including spending for overseas contingency operations), while the size of the Department's civilian employee workforce has remained essentially unchanged.”* Please see the accompanying DoD chart which details the staggering increase in service contract spending, compared with modest increases in spending on military and civilian personnel.

THE SIZE OF THE CIVILIAN WORKFORCE IS ALREADY BEING ARBITRARILY CUT: Over the objections of the White House and the Pentagon, the FY13 NDAA included a provision (Section 955) that by 2017 requires DoD to cut civilians and contractors by the same percentage as it will reduce military personnel. Because of Section 955 and the Department's own cuts, DoD is actually cutting civilian personnel at a faster rate than military personnel, but it is not cutting contractors. Through FY19, according to the Comptroller, civilian personnel are being reduced by 9.1% and military personnel by 8.7%. No long-range reductions are available for contractor personnel. However, spending for contractors is scheduled to increase slightly in FY15, particularly on Operations and Maintenance.

INCREASES IN THE SIZE OF THE CIVILIAN WORKFORCE ARE JUSTIFIED—AND HAVE SAVED MONEY FOR TAXPAYERS: DoD's civilian workforce grew approximately 17% from FY01 to FY12, or from 700,000 to 800,000. According to the Office of Personnel and Readiness, the civilian workforce now consists of 772,332 employees. The growth in the size of the civilian workforce is essentially the result of five factors, according to reports from the Department and the Government Accountability Office (GAO):

1. Secretary Donald Rumsfeld oversaw the mid-decade conversion of 50,000 military positions to civilian employees in order to relieve stress on the military workforce and return military members to operational duties. DoD has acknowledged that that "civilians typically prove to be a more cost effective source of support than their military counterparts." Moreover, the Congressional Budget Office recommended that 70,000 military positions be converted to civilian positions, which it said would save taxpayers \$20 billion in less than 10 years. In other words, the largest part of the increase in the civilian workforce complained of by federal employee-bashers came from switching positions from military to civilian, which reduced both the size and the cost of the Department's overall workforce!
2. After years of counter-productive in-house cuts that essentially allowed contractors to be supervised by other contractors, 20,000 civilians were also added to the acquisition workforce.
3. Another 8,000 civilians were hired to bolster the Department's increasingly-important CYBER/IT capacity.
4. 7,000 civilians were added to the medical workforce in order to care for wounded warriors.
5. Insourcing also increased the size of the civilian workforce. In FY10 and FY11, DoD created 28,000 positions through insourcing. More than one-half of those positions were, according to the Department, created in order to save money. The rest were

created because the work was too important or sensitive to privatize, also per the Pentagon.

IMPOSING ARBITRARY CUTS ON ONE OF THE DEPARTMENT'S THREE WORKFORCES IS SELF-DEFEATING: If the Congress wants the Department to cost less, then the Congress must reduce the Department's responsibilities. It is incumbent upon the Congress to determine which functions the Department should no longer perform, so that the relevant workforce(s) can be downsized commensurately.

The Department should perform its mission on the basis of budgets and workloads. If it has work to do and money to pay for that work to be done, then there is no reason why DoD managers should be prevented from using civilian employees, contractors, or military personnel. Rather, performance decisions should be based on law, cost, policy, and risk.

However, through 2019 only the civilian workforce is supposed to be no larger than it was in 2010—it is arbitrarily capped. The imposition of a unique constraint on the size of the civilian workforce drives work that had been performed by civilians towards the other two workforces, regardless of law or cost.

DoD told the Senate Homeland Security and Governmental Affairs Committee in 2012 that

"(t)his 'civilian cap' has reduced the flexibility of the Army to utilize the types of manpower it sees as most beneficial to the performance of its mission...The current caps on federal employees hiring have hampered agencies from actually making cost-analysis based decisions when contracting...In practical terms, if the Army cannot hire civilians, then it must turn to other sources of labor--like contracting--when it needs to execute missions..."

DoD officials have admitted that contractors cost more than civilian employees. Former DoD Comptroller Robert Hale acknowledged in 2013 testimony before the Senate Defense Appropriations Subcommittee that service contractors generally cost two to three times what in-house performance costs, particularly for long-term functions, a view subsequently affirmed by the Army Chief of Staff.

In fact, civilian employees are now in such short supply that the Department is, increasingly, using more expensive military personnel to perform routine functions that could be performed more efficiently by civilian personnel, which, as was pointed out in FY14 NDAA report language by the House Armed Services Committee, is increasing costs and diminishing readiness. In other words, imposing further arbitrary reductions on the civilian workforce will actually cause DoD to rely even more on more expensive contractors and military personnel, significantly increasing costs to taxpayers.

WHAT HAPPENED IN 2014 AND WHAT WE SHOULD EXPECT IN 2015: Thanks to the leadership of Representatives Tom Cole (R-OK), Rob Bishop (R-UT), and Austin Scott (R-GA), as well as House Armed Services Subcommittee on Readiness Chairman Rob Wittman (R-VA) and House Defense Appropriations Subcommittee Chairman Rodney Frelinghuysen (R-NJ), the bill to arbitrarily downsize the civilian workforce by 15% was rejected last year on a bipartisan basis. Nevertheless, it is likely that this legislation will be revived in 2015 and that AFGE will also be confronted with other misguided attempts to reduce spending by arbitrarily cutting the DoD civilian workforce. When those proposals are served up, here are three facts to keep in mind, all of them according to the Pentagon:

1. the civilian workforce is the cheapest of the Department's three workforces;
2. the civilian workforce has grown the least of the Department's three workforces; and
3. the civilian workforce is being cut more than the Department's other workforces.

RETAIN THE PROHIBITIONS ON USE OF FLAWED OMB CIRCULAR A-76 PRIVATIZATION PROCESS

WHAT OMB CIRCULAR A-76 IS: It is a privatization process that was last revised during the Bush Administration, which attempted to review for outsourcing almost one million federal employee jobs. Thanks to bipartisan opposition to the Bush Administration's pro-privatization crusade, the use of the A-76 circular was prohibited for particular functions, for particular agencies, and, finally, for the entire federal government. Support for the government-wide A-76 prohibition was fueled by serious concerns raised by the Government Accountability Office (GAO) and the DoD Inspector General (IG).

WHAT THE RELEVANT LAW IS: Since FY09, the Financial Services Appropriations Bill has retained a provision that would prevent new A-76 privatization studies from being launched by any federal agency. A temporary suspension of new A-76 privatization studies was imposed specifically on DoD in the FY10 NDAA until the Department finally complies with a longstanding requirement that it establish a contractor inventory and integrate the results into the budget process. The Pentagon's Office of Personnel and Readiness reports that DoD is still at least two years away from being able to certify it is in compliance.

EVEN THE BIGGEST BOOSTERS OF A-76 OPPOSE STRIKING THE SUSPENSION: In his exit interview with *The Washington Post*, the outgoing Administrator of the Office of Management and Budget's Office of Federal Procurement Policy Joe Jordan, who was leaving to take a job with a contractor "agree(d) with the congressional moratorium on a contracting-out process known as A-76, because he says it uses flawed methodology." The Administration, in its budget submissions, has recommended retention of the government-wide A-76 prohibition.

DoD is the one agency that, historically, has used the A-76 privatization process. However, DoD, like OMB, has also strongly opposed efforts to repeal the prohibition:

“The Department of Defense does NOT support the amendment that would lift the current moratorium, under section 325 of the FY10 NDAA, on public-private competitions under OMB Circular A-76 within DoD. Sec 325 requires that the Secretary of Defense make certain certifications related to improvements in the inventory of contracts for services, the review process associated with that inventory, and the integration of that data into the Department’s budget justification materials. As delineated in our Nov 2011 plan to the Congress, the Department has made long-term commitments to be able to meet these certification requirements. Our priorities with regard to contracted services include continuous and measurable improvements to the inventory of contracts for services; a deliberate and comprehensive review process to ensure appropriate alignment of workload and prevent overreliance on contracted services; increased granularity in budget justification materials; and implementation of control mechanisms to preclude over execution of budget amounts. These have been highlighted by the Congress as critical to improve our resource stewardship.”

“While we appreciate the value of the A-76 public-private competition process as a tool to help shape the Department’s workforce, until we can fully understand the extent and scope of contracted services reliance as a component of the Total Force, further conversion of internally performed work to contract performance is not in the Department’s best interests. The Department has made marked improvements in its Inventory of Contract of Services over the past year, and began comprehensive reviews of those inventories. However, there is still significant progress must be made prior to a certification...””

WHY THE A-76 PROCESS IS FLAWED: Even after years and years of costly and disruptive privatization studies across the federal government, GAO reported in 2008 that A-76 supporters could not demonstrate any savings:

“We have previously reported that other federal agencies—the Department of Defense (DoD) and the Department of Agriculture’s (USDA) Forest Service, in particular—did not develop comprehensive estimates for the costs associated with competitive sourcing. This report identifies similar issues at the Department of Labor (DoL). Without a better system to assess performance and comprehensively track all the costs associated with competitive sourcing, DoL cannot reliably assess whether competitive sourcing truly provides the best deal for the taxpayer...””

According to GAO and the DoD Inspector General (IG), the A-76 privatization process failed to keep track of costs and savings:

“DoD had not effectively implemented a system to track and assess the cost of the performance of functions under the competitive sourcing program...The overall costs and

the estimated savings of the competitive sourcing program may be either overstated or understated. In addition, legislators and Government officials were not receiving reliable information to determine the costs and benefits of the competitive sourcing program and whether it is achieving the desired objectives and outcomes...” (DoD IG)

“[The Department of Labor’s (DoL)] savings reports...exclude many of the costs associated with competitive sourcing and are unreliable...(O)ur analysis shows that these costs can be substantial and that excluding them overstates savings achieved by competitive sourcing...DoL competition savings reports are unreliable and do not provide an accurate measure of competitive sourcing savings...Finally, the cost baseline used by DoL to estimate savings was inaccurate and misrepresented savings in some cases, such as when preexisting, budgeted personnel vacancies increased the savings attributed to completed competitions...” (GAO)

This resulted in the actual costs of conducting the privatization studies exceeding the guesstimated savings, according to GAO:

“For fiscal years 2004 through 2006, we found that the Forest Service lacked sufficiently complete and reliable cost data to...accurately report competitive sourcing savings to Congress...(W)e found that the Forest Service did not consider certain substantial costs in its savings calculations, and thus Congress may not have an accurate measure of the savings produced by the Forest Service’s competitive sourcing competitions...Some of the costs the Forest Service did not include in the calculations substantially reduce or even exceed the savings reported to Congress.”

The A-76 process also included a fundamental bias against the in-house workforce, according to the DoD IG:

“...In this OMB Circular A-76 public/private competition—even though (DoD) fully complied with OMB and DoD guidance on the use of the overhead factor—the use of the 12 percent (in-house) overhead factor affected the results of the cost comparison and (DoD) managers were not empowered to make a sound and justifiable business decision...In the competitive sourcing process, all significant in-house costs are researched, identified, and supported except for overhead. There is absolutely no data to support 12 percent as a realistic cost rate. As a result, multimillion-dollar decisions are based, in part, on a factor not supported by data...Unless DoD develops a supportable rate or an alternative method to calculate a fair and reasonable rate, the results of future competitions will be questionable...”

WHAT HAPPENED IN 2013, WHAT DIDN'T HAPPEN IN 2014, AND WHAT MIGHT HAPPEN IN 2015: An amendment to the FY14 NDAA to strike the requirement that DoD certify compliance with the inventory of service contracts before starting new A-76 privatization studies was rejected by a vote of 178-214, pursuant to roll call vote 225. There was no such amendment in 2014. There were no serious attempts to revive the A-76 process in the Senate during the

previous Congress. The government-wide prohibition on new A-76 privatization studies was extended in the FY15 Omnibus funding measure.

It is expected that there will be efforts in 2015 to strike both the DoD specific A-76 prohibition as well as the government-wide prohibition, despite consistent opposition from the two agencies that historically have been the biggest boosters of the controversial process, OMB and DoD. It is imperative that OMB remind the Congress that the A-76 process is flawed, as acknowledged by the previous procurement czar; that the circular's problems have not been rectified; that the federal workforce was subject to onerous A-76 quotas in both the Clinton and Bush Administrations of 200,000 and 1,000,000 federal employees, respectively; and that the federal government's service contractors have not been subject to the same systematic scrutiny for insourcing that federal employees have endured with respect to outsourcing.

SCRAP THE CAP: FREE THE CIVILIAN WORKFORCE FROM ARBITRARY CONSTRAINTS ON ITS SIZE

SUMMARY: Absent any requirement in law, DoD has imposed a cap on the size of its civilian workforce—through 2019, the civilian workforce should not be larger than it was in 2010. Work that should be performed by civilian employees because of law or policy must sometimes instead be performed by military personnel or contractors. Work that could be performed more cheaply by civilian employees is sometimes instead contracted out or given to military personnel. And even when new work is assigned to civilian employees, adherence to the cap often requires an offsetting reduction—which means that the jobs of a comparable number of civilian employees elsewhere must be eliminated and their work converted to performance by military personnel or contractors.

In short, the cap has so significantly undermined sourcing and workforce management laws and policies that DoD managers are unable to always make performance decisions that are consistent with law, cost, policy, and risk mitigation. The imposition of an arbitrary cap on the size of the civilian workforce is in defiance of 10 USC 129, which forbids the application of such constraints on the size of the civilian workforce, instead requiring the Department to manage its civilian workforce by workloads and budgets—which means that if there is work to be done and money to pay for that work to be done, managers should not be prevented from using civilian employees to perform that work.

DoD claims that the cap is not illegal because the Pentagon has a process by which exceptions to the cap may be secured. However, that exceptions process is forbidding and cumbersome; and, as noted earlier, even when an exception is granted, it usually means that the civilian workforce must be reduced elsewhere in order to offset the increase. Worse, the arbitrary cap is unique to the civilian workforce. The Department has imposed no cap on service contract spending, and reductions in military personnel are based on changes in military strategy. Skeptics can argue that the Pentagon's cuts in force structure are too steep, ill-conceived, and excessively budget-driven, but they do have a strategic basis, unlike the purely arbitrary cap imposed on the civilian workforce.

AFGE's DoD members understand that the Department will likely become smaller because of geopolitical and budgetary realities, which will mean that the military, civilian, and contractor workforces also get smaller. However, the cap makes it more difficult for DoD managers to use the civilian workforce—which the Pentagon acknowledges to be the cheapest, the one which has grown the least, and the one which is being cut the most—at a time when defense dollars are exceedingly precious. The Congress should force the Pentagon to finally scrap the cap.

HOW THE CIVILIAN WORKFORCE CAP WORKS SPECIFICALLY IN THE ARMY: In no part of DoD is the cap on the civilian workforce imposed more stringently than in the Army. In a 2014 report to Congress on compliance with the prohibition against arbitrary constraints on the civilian workforce, Army Secretary John McHugh acknowledged: "(I)t has come to my attention that there may be elements of the Army that appear to be operating with de facto caps on the civilian workforce."

However, as the Army itself had admitted earlier, the application of the cap on the civilian workforce is neither isolated nor merely an appearance. As the Army testified in 2012, more than two years ago, before the Senate Homeland Security and Governmental Affairs Committee:

"As a result of the civilian cap, individual Army Commands have a cap on their own manpower, in order to ensure the Army's ongoing compliance with policy. This cap limits the flexibility that the Army has, both as a whole and in individual components, when managing its manpower mix. If a civilian cannot be hired, then the only remaining options are to contract the function, or use borrowed military manpower. The use of military personnel is usually not an option, which leaves only contracting as a viable means of executing a mission.

"When faced with hiring decisions, people are therefore being placed in the unenviable position of having to decide whether to comply with the civilian cap, or to comply with the other statutes and policies governing the workforce (like the prohibition on the performance of inherently governmental functions by contractors).

"Although the goal of the civilian cap—the reduction in overall Department of Defense expenditures—is clearly a good one, the workforce cap has had the unintended consequence of limiting the flexibility of the Army in managing its workforce. Cost-effective workforce management decisions ought to be based on allowing for the hiring of civilians to perform missions, rather than contractors, if the civilians will be cheaper. The lifting of the civilian workforce cap would restore this flexibility, and in that sense it would seem to be a positive potential step forward."

The Army thus acknowledged that its application of the cap resulted in higher costs to taxpayers and the illegal performance by contractors of functions too important or sensitive to privatize. Implicitly, the Army acknowledged that the cap also caused it to defy 10 USC 129.

AFGE's members in the Army report without hesitation that the application of the cap has become even more onerous as the budget's vise has been further tightened. For example, as the Army itself acknowledged, in "POM 14-18 Realignment of Resources, As of 5-30-2012," hundreds of civilian security guards, all of them veterans and many of them partially disabled veterans, were arbitrarily eliminated because of the cap:

"Headquarters Department of the Army directed IMCOM to execute a cost and risk-informed functional prioritization to identify offsets for emerging manpower requirements. After a careful and deliberate review of programs and functions, IMCOM has identified authorizations to adjust or eliminate in order to meet these requirements.

"A total of 988 DA Civilian authorizations across the command will be eliminated by FY '14 to offset the emerging manpower requirements for programs and services...

"Authorizations to be eliminated are 598 Security Guard authorizations at 13 FORSCOM installations..."

This example of the perverse impact of the cap is particularly pertinent because the conversion of work was entirely dictated by the cap on the civilian workforce. There was no attempt to establish a Military Occupational Specialty linkage between the security guard positions and the incoming soldiers. There was no attempt to determine if this massive conversion was cost-effective. At a time of heightened concern over security, there was no attempt to determine if military personnel could perform the work as reliably and comprehensively as it had been performed by civilians. And, of course, this directive was issued by Secretary McHugh's own office. The Army's only consideration: adherence to an arbitrary cap on the size of the Army's civilian workforce.

The application of the cap is not just an appearance, as the Army maintains, but reality, and the inevitable results are illegal and costly mis-assignments of work. As the Army suggested in its 2012 testimony, the cap should be lifted because of its "unintended consequences."

Instead, the Army should manage by budgets and workloads. If it has work to do and funding to pay for that work to be done, no Army manager should be prevented from using civilian employees because of a cap. Performance decisions should be driven by law, cost, policy, and risk-mitigation. The Army knows which functions it must perform and how much funding it will be given to perform that work.

Consequently, the Army should think of its workforce holistically and assign work to military personnel, civilian personnel, and service contractors based on approved criteria, rather than arbitrary constraints on the civilian workforce. This approach would be consistent with 10 USC 129, allow the Army to reduce the size of its entire workforce, enhance compliance with laws and regulations which require work to be assigned to particular personnel, and reduce costs

since work could be assigned to the most efficient workforce when costs are the sole criterion. Of course, none of this discussion—both the problems caused by the cap and the appropriate remedy—is unique to the Army because the cap perverts assignments of work throughout DoD.

IF CIVILIANS ARE TO BE CAPPED, SERVICE CONTRACT SPENDING MUST ALSO BE CAPPED: The Congress has understood that the imposition of an onerous cap on the size of one workforce can simply drive work to a less constrained workforce. As the Senate Armed Services Committee wrote in its report to the FY12 NDAA mark:

“The committee concludes that an across-the-board freeze on DOD spending for contract services comparable to the freeze that the Secretary of Defense has imposed on the civilian workforce is warranted to ensure that the Department maintains an appropriate balance between its civilian and contractor workforces and achieves expected savings from planned reductions to both workforces.”

So what steps has the Army undertaken to deter managers from shifting work from a capped civilian workforce to service contractors? Has the Army imposed similar constraints on the growth of service contract spending? Are new service contracts or expansions of existing service contracts being subjected to the same intense bureaucratic scrutiny that proposed increases in the civilian workforce experience? Clearly not.

Although the Army hasn't imposed a comparable constraint on its service contract spending, Congress has. Unfortunately, the Army hasn't complied. In DOD CONTRACT SPENDING: Improved Planning and Implementation of Fiscal Controls Needed (GAO-15-155), GAO was charged with reporting whether DoD has complied with the cap on service contract spending which was first imposed in the FY12 NDAA and which was extended through FY15 by the most recent NDAA.

After having exceeded the spending cap by \$1.62 billion in FY12, GAO reports that DoD managed to stay under the cap in FY13. How did DoD comply with the spending cap? “Improved planning and consistent implementation of fiscal controls,” reports GAO. Except at the Army, which overspent by \$2.69 billion in FY13 after overspending by \$2.0 billion in FY12. Ironically, the Army could have easily complied with the law; in fact, it was the one component most capable of compliance. The Army's inventory of contract services, which is widely considered to be the gold standard, “includes the Panel for Documentation of Contractors module, which contains data provided by the individual commands on their planned contract services spending.” However, the Army Budget Office dropped the ball and, according to GAO, failed to use the component's much-praised inventory to comply with the law! In fact, the Army wouldn't have had to furlough civilian employees, which is a polite way of saying slash their income by 20% for six weeks, if the component had not illegally over-spent its service contractors.

ENSURE DOD COMPLIES WITH PRIVATIZATION SAFEGUARDS

HOW WE CAN PROMOTE COMPLIANCE WITH PROHIBITIONS AGAINST DIRECT CONVERSIONS:

Thanks to two longstanding, bipartisan safeguards—a perennial general provision in the defense appropriations bill and 10 USC 2461—DoD must at least guesstimate, based on a formal cost comparison process, that contractor performance would be marginally more efficient before work designated for performance by civilian employees may be privatized. These prohibitions still apply during sequestration.

To the Pentagon's credit, the Office of Personnel and Readiness has promulgated several iterations of guidance to enforce the safeguards. That office has also helped AFGE to satisfactorily resolve some instances of direct conversions, the term used to describe when our work is contracted out in defiance of the laws. Nevertheless, some DoD managers either remain ignorant of the safeguards or willfully defy them, resulting in bargaining unit work being illegally privatized.

An AFGE Local that experiences a direct conversion should alert the General Counsel's Office which will help the Local document any illegal contracting out; then, working with the Legislative Department, the Local can pursue administrative and legislative remedies. Success is not guaranteed, but even unsuccessful efforts have deterred management from undertaking additional direct conversions as well as focused Congressional attention on the need for serious reforms.

ADDITIONAL STEPS TO ENSURE ENFORCEMENT OF SAFEGUARDS AGAINST DIRECT

CONVERSIONS: The Pentagon should both build on its earlier guidance and comply with recent Congressional direction to require acquisition personnel to review a checklist of relevant sourcing laws and regulations before outsourcing work designated for performance by civilian employees.

1. **EXPAND ON GUIDANCE:** Administrative and legislative requirements to reduce the size of the civilian workforce do not trump the prohibitions against direct conversions. In fact, there are laws which specifically forbid DoD from using its own arbitrary in-house personnel ceilings as well as cuts required by Congress in the size of the civilian workforce to contract out work designated for performance by civilian employees:
 - a. 10 USC 2461(a)(3)(B), which forbids contracting out work designated for performance by civilian employees in order to circumvent a personnel ceiling; and
 - b. Section 955 of the FY13 NDAA, P.L. 112-239, which forbids “unjustified transfers of functions between or among the military, civilian, and service contractor personnel workforces” in order to comply with arbitrary reductions in those workforces, and affirms the imperative to comply with four important sourcing laws.

The Pentagon should expand on its original guidance to ensure that DoD managers comply with these additional laws. Based on AFGE's experience, here are three myths about direct conversions that are sometimes entertained by DoD managers and which could be addressed in the Pentagon's expanded guidance:

- a. No harm, no foul MYTH: we can wait until civilian employees retire or are reassigned and then contract out their work—without having to follow the law.
 - b. Focus on core MYTH: we want civilian employees to focus on their core responsibilities and then contract out everything else—without having to follow the law.
 - c. More of the same is somehow new MYTH: when an agency gets more of the same work or wants to do differently work already designated for performance by civilian employees, we can call that work new—so we don't have to follow the law.
2. **COMPLY WITH CONGRESSIONAL DIRECTION:** In the FY15 NDAA, Congress required that DoD components and agencies establish a standard checklist of sourcing laws and regulations that must be reviewed before contracting for services, after previous administrative efforts to adapt a checklist Department-wide failed because of internal opposition. This Congressionally-directed checklist would impose no new requirements; rather, it would merely ensure that all relevant legal and regulatory requirements are integrated into one convenient, easy-to-use checklist.

For several years, the Army has been using a checklist of laws and regulations that makes it more difficult to privatize bargaining unit work: <http://www.asamra.army.mil/scra/documents/ServicesContractApprovalForm.pdf> Since management must actually use the checklist and comply with the laws and regulations listed, it is not foolproof. However, the Army checklist does make it harder for management to directly convert our work and easier for AFGE Locals to independently review the legality and appropriateness of their installation's service contracts.

In appreciation of the Army's efforts, the Congress included this language in the FY15 NDAA:

"We direct the Under Secretary of Defense for Acquisition, Technology, and Logistics, and the senior acquisition executive for the Department of the Navy and the Department of the Air Force, no later than March 30, 2015, to issue to the Defense agencies and the military services, respectively, policies implementing a standard checklist to be completed before the issuance of a solicitation for any new contract for services or exercising an option under an existing contract for services, including services provided under a contract for goods. We recommend that the Under Secretary and the senior acquisition executives, to the extent practicable, model their policies and checklists on

the policy and checklist relating to services contract approval currently used by the Department of the Army.”

The House and Senate Armed Services Committees must ensure that the Department follows this direction and that a checklist of laws and regulations like the one devised by the Army is always used before any work designated for performance by civilian employees is privatized.

CIVILIAN-TO-MILITARY CONVERSIONS MUST BE COST-EFFICIENT COSTS TO TAXPAYERS INCREASE WHEN DOD DECREASES USE OF CIVILIANS: It seems difficult to believe given how precious DoD dollars have become, but taxpayers are paying more for work that had been performed by civilian personnel to instead be performed by more expensive military personnel. And DoD civilian employees are losing jobs because their work is being given to military personnel, arbitrarily and permanently. There are many different terms to describe this process: borrowed military manpower, re-greening, re-purposing, and blending.

WHAT THE CAUSES ARE: There are several causes of civilian-to-military conversions: The cap on civilian personnel incentivizes managers to find alternative workforces to accomplish work. Sequestration—at the election of the President—exempts military pay, making military personnel seem like a free alternative to civilian personnel. DoD masks the impact of civilian furloughs by using military personnel to nominally perform civilian functions. Despite the military drawdown, components, particularly the Army, are attempting to find alternative positions for returning military personnel.

IT’S NOT ANTI-MILITARY TO BE CONCERNED: Most AFGE members in DoD and the Department of Veterans Affairs are veterans. Many contractors believe military personnel should never perform functions that would otherwise be performed by civilian personnel or contractors. Not AFGE, which believes that there are justifications for using military personnel to perform routine commercial functions: recruitment, retention, and career development. However, with the military drawdown—e.g., the Army going down to its smallest size since WWII—and the need to cut costs, there should be fewer military personnel performing non-military functions, not more. DoD has acknowledged that “civilians typically prove to be a more cost effective source of support than their military counterparts.” Moreover, the Congressional Budget Office recommended that 70,000 military positions be converted to civilian positions, which it said would save taxpayers \$20 billion in less than 10 years.

The House Armed Services Committee was critical about the use of military conversions in report language to its mark of the FY14 National Defense Authorization Act:

“As DoD makes reductions in its Total Force workforce composition, military, civilians, and contractors, the committee is increasingly concerned about the use of military manpower to perform functions previously performed by either civilians or contractors. While the Department of the Navy and the Department of the Air Force have indicated they do not anticipate wholesale substitutions using military personnel, the Secretary of the Army, in testimony before the committee in April 2013, predicted that the Army

could use as many as 8,000 uniformed personnel to fill positions during the current fiscal year because reduced funding for training has created time gaps in the duty day and freed up soldiers for other duties. The committee understands the need for temporary, limited local command use of military personnel performing civilian work to accomplish mission objectives, but the committee notes that use of military manpower outside the service member's military occupational specialty poses risks to readiness and training, and raises issues of unsustainable costs. Consistent with 'Guidance Related to the Utilization of Military Manpower to Perform Certain Functions,' issued March 2, 2012, by the Under Secretary of Defense for Personnel and Readiness, the committee expects the Department of Defense to calculate the cost of using military personnel in lieu of civilian personnel or service contractors to perform non-military tasks in accordance with Directive Type Memorandum (DTM)-09-007, 'Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support' or any succeeding guidance."

WHAT RULES APPLY: There are no laws that govern the conversion of work from civilians to military. The Army and the Office of Personnel and Readiness (P&R) have issued guidance in order to rationalize the conversion of civilian and contractor positions to military personnel. The Army's October 2011 guidance required a link between soldiers' Military Occupational Skill (MOS) and the functions to be performed. In order to replace civilians or contractors with military personnel, the Army was required to perform a formal cost comparison. P&R's March 2012 guidance imposes a requirement of military essentiality. If a function is not military essential, then a formal cost comparison is required. If a function is military essential, then no cost comparison is required. Here are the seven examples of military essential functions (which are summarized from DoD Instruction 1100.22):

- 1. Missions involving operational risks and combatant status under the Law of War.*
- 2. Specialized collective and individual training requiring military unique knowledge and skills based on recent operational experience.*
- 3. Independent advice to senior civilian leadership in Department requiring military unique knowledge and skills based on recent operational experience.*
- 4. Command and control arrangements best performed within the Uniform Code of Military Justice.*
- 5. Rotation base for an operational capability.*
- 6. Career progression.*
- 7. Esprit de corps (such as military recruiters, military bands).*

Personnel and Readiness' guidance insists that any use of military in lieu of civilians should be temporary and short-term. In April 2013, Army Secretary John McHugh wrote to AFGE that the "Army's (borrowed military manpower) policy is a short-term solution...to address emergency requirements associated with the current budgetary situation does not contemplate the permanent conversion to military performance of work presently allocated to civilian employees." In November 2013, Secretary McHugh wrote that "(t)he use of 'Borrowed Military Manpower' continues to be a short-term, stop-gap measure..." Even during sequestration,

substitutions of military personnel for civilian personnel are supposed to be temporary and short-term.

AFGE’S EXPERIENCES: At Fort Rucker, AL, the Army announced that 20 civilians performing support functions would be converted to military. Management told AFGE that the Army needed to find slots for returning military personnel and acknowledged that the military personnel taking the civilian positions had no relevant MOS links. Moreover, no costing was done. At Fort Stewart, GA, more than 40 civilian security guards, all veterans and almost all partially disabled, were replaced by military personnel. No costing was done, and there were MOS links for only some of the military personnel. Worse, this conversion was done explicitly because of an illegal constraint on the size of the civilian workforce—the Army was getting new work and had to eliminate comparable numbers of positions elsewhere in the civilian workforce. And the Army is planning to withdraw from the Defense Finance and Accounting Service and reconstitute its own financial operations, using military personnel instead of civilians.

WHAT DIDN’T HAPPEN LAST YEAR: The FY15 House NDAA included a provision authored by House Armed Services Subcommittee Ranking Member Madeleine Bordallo (D-GU) that would have essentially codified the pertinent parts of the Army’s October 2011 guidance and Personnel and Readiness’ March 2012 guidance: If a function comes under the first four examples of military essential functions, then it can be converted from civilian or contractor performance. However, if a function comes within the latter three examples of military essential or is not military essential at all, then there must be an MOS link between the function and the military personnel involved as well as a formal cost comparison which determines that performance by military personnel is cheaper. Because it essentially codified current and previous DoD guidance, the Pentagon endorsed the House provision.

However, perhaps coinciding with a change in leadership in P&R, the Pentagon subsequently changed its position from support to strong opposition. The Senate Armed Services Committee also strongly opposed the provision—reportedly, on the pretext that it was similar to DoD’s own guidance, apparently not understanding that this guidance was not enforced—and it was dropped in conference.

Consequently, there are no statutory limitations on the extent to which DoD can arbitrarily shift work from civilians (and contractors) to military personnel, regardless of the increased costs to taxpayers. And because of the onerous cap on the size of the civilian workforce and the resumption of sequestration, it is expected that civilian-to-military conversions will only increase in size and frequency.

AFGE Locals which are losing bargaining unit work to military conversions should contact AFGE’s General Counsel’s Office, which will assist in documenting the conversion and determine whether it is inconsistent with the Department’s guidance; then, working with the Legislative Department, the Local can pursue administrative and legislative remedies. Such efforts have sometimes prevailed; even when they don’t, fighting back often deters management from

undertaking additional military conversions and helps to focus Congressional attention on the need for serious reforms.

IDENTIFY AND CONTROL SERVICE CONTRACT COSTS

INTRODUCTION: DoD spends two and one-half times more on service contracts than on civilian employees, with service contract costs having more than doubled during the last ten years. Nevertheless, DoD still can't identify and control its spending on service contracts because it has yet to compile an inventory of its service contracts that is integrated into the budget, despite having been required to do just that since 2008. However, because of opposition from contractors and their allies in the acquisition community, DoD has failed to comply with the law.

Thanks to pioneering work by the Army, it seemed as if DoD might be on the path towards compliance; DoD, contractors, AFGE, Congress, and GAO agreed that the Army's methodology should be the basis for the contractor inventory. However, stubbornly snatching defeat from the jaws of victory, the Pentagon suspended work on the inventory in 2014 and is now considering junking the Army's methodology in favor of another that will leave unaccounted for significant contractor costs.

GAO has reported that DoD can get service contract costs under control—or at least limit the growth in such costs—by requiring DoD to complete the inventory of service contracts and enforcing the longstanding cap on service contract spending.

DOD DEFIES LAWS AND COMMITMENTS FOR IMPLEMENTATION OF THE INVENTORY: In the FY08 NDAA, a statutory requirement to inventory service contracts was enacted, the one with which DoD has yet to comply.

In the FY10 NDAA, based on GAO findings that the Department had made little discernible progress towards the implementation of an inventory of contracted services, the Congress codified a requirement that the Department better project and justify requested budgetary resources for contracted services—a requirement that the Department still struggles to meet.

Pursuant to the FY10 NDAA, Congress directed the Department to make resources available to adopt a proven Army data collection methodology.

In the FY11 NDAA, Congress assigned responsibilities to the Under Secretary of Defense for Personnel and Readiness with regards to the collection of data that would enable improved oversight of contracted services consistent with management of the Department's Total Force—the military, civilian, and contractor workforces.

In the FY11 Defense Appropriations Bill, Congress required the Pentagon to submit detailed plans for all DoD organizations to come into compliance with longstanding statutory requirements for the inventory.

In the FY12 NDAA, Congress directed the Department to use the inventory to ensure a balanced and effective workforce; inform strategic workforce planning; justify budget requests for service contracts; and identify poor, wasteful, illegal, or inappropriate service contracts.

The Under Secretaries of Defense for Personnel and Readiness and Acquisition, Technology, and Logistics jointly submitted to Congress, in November 2011, a comprehensive plan delineating a path forward to full compliance with Congressional direction by the end of fiscal year 2014.

This plan was subsequently endorsed by former Secretary Leon Panetta, in a letter to the chairman and ranking member of the House Armed Services Committee.

In accordance with those plans, in early 2012 the Department made commitments to service contractors and the public through the Paperwork Reduction Act process regarding implementation of the inventory.

In November 2012, the Under Secretaries for Personnel and Readiness and Acquisition, Technology, and Logistics jointly signed guidance to begin Department-wide use of and reporting into the enterprise-wide Contractor Manpower Reporting Application (eCMRA) for inventorying service contracts—a system predicated on a proven Army business process.

As reported by GAO, the Department allocated dedicated resources, beginning with fiscal year 2015, to ensure continued implementation of Congressional direction.

The importance of dedicated resourcing of this effort was endorsed by two Deputy Secretaries of Defense—then Secretary Ashton Carter and Acting Secretary Christine Fox.

In spite of that lengthy history, ample precedents, and senior level commitments, the Office of Personnel and Readiness decided in September 2014 to suspend work on the inventory and consider an alternative methodology to collect information from contractors for the inventory. GAO and DoD IG have also reported that the Department is not providing the inventory effort with sufficient resources.

GAO REPORTS THAT INVENTORY OF SERVICE CONTRACTS, COMBINED WITH CAP ON SERVICE CONTRACT SPENDING, CAN CONTROL SERVICE CONTRACT COSTS: In DOD CONTRACT SPENDING: Improved Planning and Implementation of Fiscal Controls Needed (GAO-15-155), GAO was charged with reporting whether DoD has complied with the cap on service contract spending which was first imposed in the FY12 NDAA and which was extended through FY15 by the most recent NDAA.

After having exceeded the spending cap by \$1.62 billion in FY12, GAO reports that DoD managed to stay under the cap in FY13. According to GAO, however, the Department failed to make the required cuts in spending on contracts for closely associated with inherently governmental functions, which by law must be performed by civilian employees to the maximum extent practical because they are too sensitive or important to privatize, as well as staff augmentation contracts in which contractors impersonate civilian employees. How did DoD comply with the spending cap? "Improved planning and consistent implementation of fiscal controls," reports GAO. Except at the Army, which overspent by \$2.69 billion in FY13 after overspending by \$2.0 billion in FY12.

Ironically, the Army could have easily complied with the law; in fact, it was the one component most capable of compliance. The Army's inventory of contract services, which is widely considered to be the gold standard, "includes the Panel for Documentation of Contractors module, which contains data provided by the individual commands on their planned contract services spending." However, the Army Budget Office dropped the ball and, according to GAO, failed to use the component's much-praised inventory to comply with the law!

And why did DoD fail to comply with legal requirements to reduce reliance on contractors for risky contracts? Because it had not fully implemented an inventory of contract services, a requirement first imposed on the Department in 2008. Invoking GAO's authority, House-Senate conferees on the FY15 NDAA noted that a "key factor inhibiting the components' inventory review is a lack of accurate and reliable data, which we note the inventory could provide if the components were to implement DOD-wide a common data system based on the Army's existing system as directed by existing DOD guidance."

WHAT HAPPENED IN 2014 AND WHAT SHOULD HAPPEN IN 2015: As noted earlier, in 2014, DoD suspended work on the inventory of contract services, is considering tossing aside the Army model, and has reneged on commitments to adequately resource the office responsible for compiling the inventory.

If DoD is to ever identify and control the skyrocketing costs of its service contracts, here are the two simple steps which must be taken:

1. Ensure that the cap on service contract spending is retained. Not only does it discourage DoD from shifting work from civilians to service contractors, but it helps to hold down costs. Nevertheless, recommendations from GAO to improve planning, enhance control, and ensure consistency in guidance should be implemented, as well as close loopholes that allow large amounts of service contract spending to escape scrutiny.
2. Follow Congressional direction to implement the inventory consistent with the Army methodology and ensure that senior officials in each component are held accountable for ensuring that the inventory of contract services is used to inform budget, manpower, and acquisition decisions, as recommended by GAO. At long last, the inventory must be

used to reduce reliance on costly contractors for the performance of risky contracts, as required by law.

The House FY13 NDAA included a provision that would have simply required the Secretary of Defense, beginning in February 2014, and continuing each year through February 2018, to certify compliance with the inventory law. GAO would have been required to review DoD's inventory to determine if the Department's certification of compliance is accurate. A failure by the Secretary to certify compliance would have triggered an IG investigation. The House provision would not have added new law. However, it would have elevated the importance of compliance to the Secretarial level and helped reformers within the Pentagon to overcome contractor-inspired opposition. Unfortunately, opposition from the Senate Armed Services Committee forced the provision to be dropped in conference, thus giving opponents of the inventory more time to kill the inventory. Taxpayers can only hope that the Congress has learned from this grievous mistake.

USE INSOURCING TO SAVE TAXPAYER DOLLARS AND IMPROVE PERFORMANCE FOR WARFIGHTERS

WHAT INSOURCING ACTUALLY IS AND WHY CONTRACTORS DON'T LIKE IT: Insourcing refers to the process by which work performed by contractors is brought in-house because the work is too important or sensitive to have been outsourced, performance can be improved, or costs can be reduced. Insourcing is common in the private sector as well as at lower levels of government.

Contractors don't like insourcing because it cuts into profits. Pro-contractor lawmakers sponsor legislation to prevent agencies from insourcing. Senior acquisition executives, most of whom have worked for contractors and / or will go to work for contractors, refuse to insource. Arbitrary constraints on the size of in-house workforces—whether pursuant to caps, freezes, or cuts—make it very difficult to insource, no matter how many taxpayer dollars might be saved.

Pursuant to 10 USC 2463, DoD is required to develop insourcing policies for new work and outsourced work, in particular to give "special consideration" to insourcing contracted out work that

1. is too important or sensitive to privatize,
2. was contracted out without competition and is now presumably more expensive than it should be, or
3. has been deemed poorly performed.

The insourcing law for DoD was enacted through the FY08 NDAA. DoD is not compelled to insource; rather, with respect to certain categories of work, DoD is simply required to give "special consideration" to insourcing. 10 USC 2330a, also enacted through the FY08 NDAA, requires DoD to use reliable and experienced civilian employees to the "maximum extent

practicable” to perform closely associated with inherently governmental functions, which includes such work as developing regulations, preparing budgets, and interpreting regulations. Nobody would ever consider having such work performed by contractors—except, of course, contractors, who have continually tried to repeal the law.

HOW DOD HAS INSOURCED: DoD officials told the Government Accountability Office (GAO) that, *“Insourcing has been, and continues to be, a very effective tool for the Department to rebalance the workforce, realign inherently governmental and other critical work to government performance (from contract support), and in many instances to generate resource efficiencies.”*

In FY10, the Department added nearly 17,000 new civilian positions as a result of insourcing. Of those, 9% were added because the work was actually inherently governmental, 41% because work was exempted from contractor performance (to mitigate risk, ensure continuity of operations, meet and maintain readiness requirements, etc.), and 50% solely because of cost savings, according to the Department. In FY11, the Department added almost 11,000 new civilian positions as a result of insourcing. Of those, 6% were added because the work was inherently governmental, 13% because work was exempted, and 81% because of cost savings, again according to DoD.

According to GAO, DoD reported, in FY10 alone, \$900 million in savings from insourcing. The Army, which had conducted the most robust insourcing effort in DoD, reported savings from between 16 and 30 percent. More significantly, “During the much smaller period from Fiscal Year 2008 to 2010 when the Department instituted an active insourcing program in conjunction with its service contract pre-award approval process and contractor inventory review process, contract service obligations not identified to Overseas Contingency Operations funding decreased from \$51 billion in Fiscal Year 2008 to \$36 billion in Fiscal Year 2010.” The increase in civilian personnel costs from insourcing was slight in comparison with the steep reduction in service contract costs.

Contractors, insisting that the insourcing process was biased against them, turned to the Center for Strategic and International Studies (CSIS), which claimed that the DoD’s costing methodology did not take into account a multitude of in-house costs. Congress later assigned the GAO to review DoD’s costing methodology. After discussions with contractors, CSIS and AFGE, GAO last year issued its own assessment of the costing methodology, which implicitly rejected the CSIS critique. If anything, GAO’s report revealed that the methodology is more biased against civilians than contractors.

WHAT HAPPENED TO INSOURCING: However, insourcing has been essentially shut down by DoD because of the imposition of an in-house personnel cap which inhibits the civilian workforce from becoming larger than it was in 2010. Now, insourcing can only occur if proposals are signed off on by senior officials after going through a daunting and cumbersome approval process. Moreover, insourcing proponents are often compelled to find comparable numbers of in-house jobs to eliminate in order to stay below the cap. DoD has imposed no

comparable size constraint on contractors and required no additional authorization before entering into new contracts or expending on existing contracts.

INDEPENDENT SUPPORT FOR INSOURCING: In 2011, the Project on Government Oversight (POGO), which accepts no union contributions, compared the costs of federal employees and contractors in a seminal study entitled *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, the first to compare service contractor billing rates to the salaries and benefits of federal employees. POGO determined that “on average, contractors charge the government almost twice as much as the annual compensation of comparable federal employees. Of the 35 types of jobs that POGO looked at in its new report, it was cheaper to hire federal workers in all but just 2 cases.”

WHY INSOURCING IS MORE IMPORTANT THAN EVER: Senior DoD officials have acknowledged that contractors cost more than civilian employees. Former DoD Comptroller Robert Hale acknowledged in 2013 testimony before the Senate Defense Appropriations Subcommittee that service contractors generally cost two to three times what in-house performance costs, particularly for the performance of long-term functions, a view subsequently affirmed by General Ray Odierno, the Army Chief of Staff, in House Armed Services Committee testimony.

Nevertheless, spending on service contracts has far exceeded investments in civilian personnel. As the Senate Armed Services Committee noted in bipartisan report language to the FY12 NDAA: *“Over the last decade, DoD spending for contract services has more than doubled from \$72.0 billion in fiscal year 2000 to more than \$150.0 billion (not including spending for overseas contingency operations), while the size of the Department’s civilian employee workforce has remained essentially unchanged.”*

WHAT HAPPENED IN 2014 AND WHAT MIGHT HAPPEN IN 2015: DoD should be required to finally hold contractors accountable to taxpayers. DoD should be required to use its costing methodology to determine whether new work, which is not required by law, regulation, or policy to be performed by military or civilian personnel, should be performed by military, civilians, or contractors. Right now, because of the cap on civilian employees that work is almost automatically given to contractors. Also, given the Comptroller’s assessment that civilian employees are cheaper for long-term functions, DoD should be required to review such workload and determine whether it might be performed by civilian employees, using its own costing methodology. In both instances, DoD should be required to raise its cap on the civilian workforce to accommodate any new positions created because in-house performance promised to be less expensive.

The House FY15 NDAA included a bipartisan provision which codified existing DoD policy that the Department use its own costing methodology in assigning new work to military personnel, civilian personnel, or contractors if the work did not need to be assigned to a particular workforce because of law, policy, or risk. The Pentagon supported the provision at mark up, but later opposed it in conference. Contractors opposed the provision because they generally

prefer to avoid having their costs compared to those of in-house workforces, even after their think-tank’s criticisms of the DoD methodology were rejected by GAO.

Because of opposition from the Senate Armed Services Committee, the provision was dropped. It was said that the Committee opposed the House provision because DoD had already issued guidance. However, it was well-known that the guidance is not used by the Department in assigning new work. (Indeed, the vast majority of instances in which the guidance is used is when the Department is considering shifting work from contractors to civilians.) Consequently, new work will continue to be assigned by DoD without regard to the impact on taxpayers. A floor amendment was offered to the House FY15 NDAA that would have prevented DoD from insourcing even inherently governmental work. Fortunately, it was defeated by a vote of 179-244, in roll call vote #235. Nevertheless, it is likely that additional attempts will be made to bail out bad contractors at the expense of taxpayers and warfighters through legislation to prevent DoD from using insourcing to cut costs and improve performance.

“ACQUISITION REFORM” SHOULD SAVE MONEY FOR TAXPAYERS, NOT BOOST PROFITS FOR CONTRACTORS

CONTRACTORS ARE USING “ACQUISITION REFORM” TO BOOST THEIR PROFITS: The budget crunch, largely driven by correctable revenue shortfalls, has forced decision-makers in the executive and legislative branches to look more carefully at the whopping \$500 billion paid annually by taxpayers for goods and services provided by contractors.

Rather than thoughtfully consider more analytically the federal government’s indisputably expensive reliance on contractors and identify ways to reduce that reliance—instead of better buying, how about just not buying?—or seriously consider cheaper alternatives—e.g., insourcing in the context of services—contractors and their political allies have cleverly shifted the focus away from their high costs to a problematic acquisition process which they relentlessly vilify.

The Congress’ own “acquisition reform” effort is largely inspired by perfectly valid concerns that weapons systems cost more and take longer to get on line than they should. It was reported in 2014 that the work of DoD’s “top weapons buyer” is complicated by “the natural tendency by industry to offer low-ball cost estimates to make them fit into a tighter budget—a phenomenon which (he asserted) historically causes `60 to 70 percent of our overruns and schedule slips” — according to recent research he cited from the Institute for Defense Analyses.

In other words, increased costs and undue delays come primarily from contractor self-promotion. Obviously, the acquisition process must be sharpened in order to better address this problem, but that would require more scrutiny, more skepticism, more transparency, and more oversight—not less, as contractors insist.

AN AGENDA FOR “ACQUISITION REFORM” THAT WOULD ACTUALLY WORK FOR TAXPAYERS:

AFGE surveyed the rank-and-file acquisition personnel represented by the union, so that the views of the hard-working civil servants it represents in almost 70 different agencies who actually award contracts and oversee contractors could be part of the “acquisition reform” discussion, one which heretofore has been dominated by contractors and similarly-minded senior acquisition executives.

1. Strengthen the acquisition workforce.

- a. Eliminate the arbitrary cap that has been imposed by the Pentagon on the size of DoD’s civilian workforce so that components can right-size their acquisition workforces—but without having to make corresponding cuts in other parts of their in-house staff.
- b. Recognize that the problems experienced by the acquisition workforce can be significantly attributed to arbitrary downsizing of the civilian workforce, particularly the thoughtless cuts imposed on DoD’s so-called “shopper corps” during the 1990’s, at the same time procurements increased in number and complexity, forcing agencies to hire contractors to perform important acquisition functions. Ultimately, these thoughtless cuts resulted in contractors often, for all intents and purposes, awarding contracts and overseeing other contractors.
- c. Offer tuition assistance in order to make additional education an attractive option. Make sure funding is actually available for job-related training. Understand that even when it is actually funded, managers sometimes still prevent acquisition professionals in their already short-staffed offices from taking job-related training.

If we genuinely want to change the culture of federal acquisition, the government should develop its own training curriculum and employ its own instructors. Currently, virtually all training is provided by contractors, and acquisition personnel surveyed by AFGE report that it emphasizes collaboration at the expense of confrontation. Collaboration with contractors is important; however, in some circumstances, confrontation is required. Expecting contractors to teach federal acquisition personnel how to hold other contractors accountable to the taxpayers is unrealistic if not farcical, and the results are predictable. Contractors teach acquisition personnel how to buy stuff. Given the budget crunch and the excessive costs of contracts, we need to teach acquisition personnel how not to buy stuff, or at least to buy less stuff.

- d. Acquisition personnel report that training, cross-training, and mobility obviate the need for gimmicky exchange programs in which contractor personnel are placed in agencies’ acquisition workforces—ostensibly to fill in-house workforce gaps but in reality “to case the joint” for contracting opportunities for their employers. Such exchange programs promote conflicts of interest with little real benefit to agencies’

bottom lines. Worse, they are bad band-aids which allow agencies to postpone the imperative to finally strengthen their own in-house acquisition workforces.

2. **Encourage the consideration of costs.** Low-price / technically acceptable (LP/TA) is not always the right source selection technique, but it often is, particularly during a time of austerity, when it simply is not in the government's interest to pay a best value premium. Acquisition personnel believe that the LP/TA technique provides the necessary level of performance at a lower cost to the government. In fact, acquisition personnel believe that best value is often used to reduce competition and to steer awards to particular service contractors. The use of LP/TA is required by law for public-private competitions, and this technique ensures that the government gets the level of service the agencies actually need at the lowest possible costs to taxpayers. That should be the very essence of any source-selection process.
3. **Write better solicitations.** Acquisition personnel believe that improved performance in this crucial stage would lead to significant reductions in waste, fraud, and abuse in the procurement process. Acquisition personnel should be involved earlier in the writing of solicitations. Ideally, acquisition personnel should be placed in program offices. Additional training to write better solicitations and additional time to get those solicitations right are also priorities for acquisition personnel. Understand that better solicitations cannot be written if the acquisition workforce remains overstretched.

Acquisition personnel also believe that the right approach towards writing solicitations should be one of healthy skepticism, rather than simple credulity. The government and contractors are not partners. Perhaps the most pernicious legacy of the "acquisition reform" effort of the 1990's is the culture of collaboration which results in contractors being treated as constituents or "partners" to be indulged instead of a self-interested industry that is looking out for its own best financial interests – those of the seller, not the buyer. Contractors are obligated by their shareholders to attend to their private interests, which is precisely why the government must always safeguard the public interest. Contractors often have useful suggestions for solicitations, but such suggestions should not be adopted if they would reduce the level of competition. Ultimately, all contractors should be allowed to compete fairly under all of the requirements in the solicitation. A board of acquisition, legal, and program experts should review all solicitations anticipated to result in high-dollar awards.

4. **Promote competition between contractors.**
 - a. Appreciate the importance of a robust acquisition workforce. Overstretched acquisition personnel report that they are often directed, explicitly or implicitly, by resource-starved managers "to make things easy" by limiting competition. Right-sizing the acquisition workforce is an investment that will yield significant dividends—more staff leads to more competitive contracting, which in turn will yield savings to the taxpayers.

- b. Avoid procurement mandates. Acquisition personnel strongly discourage the use of procurement mandates which steer awards to particular contractors based on their characteristics rather than their capabilities. Although well-intentioned, these intrinsically anti-competitive mandates increase costs to taxpayers and facilitate sole-sourcing or at least the steering of awards to certain contractors.
- c. Limit the use of indefinite delivery / indefinite quantity contracts, including Government-Wide Acquisition contracts and Multiple Award contracts. Under these contracts, the government does not specify exactly which products or services it wants, but asks the contractor to be available to perform services or manufacture products if called upon, which is, effectively, as has often been observed, the equivalent of a hunting license. Acquisition personnel believe that such contracts are too easily undertaken and are intrinsically anti-competitive because they stifle small business competition.
- d. "Commercial items" should be those sold to the general public in significant quantities. The current definition—an item not necessarily sold to the public, but merely "offered for sale"—is inadequate. Earlier this summer, the DoD Inspector General recommended that the Department

“should issue guidance to establish a percentage of commercial sales that is sufficient to determine fair and reasonable prices when items are being acquired on a sole-source contract and market-based prices are used. The guidance should also require contracting officers to request ‘information other than cost or pricing data,’ to include cost data, if sales data are not sufficient.”

5. Get the contractors out of the contracting process.

Insource all acquisition functions which are inherently governmental or closely associated with inherently governmental functions. Acquisition personnel believe that the use of contractors to perform important acquisition functions drives up costs, promotes conflicts of interest, and undermines the integrity of the acquisition process.

Contractors should not perform functions that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.; evaluation of another contractor’s performance; support of acquisition planning; provision of assistance in contract management (such as where the contractor might influence official evaluations of other contractors); technical evaluation of contract proposals; assistance in the development of statements of work; participation as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board; or serving as arbitrators or providing alternative methods of dispute resolution.

Agencies should review their inventories of contract services, using the Panel for Documentation of Contractors model developed by the Army, in order to identify and then insource acquisition functions performed by contractors that are deemed inherently governmental or closely associated with inherently governmental functions.

SAVE THE COMMISSARY BENEFIT FOR AMERICA'S WARFIGHTERS

AFGE IS PROUD TO SERVE MILITARY FAMILIES: AFGE is proud to represent civilian employees who work for the Defense Commissary Agency (DeCA), which provides groceries and household goods through more than 250 commissaries to active-duty, Guard, Reserve, and retired members of all seven uniformed services of the United States as well as eligible members of their families at cost, plus a 5% surcharge.

WHY DECA WORKS SO WELL: Authorized customers buy items “at cost plus a 5% surcharge, which covers the costs of building new commissaries and modernizing existing ones. Shoppers save an average of more than 30 percent on their purchases compared to commercial prices—savings that amount to thousands of dollars annually when shopping regularly at a commissary,” according to the agency.

Per the American Logistics Association, commissaries provided military households in 2013 with \$2.7 billion in price savings and another \$200 million in income for military family members employed by DeCA; 90% of active-duty military families used the commissaries in 2012, helping to rack up almost 100 million customer transactions at DeCA. And as DeCA points out, as a core military family support element, and a valued part of military pay and benefits—according to surveys of military personnel— commissaries enhance the quality of life for America's military and their families, and help recruit and retain the best and brightest men and women to serve our country.

HOW THE PENTAGON WANTS TO, EFFECTIVELY, SHUTTER THE COMMISSARIES: DoD's FY14 budget included \$1.4 billion in funding for DeCA. For FY15, the Administration proposed, over three years, to permanently slash that funding to just \$400 million. In order to continue operations, including paying the salaries of its employees, DeCA would be forced to significantly increase costs to its customers. Instead of discounts, commissaries would be forced to mark up groceries and household goods. Of course, mark ups will make the commissaries less attractive to customers, eventually reducing DeCA's revenues, to say nothing of compromising its important mission.

The impact on the agency's workforce would be severe. Losing \$1 billion in funding annually means that DeCA would have to use increased revenues from marking up products to meet its payroll. DeCA officials have assured the civilian workforce that the agency would not as a result of the Administration's proposal become a non-appropriated fund (NAF) entity. (In NAF agencies, the size and compensation of the civilian workforce rises and falls on the basis of monthly sales figures.)

However, senior Pentagon officials have, off-the-record, acknowledged to AFGE that it is inevitable DeCA, after becoming largely dependent on falling sales revenues, becomes a NAF agency. And if DeCA's customers take their business elsewhere because the commissaries no longer offer a discount, the agency and its workforce would surely shrink. In fact, given that the basic reason commissaries exist is to give significant discounts to our warfighters and their families as part of their overall compensation package, DeCA is unlikely to survive if the commissaries are forced to mark up products in order to make up for the lost DoD funding. An internal legislative proposal prepared by DeCA in 2014 showed that the goal of the Pentagon's restructuring plan was to end DeCA as we know it. The commissaries would become just another bunch of stores, rather than a key part of the compensation package to warfighters. The new DeCA law would "plac(e the) emphasis on the ability to recover costs as being the primary factor for (a commissary's) existence, as opposed to needs of active duty members and their families or the welfare of the military community."

WHY COMMISSARIES SHOULD CONTINUE TO SERVE MILITARY FAMILIES: The Administration insists that in a time of downsizing DeCA must be run in a more business-like fashion. However, the commissaries are already inextricably intertwined with the private sector. The private sector supply chain of vendors contributes nearly \$500 million annually in discounts and services, according to ALA. Moreover, the number of commissaries has been reduced by 170 during the last 20 years because of BRAC. Finally, DeCA has passed audits for 13 straight years. How many other parts of DoD can we say every dollar spent is accounted for?

The Pentagon insists that no commissaries would be closed under its scheme, which proposes only to "reduce DeCA's subsidy". First of all, it's not a subsidy. Reduced prices on groceries and household goods available through the commissaries constitute an earned benefit, not a subsidy or a tip to military families. Moreover, slashing DeCA's funding by more than two-thirds would mean that the commissaries will have to eliminate their discounts and raise prices in order to survive. Inevitably, increased costs will lead to fewer customers, which will force all commissaries to base compensation and job status on falling revenues and many commissaries out of business.

The Pentagon's proposal would be as bad for military families as it is for DeCA employees. Military families wouldn't get any subsidies to make up for the loss of the crucial DeCA discount. The annual hit on those families would be as much as \$3,000 annually, according to some experts, especially for those who live in high-cost urban areas and in rural areas with few commercial alternatives. The entire rationale for DeCA's existence—to provide significant savings for military families on their groceries and household goods—would be cast aside. Indeed, military families would likely have no choice but to shop elsewhere, diverting from DeCA revenues that are vital in making up for the lost DoD funding. Inevitably, our compensation and, indeed, our jobs would be dependent on the revenues commissaries would try to generate from increasing the prices for their products. And how often in the real world do consumers buy more from businesses that raise their prices?

WHAT HAPPENED IN 2014 AND WHAT WE CAN EXPECT IN 2015: This is not the first time the budget-cutters have come after DeCA. Fortunately, DeCA enjoys broad support—from the private-sector vendors which supply the commissaries to the military families who can balance their budgets because of cheaper DeCA products to the hard-working and dedicated civilian workforce that makes DeCA an integral part of the compensation package for our warfighters and their families.

The Pentagon wanted to slash funding for the commissaries by \$200 million, but House-Senate conferees to the FY15 NDAA halved the cut and required that the Department study various commercial reforms to the system, including conversion to a non-appropriated fund entity. The long-term fate of the commissaries will be an issue in 2015, particularly upon the release in February of the report of the Military Compensation and Retirement and Modernization Commission.

PRESERVE DFAS TO KEEP FINANCIAL MANAGEMENT COSTS DOWN

AFGE is proud to represent the civilian workforce at the Defense Finance and Accounting Service (DFAS), which is responsible for paying all DoD military and civilian personnel, retirees and annuitants, as well as major DoD contractors and vendors. The agency is responsible for processing annually tens of millions of pay transactions, travel payments, commercial invoices, and General Ledger accounts, and transacting hundreds of billions of dollars of Military Retirement and Health Benefits Funds, disbursements, and Foreign Military Sales. DFAS is based in Indianapolis, IN; but it also has offices in Columbus, OH; Limestone, ME; Rome, NY; Cleveland, OH; Texarkana, TX; as well as in Europe and Japan.

WHY DFAS HAS BEEN SUCH A SUCCESS: In 1991, the Secretary of Defense created DFAS in order to standardize, consolidate, and improve accounting and financial functions throughout DoD. DFAS allowed the Department to reduce the cost of its finance and accounting operations while strengthening its financial management.

Consolidation has generated significant savings. According to DFAS, since its inception, the agency has consolidated more than 300 installation-level offices into 9 DFAS sites and reduced the number of systems in use from 330 to 111. As a result of BRAC efforts begun in FY 2006, DFAS has closed 20 sites, realigned its headquarters from suburban Washington, DC, to Indianapolis.

DFAS pays for itself—literally. The agency's operations are financed as a Working Capital Fund (WCF), rather than through direct appropriations, so DFAS charges its agency customers for the services provided. DFAS sets annual rates two years in advance based on anticipated workload and estimated costs calculated to offset any prior year gains or losses.

HOW THE ARMY WANTS TO BUST UP DFAS: Throughout the last two years, the Army has been engaged in intensive planning to pull out of DFAS in order to reconstitute its own financial management office which would be largely staffed by military personnel in various Army

installations across the world, an initiative it calls the Army Financial Management Optimization (AFMO). Currently, DFAS' civilian employee workforce performs work for the Army in Rome, Indianapolis, and Limestone. DFAS's own internal estimate is that implementation of the Army's plan would cost more than 600 jobs in Rome and at least 1,800 jobs in Indianapolis.

AFMO initiative planning is already very far along. Of the 31 financial management functions performed by DFAS in whole or in part, the Army has already recommended that DFAS be allowed to retain exclusively just two of those functions. The Army has also already identified at least six Army facilities that would perform DFAS work if the Army deems the pilot project to be a success. Army planning documents consistently plan for bottom-up consolidation of financial management transactional activities within the dozen hubs and transfer of transactional activities currently provided by DFAS to the Army. Moreover, work is already shifting from DFAS to the Army's Fort Stewart.

After expressions of Congressional concern which were inspired by AFGE's own DFAS Council, the Army claims that no decisions will be made until the pilot project has been evaluated. However, given the extent to which the Army has already planned for the wholesale transfer of functions from DFAS to the Army, it is doubtful that the Army's analysis of the results of the pilot project will be independent and objective.

Moreover, it is not clear that the Army will consider the substantial start-up costs that would inevitably be required if the Army reconstitutes its financial management operation, particularly those associated with training an entirely new workforce. The compelling rationale for DFAS' creation is that significant savings are possible through the consolidation of financial management functions for various parts of DoD in a single entity. Nothing relevant has changed since the establishment of DFAS that would undermine the rationale for its establishment. The bottom line is that the Army can't save money for the taxpayers by duplicating DFAS' already existing capacity because consolidation has lowered costs.

Indeed, performance of financial management functions by the Army would cost more because the Army plans to use military personnel to staff its version of DFAS. Because of their justifiably superior compensation, military personnel cost more than civilians and contractors. Of course, using military personnel to perform financial management functions decreases readiness as well as increases costs. Permanently converting financial management functions from civilian to military is not just contrary to policy issued by the Secretary of Defense's Office of Personnel and Readiness but also to written commitments made by Army Secretary McHugh to AFGE National President J. David Cox, Sr., that any substitution of military personnel for civilian personnel would be short-term and temporary.

HOW THE ARMY IS ALREADY ARBITRARY SHIFTING FUNCTIONS FROM CIVILIAN TO MILITARY PERSONNEL: DFAS appears to be inhibited or prevented from replacing vacancies in its civilian employee workforce because of a cap, ceiling, or target. DFAS has, increasingly, particularly at its Indianapolis office, filled vacancies in the civilian employee workforce with reservists under the authority of the Personnel Force Innovation (PFI) program. Under this program, DFAS can

use Working Capital Funds (WCF) to activate reservists to fill critical manpower needs when active duty personnel are not available.

DFAS is using PFI—as “a temp agency” in the words of an agency representative—to fill gaps in the civilian workforce which occur normally through attrition, which is inconsistent with the program. The terms of PFI require DFAS to make determinations that use of military personnel is value-added or cost effective vis-à-vis using civilian employees or contractor employees. The PFI Order Form also requires an agency official to certify that “using the PFI program provides greater value or is less costly than obtaining contractor or civilian employees”. However, DFAS has failed to make such determinations and certifications.

DFAS’ use of PFI also appears to be inconsistent with DoD guidance, under which military personnel are prohibited from performing non-“military essential” functions unless (1) there is a demonstrated and documented need to do so (such as recruitment, retention, or career development); or (2) extraordinary, and typically temporary, circumstances exist. In either case, DoD must perform a formal cost comparison and document the need for utilizing military personnel. It is imperative that Congress investigate DFAS’ apparent abuse of the PFI program and insist that the agency abide by the terms of the program as well as DoD’s own guidance that govern civilian-to-military conversions.

WHAT HAPPENED IN 2014 AND WHAT WE CAN EXPECT IN 2015: An attempt to rationalize the practice of converting functions performed by civilians and contractors to military performance was killed because of opposition from the Senate Armed Services Committee. The discarded bipartisan House FY15 NDAA provision, which would have essentially codified current Pentagon and recent Army policies would have prevented the Army from converting work performed by civilian DFAS employees to military performance, absent a finding that such conversions would have been cost-efficient.

House-Senate conferees to the FY15 NDAA did direct the Office of the Secretary of Defense to review the Army’s pilot project underway and the Comptroller to review any proposal in the short-term future to permanently transfer work out of DFAS. The FY15 Defense Appropriations Bill included report language that prohibits DFAS from transferring its functions to another agency until the secretary of defense provides a report and certifies that the plan would save money and increase efficiencies. The Army appears committed to shifting significant amounts of work from civilian personnel to military personnel, regardless of costs, and to the AFMO initiative specifically. Firm Congressional action will be necessary next year in order to prevent the Army from busting up DFAS and needlessly increasing costs to taxpayers of financial management functions.

RETAIN THE A-10 WARTHOG AND ENSURE CLOSE AIR SUPPORT

AFGE SUPPORTS AND MAINTAINS THE A-10: AFGE is proud to represent hundreds of civilian employees who support and maintain the A-10 Thunderbolt II, aka “the

Warthog”, at installations across the nation, including Davis-Monthan (AZ), Eglin (FL), Moody (GA), Nellis (NV), and Whiteman (MO) Air Force Bases as well as Selfridge (MI) Air National Guard Base.

The Air Force includes almost 300 A-10 Warthogs, which were designed during the late 1970s and early 1980s specifically to support ground troops in close proximity to enemy forces. The A-10 Warthogs are protected by 1,200 pounds of titanium armor and they can use GAU-8 Avengers—a 30mm rotary cannon, the heaviest such weapon ever mounted on an aircraft—to destroy enemy tanks. In fact, the A-10 was credited with destroying more than 900 Iraqi tanks in the first Gulf War and has been a close air support mainstay in the Iraq and Afghanistan wars.

WHY THE A-10 IS SO IMPORTANT: The A-10 has been and continues to be the principal plane in the Air Force for close air support. Wherever close air-ground cooperation has occurred, close air support has been overwhelmingly successful in saving the lives of troops in contact with the enemy, greatly reducing the "friendly fire" events that devastate units at the morale, mental and physical levels, and achieving operational victory.

Because of their inherent vulnerability, maneuverability and other limitations, the helicopters in the Army and Marine Corps, the Short Take Off and Vertical Landing jets of the Marines Corps and "fast mover" fighters and bombers of the Air Force cannot replicate the capabilities of the A-10.

It is no wonder that Army grunts on the ground revere the A-10 Warthog. No other plane can fly low and slow enough to find targets independently, distinguishing real targets from civilians and friendlies, and then employ an effective, precise weapon—usable when the enemy is just ten yards from friendlies and with enough ammunition for ten to twelve firing passes.

During a Senate Armed Services Committee in November 2013, General Raymond Odierno, the Army Chief of Staff, testified, “The A-10 is the best close air support platform we have today...it's performed incredibly well in Iraq and Afghanistan.”

WHY THE PENTAGON WANTS TO RETIRE THE A-10: The Air Force has long been determined to get rid of the A-10 Warthogs. In the Administration’s FY15 budget proposal, Secretary Hagel announced that the Air Force would retire the entire fleet of A-10 Warthogs, claiming savings of \$3.5 billion over five years. The A-10 Warthogs will eventually be replaced with the F-35.

Hagel insisted that “the A-10 is a 40-year-old single-purpose airplane originally designed to kill enemy tanks on a Cold War battlefield; it cannot survive or operate effectively where there are more advanced aircraft or air defenses. And as we saw in Iraq and Afghanistan, the advent of precision munitions means that many more types

of aircraft can now provide effective close air support, from B-1 bombers to remotely piloted aircraft, and these aircraft can execute more than one mission. The A-10's age is also making it much more difficult and costly to maintain.”

WHY THE ADMINISTRATION’S RECOMMENDATION SHOULD BE REJECTED: Here is an important excerpt from a bipartisan, bicameral November 2013 Congressional letter to Secretary Hagel in support of the A-10 Warthog:

“An Air Force plan to divest A-10s may be based on two questionable—and potentially dangerous—assumptions. The first assumption is that the United States will not be fighting wars like Operations Iraqi Freedom and Enduring Freedom in the future. While we hope the U.S. can avoid such conflicts in the future, should they emerge unexpectedly, we have an obligation to ensure that our service members have the best resources at their disposal. The United States has had a poor track record predicting conflicts. When the U.S. military enters a conflict without sufficient training, resources, and capabilities, the cost is measured in the lives of our brave service members. We have a responsibility to not make those mistakes again.

“The second assumption related to A-10 divestment appears to be that other aircraft currently in the Air Force inventory can replace the CAS capabilities of the A-10. The F-15, F-16, B-1, and B-52 are incredibly effective aircraft that are important components of the Air Force inventory, yet none of these aircraft can fully replace the capabilities and focus of the A-10 in many CAS situations. Technological advancements in weapons and sensors will not make a “multi-role” aircraft designed for other missions—and with a pilot who only spends a portion of their time training for CAS missions—comparable to the A-10, an aircraft and crew with a singular focus on CAS missions. Experience in Iraq and Afghanistan clearly demonstrate the A-10’s well-documented capability to operate effectively in combat below 800 foot ceilings/2 miles visibility and still provide effective CAS within 50 meters to save the lives of our troops when engaged in close combat with the enemy. In fact, the ability of the A-10 to operate in these conditions close to the point of engagement often results in faster re-attack times and lower civilian casualties.”

WHAT HAPPENED LAST YEAR: The House version of the FY15 NDAA included strong language to prevent the Pentagon from going forward. The Senate’s slightly weaker language was ultimately retained, which substantially protects the fleet, allowing the Department to retire 36 Warthogs, or slightly more than one-tenth of the fleet.

WHAT COULD HAPPEN NEXT YEAR: Disposition of the fleet will likely be an issue in 2015, even as A-10s are being deployed to Iraq to battle ISIS militants. Senator John McCain (R-AZ), the Chairman of the Armed Services Committee, told civilian and military personnel

at Davis-Monthan in December that, “The A-10 is the most capable air-to-ground weapon system that is in the entire inventory. I think they will be with us for an extended period of time.”

CAREFULLY CONSIDER THE CONSEQUENCES BEFORE UNDERTAKING NEW ROUNDS OF BRAC

AFGE-represented DoD facilities must prepare for the possibility of a future Base Realignment and Closure (BRAC) round, minimizing the risk for closure of specific facilities and enhancing the chance for survival in the event of a closure or realignment recommendation from DoD or additional scrutiny called by a Commission. It is important to align AFGE Locals with their communities and other interested parties so that the public understands the importance of the military facilities and government employees to their regions.

The political environment is not favorable for federal employees, particularly for those working in DoD facilities. After more than a decade of war, the defense budget is being reduced dramatically as result of sequestration and the removal of troops from Iraq and Afghanistan. In some sectors of the military services, we have already seen civilian reductions of more than 30% at some bases and the totals are climbing. Across the board, planned civilian downsizing will exceed the cuts to military and contractor workforces between now and FY 2019. And this is before sequestration! In the absence of some sort of budget agreement to remove the threat of sequestration, the threats only mount. Failure to reach agreement on a greater long-term budget agreement put DoD at risk for almost another half trillion dollar series of across the board spending cuts over the next several years of sequestration. Each impacted Secretary of Defense has characterized sequestration as devastating to the US military force structure, personnel and infrastructure.

The President’s FY15 Budget requested a BRAC round in 2017 and estimated costs of \$1.6 billion through FY19, but savings of \$1.6 billion to begin in FY20. For several years, DoD military and civilian leadership have estimated that the Department has between 20% to 25% excess capacity based on the status following BRAC 2005. As budgets have tightened, senior military leadership calls for BRAC have escalated with each of the military service chiefs indicating their active support and stating the absolute necessity of a BRAC to manage the size and scope of the budget cuts facing DoD. In the FY15 DoD budget proposal, DoD stated that BRAC is needed to accomplish civilian workforce reductions (presumably in compliance with Section 955 of the FY13 NDAA beyond in some cases) and to garner future, multi-year savings. The Strategic Review included BRAC as a centerpiece and the Quadrennial Defense Review (QDR) followed suit. Further, multiple think tanks across the ideological spectrum are calling for another BRAC round as part of their assessments of the actions necessary to downsize DoD in the current and future budget environment. The services, and particularly the Army, have stated that they plan to invest in larger, more established bases and rid themselves of older infrastructure.

With few exceptions, congressional reaction to the updated BRAC proposal from the President has continued to be almost universally negative—at least publicly. Once again, for FY15, the NDAA cut funding for BRAC planning and forbid a BRAC. However, most offices and Members acknowledge that a BRAC is a matter of when, and not if, at this point.

AFGE Locals at DoD facilities should begin now to protect their jobs by strengthening the military value and the political position of their military bases. Regardless of protestations to the contrary, BRAC is political at every stage of the process, beginning with the development of the initial list of bases for closure proposed by the military services and ending with the vote of the BRAC Commission. On the other hand, there are factual, data-driven components that are considered with significant weight when determining military value. The specific elements that will be considered in the military value of facilities will be unknown for some time; however, history has shown certain areas are always factors such as cost, efficiency and military necessity based on mission and unique capabilities. Other intangibles, such as quality of life, are always considered. AFGE members should unite to address these factors in a systematic manner.

There are several steps that union members can take to strategically prepare for BRAC to protect jobs and military bases from closure or major realignment. NVPs and other regional and national leaders should assist locals in identifying ways to showcase individual military facilities. Competition should be limited to non-AFGE represented bases to the greatest extent possible as DoD looks at military value from a cross-service perspective.

- a. Energize and Organize Elected Officials: Your elected officials at every level of government will be important to saving your base from closure. All of the “easy” bases to close have been shuttered. No base is completely safe and many are extremely vulnerable. Elected officials can influence the Pentagon decision-makers and eventually BRAC Commissioners, but they need to be armed with facts rather than just good intentions – although they must have good intentions.

First, if you do not know your Member of Congress and your Senators in Washington, introduce yourselves and your military facility to him or her and the staff. If they are not naturally friendly towards unions, use your local elected officials to help you gain an entrance to their offices. Have your Member of Congress or Senators seek information on your projected workload, have them ask questions about the calculation of your rates if you handle industrial work; keep them involved with the military on behalf of your base. Encourage your elected officials to become involved with the Pentagon in support of your facility – this is especially important for those bases represented by Members who do not serve on one of the Defense Committees.

Get to know your local elected officials at the community, regional and state levels. Just as you will your Washington officials, make them aware of any potential threat to your facility as a result of a force structure change, reduction in personnel, weapons system cancellation or reduction, functional merger or other sentinel

event. Have your local officials pass resolutions of support for your military facilities and the civilian and military personnel who work on base and transmit these resolutions to Washington. These elected officials should participate in any community hosted meetings with senior DoD personnel.

b. Partner with Your Local Chamber of Commerce and Prominent Civic

Organizations: Military facilities have a huge multiplier effect in terms of the economy of any community. Depending on the type of facility, the ratio could be estimated as high as approximately 4:1. Federal facilities produce a strong middle class for most host communities and are greatly appreciated, as are the people who work at the base.

Local Chambers of Commerce generally recognize the strong economic impact of a military facility and the economic engine provided, creating many jobs in the private sector. Many Chambers have Military Liaisons totally focused on the military bases, while others have designated officials who regularly communicate with base leadership. AFGE Locals, if they have not already, should initiate a relationship with their local Chamber of Commerce to establish a unified grass-roots campaign to protect the local facility from downsizing and BRAC. Inform the Chamber of any impending personnel reductions, workload losses, and adverse events that impact civilian and/or military employees at the base. Work with the Chamber of Commerce to develop promotional material that can be used to brief senior DoD officials on the benefits of your facility. Encourage the Chamber to host higher command and Pentagon briefings on the surrounding area and your facility and participate in those meetings. Identify senior or highly decorated military members in your local area and have them begin networking on behalf of your facility. The same is true for retired senior civilian leadership. Seek support from local educational outlets, particularly universities and community colleges. They are particularly helpful in providing economic data on the benefit of the base to the local economy. Identify issues and allies from past BRAC rounds.

Encourage positive media attention regarding your facility, the work completed by the civilian workforce and the value of the base to the community. Newspaper articles are often included in the daily summary distributed throughout the Pentagon so having your local paper write positive stories has a constructive purpose. Public interest pieces work almost as well as hard news stories to produce a good reputation. Television news stories are also important for capturing the attention of your local politicians and the members of your community in terms of building popular support.

Get the community involved now in promoting the benefits to the military of your facility – they can help you fight BRAC actions aimed at your base.

- c. Work with Management: First and foremost, military leadership tries to protect those bases that they view as good, solid bases with a content, reliable workforce and look for ways to close those that they feel are problematic. A reputation for poor labor-management relations is one of the fastest ways to have your facility targeted for closure. Both management and labor must work together to overcome difficulties for the sake of the workforce and the community.

Local facility management will be directed to supply information to higher command on specific elements related to military value, usually in formats that can be related to efficiency, cost, capability and unique capacity. Insight into the questions being asked and the answers submitted provide great assistance in preparing a facility to fight a base closure recommendation. Often questions are subject to some level of interpretation, requiring judgment in the answers. It is important to know the mindset of the local military leadership and positively influence it as we as answers to questions as much as possible. Strong, open communication is crucial since much of this information is conveyed to Commanding Officer and staff in a confidential format. Discretion is a virtue.

Therefore, now is the time for AFGE Locals to build management relationships with both senior career and military leadership.

- d. Maximize Strengths and Minimize Weaknesses: Encourage quality work and efficiency on the part of union members. Their jobs may depend on the reputation of their work. As much as it is up to you, increase your competitive edge and reduce your rates in working capital funds if that applies to your Local. Know your competitors both in industry and the military and do a better job than they do. Develop your best arguments for saving your facility. Educate AFGE district personnel of the importance of your facility and the threat of BRAC. Do your part as individuals to save your base.

AFGE Locals can and must take positive action now to minimize the impact and size of BRAC actions by strategically addressing specific elements where senior DoD officials have the ability to make choices between facilities and/or programmatic decisions. The actions with the greatest probability of success in reducing the number of civilian personnel job losses at DoD are those that are taken in advance of any adverse decision. From a historical perspective, military facilities enjoying the greatest across-the-board unity between all elements of the community and political spectrum are the ones who have been the most likely to survive a BRAC threat. Political activism and early involvement by base employees have been critical elements of success. AFGE Locals can and should take steps now to reinforce their facilities and save jobs.

WHAT HAPPENED LAST YEAR: Both the House and Senate declined to authorize a new BRAC round in FY15 and cut \$4.8 million from the Secretary of Defense Operations and

Maintenance account to prohibit funding for a study of a new BRAC round. The House version of the FY15 NDAA included a provision requiring DoD to submit with the FY16 budget two force structure plans (one compatible with the QDR and one aligned to the sequester law) and an inventory of all installations worldwide, along with an assessment of infrastructure needed to support the force structure plans; an assessment of excess infrastructure based on the inventory and force structure; justification for possibly keeping excess infrastructure; and economic impact of closures. This language was modified in conference to less specific report requirements. The new report requirements are less specific, and therefore less open to criticism that the findings would provide ammunition for a future BRAC round.

WHAT COULD HAPPEN NEXT YEAR: AFGE should expect that the Administration will once again request a BRAC round for FY17 or beyond to deal with perceived excess infrastructure based on the new national military strategy. Additionally, officials from the DoD Office of Installations and Environment have stated that DoD plans to implement the congressional guidance for a study, so we should expect some sort of infrastructure capacity study that outlines and quantifies excess capacity across the military services—though it will not be as specific as the one originally mandated by the House.

Further, DoD recently announced a number of base closures in Europe so we should expect DoD to tout those closures and realignments as further justification for domestic closures in the United States. Only one of the top four leaders of the HASC and SASC remain in place for the coming year; however, Congress may continue to oppose BRAC for the moment, while beginning to give some indication for future support. The incoming Chairman of the House Armed Services Committee has stated that he is uncomfortable with approving a BRAC until he has a clearer picture of the roles and missions of BRAC; however, he was quick to say that he was not saying “NEVER BRAC.”

PRESERVE AND PROTECT DOD’S INDUSTRIAL FACILITIES

Congress and the Administration must preserve our organic industrial base—our nation’s government-owned and government-operated depots, arsenals and ammunition plants—as DoD shifts military strategy and embarks on a major drawdown of force structure. The Administration’s stated commitment to preserve the defense industrial base must extend to the organic industrial base. It is vital that the House and Senate continue to affirm Title 10 statutory provisions that assure the viability of an organic logistics and fabrication capability necessary to ensure military readiness.

AFGE agrees with long-held public policy that it is essential to the national security of the United States that DoD maintain an organic capability within the department, including skilled personnel, technical competencies, equipment, and facilities, to perform depot-level maintenance and repair of military equipment, as well as fabrication and manufacturing capabilities at our arsenals and ammunition plants, in order to ensure that the Armed Forces of

the United States are able to meet training, operational, mobilization, and emergency requirements without impediment.

The organic capability to perform depot-level maintenance, repair and production/fabrication of military equipment and ammunition must satisfy known and anticipated core maintenance and repair scenarios as well as retain key manufacture capabilities across the full range of peacetime and wartime scenarios.

The statutes that require this core capability and others, such as designation of a 50% floor for depot maintenance work by civilian employees of DoD, and protection of the organic industrial manufacturing base through the Arsenal Act, have kept our nation secure and our core defense skills protected and should continue to be supported and strengthened. AFGE opposes establishment of an outside commission or panel of private industry analysts to review Chapter 146 of Title 10 for a major overhaul because of the inherent lack of impartiality to be found on such a panel.

For FY16 Congress must designate a core workload for arsenals and ammunition plants or at a minimum provide enforcement tools for the Arsenal Act to strengthen the manufacturing arm of our organic industrial base. This workload should not come at the expense of workload already being performed by the Army organic sector. The intent is not to pit facilities against each other or to shift work from one organic facility to another, but to have arsenals perform the work that is critical to our national defense, where there is no domestic manufacturing, fabrication or production capability or very limited supply available at a reasonable cost.

AFGE applauds the Appropriators and the Congress providing Industrial Mobilization Capacity (IMC) funding for arsenals to reduce rates and improve efficiency to enable competitiveness and support continued funding in FY16. As importantly, we urge the Administration and the Army to seek expanded and non-traditional new manufacturing opportunities to meet the workload levels determined as the amount necessary to be efficient in accordance with the Army Organic Industrial Base Strategy Report.

AFGE also opposes DoD and the military services using sequestration, funding uncertainties, furloughs, and arbitrary civilian personnel cuts and caps as an excuse to breach the 50/50 depot maintenance law or to circumvent fully meeting core requirements. Congress made it clear in FY15 that it expects DoD to fully comply with 50/50 statute and the investment in the upgrade and maintenance of organic depots and AFGE fully applauds those efforts. However, AFGE remains very concerned about the ongoing reports of personnel caps and arbitrary cuts at organic depots. These cuts undermine the integrity of the working capital fund and the statutes in Title 10 that require that depots and depot personnel be managed to workload and budgets rather than end strength.

In addition to opposing arbitrary personnel ceilings, AFGE strongly supports legislation in FY16 that would eliminate sequestration related furloughs, which are devastating to military readiness and to civilians and their families. This is especially true of the unnecessary furlough

of working capital fund employees, who are not paid through direct appropriations, but rather through customer orders. In FY15, the House passed legislation prohibiting the furlough of any employees whose work is charged to a working capital fund as long as there is money in the working capital fund to pay for the workload. While in the end, only report language survived in the NDAA, AFGE asks that similar bill language be enacted in FY16.

Under this legislation, before the Secretary of Defense or of a military service could furlough a working capital fund employee, he/she would have to certify to Congress that no funds are available in the working capital fund and that the workload will not be transferred to the private sector, uniformed military or any other civilian workforce. This amendment makes the furlough provision permanent rather than specifically tying to sequester budget cuts; however, it would also apply to sequester furloughs. Furloughing working capital fund employees saves no money because they are funded through customer orders in a revolving fund and not directly through appropriations. For example, depots and arsenals would not have had to furlough workers the previous summer because they had sufficient funds and workload.

During the shutdown furlough in 2013, working capital fund employees were exempt even if their work was not considered excepted. The furloughs cost more money than they saved in many cases by increasing overhead and raising rates plus delaying delivery of orders. In some cases work was transferred from government facilities to higher priced contractors in violation of multiple statutes. The military services are still complaining of large backlogs caused by the furloughs ordered by the Secretary of Defense—even 18 months after the fact! This legislation is common sense. It doesn't prevent a furlough if a program runs out of money. It only prevents a furlough if there is money available.

As Congress and the Administration consider Acquisition Reform, AFGE urges Members, especially those who support depots and arsenals, to be on alert for unintended consequences and impacts to organic depots, arsenals and ammunition plants. Issues of special concern include: encouraging the blanket use of Performance Based Logistics (PBL) contracts, which call into question the whole issue of government control and government owned workload and have been used in some cases as an excuse to move work from organic facilities to contractors in spite of protestations to the contrary by DoD; streamlined acquisitions that fail to create programs of record, thus circumventing milestones and criteria that are the “hooks” in statute, policy and direction to bring core and new workload into the organic depots; ownership of so-called intellectual property (IP), which impacts the ability for depots to secure and obtain unfettered access to data rights necessary to maintain and overhaul weapons systems and components (examples exist where they can have the data, but can't “see” it because of technicalities); and accounting for core and workload that is designated at the very “minimum” versus the statutory definition of “efficient”.

Further, depot and arsenal advocates must continue to watch closely the workforce numbers and the arbitrary constraints on the workforce. In spite of exemptions from the cuts imposed by Section 955 of the FY13 NDAA, requiring a reduction in the percentage of civilian personnel equal to the percentage in military personnel, depot personnel across DoD have been reduced

at a greater rate than the average for all DoD personnel, including those who were not exempt from the reductions and exceeding the rate of military personnel. The reductions in this workforce far exceed the reductions for any other group of exempt employees. When combined with DoD comments about the need to get at depot employees and depots and arsenals for BRAC, Members of Congress should be very concerned about Administration actions. This is in spite of DoD reporting an uptick in the funding for commercial depot maintenance and the fact that the DoD comptroller has reported that contractors cost more than 2 times as much as having work completed by civilians.

In summary, an analysis of historical data reveals that organic depot level maintenance, as well as arsenal and ammunition plant manufacturing capability may provide the best value to the American taxpayer in terms of cost, quality and efficiency.

To preserve our military readiness, the department should sustain the organic capability and capacity to maintain and repair equipment, including new weapons systems within four years of Initial Operating Capability, associated with combat, combat support, combat service support, and combat readiness training.

To ensure the efficient use of organic maintenance, repair and production capacity, as well as best value to the taxpayer, the department must effectively utilize its organic facilities at optimal capacity rates. Not only does this strategy reduce costs, it returns taxpayer dollars to the community as economic multipliers for industrial jobs are almost double those for almost any other sector, creating on average three jobs for every one – certainly a priority in this economic climate.

Further, the department must sustain a highly mission-capable, mission-ready maintenance, arsenal and ammunition plant workforce; therefore, depot, arsenal and ammunition plant personnel must be managed to funding levels and not by artificial civilian end-strength constraints.

AFGE believes it is important to recall that our organic depots and industrial facilities are essential to ensuring the success of the military warfighting mission. During downsizing, DoD must protect those functions necessary to ensure readiness and defend the United States and our allies during periods of armed conflict. These government-owned, government-operated, facilities, employing government personnel, meet defense requirements effectively and efficiently; are highly flexible and responsive to changing military requirements and priorities; produce the highest quality work on critical systems; meet essential wartime surge demands; promote competition; and sustain critically needed institutional expertise.

WHAT HAPPENED LAST YEAR: The Senate version of the FY15 NDAA changed the Arsenal act to now prohibit the Secretary of the Army from closing any arsenal that he deems unnecessary without any restraint. This closes a loophole in the law and puts arsenals back on even footing with other DoD facilities. Further, the FY15 Omnibus Appropriations bill contained \$225 million in funding for Industrial Mobilization Capacity (IMC) to help

arsenals keep their rates competitive. This helps arsenals compete more effectively for workload to sustain capacity, cost efficiency and technical competency.

Efforts to establish a Commission to review depot laws and to undermine Title 10 depot-specific requirements were successfully rebuffed to the point that they were never considered publicly. The House version of the FY15 NDAA and the House Appropriations version of the FY15 Defense Appropriations Act required greater auditing of reports that the military services provide on 50/50 compliance to be sure that there is full documentation of all dollars spent in the private sector and not guesstimating that underestimates the total cost of contractor dollars spent. Also, both the Senate authorizers and appropriators expressed concern that the military services were failing to meet their statutory obligation to fund capital investments to modernize depots at 6% of the budget and directed DoD to comply with Title 10. Both initiatives sent a strong signal to DoD that Congress continues to support depots, including a robust workload and technological modernization, and expect DoD to comply with the law.

The House passed an amendment to the FY15 NDAA that prohibited the non-disciplinary furlough of any employee whose salary is charged to a working capital fund (WCF) as long as there is money in the working capital fund to pay for the workload. Before the Secretary could furlough a WCF employee, he/she would have to certify to Congress that no funds are available in the WCF and that the workload will not be transferred to the private sector, uniformed military or any other civilian workforce. This amendment would have made the furlough provision permanent rather than specifically tying to sequestration budget cuts; however, it would also apply to sequestration furloughs. In conference the House and Senate decided to change the amendment to report language urging the department to abandon furloughs of all employees and especially condemned the furlough of WCF employees.

WHAT COULD HAPPEN NEXT YEAR: WCF furloughs will likely be an issue in 2015 and it is possible that an amendment will be offered to either the FY16 National Defense Authorization Act or the FY16 Defense Appropriations Act or both. As the House and Senate Armed Services Committees, as well as the Department of Defense, pursue acquisition reform, Locals and Members representing arsenals and depots, as well as ammunition plants, must be on alert for provisions and policy directives that would either strip or downgrade protections in statute such as 50/50, core, A-76 prohibitions, etc.; provisions that would prevent the public sector from competing for manufacturing or maintenance workload; provisions that fail to secure necessary data rights in order to work effectively on warfighting platforms; or provisions that mandate logistics and sustainment strategies that have negative long-term impacts on the organic industrial base. Funding shortfalls may be expected in some areas based on budget cuts.

Department of Veterans' Affairs

Introduction

In 2015, AFGE and the National VA Council (AFGE) will work with lawmakers and veterans' groups to increase access to VA health care services, reduce the claims backlog through improved performance standards and increased oversight of the Veterans Benefits Management System (VBMS), extend equal representational rights to VA Title 38 clinicians and veterans' canteen personnel, "modernize, not downgrade" by aligning support personnel job classifications with the VA's 21st century customer service mission, curb illegal contracting out, increase security at VA facilities and extend veterans' preference appeal rights to all veterans in the VA workforce.

Equal Representational Rights

Bargaining Rights for Title 38 Health Care Professionals

The lack of equal bargaining rights for VA physicians, registered nurses and others covered by the VA's arbitrary and abusive "7422" policy (interpreting 38 USC §7422) is directly undermining Secretary McDonald's laudable physician hiring initiative, and similar efforts to recruit other clinicians. High turnover and low morale also are a direct result of the VA's use of Section 7422 to intimidate, harass and silence dedicated clinicians by refusing to come to the bargaining table with labor over routine matters regularly bargained by other health care employees with full Title 5 bargaining rights (e.g. VA Hybrid Title 38 ("Hybrid") employees, and clinicians in DoD facilities and other federal facilities).

Why does the VA single out one group of clinicians (physicians, dentists, registered nurses (RN), physician assistants (PA), podiatrists, optometrists, chiropractors, and expanded-duty dental auxiliaries) for this unfair treatment while affording *full* bargaining rights to nearly 40 other health care positions? Why have all VA secretaries since 2003 ruled in favor of management (and against the union seeking to negotiate over these routine matters) in virtually *all* cases? The reason: VA secretaries are rubber stamping the recommendations of labor relations specialists who use this unintended loophole in Title 38 bargaining law to violate agency policies on pay, schedules, assignments, training, workload and numerous other matters *without any accountability*. Many of these Secretary determinations are directly inconsistent with VA's own revised 7422 policy (issued in 2011) allowing bargaining over violations of agency regulations and policies.

The VA needs to return to the common sense 7422 policies in place prior to 2003, when labor and management operated under an agreement that vastly reduced the number of labor management disputes and fostered valuable collaboration on innovations in health care delivery.

Congressional Action Needed:

- Enact legislation to amend 38 USC §7422 to restore equal bargaining rights to Title 38 health care professionals.
- Ask Secretary Robert McDonald to reconsider “7422” determinations made since issuance of its revised 2011 policy that involve assertions of that agency regulation or policy were violated.
- Ask Secretary McDonald to improve retention and workplace morale by adding to VA’s “7422” policy language from the prior labor management agreement permitting bargaining over routine scheduling and compensation matters.

Fair Treatment of Veterans Canteen Service Employees

The Veterans Canteen Service (VCS) is the sole provider of retail, food and vending operation at almost all VA medical facilities. VCS operates with non-appropriated funds. Its 3000 employees are “at-will employees” because they are hired under a separate section of Title 38 that does not provide them with any appeal rights when management terminates their employment.

This lack of basic rights and permanent job insecurity has led to an environment of fear and abuse in many VCS workplaces. Employees facing discrimination, harassment and false allegations of misconduct will never have any real recourse as long as they remain at-will employees who can be summarily fired.

The canteen workforce is comprised of a disproportionate number of women and minorities who are often paid less than other VA employees performing the same duties, especially in food service.

Recent legal challenges have confirmed that a legislative fix is needed to change the law in order to provide basic rights to this vulnerable workforce.

Congressional Action Needed:

- Introduce legislation to amend Title 38 law to provide Veterans Canteen Service employees with the same right to appeal their terminations through the grievance process as other federal employees.

VA Benefits Issues

Last year, the wait list scandal in the Veterans Health Administration (VHA) prompted several congressional hearings on the Veterans Benefits Administration’s (VBA) manipulation of backlog numbers and arbitrary performance goals. AFGE continues to work to expose management data manipulation and other areas that hide real claims processing problems in VBA. In order to have a significant impact on reducing the claims backlog, VBA must hire significantly more claims processors.

AFGE will continue to work to fix unfair performance standards and a broken work credit system through legislation and discussions with VBA. Employees consistently do not receive adequate if any credit for many tasks they perform on a daily basis. VBA's performance standards for employees are based on arbitrary metrics that do not accurately measure an employee's ability to perform his or her job. AFGE urges Congress to mandate a scientifically valid time motion study of the tasks VBA employees complete on a regular basis in order to develop a fair work credit system. Recently, President Alma Lee had discussions with Undersecretary Allison Hickey about the current performance standards, which the Undersecretary agreed were "unattainable." AFGE and VBA created a working group to discuss a new performance standard system, but additional Congressional pressure will be necessary for accountability and compliance from VBA. AFGE urges Congress to introduce legislation to mandate a scientifically valid time motion study to determine how long each claim and task take to complete.

AFGE remains focused on preventing contracting out of veterans' benefits cases, particularly in regards to dependency claims. Last year, VBA contracted out dependency claims, which the agency justified due to a high backlog. However, VBA employees were specifically told to not focus on those claims, creating an artificial backlog. The dependency claims from the contractor often do not have the correct effective date among other issues, so every case must be checked and often reworked by federal employee claims processors. This is a waste of taxpayer money. AFGE urges Congress to provide oversight on future contracting out of claims and work to bring dependency claims back in house.

Congress must implement changes for VBA's new claims processing system, the Veterans Benefits Management System (VBMS). VBMS is now implemented in every Regional Office nationwide, yet major problems continue on a daily basis. VBMS still does not work with other systems and employees are constantly provided "work arounds" for problems with the system. AFGE urges Congress to require VBA to create an effective feedback loop for employees to provide insights and suggestions for improving the system.

AFGE remains concerned about the backlog of veterans' appeals cases and the lack of attention VBA places on appeals. Decision Review Officers are regularly removed from working on appeals and required to work initial claims, while veterans appealing their cases wait years for a decision. AFGE urges Congress to investigate the appeals process at Regional Offices and require VBA to report appeals data in the Monday Morning Workload Report.

Congressional Action Needed:

- Pass legislation requiring a scientifically valid time motion study of VBA's work credit system
- Conduct greater oversight of VBMS technical issues and mandate a formal, permanent process for regular input from AFGE and frontline employees for reporting issues and finding solutions for issues with VBMS

- Provide oversight of the current dependency claims contract and mandate VBA compliance with federal laws prohibiting direct conversions and other illegal contracting out
- Require VBA to report total appeals pending in VBA's Monday Morning Workload Report

VA Downgrades

Approximately six years ago, the VA began an initiative to downgrade low wage positions at VA medical centers, including the vast majority of positions that employ large numbers of service-connected disabled veterans. The pace of these downgrades accelerated over time, spreading to more facilities and medical center positions as well as a few positions in VBA regional offices. Between 2008 and 2012, approximately 1,600 low wage VA employees lost pay, retirement benefits, future promotion opportunities and job security as a result of downgrades.

In February 2013, the VA announced a plan to reclassify workers in 17 occupational series that would impact 14,000 low wage employees. Of these employees, 11,000 work as a GS-7 or below, and at least 8,000 are veterans. The VA contends that it is required to downgrade these positions based on results of regular Department reviews to ensure the accuracy of job classifications.

As a result of AFGE's efforts to expose the extensive mismanagement and questionable tactics involved in carrying these downgrades, former Secretary Eric Shinseki imposed a temporary stay on the downgrades in 2012. However, the VA continued to initiate new downgrades and also engage in "backdoor downgrades" by hiring many new medical support personnel at lower grades than incumbents.

AFGE applauds Secretary McDonald for addressing this downgrade crisis head on immediately upon taking office. First, the Secretary testified before the Senate Veterans' Affairs Committee on September 9, 2014 regarding the importance of properly classifying positions involving direct services to veterans:

"I think we might not have done a great job of presenting the importance of those people...I mean, in any corporation, particularly one that's service-oriented, the people on the front lines serving the customer are highly, highly, highly valued. So we're going back now and we're looking at that, and we're going to be looking to seek exceptions [from OPM] where we need them."

Second, at a September 21st meeting with national AFGE and VA Council leadership, Secretary McDonald reiterated his strong disapproval of downgrading customer service positions, stating "shame on us, shame on me" for undervaluing employees who interface with veterans.

Third, in a September 24, 2014 memorandum from Chief of Staff Jose Riojas, Secretary McDonald extended the 2012 moratorium on new downgrades through the end of 2015, pending completion of a national classification review. The Secretary also authorized local hiring officials

new authority to bring on new employees at the same grades as incumbents, recognizing that “VA must continue to recruit new talent” in positions on the downgrade target list.

Despite the Secretary’s clear mandate, a number of medical centers have continued to conduct downgrades. At the Secretary’s request, AFGE has provided him with reports of numerous downgrades that are proceeding in violation of this moratorium. AFGE has also shared recommendations of third party experts regarding ways to modernize outdated position descriptions and restructure VA jobs to reflect the current mission of the Department.

Congressional Action Needed:

- AFGE urges lawmakers to support Secretary McDonald’s mandate to maintain a downgrade moratorium and conduct classification reviews with its AFGE partner that enable modernization of outdated positions in order to align them with the VA’s 21st century mission.

Equal Protections for Veterans in the VA Health Care Jobs

AFGE and the National VA Council will seek support for reintroduction of legislation to provide equal rights to veterans hired under the VA Hybrid and Title 38 personnel systems (the vast majority of VA health care employees). In the 113th Congress, Representative Tim Walz (D-MN) introduced legislation (H.R. 2785) to address this inequity and extend veterans’ preference rights to reservists.

Current law must be changed in order to overturn a 2003 Federal Circuit Court decision that held that these VHA employees are not covered by the Veterans Employment Opportunities Act (VEOA), and therefore lack the right to appeal to the Merit Systems Protection Board and Labor Department when their veterans’ preference rights are violated.

The men and women who are healing veterans at VA medical centers, including the growing number of active duty personnel who are transitioning to VHA jobs as physicians, RNs, PAs, among others, deserve the same employment rights as other veterans in Title 5 positions at the VA, Department of Defense and other federal agencies. The need for this legislative fix has increased as VHA converts more Title 5 employees to the Hybrid Title 38 personnel system pursuant to the expanded authority provided to the VA Secretary by the Caregivers and Veterans Omnibus Health Services Act (Public Law 111-163).

Congressional Action Needed:

- Reintroduce legislation to extend coverage of the Veterans Employment Opportunities Act, including appeal rights, to VA employees hired under the VA Hybrid and Title 38 personnel systems.

Increased Access to VA Health Care

When President Obama signed into law the Veterans Access, Choice and Accountability Act of 2014 (P.L. 113-175), the VA received a strong mandate to strengthen the VA's in-house capacity to provide quality, timely care to our nation's veterans. AFGE is carefully monitoring the implementation of this law and urges lawmakers to conduct oversight and investigation of a number of obstacles to increasing VA health care access.

Growing Number of Closed Inpatient Beds: AFGE urges Congress to address the accelerating trend of eliminating inpatient beds at VA medical centers and long term care facilities. The VSO Independent Budget also has longstanding concerns about short staffing of inpatient beds in the face of a mandate in 1996 legislation to maintain bed capacity for the needs of veterans with spinal cord injury, blindness, amputations and mental illness.

Advances in outpatient care do not justify the massive reductions in the number of beds over the past decade that have resulted in a permanent loss of inpatient capacity. The VA must address the skyrocketing need for inpatient care among older veterans and severely injured veterans from recent wars.

Widespread "bed count gaming" is occurring across the nation through the excessive use of "virtual beds" and observational beds, to hide the number of operational beds that are permanently closed due to severe short staffing of nursing personnel. Veterans in need of lifesaving mental health inpatient care are especially at risk from these destructive bed closing practices.

Lags in hiring new health care personnel: AFGE commends Secretary McDonald for his efforts to hire clinicians to care for our veterans, and his decision to increase physician and dentist pay ranges to keep the VA competitive with other health care employers. Despite these positive steps and the new law's provision for \$5 billion for more health care personnel, many short staffed medical centers are slow to hire, and some are still maintaining unofficial hiring freezes.

Failure to address barriers to retention of current clinicians with valuable expertise and experience:

- **Inadequate turnover data:** Currently, VA collects very limited data on its ability to retain health care professionals. This data gap masks significant turnover among recent hires who did not get what they were promised. AFGE recommendations for improving measures of job satisfaction and causes for turnover should be considered in any VA effort to revise collection of this data.
- **Undesirable working conditions:** A growing number of older clinicians with unique expertise and years of valuable experience with VA best practices are quitting or taking early retirement because of frustrations over pay (including significantly lower pay than new hires performing the same work with less VA experience), workload, schedules (including widespread noncompliance with a new VA 40-hour workweek policy),

inadequate continuing education benefits, abusive management practices fueled by a lack of bargaining rights (discussed earlier) and retaliation against whistleblowers through sham peer reviews and other tactics.

- **Short staffing of primary care (PACT) teams:** VHA regularly implements new patient care initiatives without corresponding increases in staff or workspace. As a result, the goals of these important initiatives are frustrated, and already short staffed facilities are even less able to provide quality, timely care. Short staff has taken an especially heavy toll on the effectiveness of VHA's "PACT" initiative (Patient Aligned Care Teams). Many of these teams lack designated providers, nurses and support personnel, directly undermining the effectiveness of this innovative approach to care.

Congressional Action Needed:

- Oversight and investigation of the number of available beds in VA medical facilities, and greater accuracy and transparency of the bed count process.
- Oversight of short staffing of PACT teams and other short staffing leading to excessive provider panel sizes.
- Mandate an expansion of VHA data collection to ensure that short term and long term staffing needs are met, with input from AFGE.
- Urge the VA to partner with AFGE to address barriers to recruitment, including VHA's refusal to extend 2014 pay increases for new hires to current physicians and dentists and widespread medical center noncompliance with laws for setting market and performance pay.
- Investigate medical center noncompliance with VA's new physician and dentist scheduling policy (issued in December 2014) that revises the problematic "24/7" rule and sets a 40-hour work week and other reasonable limits on schedules.

Violence in the Workplace

By the VA's own admission, many VA medical centers, clinics and other facilities lack sufficient numbers of VA police to respond to incidents of violence. In particular, short staffing of medical personnel in combination with inadequate security put both patients and personnel at risk of harm from acts of violence. The fatal shooting of a VA psychologist at the El Paso VA Medical Center in January 2015 highlighted the need for significant enhancements in security, especially at outpatient clinics that are geographically isolated.

Congressional Action Needed:

- Mandate improved risk assessments at all VA facilities;
- Increase use of bulletproof glass at appropriate facilities;
- Improve recruitment and retention of VA police officers through a ban on downgrades, improved career ladders and competitive pay with other public and private sector employers.

VA Outsourcing Hurts Employment Opportunities for Tomorrow's Veterans

AFGE and its VA Council have secured a statutory ban against “direct conversions” by the VA that is modeled after that ban that AFGE won to curb direct conversions by other federal agencies. “Direct conversions” are management actions to contract work by federal employees without a formal cost comparison. AFGE has also secured a law that prohibits VA and other agencies from conducting a formal cost comparison process. Title 38 also prohibits VHA from using medical dollars to conduct cost comparisons.

Despite these statutory bans, the VA regularly enters into contracts for a wide range of services performed by its own employees working in VHA, VBA and NCA. Hardest hit are service-connected disabled veterans in low wage jobs such as housekeeping, food service, building maintenance, patient transportation and cemetery caretaking. VA also engages in “back door” direct conversions through reassignments and downgrades (discussed previously) and refusing to fill vacancies created through retirements.

VA employees need the same protections against direct conversions that are in place for DoD employees. AFGE and the National VA Council also urge VA, consistent with longstanding law, to finally establish reliable and comprehensive inventories of all their current service contracts to determine which should be cancelled and which should be insourced, i.e. brought back in to the agency. All moderately skilled VA jobs should be insourced and reserved for veterans, especially those recovering from a disability. Numerous other VA functions should be insourced, because they are more appropriately performed by the agency rather than a for profit contractor, for example, “comp and pen” disability exams, medical, behavioral and pharmaceutical care related to service-connected conditions, cemetery caretaking and scanning of claims files and other documents containing confidential information.

Congressional Action Needed:

- Require the VA to issue direct conversion guidance in order to ensure compliance with statutory prohibition.
- Expedite the development of VA’s insourcing plan.
- Require VA to produce an inventory of service contracts to identify which cost too much, are poorly performed, or include functions too important or sensitive to privatize.

Federal Prisons

Summary

Over the past several years, the Federal Bureau of Prisons (BOP) correctional institutions have become increasingly dangerous places to work. The savage murders of Correctional Officer Jose Rivera at U.S. Penitentiary (USP) Atwater (CA), Correctional Officer Eric Williams at USP Canaan (PA), and Lieutenant Osvaldo Albarati at Metropolitan Detention Center (MDC) Guaynabo (PR), as well as the hundreds of vicious, albeit less-than-fatal, inmate-on-staff assaults that have occurred at many BOP institutions illustrate that painful reality.

AFGE strongly urges the Obama Administration and the 114th Congress to:

1. Increase federal funding of BOP to remedy the serious correctional officer understaffing and prison inmate overcrowding problems that are plaguing BOP prisons.
2. Address the primary cause for the explosive growth in the BOP prison inmate population by supporting the reintroduction of the Smarter Sentencing Act of 2013, a bill that would modestly reduce lengthy mandatory minimum sentences for those convicted of non-violent drug offenses.
3. Support the reintroduction of the Eric Williams Correctional Officer Protection Act, a bill that would allow BOP correctional officers and employees who work in high or medium security institutions to routinely carry pepper spray to defend themselves if physically attacked by dangerously violent inmates.
4. Support the Federal Prison Industries (FPI) prison inmate work program.
5. Support the reintroduction of the Correctional Officer Self-Protection Act of 2014, a bill that would require the warden of each BOP-operated institution to provide a secure storage area located outside of the secure perimeter of that BOP-operated institution for personal firearms carried to and from work by BOP correctional officers and staff.
6. Continue the existing prohibition against the use of federal funding for public-private competition under OMB Circular A-76 for work performed by federal employees of BOP and FPI.
7. Prohibit BOP from meeting additional bed space needs by incarcerating prison inmates in private prisons.
8. Oppose any effort to statutorily redefine the term “law enforcement officer” for pay and retirement purposes to exclude BOP prison staff.

9. Support the reintroduction of the Correctional Officer Fairness Act of 2014, a bill that would exempt qualified federal correctional officers who separate from federal government service (a) after age 50 with 20 years of creditable service or (b) at any age with 25 years of creditable service, whichever is earlier, from the federal tax law's 10% additional tax penalty for early withdrawals from the Thrift Savings Plan (the third component of the Federal Employees Retirement System or FERS).

10. Support legislation that would provide registered nurses employed at BOP Federal Medical Centers and other BOP institutions, as well as at the various Department of Defense medical facilities, with the same right to full time-and-a half overtime pay as private sector registered nurses.

Discussion

1. Increase federal funding of BOP to remedy the serious correctional officer understaffing and prison inmate overcrowding problems that are plaguing BOP prisons.

Nearly 211,000 prison inmates are confined in BOP correctional institutions today, up from 25,000 in 1980, 58,000 in 1990, and 145,000 in 2000. About 80% - or 169,711 – of the inmate population is confined in BOP-operated prisons while 20% - or 41,070 – is managed in private prisons and residential reentry centers.

This explosion in the federal prison inmate population is the direct result of Congress approving stricter anti-drug enforcement laws involving mandatory minimum sentences in the 1980s, as documented in the *History of Mandatory Minimums*, a study produced by the Families Against Mandatory Minimums Foundation (FAMM).

- The Comprehensive Crime Control Act of 1984 created a mandatory 5-year sentence for using or carrying a gun during a crime of violence or a drug crime (on top of the sentence for the violence itself), and a mandatory 15-year sentence for simple possession of a firearm by a person with three previous state or federal convictions for burglary or robbery.
- The 1986 Anti-Drug Abuse Act established the bulk of drug-related mandatory minimums, including the five- and 10-year mandatory minimums for drug distribution or importation, tied to the quantity of any “mixture or substance” containing a “detectable amount” of the prohibited drugs most frequently used today.
- The Omnibus Anti-Drug Abuse Act of 1988 created more mandatory minimums that were targeted at different drug offences. At one end of the drug distribution chain, Congress created a mandatory minimum of five years for simple possession of more than five grams of “crack” cocaine. (Simple possession of any amount of other drugs—including powder cocaine and heroin—remained a misdemeanor with a

mandatory 15-day sentence required only for a second offense.) At the other end, Congress doubled the existing 10-year mandatory minimum for anyone who engages in a continuing criminal enterprise, requiring a minimum 20-year sentence in such cases.

The number of federal correctional officers who work in BOP-operated prisons, however, is failing to keep pace with this tremendous growth in the prison inmate population. The BOP system is staffed at an 86% level, as contrasted with the 95% staffing percentage levels in the mid-1990s. This 86% staffing level is *below* the 90% staffing level that BOP believes to be the minimum staffing level for maintaining the safety and security of BOP prisons. In addition, the current BOP inmate-to-staff ratio is 4.82 inmates to 1 staff member, as contrasted with the 1997 inmate-to-staff ratio of 3.7 to 1.

At the same time, prison inmate overcrowding is an increasing problem at BOP institutions despite the activation of new prisons over the past few years. The BOP prison system today is overcrowded by about 34%, up from 31.7% as of January 1, 2000. Inmate overcrowding is of special concern at higher security institutions—with 54% overcrowding at high security prisons and 44% at medium security institutions.

These serious correctional officer understaffing and prison inmate overcrowding problems are resulting in significant increases in prison inmate assaults against correctional officers and staff. Illustrations of this painful reality include: (1) the savage murder of Correctional Officer Jose Rivera on June 20, 2008, by two prison inmates at the United States Penitentiary in Atwater, CA; (2) the lethal stabbing of Correctional Officer Eric Williams on February 25, 2013 by an inmate at the United States Penitentiary in Canaan, PA and (3) the murder of Lieutenant Osvaldo Albarati on February 26, 2013 while driving home from the Metropolitan Detention Center in Guaynabo, Puerto Rico.

BOP has performed a rigorous analysis of the effects of prison inmate overcrowding and correctional worker understaffing on inmate-on-worker rates of violence. It found that increases in both the inmate-to-worker ratio and the rate of overcrowding at an institution are directly related to increases in the rate of serious inmate assaults on correctional workers. An increase of one in a BOP prison's inmate-to-worker ratio increases the prison's annual serious assault rate by about 4.5 per 5,000 inmates.

AFGE has long been concerned about the safety and security of the correctional officers and staff who work at BOP institutions. But the significant increase in prison inmate assaults against correctional officers and staff has made it clear that the BOP correctional officer understaffing and prison inmate overcrowding problems must be solved.

Therefore, AFGE strongly urges the Obama Administration and the 114th Congress to:

- Increase federal funding of the BOP Salaries and Expenses account so BOP can hire additional correctional staff to return to the 95% staffing percentage levels of the mid-1990s.
- Increase federal funding of the BOP Buildings and Facilities account so BOP can build new correctional institutions and renovate existing ones to reduce inmate overcrowding, particularly at the high and medium security institutions.

2. Address the primary cause for the explosive growth in the BOP prison inmate population by supporting the reintroduction of the Smarter Sentencing Act of 2013, a bill that would modestly reduce lengthy mandatory minimum sentences for those convicted of non-violent drug offenses.

The statistics above demonstrate the need to move away from the “tough on crime” laws of the 1980s and focus more on “smart on crime” policies. That is why AFGE is urging Members of Congress to support the reintroduction of last Congress’s Smarter Sentencing Act of 2013 (S. 1410 and its companion H.R.3382), a bill that takes an incremental approach to modernizing non-violent drug policy. This legislation would:

- Modestly expand the existing federal “safety valve” with regard to mandatory minimum sentences and certain non-violent drug offenses.

The “safety valve” has been effective in allowing federal judges to appropriately sentence certain non-violent drug offenders below existing mandatory minimum sentences. However, this “safety valve” only applies to a narrow subset of cases – defendants that do not have more than one criminal history point.

The Smarter Sentencing Act would broaden the “safety valve’s” eligibility criteria. The bill provides that a federal judge can impose a sentence for certain non-violent drug offenses below existing mandatory minimum sentences if he or she finds the “criminal history category for the defendant is not higher than category II.” Category II includes 2 or 3 criminal history points.

- Retroactively apply the mandatory minimum sentencing reforms of the Fair Sentencing Act of 2010 (P.L. 111-220) to non-violent drug offenses that were committed before August 3, 2010, the date the President signed that bill into law.

The Fair Sentencing Act of 2010 (P.L. 111-220) reduced the disparity between the amount of crack cocaine and powder cocaine that is needed to trigger federal mandatory minimum sentences from a 100-to-1 weight ratio to an 18-to-1 weight ratio. The 2010 federal law also eliminated mandatory minimum sentences for simple possession of an illegal drug, narcotic, or chemical.

The Smarter Sentencing Act would provide that a federal judge who imposed a drug offense sentence under the pre-Fair Sentencing Act of 2010 regime, may – on a motion of the sentenced inmate or the BOP Director – impose a reduced sentence as if the 2010 federal law was in effect at the time the inmate committed the drug offense.

- Reduce the 5-, 10-, and 20-year mandatory minimum sentence “floors” for federal non-violent drug offenses to 2-, 5-, and 10-year terms, respectively.

The Controlled Substances Act and the Controlled Substances Export and Import Act provide that non-violent drug offenders shall be sentenced to a term of imprisonment of not less than the *minimum* mandatory minimum sentence (or “floor”) and not more than the *maximum* mandatory minimum sentence (or “ceiling”). For example, a person who knowingly distributes 500 grams of powder cocaine “shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years.”

The Smarter Sentencing Act would reduce the *minimum* mandatory minimum sentences (or “floors”) for non-violent drug offenses, allowing a federal judge more discretion than he or she has now to decide the appropriate sentence in individual cases. The bill does not lower the *maximum* mandatory minimum sentences (or “ceilings”). In the above example, a person who knowingly distributes 500 grams of powder cocaine shall be sentenced to a term of imprisonment which may not be less than 2 years – lowered from 5 years – and not more than 40 years.

3. Support the reintroduction of the Eric Williams Correctional Officer Protection Act, a bill that would allow BOP correctional officers and employees who work in high or medium security institutions to routinely carry pepper spray to defend themselves if physically attacked by dangerously violent inmates.

AFGE is urging Members of Congress to support the reintroduction of last Congress’s Eric Williams Correctional Officer Protection Act (S. 2309 and its companion H.R. 4607), a bill that would:

- Require the BOP Director to routinely issue oleoresin capsicum spray – commonly known as pepper spray – to BOP correctional officers and employees who work in high or medium security prisons so they may defend themselves and others if physically attacked by dangerously violent prison inmates.
- Require such BOP correctional officers and employees to complete a training course on pepper spray use before being issued such spray, and annually thereafter.
- Require the U.S. Government Accountability Office to evaluate the effectiveness of routinely issuing pepper spray to BOP correctional officers and employees who work in high or medium security prisons on reducing acts of violence committed by prison inmates in such prisons.

Current BOP policy does not allow correctional workers (both officers and employees) to routinely carry pepper spray in any BOP prisons. Instead, prison wardens must authorize pepper spray use before correctional workers can use it to quell an emergency situation. Pepper spray is stored in specific locations throughout a BOP prison, such as in secure control rooms, watchtowers in the prison yards, or prison armories outside the secure perimeter.

The problem, however, is that in emergency situations where aggressive inmates - who often have home-made lethal weapons - are physically attacking correctional workers, there is little or no time for prison wardens to authorize the use of pepper spray and then get it to the endangered workers so they can protect themselves. The correctional workers are left to defend themselves with only the two things they are authorized to routinely carry: their keys and a walkie-talkie radio.

For several years, AFGE has been urging BOP to institute a new pepper spray policy that would allow federal correctional workers who work in high or medium security BOP institutions to routinely carry pepper spray in case situations arise where they must defend themselves if physically attacked by dangerously violent inmates.

That is why we were pleased when BOP implemented In August 2012 a one-year pilot evaluation of pepper spray at seven U.S. penitentiaries to determine if allowing correctional officers to routinely carry pepper spray while on duty would improve the safety of correctional workers, prison inmates, and others. The seven penitentiaries are: USP Coleman I (FL), USP Coleman II (FL), USP Florence (CO), USP Lee County (VA), USP Lewisburg (PA), USP Pollock (LA), and USP Atwater (CA).

Since that time, BOP has gradually expanded its pepper spray pilot evaluation:

- On February 28, 2013—three days after the savage murder of Correctional Officer Eric Williams by a prison inmate at USP Canaan (PA)—BOP announced that as part of a Partnership Council Initiative with the AFGE Council of Prison Locals, the agency was expanding the pilot to include all high security institutions, detention centers, and jails.
- In April 2014, BOP expanded the pilot evaluation to include members of the BOP institution unit team: Unit Manager, Case Manager, Counselor, and Unit Secretary.
- In November 2014, BOP announced that the agency was expanding the pepper spray evaluation program to include staff who work in recreation, food service, and receiving and discharge. In addition, BOP announced it will provide pepper spray in all of the designated positions at medium security institutions: USP Atlanta (GA), FCI Victorville (CA), FCI Beckley (WV), FCI Terre Haute (IN), FCI Allenwood (PA), and FCI Forrest City (AR).

AFGE continues to support the BOP pepper spray pilot program, and is encouraged to hear that BOP internal reviews of the pilot indicate that the routine use of pepper spray is significantly

reducing incident containment times. But we are beginning to wonder when BOP intends to end the pilot program and send a final evaluation of the program to Congress. After all, the original one-year pilot program is now in its 30th month, with no apparent end in sight.

Indeed, AFGE remains puzzled as to why BOP has been so reluctant over the years to institute a new pepper spray policy. A new pepper spray policy is vitally necessary because BOP prisons are significantly more violent than a few years ago because of serious correctional officer understaffing and prison inmate overcrowding – and because correctional officers are being forced to control more aggressively dangerous offenders, including more gang-affiliated inmates.

BOP management has relied on four arguments to disallow correctional officers from routinely carrying pepper spray while on duty – arguments with which AFGE strongly disagrees:

(1) Cultural argument: BOP officials have argued that correctional officers should not carry pepper spray or other equipment because BOP believes in the importance of officers communicating with inmates to ensure officer safety. BOP believes that carrying pepper spray would impede officers' communication with inmates—and increase the level of prison violence—because (a) the officers would be more likely to use the pepper spray to prevent an inmate from engaging in dangerous misconduct than talk with the inmate, or (b) the inmate would perceive correctional officers carrying pepper spray as more threatening and therefore would be less willing to engage in communication with officers.

AFGE, however, believes this “officer-inmate communication” policy totally ignores the current reality at BOP institutions. The level of violence inside BOP institutions is already increasing – and not because correctional officers are not attempting to communicate with prison inmates. The violence level is increasing because of the serious correctional officer understaffing and prison inmate overcrowding problems – and because correctional officers are being asked to control offenders who are deliberately non-communicative, more aggressively violent, and often gang-affiliated.

In addition, AFGE believes this “officer-inmate communication” policy ignores the information in a BOP Executive Staff Paper, dated March 7, 2003. According to that paper, the Colorado, Illinois, and Texas State Departments of Corrections—three of the many states that allow their prison staff to routinely carry pepper spray—reported to BOP in 2003 that the ability of their staff to immediately use pepper spray decreased the need for physical restraint techniques, enhanced inmate compliance to staff warnings and commands, and resulted in an overall and significant reduction in injuries to both staff and inmates.

(2) “Used against officer” argument: BOP has argued that correctional officers should not routinely carry pepper spray because it could be taken from the officer by an inmate and then used against him or her by that inmate.

AFGE believes this “used against officer” argument ignores one of the reasons why the BOP Executive Staff Paper (March 7, 2003) recommended providing correctional officers with pepper spray rather than expandable batons. One of the advantages of pepper spray use that was detailed in that paper was: “If an inmate gains control of the [pepper spray] and uses it on staff, there is no permanent harm to the staff member.” By contrast, “if an inmate gains control of the expandable baton and uses it on staff, there could be serious permanent physical harm to the staff member.”

(3) Regulatory argument: BOP has argued that 28 CFR 552.25 - *Use of chemical agents or non-lethal weapons* is the reason why the agency cannot allow correctional officers to carry pepper spray. Here is that CFR section:

TITLE 28--JUDICIAL ADMINISTRATION

CHAPTER V--BUREAU OF PRISONS, DEPARTMENT OF JUSTICE

PART 552_CUSTODY--Table of Contents

Subpart C_Use of Force and Application of Restraints on Inmates

Sec. 552.25 Use of chemical agents or non-lethal weapons.

The Warden may authorize the use of chemical agents or non-lethal weapons only when the situation is such that the inmate:

- (a) Is armed and/or barricaded; or
- (b) Cannot be approached without danger to self or others; and
- (c) It is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate or others, or would result in a major disturbance or serious property damage.

[54 FR 21394, May 17, 1989. Redesignated and amended at 59 FR 30469, 30470, June 13, 1994] ***[Emphasis added]***

AFGE contends that 28 CFR 552.25 does not support the BOP position regarding correctional officers carrying pepper spray. The important key is the word “use” in the first sentence. 28 CFR 552.25 restricts the active “use” of pepper spray—that is, the “putting into action” of pepper spray—to situations where an inmate is armed and/or barricaded or cannot be approached without danger to the correctional officer, and when a delay in restoring order would result in a major disturbance or serious property damage. In other words, this regulation’s intent is to prevent correctional officers from actively spraying an inmate with pepper spray in less-than-dangerous situations—that is, in situations where the inmate is not armed or can be approached without any danger to the correctional officer, and when a delay in restoring order would not result in a major disturbance or serious property damage.

However, 28 CFR 552.25 says absolutely nothing about the passive carrying of pepper spray. Thus, contrary to BOP's position, this section does not preclude BOP from authorizing correctional officers to routinely carry pepper spray. And it certainly does not preclude BOP from authorizing a correctional officer to routinely carry pepper spray in highly dangerous prison areas—just in case the correctional officer must actively “use” pepper spray in situations where an armed inmate is physically attacking the correctional officer, and when a delay in restoring order would result in a major disturbance or serious property damage.

(4) Cost argument: BOP has argued that the agency cannot afford the cost of supplying pepper spray to its correctional officers because the Congress has failed for years to provide BOP with sufficient funding. As a result, BOP is experiencing serious correctional worker understaffing, prison inmate overcrowding, and a significant increase in inmate-on-worker assaults.

AFGE is totally cognizant of the BOP's funding problems, and has been actively lobbying the Congress to substantially increase funding for BOP. However, we think the argument that BOP cannot afford the cost of supplying pepper spray to its correctional officers is a bit overdone.

Frankly, pepper spray costs seem to be relatively minimal. A brief perusal of the Internet reveals that a two ounce pepper spray device costs from \$12.95 to \$17.95, and a four ounce pepper spray device costs from \$15.95 to \$20.95. Thus, the cost of providing pepper spray to each and every one of its approximately 16,000 correctional officers would be in the range of only \$207,200 to \$335,200. In addition, the total number of pepper spray devices that must be purchased—and the attendant costs—would be greatly reduced by the number of such devices already stored today in BOP prisons' armories.

4. Support the Federal Prison Industries (FPI) prison inmate work program.

The increasingly violent and dangerous environment in which BOP correctional officers and staff work is the primary reason why AFGE strongly supports the FPI prison inmate work program.

The FPI prison inmate work program is an important management tool that federal correctional officers and staff use to deal with the huge increase in the BOP prison inmate population. It helps keep 12,468 prison inmates productively occupied in labor-intensive activities, thereby reducing inmate idleness and the violence associated with that idleness. It also provides strong incentives to encourage good inmate behavior, as those who want to work in FPI factories must maintain a record of good behavior and must have completed high school or be making steady progress toward a General Education Degree (GED).

In addition, the FPI prison inmate work program is an important rehabilitation tool that provides federal inmates an opportunity to develop job skills and values that will allow them to reenter—and remain in—our communities as productive, law-abiding citizens. The Post-Release Employment Project (PREP), a multi-year study of the FPI prison inmate work program carried

out and reported upon in 1996 by William Saylor and Gerald Gaes, found that the FPI prison inmate work program had a strongly positive effect on post-release employment and recidivism. Specifically, the study results demonstrated that:

- In the short run (i.e., one year after release from a BOP institution), federal prison inmates who had participated in the FPI work program (and related vocational training programs) were: (1) 35% less likely to recidivate than those who had not participated, and (2) 14% more likely to be employed than those who had not participated.
- In the long run (i.e., up to 12 years after release from a BOP institution), federal prison inmates who participated in the FPI work program were 24% less likely to recidivate than those who had not participated in the FPI work program. (*PREP: Training Inmates Through Industrial Work Participation, and Vocational and Apprenticeship Instruction*, by William Saylor and Gerald Gaes, Office of Research and Evaluation, Federal Bureau of Prisons, September 24, 1996.)

Unfortunately, over the past several years, the FPI prison inmate work program has experienced a significant decline in its ability to remain financially self-sustaining while providing “employment for the greatest number of inmates in the United States penal and correctional institutions who are eligible to work as is reasonably possible.” (18 U.S.C. 4122) For example, FPI has experienced a:

- Significant decline in FPI net sales revenues: While FPI in FY 2009 had sales revenues of \$889,355,000 in FY 2009, it only had revenues of \$389,131,000 in FY 2014—a decline of \$500,224,000 or 56% over five years.
- Significant decline in the number of prison inmates employed by FPI: While the FPI program employed 18,972 inmates in FY 2009, it employed only 12,468 inmates as of September 30, 2014 – a decline of 6,504 inmates or 34% over five years.

These significant declines are the result of the various limitations imposed by Congress and the FPI Board of Directors on FPI’s mandatory source authority relating to DoD’s and federal civilian agencies’ purchases from FPI. But of the many imposed limitations, Section 827 in the National Defense Authorization Act for FY 2008 (P.L. 110-181)—which is statutorily 10 U.S.C. 2410n - is probably the most significant impediment to the FPI prison inmate program.

The FPI Board of Directors in 2003 administratively ended the application of mandatory source authority for those FPI-made products where FPI had a share of the Federal market that was greater than 20%. But Section 827 took a much more stringent approach, ending the application of the mandatory source authority with regard to DoD purchases of FPI-made products where FPI’s share of the DoD market for those products was greater than 5

As can be seen, FPI is in desperate need of new inmate work program authorities. That is why AFGE was pleased when Congress included Section 221 in the FY 2011 Commerce-Justice-Science Appropriations bill (P.L. 112-55). This section extended—for the first time—the Prison Industry Enhancement (PIE) inmate employment program to the federal BOP system. The PIE program was created by Congress in 1979 to encourage state prison systems to establish employment opportunities for inmates that approximate private-sector work opportunities. The program is designed to place inmates in a realistic work environment, pay them the prevailing local wage for similar work, and enable them to acquire marketable skills to increase their potential for successful rehabilitation and meaningful employment upon release.

AFGE also was pleased that Section 221 authorized FPI to carry out pilot “off-shore repatriation” projects to produce items not currently produced in the United States. It is believed that FPI, if allowed to enter into partnerships with private businesses, could bring lost production back into the United States while providing BOP prison inmates with opportunities to learn skills that will be marketable after their release.

5. Support the reintroduction of the Correctional Officer Self-Protection Act of 2014, a bill that would require the warden of each BOP-operated institution to provide a secure storage area located outside of the secure perimeter of that BOP-operated institution for personal firearms carried to and from work by BOP correctional officers and staff.

Currently, BOP correctional workers (officers and staff) are unable to carry their personal firearms to and from BOP institutions because BOP management refuses to provide a place to secure those personal firearms. But many correctional workers, particularly those who work in or near large cities, want to carry their personal firearms to and from work because they have real worries that former prison inmates and others may attempt to harm them.

That is why AFGE urges Members of Congress to support the reintroduction of the Correctional Officer Self-Protection Act of 2014 (S. 2426), a bill that would require each warden of a BOP-operated institution to provide a secure storage area for personal firearms carried to and from work by correctional workers.

BOP management has argued that providing a storage area for personal firearms carried to and from work by correctional workers would lessen security at BOP-operated institutions. However, we believe that BOP is refusing because it does not want to be put in a publicly embarrassing situation if a BOP correctional worker accidentally shoots himself/herself with his/her personal firearm while driving to and from work.

AFGE strongly believes that BOP correctional workers’ very real personal safety interests should outweigh BOP management’s concerns about a hypothetical, publicly-embarrassing situation. In addition, we believe it to be ironic that BOP is so reluctant to provide BOP officers with a place to secure their personal firearms when BOP is already providing such secure places for certain non-work, non-BOP firearms. FDC Guaynabo (PR), one of the many BOP institutions that provides on-site housing for BOP correctional officers, provides a place on-site (the institution’s

armory) for those officers to secure their personal firearms. In addition, when county and local law enforcement officers transport criminals to BOP institutions, those BOP institutions provide a safe place for those county and local law enforcement officers to secure their firearms.

6. Continue the existing prohibition against the use of federal funding for public-private competition under OMB Circular A-76 for work performed by federal employees of BOP and FPI.

The FY 2015 Consolidated and Further Continuing Appropriations Act (P.L. 113-235), which contains the FY 2015 Commerce-Justice-Science (CJS) Appropriations bill, includes a general provision—Section 211—to prohibit the use of FY 2015 funding for a public-private competition under OMB Circular A-76 for work performed by federal employees of the BOP and FPI. Here is the exact language:

“Sec. 211. None of the funds appropriated by this Act may be used to plan for, begin, continue, finish, process, or approve a public-private competition under the Office of Management and Budget Circular A-76 or any successor administrative regulation, directive, or policy for work performed by employees of the Bureau of Prisons or of Federal Prison Industries, Incorporated.”

AFGE strongly urges the Obama administration and the 114th Congress to include the Section 211 language in the FY 2016 CJS Appropriations bill because:

(a) Competing these BOP and FPI employee positions would not promote the best interests or efficiency of the federal government with regard to ensuring the safety and security of federal BOP prisons. Federal correctional officers and other federal employees who work for BOP and FPI are performing at superior levels. It therefore would be ill-advised to compete their positions merely to meet arbitrary numerical quotas.

(b) Various studies comparing the costs of federally operated BOP prisons with those of privately operated prisons have concluded—using OMB Circular A-76 cost methodology—that the federally operated BOP prisons are more cost effective than their private counterparts. For example, a study comparing the contract costs of services provided by Wackenhut Corrections Corporation (now The Geo Group) at the Taft Correctional Institution in California with the cost of services provided in-house by federal employees at three comparable BOP prisons (Forrest City, AR; Yazoo City, MS; and Elkton, OH) found that “the expected cost of the current Wackenhut contract *exceeds* the expected cost of operating a Federal facility comparable to Taft....” (*Taft Prison Facility: Cost Scenarios*, Julianne Nelson, Ph.D, National Institute of Corrections, U.S. Department of Justice.)

7. Prohibit BOP from meeting additional bed space needs by incarcerating federal prison inmates in private prisons.

In recent years, the federal government and some state and local governments have experimented with prison privatization as a way to solve the overcrowding of our nation's prisons—a crisis precipitated by increased incarceration rates and politicians' reluctance to provide more prison funding. But results of these experiments have demonstrated little evidence that prison privatization is a cost-effective or high-quality alternative to government-run prisons.

Private Prisons Are Not More Cost Effective

Proponents of prison privatization claim that private contractors can operate prisons less expensively than federal and state correctional agencies. Promises of 20 percent savings are commonly offered. However, existing research fails to make a conclusive case that private prisons are substantially more cost effective than public prisons.

For example, in 1996, the U.S. General Accounting Office reviewed five studies of prison privatization deemed to have the strongest designs and methods among those published between 1991 and mid-1996. The GAO concluded that “because these studies reported little cost differences and/or mixed results in comparing private and public facilities, we could not conclude whether privatization saved money.” (*Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service*, GGD-96-158 August 16, 1996.)

Similarly, in 1998, the U.S. Department of Justice entered into a cooperative agreement with Abt Associates, Inc. to conduct a comparative analysis of the cost effectiveness of private and public sector operations of prisons. The report, which was released in July 1998, concluded that while proponents argue that evidence exists of substantial savings as a result of privatization, “our analysis of the existing data does not support such an optimistic view.” Instead, “our conclusion regarding costs and savings is that.....available data do not provide strong evidence of any general pattern. Drawing conclusions about the inherent [cost-effective] superiority of [private prisons] is premature.” (*Private Prisons in the United States: An Assessment of Current Practice*, Abt Associates, Inc., July 16, 1998.)

Finally, a 2001 study commissioned by the U.S. Department of Justice concluded that “rather than the projected 20 percent savings, the average saving from privatization was only about one percent, and most of that was achieved through lower labor costs.” (*Emerging Issues on Privatized Prisons*, by James Austin, Ph.D. and Garry Coventry, Ph.D., February 2001.)

Private Prisons Do Not Provide Higher Quality, Safer Services

Proponents of prison privatization contend that private market pressures will necessarily produce higher quality, safer correctional services. They argue that private prison managers will develop and implement innovative correctional practices to enhance performance. However, emerging evidence

suggests these managers are responding to market pressures not by innovating, but by slashing operating costs. In addition to cutting various prisoner programs, they are lowering employee wages, reducing employee benefits, and routinely operating with low, risky staff-to-prisoner ratios.

The impact of such reductions on the quality of prison operations has been obvious. Inferior wages and benefits contribute to a “degraded” workforce, with higher levels of turnover producing a less experienced, less trained prison staff. The existence of such under qualified employees, when coupled with insufficient staffing levels, adversely impacts correctional service quality and prison safety.

Numerous newspaper accounts have documented alleged abuses, escapes and riots at prisons run by the Correctional Corporation of America (CCA), the nation’s largest private prison company. In the last several years, a significant number of public safety lapses involving CCA have been reported by the media. The record of Wackenhut Corporation (now The Geo Group), the nation’s second largest private prison company, is no better, with numerous lapses reported since 1999.

And these private prison problems are not isolated events, confined to a handful of “under performing” prisons. Available evidence suggests the problems are structural and widespread. For example, an industry-wide survey conducted in 1997 by James Austin, a professor at George Washington University, found 49 percent more inmate-on-staff assaults and 65 percent more inmate-on-inmate assaults in medium- and minimum-security private prisons than in medium- and minimum-security government prisons. (referenced in “Bailing Out Private Jails,” by Judith Greene, in *The American Prospect*, September 10, 2001.)

Lacking data, BOP is not able to evaluate whether confining inmates in private prisons is more cost-effective than federal government prisons.

Despite the academic studies’ negative results, BOP has continued to expand its efforts to meet additional bed space needs by incarcerating federal prison inmates in private prisons. Over a 10-year period, the costs to confine federal BOP inmates in non-BOP facilities nearly tripled from about \$250 million in FY 1996 to about \$700 million in FY 2006. To determine the cost-effectiveness of this expanded use of private prisons, Congress directed the U.S. Government Accountability Office (GAO) in the conference report accompanying the FY 2006 Science, State, Justice and Commerce Appropriations Act (P.L. 109-108) to compare the costs of confining federal prison inmates in the low and minimum security facilities of BOP and private contractors.

However, GAO determined in its October 2007 report that a methodologically sound cost comparison analysis of BOP and private low and medium security facilities was not feasible because BOP does not gather data from private facilities that are comparable to the data collected on BOP facilities. As a result, the GAO concluded that:

“[W]ithout comparable data, BOP is not able to evaluate and justify whether confining inmates in private facilities is more cost-effective than other confinement alternatives such as building new BOP facilities.” (*Cost of Prisons: Bureau of Prisons Needs Better Data to Assess Alternatives for Acquiring Low and Minimum Security Facilities*, GAO-08-6, October 2007)

BOP officials told GAO that there are two reasons why they do not require such data from private contractors. First, federal regulations do not require these data as a means of selecting among competing contractors. Second, BOP believes collecting such data could increase private contract costs. However, BOP officials did not provide evidentiary support to substantiate this concern.

In conclusion, AFGE strongly urges the Obama administration and the 114th Congress to prohibit BOP from meeting additional bed space needs by incarcerating federal prison inmates in private prisons. Prison privatization is not the panacea that its proponents would have us believe. Private prisons are not more cost effective than public prisons, nor do they provide higher quality, safer correctional services. Finally, without comparable data, BOP is not able to evaluate or justify whether confining inmates in private facilities is more cost-effective than building new BOP facilities.

8. Oppose any effort to statutorily redefine the term “law enforcement officer” for pay and retirement purposes to exclude federal prison staff.

Under current law, the definition of “law enforcement officer” for pay and retirement purposes includes federal prison support staff, in addition to those individuals who fill federal correctional officer positions. However, a few years ago, the Republican staff of the House and Senate federal workforce subcommittees released a 25-page “Concept Paper for a Federal Law Enforcement Personnel System” that proposed to redefine “law enforcement officer” for pay and retirement purposes to exclude federal prison support staff.

AFGE strongly urges the Obama administration and the 114th Congress to oppose any legislative effort to institute such a redefinition. The reason federal prison support staff receive law enforcement officer pay and retirement benefits is because their jobs include performing law enforcement security functions in federal prisons. These men and women, on a daily basis, help supervise and control prison inmates at all security levels inside the walls and fences of federal prisons. They are called upon, on a daily basis, to provide searches of inmates, to search housing areas of federal prisons for contraband, and to escort inmates to local hospitals or other outside facilities.

In addition, federal prison support staff—like federal correctional officers—are required to successfully undergo training to perform these law enforcement security operations in federal prisons. These men and women are required to go to law enforcement training in Glynco, GA, and are required to pass firearms training every year.

Why do the jobs of federal prison support staff include performing law enforcement security operations at federal prisons? It is because federal prisons - unlike state or county correctional facilities - do not have sufficiently large numbers of correctional officers to deal with security-related issues. Because of this shortage of correctional officers, the federal BOP must train and use prison support staff to help maintain safety and security at federal prisons.

9. Support the reintroduction of the Correctional Officer Fairness Act of 2014, a bill that would exempt qualified federal correctional officers who separate from federal government service (a) after age 50 with 20 years of creditable service or (b) at any age with 25 years of creditable service, whichever is earlier, from the federal tax law’s 10% additional tax penalty for early withdrawals from the Thrift Savings Plan (the third component of the Federal Employees Retirement System or FERS).

Under present law, a federal employee who receives a distribution from a qualified retirement plan such as the Thrift Savings Plan (TSP) prior to age 59½ is subject to a 10% early withdrawal tax on that distribution, unless an exception to the tax applies. Among other exceptions, the early withdrawal tax does not apply to TSP distributions made to a federal employee who separates from government service after age 55.

Present law also provides that BOP correctional officers are eligible to retire (a) at age 50 if they have completed 20 years of service in a “hazardous duty” law enforcement position or (b) at any age if they have completed 25 years of service in such a “hazardous duty” law enforcement position, whichever is earlier. This provision is intended to help the federal government recruit and retain a young, physically strong work force to work in BOP correctional institutions.

As a result, BOP correctional officers who retire at 50 years of age with 20 years of service or at any age with 25 years of service cannot—under present law—withdraw their TSP funds without incurring the 10% early withdrawal tax penalty. These retirees must wait until age 55 to withdraw their TSP monies if they want to avoid incurring this penalty.

Congress rectified a similar glitch a few years ago that had been adversely affecting police, firefighters and emergency medical technicians who worked for State and local governments. Those who retired after age 50 but before age 55 were unable to withdraw money from their defined benefit plans without incurring the 10% additional tax penalty. However, section 828 of the Pension Protection Act of 2006 (P.L. 109-280) resolved the problem for these State and local public safety employees. This section amended section 72(t) of the Internal Revenue Code of 1986 (which exempts certain individuals from the 10% early withdrawal penalty) by adding the following new paragraph:

“(10) Distributions to qualified public safety employees in governmental plans.

(A) In general. - **In** the case of a distribution to a qualified public safety employee from a governmental plan (within the meaning of section [414 \(d\)](#)) which is a defined benefit plan, paragraph (2)(A)(v) shall be applied by substituting “age 50” for “age 55”.

(B) Qualified public safety employee. - For purposes of this paragraph, the term “qualified public safety employee” means any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision.”

AFGE strongly urges the Obama administration and the 114th Congress to provide a similar legislation solution for BOP correctional officers by supporting the reintroduction of last Congress's Correctional Officer Fairness Act of 2014 (S. 2257). This bill would modify section 72(t) by adding the following new paragraph:

- “(11) Distributions to qualified Federal correctional officers from the Thrift Savings Fund.
- (A) In general - In the case of a distribution to a qualified Federal correctional officer from the Thrift Savings Fund established under section 8437 of title 5, United States Code, paragraph (2)(A)(v) of this subsection shall be applied by substituting age 50 (or, if earlier, the age at which the employee has completed 25 years of creditable service) for age 55.
- (B) Qualified Federal correctional officer - For purposes of this paragraph, the term *qualified Federal correctional officer* means an individual—
- (i) who is employed by the Bureau of Prisons as a correctional officer, and
 - (ii) who has completed 20 years of creditable service.
- (C) Creditable service - For purposes of this paragraph, the term *creditable service* means creditable service under section 8331 or 8411 of title 5, United States Code.”

10. Support legislation that would provide registered nurses employed at BOP Federal Medical Centers and other BOP institutions, as well as at the various Department of Defense medical facilities, with the same right to full time-and-a half overtime pay as private sector registered nurses.

AFGE strongly urges the Obama administration and the 114th Congress to support legislation that would provide registered nurses employed at all 119 BOP institutions, including the BOP Federal Medical Centers located in Rochester, MN; Butner, NC; Carswell, TX; Devens, MA; and Lexington, KY, as well as at the various Department of Defense (DOD) medical facilities, with the same right to full time-and-a-half overtime pay as private sector registered nurses. BOP and DOD registered nurses currently receive a more limited, pay-capped overtime pay pursuant to 5 U.S.C. Section 5542(a).

This legislation is necessary because the AFGE General Counsel Office (GCO) has determined that it would not be able to successfully argue in court that BOP and DOD registered nurses – like private sector nurses - should be classified as nonexempt under the Fair Labor Standards Act (FLSA) because they are hourly employees. (FLSA nonexempt employees are entitled to receive full time-and-a-half overtime pay; FLSA exempt employees are not.)

AFGE's GCO made this determination after reviewing Billings v. U.S., 322 F.3d 1328 (Fed. Cir. 2003), a case in which the Court of Appeals for the Federal Circuit ruled that the Office of Personnel Management is not required to apply the same regulatory “salary-basis” test to federal employees as the Department of Labor applies to private sector employees. Here is the language that is needed to provide BOP and DOD registered nurses with full time-and-a-half pay for overtime work:

5 U.S.C. Section 5542(a)(6):

Notwithstanding paragraphs (1) and (2) of this subsection, for an employee of the Bureau of Prisons or Department of Defense who is a registered nurse, the overtime hourly rate of pay is an amount equal to one and one half times the hourly rate of basic pay of the employee, and all that amount is premium pay. These employees shall receive overtime for performing officially ordered or approved hours of service in excess of 40 hours in an administrative workweek, or in excess of eight hours in a day.

5 U.S.C. Section 5543(e):

Notwithstanding paragraph (a) of this subsection, compensatory time off instead of payment under section 5542 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work for an employee of the Bureau of Prisons or Department of Defense who is a registered nurse, shall not be permitted, except as voluntarily requested in writing by the employee in question.

It is only fair that BOP and DOD registered nurses receive the same full time-and-a-half overtime pay as private sector nurses. They perform the same work and are paid the same way – by the hour.

Transportation Security Administration and Transportation Security Officers (TSOs)

"It always seems impossible until it's done."

Nelson Mandela

The 45,000 Transportation Security Officers (TSOs) represented by AFGE have upheld their obligation as an integral part of national security by ensuring public safety as they screen passengers and baggage at our nation's airports, mass transit and large public gatherings such as Presidential inaugurations and the Super Bowl. In 2014, the Transportation Security Administration (TSA) profoundly made it clear that the agency has no intention of maintaining the stability of this important workforce by upholding negotiated agreements, arbitration decisions and even the agency's own 2011 Determination. Real due process rights, including the right to appeal adverse personnel decisions to an objective third party, are afforded to all federal workers. No federal agency head, regardless of the mission of the agency, is above the law. All TSA employees (including TSA managers) other than TSOs follow the Federal Aviation personnel management system, which gives those employees the right to file appeals to the Merit Systems Protection Board (MSPB). The so-called "New Determination" issued at the end of December, 2014, as a Grinch-like surprise by former TSA Administrator John Pistole is Exhibit A in the case for full Title 5 rights for TSOs. TSA can no longer use national security as a shield against the requirement that the agency follow the same laws, Office of Personnel (OPM) regulations and guidance as the rest of the Federal government. AFGE calls upon President Obama to direct the Acting TSA Administrator to immediately apply all laws, guidelines and regulations applicable to Title 5 workers to the TSO workforce.

AFGE also calls for the reintroduction of the Transportation Security Workforce Enhancement Act, championed by Representative Nita Lowey (D-NY), Rep. Bennie Thompson (D-MS) and Rep. Sheila Jackson Lee (D-TX). Basic workforce protections should have the permanence of enacted law and not be subject to the politics of successor administrations. In 2007 majorities in both the House and Senate agreed to include TSO Title 5 rights legislation in the 9-11 Commission Report Act to enhance our nation's security by protecting the well trained and compensated professional screening workforce demanded by the public following the tragic events of September 11. TSA's behavior toward the TSO workforce has proven the agency to be particularly unsuited for the sweeping authority granted to it by an ill-considered management rights provision included in the Aviation Transportation Security Act (ATSA). A mere statutory footnote has no relationship to the goal of defending the country against those seeking to commit harmful acts. AFGE will continue the fight for rights for TSOs and respect for the important work that they do. Our goal is not impossible. No matter the trials and obstacles, AFGE will achieve justice for TSOs.

New Determination—Same Problems

The original 2011 Determination granted TSOs the right to elect AFGE as their exclusive representative for collective bargaining and established a very basic framework for a dispute resolution system. The new Determination attempts to scale back those *limited* collective bargaining, representation and appeal rights to TSOs by implementing a personnel system that is even more separate and unequal than its predecessor. Despite limited arbitration rights, AFGE won over 95% of the matters brought before independent third party arbitrators between 2012 and 2014 because management consistently overstepped provisions of the 2011 Determination and the negotiated collective bargaining agreement. After years of pressure from AFGE and TSOs, TSA granted to TSOs the same free parking benefits provided to other Department of Homeland Security officers working at airports. But even limited rights have proven to be more than TSA management can handle: the new Determination seeks to overturn the results of every arbitration won by AFGE over the past two years and impose on AFGE what TSA could not win during arbitrations before third party neutral panels. The new Determination even creates a precedent that could require the Administrator's permission to hold another round of negotiations when the current collective bargaining agreement expires.

Every section of the 2011 Directive has been modified to take away rights from TSOs and strengthen management's hand. These actions have nothing to do with national security: The new Determination is a naked power grab by an agency that believes it has absolute authority and demands to prevail in each and every dispute with TSOs. The new Determination is an attack on the TSO workforce. TSA's continued attacks on its own TSO workforce must end.

AFGE calls for the introduction and passage of legislation similar to the Transportation Security Workforce Enhancement Act introduced by Representative Lowey in 2009. Although naysayers claim there is no Congressional support for TSO rights, between 2009 and 2010 the bill gained 147 cosponsors and was favorably reported by the House Homeland Security Committee on September 29, 2009. In 2007 an amendment providing TSOs title 5 rights prevailed in two votes on the Senate floor during debate of the 9-11 Commission Report Act and failed to become law only when President George W. Bush threatened to veto the bill if TSO rights were included. AFGE commits to working tirelessly with TSOs for the introduction and advancement of a TSO rights bill in the 114th Congress.

TOPS to Bottom: Replace TSA's Unfair Pay System With the Federal Pay System that Works: the General Schedule

The Transportation Officer Performance System (TOPS) pay system changed again in 2014, and as a result over half (53%) of the TSO workforce failed to receive a pay raise as compared to 24% the previous year. TSA manipulated TSO payouts by changing the pay scale provided to the workforce at the beginning of the performance evaluation year. All year TSOs relied on the false information provided to them and reinforced by TSA management until *after* their performance evaluations. For the second year under TOPS, TSA management misled the TSO workforce. In 2013 TSA managers incorrectly told TSOs dissatisfied with their evaluations there

would be no payout for anyone for the year. As a result some TSOs who believed they were evaluated unfairly failed to grieve their evaluations in a timely manner because of management misrepresentations.

TSOs' sense that they do not receive fair pay for doing their job is reflected in the low level of trust between management and the workforce. Rampant employee dissatisfaction led to employees' ranking TSA dead last in pay and next to last in "performance-based rewards and advancement" out of 315 agencies in the *2014 Partnership for Public Service Best Places to Work in the Federal Government* survey. By contrast, if TSOs were paid under the General Schedule (GS), objective criteria would be used to accurately assign jobs by grade, including performance-related criteria. The GS system precludes management from using the bait-and-switch tactics that TSA implemented to cheat TSOs out of their pay raises and bonuses. The attrition rate at TSA remains higher than that of the federal workforce overall; TSOs routinely leave TSA to find better pay and employment rights at other federal agencies under Title 5 and the GS system. No federal employee, especially TSOs assigned an important piece of the national security framework, should have to worry about fair pay.

Congress continues to impose an arbitrary cap on the number of Full Time Equivalent (FTE) TSOs the agency can employ. The FTE cap and budget cuts for TSO compensation and benefits are nothing more than an example of the determination of some in Congress to re-privatize airport screening. Common sense and security standards support the agency's imperative to hire as many TSOs as necessary to ensure the safety of the flying public. AFGE calls for elimination of the cap in the FY 2016 DHS appropriations bill and for an increase in funding for TSO personnel, compensation and benefits. AFGE strongly believes that continued Congressional cuts to personnel funding have influenced a number of TSA's more odious personnel actions, such as tricky pay systems and discrimination against TSOs with medical conditions.

AFGE is fighting back legally by filing a grievance on the TOPS payout and legislatively by working for the introduction of legislation that will apply Title 5 and the GS system to the TSO workforce.

TSA Denies a Fundamental Civil Right to TSOs

TSA continues to violate the letter and spirit of the Rehabilitation Act and the Americans with Disabilities Act. TSA's website specifically states that TSA employees or applicants "may raise" disability or the other prohibited forms of discrimination in the Equal Employment Opportunity (EEO) complaint process. The TSA website fails to mention that the agency has removed itself from enforcement of EEO rights, especially if the agency is likely to be held liable for discriminatory acts. Two 2014 AFGE victories before the Equal Employment Opportunity Commission (EEOC) clarified TSO rights under the Rehabilitation Act. The EEOC held that the Rehabilitation Act requires TSA to consider reassignment if there are vacant, funded positions available and the TSO is qualified to perform the position's duties.

TSA continues to disqualify TSOs from working at airports based on certain diagnoses, even if TSA was aware of the condition when the TSO was hired. The mere diagnosis of a condition such as an arrhythmia or diabetes and the use of Family and Medical Leave Act provisions apparently trigger evaluation under the *Guidelines*, not whether there is any evidence that the condition prevents a TSO from performing his or her duties. TSA continues to disqualify TSOs from their jobs based on the *Guidelines* and also refuses to provide a current copy of the document to AFGE despite numerous requests. No other federal agency applies this criteria to its workforce. These are hardly the actions of an agency dedicated to a fair and equal workplace.

Because of the ATSA footnote, TSA consistently has demonstrated a preference for exempting itself from laws and regulations that provide protection and rights to federal workers. AFGE calls on President Obama to use his Executive authority and Congress to pass legislation making it clear that TSOs are protected by Title 5 worker protections, all civil rights laws and OPM guidelines and regulations.

Attempts to Privatize the Screening Function by Some in Congress

Following the tragic events of 9/11, Congress and the public demanded that jobs of screening passengers and baggage be performed by federal employees. The Screening Partnership Program (SPP) was created as a pilot and experimental program. But some lawmakers and their business allies have continued to oppose federalization, even though the appalling performance of private screening companies clearly contributed to the attackers' success on 9-11. Despite the tragic history of private screening companies, House Oversight and Government Reform Subcommittee on Transportation Chairman John Mica (R-FL) continues to champion the financial interests of the security industry over the security of the flying public. Incoming Senate Homeland Security and Governmental Affairs Chairman Ron Johnson (R-WI) has called for privatization of the 35 largest U.S. airports. AFGE will continue to stand on the side of aviation security by opposing expansion of the SPP. AFGE will work in Congress to limit the SPP and apply the same contracting rules followed by the rest of federal government to the privatization program.

Members of AFGE Local 556 at Orlando International Airport (MCO) are fighting to protect their jobs from Representative Mica's attempts to influence the Greater Orlando Airport Authority to apply for private screeners under the SPP. TSOs at the airport confiscated 47 firearms and 4000 rounds of ammunition in 2014 and processed passengers through checkpoint screening at an average of 8 minutes. MCO TSOs continued to receive high satisfaction ratings from passengers surveyed in the most recent Valencia College passenger satisfaction survey. Despite continued high performance by the MCO workforce, Representative Mica continues to advocate on behalf of for-profit private screening companies. AFGE stands with the TSOs at MCO and will continue to provide local officials with the facts about SPP to prevent expansion of this program.

AFGE strongly supports the Contract Screener Reform and Accountability Act previously introduced by TSO and worker rights advocate Representative Bennie Thompson (D-MS),

ranking member of the House Homeland Security Committee, and will work for its reintroduction in the 114th Congress. The Contract Screener Reform and Accountability Act is a common sense bill that finally applies transparency and accountability to private screening companies seeking to make a fast buck off aviation security. The bill prohibits subsidiaries of foreign-owned corporations from obtaining SPP contracts; requires that security breaches at airports with private screening services be reported; requires training for the proper handling of sensitive security information at SPP airports; mandates covert testing of contract screeners and imposes penalties for cheating; and enhances customer service at SPP airports. These are the basic minimum standards of operation and accountability that private screening contracts should meet.

TSO Respect, Violence Prevention, and Health and Safety Issues

Disrespect Inevitably Leads to Violence

Tragically on November 1, 2013, an active shooter at Los Angeles International Airport (LAX) murdered TSO Gerardo Hernandez, the first TSO to die in the line of duty. Two other TSOs were injured in the same attack. The potential for checkpoint carnage aimed at the TSOs on duty that day was immeasurable. The shooter was indicted on federal charges including murder of a federal employee, but he was not charged with violation of 49 U.S.C. §46502, which establishes assault with a dangerous weapon on security workers at an airport as punishable with a sentence of up to life imprisonment. This omission was yet another indication of a failure to appreciate the skill, commitment to duty, and courage of our nation's 45,000 TSOs.

Every member of the flying public should know that it is absolutely unacceptable, not to mention a violation of federal law, to assault a TSO. TSA must also take steps to better protect the TSO workforce. Although TSOs are required to report checkpoint assaults to management, it is not clear what occurs from that point. Some managers have refused to detain passengers who have assaulted TSOs, and at times TSOs who were the victims of assaults are blamed for the incident. TSOs are unarmed, do not have apprehension authority or even the authority to call airport local police if there is an assault. As was sadly learned as a result of the LAX shooting, delays in summoning—and the response time of—airport local police may result in loss of life and injury. AFGE strongly supports the creation of an armed federal law enforcement TSO position to guard the checkpoint and our nation's airports.

Why Won't TSA Agree that TSOs Should Wear Dosimeters?

AFGE raised the radiation issue with TSA in early 2010 and urged all officers to file with TSA a CA-2 workers' compensation claim to document their exposure to ionizing radiation after AFGE received numerous reports from employees alarmed by what appeared to be a large number of TSOs being diagnosed with cancer and thyroid conditions in Boston and other locations. TSA maintained that the X-ray machines were safe and repeatedly denied AFGE's requests for dosimeters and our offer to purchase them for officers. AFGE took the issue to Capitol Hill, and testified before Congress calling for a radiation safety and monitoring program at the agency.

TSA announced that it would retest every one of its 247 full-body X-ray scanners at 38 airports after maintenance records on some of the devices showed that X-ray machines emit ionizing radiation 10 times higher than previously reported.

In an article from the premier science publication, *Scientific American*, two quotes from respected scientists say it all: "I wouldn't dream of not having [dosimeters] already," said Dr. Nagy Elsayyad, of the University of Miami School of Medicine. "By any definition they are radiation workers," said David Brenner, director of the Center for Radiological Research at Columbia. AFGE will continue to press Congress for legislation that would require TSA to allow TSOs to wear dosimeters and be responsible for the collection, testing and reporting of the results.

Conclusion

TSOs are presented with new challenges in 2015. AFGE will work to address those challenges during the 114th Congress and by renewing calls for Executive action by the Obama administration.

Paid Parental Leave

Introduction

On January 15, 2015, President Obama issued a presidential memorandum updating federal leave policies by directing federal agencies to advance up to six weeks paid leave for the care of a newborn, newly adopted, or newly placed foster child. The presidential memorandum also allows advanced leave to be used for spouses and partners to care for newborn children and newly adopted or foster children. The President's actions were necessary because despite the protections of the Family and Medical Leave Act (FMLA), federal workers are among those who must choose between a paycheck and meeting their family obligations because they currently have no paid parental leave. The presidential memorandum also encourages agencies to utilize Employee Assistance Programs to assist workers who need emergency care for children, seniors, and adults with disabilities. President Obama's policies recognize that the committed federal workforce is strengthened by recognizing the need for flexibilities in balancing their work and family obligations.

Paid parental leave champion Representative Carolyn Maloney (D-NY) reintroduced the Federal Employee Paid Parental Leave Act (FEPPLA) on January 26, 2015. The bill would provide federal employees six weeks of paid parental leave upon the birth, adoption or fostering of a child. AFGE calls on Congress to recognize the value of this benefit to the federal workforce and working families. The Federal Employee Paid Parental Leave Act should be advanced in the 114th Congress and sent to the President's desk.

Virtually all research on child development and family stability supports the notion that parent-infant bonding during the earliest months of life is crucial. Children who form strong emotional bonds or "attachment" with their parents are most likely to do well in school, have positive relationships with others, and enjoy good health during their lifetimes. These are outcomes that should be the goal for all children, including those of federal employees. Spending time with a newborn, newly adopted, or foster child should not be viewed as a personal choice, or a luxury that only the rich should be able to afford. The only reason a new parent would ever go back to work immediately after the birth of a child, adoption or placement of a foster child—even with the protections of the FMLA—is because she or he could not do without his or her paycheck. And far too many workers in both the federal government and outside must make this terrible choice.

Congressional opponents of paid parental leave for federal employees have raised arguments largely based on cost, or notions that attempt "ranking" parental status. Unrealistic assertions about the ability of federal workers to accrue leave continue. It is not difficult to speculate on the cost of failing to extend this benefit to new families. Productivity is lost when a parent returns to work too soon without securing proper daycare for a newborn or newly adopted child or when federal employees come to work when they are ill because they used up all of their sick leave during the adoption process or caring for a newborn. A lack of paid parental

leave also negatively impacts the government when a good worker, trained at taxpayer expense, decides to leave federal service for another employer who does offer paid leave.

Growing numbers of private employers and most governments across the globe have acknowledged the benefits that attach to the workplace when workers are provided paid new parent leave like that provided in FEEPLA. Only 12% of U.S. workers have paid family leave and only 61% have paid sick leave according to the Bureau of Labor Statistics. The U.S. joins Papua New Guinea as the only countries with no statutory paid parental leave for workers.

FEEPLA Equally Recognizes Mothers, Fathers, and Families Formed Through Adoption

Some opposition to the Federal Employee Paid Parental Leave Act is based on irrelevant distinctions between adoptive parents, birth parents, mothers and fathers. The FMLA settled the question of whether anyone besides a woman who has just given birth deserves time off from work to care for a child. Attempts to create an employer-financed short-term disability insurance for federal employees as a means of providing paid maternity leave for birth mothers only solves part of the problem. Such a short-term disability insurance program would not provide a solution for new fathers or new adoptive parents and is therefore discriminatory as a solution to the problem of providing paid leave to new parents. The FEPPLA takes it as a given that all parents deserve equal treatment.

Congress Should Recognize the Benefits of Leave to Workers and Agencies

Congress must face the reality of the difficulties federal workers face in accumulating annual leave. Federal employees are only able to accumulate a maximum of 30 days of annual leave, not an adequate amount of time for providing care to a newborn or a newly adopted child. By most conservative estimates it would take a federal worker who takes two weeks of annual leave and 3 days of sick leave per year close to 5 years to accrue enough sick and annual leave to receive pay during the 12 weeks of parental leave allowed under FMLA. Even if a federal worker never got sick and never went on vacation it would take over 2 years to accumulate enough leave to pay for 12 weeks of parental leave. The alternatives suggested by federal employee paid parental leave opponents are far too simplistic and unrealistic to adequately address the problem. Federal workers who take unpaid parental leave too often fall behind on their bills and face financial ruin. Federal workers in their child-bearing or adopting years, earn less, on average, than other federal employees. They are at a moment in their careers when they can least afford to take any time off without pay, and least likely to have accumulated significant savings.

In 2009 the Congressional Budget Office scored an earlier version of the Paid Parental Leave Act and determined that the bill was budget neutral. AFGE believes that the Paid Parental Leave Act will result in the retention of talented workers who would otherwise leave federal government work for private sector jobs because of the availability of paid parental leave. The federal government currently reimburses federal contractors and grantees for the cost of providing paid parental leave to their workers. Surely if such practice is affordable and

reasonable for contractors and grantees, federal employees should be eligible for similar treatment.

Conclusion

President Obama has led by example by directing federal agencies to support their workers by providing paid leave for newborn, newly adopted, and newly placed foster children. AFGE knows that the federal government can only attract and keep the workforce necessary to carry out its mission by providing benefits on par with other large employers. AFGE will again work with a coalition of work-family advocates to support the Federal Employee Paid Parental Leave bill. The benefits to children and families of six weeks of paid parental leave are enormous and long-lasting. AFGE strongly urges passage of the Federal Employee Paid Parental Leave Act during the 114th Congress.

Equality for All Federal Employees

Introduction

Further steps were taken in 2014 towards fairness in the workplace and the fight for equality for all federal workers. A year, the Supreme Court ruled that the restrictive definition of marriage as only between “one man and one woman as husband and wife” in the Defense of Marriage Act (DOMA) was unconstitutional, the Office of Personnel Management proposed regulations to extend to same- sex spouses of federal workers Federal Employee Health Benefits, annuity survivor and federal long term care insurance benefits. In July President Barack Obama signed an amendment to Executive Order 11478 protecting federal workers from discrimination based on gender identity. Despite these significant advancements, Congress failed to send to the President legislation that would ensure that all workers—federal and others—are treated equally. AFGE will fight for equality in the federal workplace until those rights are achieved.

A Strong Senate Victory for the Employment Non-Discrimination Act (ENDA)

The pursuit of justice has not always been easy or popular, but AFGE stands true to a basic tenet of fairness: an employee or job applicant should be judged by his or her ability to perform the job. In this light, AFGE strongly opposes employment discrimination on the basis of sexual orientation. Currently it is not a statutory civil rights violation to fire a hard-working, dedicated federal employee simply because that worker is not heterosexual – and that is wrong. Although this protection has been applied administratively to federal employees for decades, the Special Counsel under the Bush Administration systematically denied federal workers a process to remedy discrimination based on sexual orientation demonstrating the need for statutory protections. The Employee Non-Discrimination Act (ENDA) extends the federal employment discrimination protections currently provided on race, religion, sex national origin, age, and disability to sexual orientation for both public and private workers.

The Senate Makes History

The House followed the Senate’s passage of ENDA over a year ago by a decisive 64–32 vote with inaction. Although the House companion to ENDA (H.R. 1755), introduced by Representative Jared Polis (D-CO) had over 200 cosponsors and would have likely won a floor vote, Republican leadership failed to move this important bill. AFGE supports ENDA as well as legislation extending benefits to domestic partners of federal employees.

ENDA Provides Basic Legal Protections

- Extends federal employment discrimination protections currently based on race, sex, religion, national origin, age and disability to sexual orientation. ENDA extends fair employment practices and does not convey special rights.

- Prohibits public and private employers, employment agencies and labor unions from using an individual's sexual orientation as the basis for employment decisions.
- Provides for the same process as permitted under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act but has limited remedies. Remedies that are available for cases of statistically disparate impact (affirmative action, quotas, or the prohibitions of policy or practice) are permissible under ENDA.

What ENDA Does Not Do:

- Does not cover most religious organizations and employers with 15 or fewer employees.
- Does not apply to the uniformed members of the armed forces and does not affect current law on lesbians and gays in the military.
- Does not require an employer to provide benefits for the same-sex partner of an employee.
- Does not allow the Equal Employment Opportunity Commission (EEOC) to collect statistics on sexual orientation.

The Domestic Partnership Benefits and Obligations Act

Senators Tammy Baldwin (D–WI) and Susan Collins (R–ME) introduced S. 1529, the latest version of the Domestic Partnership Benefits and Obligations Act. Representative Mark Pocan (D–WI) introduced the House companion, H. R. 3135. The Domestic Partnership Benefits and Obligations Act would provide the same-gender domestic partners of federal employees equal benefits as those available to spouses of married federal employees. AFGE strongly urges the House and Senate to support the fight for equality on behalf of all federal workers by cosponsoring this important legislation.

Background

The Domestic Partnership Benefits and Obligations Act is about equity. It is not, as its opponents try to argue, about providing any form of special preference or extra benefit for federal employees who have formalized their exclusive relationships with a same-gender domestic partner as compared with those who marry a person of a different gender. The equalization of benefits would extend to health insurance under FEHBP, retirement benefits, rights under the Family and Medical Leave Act (FMLA), life insurance under the Federal Employees Group Life Insurance (FEGLI) plan, workers' compensation, death and disability benefits, and reimbursement benefits for relocation, travel, and related expenses. Further, the biological and adopted children of the domestic partner would be treated just like step-children of married federal employees under the benefits listed. Finally, under the legislation, same-

gender domestic partners would be subject to the same anti-nepotism and financial rules and obligations as those that apply to married federal employees.

To become eligible for the equitable treatment provided for in the legislation, federal employees would be required to file legal affidavits of eligibility with the Office of Personnel Management (OPM) to certify that they share a home, and financial responsibilities. The employee must affirm the intention to remain in the domestic partnership indefinitely, and must notify OPM within thirty days if the partnership is dissolved. The provisions of the legislation would apply only to same-sex domestic partnerships.

The practice of treating married employees and those in committed same-sex partnerships equitably with regard to health insurance and retirement benefits is well-established in the private sector and in many state and local governments. More than half of the Fortune 500 firms extend equal benefits to spouses and same-sex domestic partnerships. They do so not only because it is fair and appropriate, but also because the market has made such policies an imperative in the competition to attract and retain excellent employees. The federal government should do no less. It should strive to attain the highest level of fairness for its employees, and it has a duty to all taxpayers to adopt employment policies that facilitate the hiring and retention of a workforce of the highest possible quality.

Refusal to provide equitable treatment with regard to the provision of employee benefits is a violation of the merit system principle that promises equal pay for substantially equal work. The economic value of family coverage for health insurance, survivor benefits for retirement, disability, workers' compensation, and life insurance; and full family coverage of relocation costs are substantial to a worker and would have extremely modest costs for the government. The equal pay principle has historically been understood to include all financial compensation, not just salary. Non-cash federal benefits make up almost a third of a typical federal employee's compensation. In many metropolitan areas, the salary gap between federal and non-federal jobs has actually grown in recent years so that it now stands at 34 percent on average nationwide. To exacerbate the challenge this poses to efforts by federal agencies to hire the next generation of federal employees by continuing to discriminate between married employees, and those in domestic partnerships is as irrational as it is unfair.

The difference between the retirement annuities of employees with and without survivor designations vary widely on the basis of length of service, age at retirement, high-three salary, and retirement system. The two major federal retirement systems, the Civil Service Retirement System (CSRS), and the Federal Employees Retirement System (FERS) both allow married federal employees to ensure that their survivors continue to receive benefits after they die. The employee is required to take a reduction in the amount of his or her annuity in order to "buy" this survivor protection, but in most cases, taking the survivor option costs the employee about half of the value of benefits received by the survivor. The important point is that the financial value of survivor annuity benefits is substantial, and is, for the vast majority of federal employees who earn a full retirement annuity after a career of federal service, the single largest component of compensation after salary and their own annuity. This inequity in

the treatment of a federal employee's survivors is the most severe and the most indefensible. After all, even the most ardent opponent of equality might feel shame at depriving an elderly surviving domestic partner the survivor benefits available to an elderly surviving husband or wife.

Worker Equality Facilitates Good Governance

One cannot justify discriminating against federal employees who are in domestic partnerships versus federal employees who are in conventional marriages. All else equal, sexual orientation should not form the basis of discrimination in compensation. But unless and until the Domestic Partnership Benefits Act becomes law, discrimination in compensation will continue to occur in the federal government. Of course, passage of this legislation is not just a matter of fairness. It is also a matter of what is necessary for the federal government to succeed in recruiting the next generation of government employees, and to retain them once they form monogamous relationships and start families. There will be no reason to stay with the government when other employers, whose mission can be just as compelling as the government's, offer higher salaries and more comprehensive benefits. Employees who do stay and are affected by the inequity will understandably feel the pain of this discrimination, and it will inevitably affect their morale and commitment to their agency's mission. They will know that they are receiving far less compensation for their work than their married coworkers, and have every reason to feel resentment at the inequity.

The Domestic Partnership Benefits Act is fair and equitable for employees, is affordable for the taxpayers, and will greatly enhance recruiting and retention in the federal government. It should be passed and signed into law with all due speed.

Conclusion

AFGE strongly urges House and Senate passage of the Domestic Partnership Benefits Act and passage of ENDA in the House.

Federal Workers' Due Process Rights

The Conyers Decision: National Security or a Brazen Attempt to Convert the Civil Service to an "At Will" Workforce?

The right of federal employees to appeal adverse agency actions is under assault. In 2014 the Supreme Court refused to hear the lower court's decision in *Kaplan v. Conyers (Conyers)* upholding the ability of Federal agencies to deny independent due process appeal of adverse actions to the civil service if their positions are designated noncritical sensitive. The Office of Personnel Management (OPM) proposed regulations that if implemented will allow agencies to designate almost any civil service position as noncritical sensitive and create a large and growing class of federal workers with second-class due process rights. Neither OPM nor the Office of the Director of National Intelligence (ODNI) have documented why such a sweeping denial of due process rights is necessary, estimated the number of positions anticipated to be subject to redesignation, or projected the cost of never-ending background investigations. Without Congressional intervention, thousands of hard-working public servants may be subject to arbitrary, unfair or discriminatory adverse actions without meaningful review. AFGE calls on the Obama administration to stay "national security position" redesignations, background investigations and personnel actions until justification for these actions is provided to Congress. AFGE supports the reintroduction of legislation in the House and Senate that restores MSPB appeal rights to federal workers who are found ineligible to occupy a noncritical sensitive "national security position." Executive branch accountability and the enforceability of federal workforce due process rights are on the line.

The Conyers Decision: A Step Backwards for the Rights of All Federal Workers

The Conyers case combines appeals of Department of Defense (DoD) decisions that resulted in the termination of Rhonda Conyers and the demotion of Devon Northover. Rhonda had served as an accounting technician for the Defense Finance and Accounting Service (DFAS) for over 20 years when in September 2009 she learned she had been indefinitely suspended from her job. DoD notified Rhonda that her job had been designated as a noncritical sensitive and that she had been deemed ineligible to access sensitive information—even though her job did not require her to access sensitive information. The agency explained that her financial circumstances, namely debts totaling less than \$10,000, precluded her from keeping her job.

Devon Northover had worked at an Air Force Base commissary for close to seven years when he learned of his demotion to a part-time store clerk in 2009. DoD had determined Devon's position, which primarily involve stocking shelves at the commissary and checking inventory, would be designated a national security position. In a manner similar to that experienced by Rhonda, DoD did not elaborate on why his position suddenly impacted national security. Also like Rhonda, the decision was based on financial considerations, i.e., debt. Devon requested an extension to respond to this determination and explain that family issues that led to his financial circumstances. The agency denied his request. Sadly, these facts are not unique to Rhonda and Devon.

Background

The Civil Service Reform Act (CSRA) allows employees facing adverse actions (14-day suspension or worse) to appeal their agency's decision to the independent Merit Systems Protection Board (MSPB). Under normal circumstances, the MSPB reviews the merits of the agency's decision to take an adverse action against an employee to ensure that the decision is fair.

In 1988, the Supreme Court decided in *Department of the Navy v. Egan (Egan)* that the MSPB could not review the merits of security clearance determinations while adjudicating agencies' adverse actions against employees. As a result of this decision, an agency could require an employee to hold a security clearance in order to perform a particular job, then revoke the employee's clearance, then terminate the employee because he was no longer eligible for the position because he had lost his clearance. Yet there was no requirement for the agency to explain or justify to the MSPB why the employee's clearance had been revoked. The employee could still appeal his firing to the MSPB, but his appeal would be meaningless: the agency could justify firing the employee simply because his clearance had been revoked. The MSPB was not permitted to determine whether the underlying cause of the firing; i.e., the revocation of the clearance, was fair to the employee.

Conyers and Northover in the Federal Courts

Egan was bad enough for federal workers. But at least until the *Conyers* case, federal courts interpreted *Egan* as limited to security clearance determinations. With the support of 20-plus years of legal precedent, AFGE appealed the actions against Rhonda and Devon to the MSPB because their cases did not include a security clearance determination. The MSPB had jurisdiction and accepted review of both cases because DoD had decided both employees were unfit for their positions, and the board has always exercised jurisdiction over these types of determinations. The MSPB found the narrow exception stated in *Egan* did not apply to Rhonda or Devon because neither position required the occupant to access sensitive or classified information.

OPM appealed the decision to a three-judge panel of the Federal Circuit, which overruled MSPB in January 2013. AFGE appealed to the full Federal Circuit which once again ruled the designation of a worker's fitness to hold a "national security position" is beyond MSPB review and that the agency's determination of fitness to occupy a position is not reviewable by the MSPB or any court. The United States Supreme Court denied AFGE's petition for *certiorari* on March 31, 2014.

OPM and ODNI Propose Regulations to Codify Conyers

The Office of the Director of National Security (ODNI) reissued regulations in May, 2013 that expanded the reach of the *Conyers* decision. Without any legitimate justification and under the guise of simplifying and modernizing the process, OPM and ODNI expanded their own power by

crafting arbitrary guidelines for the designation of positions as “national security positions.” Under the proposed regulations, a national security position includes any position in a department or agency, the occupants of which could bring about a materially adverse effect on national security. The definitions provide a laundry list of examples of positions that might constitute a national security position. These vague, expansive descriptions might allow any agency to reclassify positions as “national security positions,” thereby removing them from the jurisdiction of the MSPB. There are no real limits on an agency’s so-called discretion included in the proposed regulations.

The proposed regulation authorizes department heads to designate national security positions as one of three sensitive sensitivity levels: noncritical sensitive, critical sensitive, or special sensitive. The lowest sensitivity level—noncritical sensitive—specifically mentions positions that would not require any security clearance at all. Despite the apparent lack of coherence, this regulation echoes and codifies the Federal Circuit’s ruling under *Conyers*. The repercussions are that any agency may designate any position as national security sensitive, and there will be no meaningful review of that decision or an adverse action appeal arising from it. A Justice Department attorney acknowledged that as many as 200,000 positions within DOD alone could be reclassified as one of the three sensitive designations and could not estimate the number of positions impacted at other agencies. The proposed rule would require that each newly designated position be reviewed by the agency every 24 months, basically precluding accountability, accuracy, and any legitimate appeal by the occupant of the position. The potential for agency abuse and workforce harm is beyond measure.

What’s at Stake for Federal Workers?

The jobs of hundreds of thousands of federal workers will be placed at risk by both the OPM proposed regulation and the *Conyers* decision with no legitimate motive or public policy reason expressed by the Federal government. It is important to keep in mind that both the *Conyers* decision and the OPM/ODNI proposed regulations deny review of the agency’s actions in redesignating positions as well as decisions made regarding the fitness of occupants to continue holding those positions. DoD’s actions are an example of the abuse of discretion that will spread across all federal agencies if the *Conyers* ruling stands and the OPM/ODNI proposed regulations are made final. The *Conyers* ruling itself involves federal employees who never had any access to classified information. Neither Rhonda Conyers nor Devon Northover held a security clearance. They never had access to classified or sensitive information. Neither had any plausible potential to negatively impact our nation’s safety. Rhonda was an accounting clerk and Devon worked at a commissary. Yet DoD brazenly designated both positions as national security positions with little explanation.

The federal workforce is faced with a “perfect storm” of tremendously bad potential outcomes. Federal workers have endured the injustices of frozen pay and threatened benefits. They’ve been furloughed as a result of harmful sequestration cuts. They were furloughed for 16 days as result of a pointless government shutdown, unsure how or when they’d be able to pay their bills or make ends meet. Despite these problems and resulting low morale, federal workers

showed up to work protecting the country providing crucial public services. But the impact on federal worker finances is real and severe, and now the risk of job loss because of financial hardship is equally as real.

Bad credit or financial hardship is not an indication of bad character or disloyalty to the country. The implication that those with credit card debt, occasional late bill payments, or temporary financial hardships are somehow disloyal to their country is deeply offensive and patently absurd. Like most Americans, federal employees have been hit hard by the great recession and some have struggled to make ends meet. Unlike most Americans, federal employees now face baseless accusations of disloyalty to their country based on a bad credit report.

AFGE's Department of Women's and Fair Practices has found that the national security designations process disproportionately impacts public servants over 40 years old, women in the federal workforce, and public servants of color at DFAS. Overreliance on credit history also disproportionately affects those of lower grade positions even though lower grade positions are much less likely to pose any actual risk to national security. OPM and ODNI have simply failed to adequately document the need to create "national security positions," or the extent of problems that would require the cancellation of civil service rights.

Congress Reaffirms its Intent that the MSPB Ensure Accountability to the Public and to Federal Employees

For over three decades Congressional intent to provide important safeguards for federal workers included in the 1978 CSRA and its subsequent amendments has stood. That intent is crystal clear: the MSPB's mandate is to serve as a vigorous defender of the merit system to prevent the civil service from devolving to a patronage system. Chief among the MSPB's functions is protecting federal employees from arbitrary disciplinary actions, inappropriate favoritism, and coercion for partisan political purposes. When a federal employee faces discipline or termination, he or she may challenge that decision before the MSPB. The MSPB reviews the decision to determine whether or not it complies with the principles of the CSRA. Congresswoman Eleanor Holmes Norton (D-DC) has shown tremendous leadership in assembling bipartisan support for H.R. 2272, her legislation in the 113th Congress. That bill would have overturned *Conyers/Northover* by restoring due process procedures of the CSRA to workers who do not hold a security clearance and whose work does not involve access to classified materials.

The September 9, 2014 hearing entitled "Examining the Administration's Treatment of Whistleblowers" before the House Federal Workforce, U.S. Postal Service and Census presented an opportunity for Congresswoman Norton and other bipartisan subcommittee to question the basis and wisdom for the agency actions leading to the *Conyers* decision. Witness testimony exposed that the *Conyers* decision denies federal workers who are found ineligible to occupy a noncritical sensitive "national security position" the ability to argue that they are being removed for illegal reasons ranging from discrimination based on race, national origin or religion, because they are gay or in retaliation for blowing the whistle on government fraud,

waste or abuse. AFGE worked closely with Rep. Norton to ensure introduction of the bill and applauds her continuing courage and leadership as a vocal supporter of the federal workforce and will work for reintroduction of the bill in the 114th Congress.

Congresswoman Norton's bipartisan efforts were echoed in the Senate by Senator Jon Tester (D-MT), who introduced S. 1809, a companion bill to H.R. 2272 during the 113th Congress. Senator Tester was joined by Senators Charles Grassley (R-IA), and Claire McCaskill (D-MO) in supporting due process rights for federal workers. In November 2013, AFGE General Counsel David Borer testified before the Senate Homeland Security and Governmental Affairs Subcommittee on Efficiency and Effectiveness of Federal Programs and the Federal Workforce on the arbitrary manner in which government agencies designate sensitive positions and the ramifications on federal workers. Senator Tester also raised compelling questions regarding the costs of expanding background checks to a large portion of the federal workforce. AFGE will continue to work with Senator Tester, Senator Grassley and Senator McCaskill to reintroduce their legislation in the 114th Congress.

Conclusion

AFGE is outraged by Court and administrative attempts to deny untold numbers of federal workers their due process rights. The CSRA and numerous amendments have made clear the will of Congress to provide the vast majority of federal workers with due process rights before the MSPB and Federal courts. AFGE joins other federal worker unions, good government, and whistleblower advocates in calling for reintroduction and swift passage of replacement legislation for S. 1809 and H.R. 2272 in the 114th Congress.

Equal Employment Opportunity Commission

As EEOC Celebrates Fifty Years of Service Ensuring the American Dream for All, the Agency is Hobbled by Backlogs, Inadequate Frontline Staffing, Poor Morale, and a Failure to Adopt Efficiencies Recommended by the Union.

Summary

For fifty years the employees of the Equal Employment Opportunity Commission (EEOC) have been working to ensure that discrimination does not stop any American from getting or keeping a job. AFGE's National Council of EEOC Locals, No. 216, is proud to represent EEOC's investigators, attorneys, mediators, administrative judges and other EEOC staff who contribute to job creation by enforcing Title VII of the Civil Rights Act of 1964 and other key civil rights laws, which protect against discrimination on the job based on race, religion, color, national origin, sex, age, disability and now genetics.

Fifty years since opening its doors, EEOC continues to be hobbled by budget constraints, inadequate hiring of frontline staff, low morale, and a failure to implement common-sense efficiencies. In FY13, sequestration slashed EEOC's budget from \$370M to \$344M. Staff were required to absorb the cuts with five furlough days and a continuing hiring freeze. FY14 began with the shutdown. FY14 ended with EEOC's staffing at a record low 2,098 FTEs.

Frontline staff is critical to EEOC's ability to enforce anti-discrimination laws. The lack of adequate staffing, exacerbated by losing a month to the shutdown and furloughs, has taken its toll on EEOC's ability to carry out its civil rights mission. In FY14, EEOC resolved 9,810 fewer charges than FY13 and in FY13, resolved 14,000 fewer charges than in FY12. The EEOC's backlog worsened from 70,781 cases in FY13 to 75,935 in FY14, a trend it cannot afford.

The public must wait almost nine months for EEOC to process a case. Just to have a call answered by the in-house call center takes 45 minutes. These extended delays represent lost opportunities for Americans who want to work free from discrimination.

AFGE Council 216 will lobby for Congress to end sequestration and to fund EEOC at \$367M, i.e., the agency's funding back in FY10. AFGE Council 216 will also press EEOC to implement real efficiencies e.g., the Union's dedicated intake plan, smart-staffing EEOC's frontlines, reducing supervisor to employee ratio to 1:10, cutting management travel, and eliminating contracts for work that can be performed in-house.

Discussion

1. Civil Rights Enforcement Has Been Harmed Enough by Sequestration and the Shutdown; Sequestration Should End.

- *AFGE Council 216 will lobby Congress to end across the board cuts that cause particular harm to EEOC, which suffers an imbalance of low staffing to high workload.*

Title VII of the Civil Rights Act's historic passage created EEOC, the chief agency responsible for enforcing numerous laws preventing employment discrimination. Fifty years later, discrimination, such as harassment, failure to accommodate a disability, or retaliation, still prevent private and Federal sector employees from working or initially getting a job.

Since its inception, EEOC has always been small and underfunded. In FY13, Sequestration worsened the situation dramatically, slashing EEOC's FY13 budget from \$370M to \$344M. To absorb this drastic cut, EEOC forced five furlough days on its employees. AFGE Council 216 maintains that EEOC could have better managed the sequester cut, e.g., cutting contracts, management travel, etc. To that end, AFGE Council 216 spearheaded a successful campaign that ended EEOC's plan of forcing staff to furlough an additional three days.

Nevertheless, the fact remains that not only were EEOC's workers harmed by the furloughs, but American workers still suffer from the loss of assistance during those furlough days. The EEOC reported "a significant decrease in resolutions." Specifically, EEOC resolved 14,000 fewer cases in FY13 than in FY12. EEOC's Performance and Accountability report explained the drop was "likely due to the decline in staffing and resources the agency faced in FY2013, including the impact from furloughs."

On the heels of FY13 furloughs came the sixteen day government shutdown. According to the Office of Management and Budget, the EEOC lost 23,000 worker days to the shutdown. During that time, EEOC received nearly 3,150 charges of employment discrimination that it was unable to investigate. Continuing its downward trend in the number of workers it was able to help, in FY14 EEOC resolved 9,810 fewer cases and again said this was "likely due to the government shutdown and the effects of sequestration."

Workers who rely on EEOC cannot afford a return of sequestration in FY16. Sequestration would again slash EEOC's funding and further imperil the agency's ability to enforce civil rights laws.

2. Backfilling Frontline Staff Must be the Priority - Record Low Staffing and High Workload Have Had Disastrous Public Impact.

- *AFGE Council 216 will lobby Congress to adequately fund EEOC and ensure that the agency prioritizes backfilling frontline staff.*

Fifty years ago, thanks to Martin Luther King, Jr. and others who marched and fought for the passage of Title VII, EEOC opened its doors. Enforcing Title VII and other laws that prevent employment discrimination requires frontline staff. Effectiveness requires more than just laws on the books. EEOC must be swift and effective in order to deter discrimination.

EEOC experienced an unprecedented budget cut in FY12, from \$367M to \$360M. Then in FY13, the Sequester slashed EEOC's budget from a base funding level of \$370M to an actual budget of \$344M.

The timing of these cuts unfortunately coincided with five years of historically high discrimination charge filings. The worst impact of the consecutive years of budget cuts was the steady loss of frontline employees in virtually every EEOC field office at a time when workload is up.

A hiring freeze first implemented in FY11 caused EEOC's workforce to plummet. In the second half of FY14, EEOC finally ended its hiring freeze, but EEOC's modest hiring has not kept up with attrition. In fact, EEOC had a net staffing loss compared to the previous year. EEOC's FY14 performance report states the agency ended FY14 with only 2,098 employees nationwide - down 16% from 2,505 just three years earlier in FY11. This is a record low number of employees, since EEOC began reporting staffing levels in 1980.

The few recently hired are insufficient to address the workloads. Shrinking frontline staff resulted in fewer charges of discrimination being resolved. Fewer resolutions means more victims trapped in EEOC's worsening backlog, which has risen from 70,781 cases in FY13 to an abominable 75,935 in FY14 (up 7.28%). EEOC's last reported average case processing delay is a dismal 9 months.

Even though the agency's FY14 Inspector General's report notes the number of investigators at 716, the reality is that the new investigators must first get trained and will not be immediately available to reduce the backlogs. The other point to note is that even at 716, this is almost 50 fewer investigators than in FY11. By contrast, EEOC had a high of 917 investigators in FY00. EEOC's frontline staff is the single most critical resource utilized to enforce civil rights laws that protect workers. EEOC's OIG recognized in its FY13 report that, "[i]t is axiomatic that any substantial and sustainable effort to significantly reduce the charge inventory requires adequate numbers of staff (investigators in particular)." EEOC recognizes that the drop in resolutions and current rise in backlog is due to the impact of sequestration, the government shutdown, and the recent hiring freeze with consequent attrition.

Other frontline activities have been impacted by the relentless attrition, as well. Overall monetary relief for victims of discrimination from mediation, conciliation, and other administrative enforcement dropped from \$372M in FY13 to \$296.1M in FY14. Loss of staff mediators and the shutdown meant only 10,221 mediations conducted in FY14, as compared to 11,513 in FY13.

EEOC's in-house call center has shrunk from 65 intake information representatives (IIR) to the current 28. The IIR shortage means phones are not answered promptly. This leaves the public the choice of waiting approximately 45 minutes to speak to a live employee or hanging up.

EEOC also fell further behind on its obligation to respond to Freedom of Information Act requests (FOIA). EEOC receives over 18,000 FOIA requests annually. According to the FY14 Chief FOIA Office report, the lack of reduction in the request backlog was caused both by more requests and the "[l]oss of staff and a continuing hiring freeze impeded EEOC's ability to reduce its backlog."

The result of nationwide frontline staffing losses is that the public is not being served. The FY15 CROmnibus funds EEOC at \$364.5M, which is actually less than EEOC's FY10 budget of \$367M. Meanwhile the price of airline tickets, postage, leased space, etc. has increased.

Council 216 will press EEOC to prioritize within the tight budget the backfilling of frontline staff after implementing the 1% salary increase and paying outstanding overtime claims, discussed below. Council 216 will urge Congress to at least restore the FY10 funding level of \$367M.

3. EEOC Should Increase Efficiencies, Including: the National Intake Plan, Reducing Supervisor to Employee Ratio, and Expanding Telework to Decrease Rental Costs.

- *AFGE Council 216 will lobby Congress to make EEOC implement efficiencies to prioritize frontline staff and eliminate unnecessary contracts and travel.*

EEOC's planned efficiencies, as set out in its Performance and Accountability Report, are all smoke and mirrors. The EEOC's plans involve online pre-charge filing, an online appointment system, and on-line tracking of charge status. While technology and transparency can be helpful, they must provide more than a way for the public to track EEOC's bottlenecks. These efficiencies still require staff to avoid a bigger pile of work for fewer EEOC employees to process. EEOC should focus on pushing resources to frontline staff, who directly serve the public.

- *Transition to the National Intake Plan Cannot Wait*

AFGE Council 216's Full Service Intake Plan addresses the efficient use of resources and the backlog, both of which benefit the public. AFGE Council 216 first submitted the plan five years ago. Council 216's Full Service Intake Plan would staff each field office with a compliment of positions and grades (GS-5 through GS-9), including investigator support assistants (ISAs). These employees would advance the intake process from pre-charge counseling through charge filing and address the flood of intake questionnaires and long hold times for the public. Investigators will be able to focus on investigating cases and reducing the backlogs.

Congress recognizes the need for EEOC to implement efficiencies. Nevertheless, EEOC refuses to consider the plan and did not even mention it in the agency's Strategic Plan, the budget, or the performance report.

It is now even more imperative to transition to AFGE Council 216's National Intake Plan to fix the in-house call center and improve intake. In 2006 EEOC was forced to shut down its failed contract call center, but stubbornly tries to replicate it in-house. The in-house version is based on 64 Information Intake Representatives. But for the FY15 budget request, EEOC reported it was down to 34 IIRs. The IIR shortage has also meant fewer calls handled, i.e., 19,000 monthly calls handled in FY14, down from 20,000 in FY13, and 25,000 in FY12.

Since the FY15 budget request was penned, only 28 IIRs remain. The remaining IIRs report that callers are angry and frustrated after waiting up to 45 minutes. Turnover rates are high for IIRs,

given the oppressive quotas, e.g., 6 minute call length, and working conditions, e.g., Tampa IIRs relocated to cubes in noisy hallway. The call center model was never effective or efficient and at the current staffing level, also is unsustainable.

Moreover, the Strategic Plan emphasizes consistent implementation of customer service goals and the priority charge handling process [PCHP]. The National Intake Plan would achieve this desired consistency. AFGE Council 216's Intake Plan also better utilizes resources by relieving investigators of intake responsibilities, to focus on processing cases already in the system and reducing EEOC's unacceptable 75,935 case backlog.

Initially, the plan should be piloted in offices which have IIRs. The pilots will create efficiencies without expense by training and integrating existing ISAs and in-house call center staff, whose job series falls under the ISA family, into dedicated intake units that both answer phones and draft charges where appropriate. Moving forward, EEOC should focus backfill decisions on staffing the dedicated intake plan, rather than throwing good money after bad by sticking with the failed contract call center model which continues to burden the investigators and backlogs.

- *EEOC Must Prioritize Frontline Staffing*

EEOC passed sequester cuts to staff as furlough days and a hiring freeze. It is now critical that EEOC implement real efficiencies that push resources to frontline staff, who serve the public. First, any hiring should be used to backfill frontline vacancies. Hiring or re-employing annuitants in more costly management positions does not help the frontline. Nor does promoting staff to management without ensuring the resulting vacancies are backfilled. By filling more GS-13 Systemic Investigator positions, EEOC could retain talent and match staffing to its stated priorities, given its renewed emphasis on systemic cases.

Second, a budget neutral way for EEOC to increase frontline staff is to reduce supervisor to employee ratio to 1:10. The EEOC's Republican leadership in 2006 supported this ratio, but to date this reasonable goal has never been realized.

Third, EEOC should smart staff offices in the manner recommended by Council 216's People First Plan, first recommended in 2005. The premise of the plan is to rely on building blocks of staff teams. For instance, no EEOC office should have less than one full investigative team, which would consist of a supervisor or team leader, ten investigators, two investigator support assistants, and one OAA support person. Smart staffing can best utilize hiring to efficiently address priorities in offices suffering arbitrary vacancies caused by a three year hiring freeze and resulting attrition.

Fourth, EEOC should belatedly heed the Administration's call for efficiency and cost savings by using expanded telework to reduce rental costs. Ignoring the call, EEOC continues leasing the same or even greater space, not accounting for the reduction of needed space if employees voluntarily teleworked most days. EEOC's new CBA allows for an added day of telework, which EEOC is blocking. EEOC intends to use a quota of small shared offices without regard to

telework. This will negatively impact efficiency and cause more staff to leave, but EEOC does not care. AFGE Council 216 will advocate for EEOC to implement the extra day and link it to space savings, as was intended by the new CBA.

Fifth, EEOC should limit turnover by taking actions and using flexibilities to improve employee morale. EEOC ranks third on its own list of agencies most accused of discrimination. EEOC continues to score below the government average in significant areas of concern in the 2014 Federal Employee Viewpoint and Best Places to Work surveys. EEOC ranked last in its category of midsized agencies in the work-life balance score. EEOC should embrace the new maxi-flex pilot and not block the use of an added telework day that was agreed to in the 2013 CBA.

EEOC also must pay its debt to employees for willfully violating overtime laws since 2006, per the current claims process stemming from a Federal arbitrator's March 23, 2009 ruling.

Only by focusing its limited resources on the frontline, including appropriate support staff, will EEOC at least prevent the 75,935 charge backlog from growing larger and the 9 month processing time from getting even longer.

4. EEOC Must Avoid or Reduce Staff Furloughs, like the 5 days of Furloughs in FY13, by Implementing Real Efficiencies and Eliminating Unnecessary Contracts and Management Travel.

- *AFGE Council 216 will lobby Congress to end sequestration and call on EEOC to implement common sense efficiencies, rather than require more furloughs.*

EEOC's response to sequestration in FY13 was to force staff to take five days of furloughs. While EEOC threatened three more days of phase two furloughs, AFGE Council 216 prevented this harmful plan by waging a public awareness campaign and enlisting Congress to urge EEOC to find less damaging ways to manage. EEOC should prepare for the return of sequestration in FY16 by saving money on unnecessary expenses/travel and working smarter.

A. EEOC Should Eliminate Expendable Contracts and Unnecessary Management Travel

The EEOC should eliminate contracts it simply cannot afford and can be performed in-house. EEOC habitually pays contractors to evaluate its work practices. The reviews can and should be performed by the Office of Inspector General (OIG). Instead, the OIG farms out these projects.

- OIG's September 2014 Semi-Annual report to Congress, states "contracted with the Urban Institute to conduct an evaluation of the Agency's Outreach and Education Program. The objective of this evaluation is to assess the program's efficiency and effectiveness." OIG could have done the review.
- EEOC's OIG contracted a "Review of Evaluations," dated April 9, 2013, with generalized recommendations, such as "EEOC should further standardize intake procedures across

field offices.” EEOC could have implemented AFGE Council 216’s cost effective dedicated intake unit which takes tangible action to standardize intake. Instead it wasted money on this airy review, panned by EEOC’s Office of Research, Information and Planning: “[T]he report is not really research per se but a review of relevant literature that is generally used to develop research and generally not used to make recommendations.”

- According to the FY14 Budget Justification: “EEOC has engaged an independent contractor to provide expert guidance and assistance to the agency in developing an improved performance management program. . . . The near-term goals of identifying competencies, measuring degrees of proficiencies, and closing competency gaps that are considered significant components of the program are more than half way completed.” To date, the performance system has not been usable.
- EEOC also contracted: “Evaluation of EEOC’s Performance Measures, The Urban Institute, March 2013” and “Collecting Compensation Data from Employers; Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin, National Research Council of the National Academies, August 2012.” The latter appears to duplicate the type of data the Department of Labor collects.
- EEOC contracted a 2010 “Evaluation of Priority Charge Handling Procedures,” which concluded that different EEOC offices apply the procedures inconsistently. This determination could have been made by any in-house team and already was known to EEOC.
- EEOC contracted a study with Administrative Conference of the United States (ACUS), reviewing the organizational placement of its Federal sector hearings judges. OIG could have conducted this evaluation.
- EEOC already employs mediators for its successful mediation program. EEOC should not pay contract mediators for work that can be performed by in-house mediators; especially those conducted within a 100 mile radius of an EEOC office. Also, EEOC could start an expanded voluntary telework program for mediators to extend their geographic reach by being based in or assigned to serve certain regions.
- EEOC pays contract OIT staff and labor economists for functions that can be performed in-house.
- EEOC rents hotel space to conduct “TAPS” and “EXCEL” training conferences when it could use its own offices’ conference space. Smaller conferences held more frequently in-house, would offer additional scheduling choices for the public.
- EEOC wastes money for managers to travel to meetings and for office visits when offices have been equipped with video teleconference (VTC) ability, new television monitors, and updated IT capabilities.
- Management has ignored the recommended protocol of a cost efficiency committee for purchasing individual non-refundable airline tickets for a conference, instead purchasing more expensive government reserved contract carrier tickets.
- A diversity council training in 2013 flew in 16 employees at a cost of \$12,000 from around the country, during the period employees were required to take furloughs. Also,

during furloughs, an HR official was flown around the country for audits, even though personnel files are now electronic.

- In FY13, EEOC advertised on www.fbo.gov for a tracking service for legislation affecting EEOC to be used by its Office of Communications and Legislative Affairs (OCLA). OCLA could have used Thomas.gov.
- In December 2013, EEOC advertised on www.fbo.gov for an online appointment scheduling tool. While AFGE 216 supports the use of technology, the tool does not address the lack of available staff to cover the appointments. EEOC should implement the Union's cost efficient full service dedicated plan, so that there is adequate available staff for intake appointments and to free up investigators to process the charges.

5. Federal Employees Must Retain Rights to Discovery and Full and Fair Hearings.

- *AFGE Council 216 will demand that Federal employees not lose rights as EEOC implements changes to EEO and hearings processes.*

AFGE Council 216 will continue to object to and scrutinize pilots of a new case management system to ensure that judicial independence is retained, that discovery and hearings for Federal employees remain an essential part of the process and that the plan creates efficiencies which allow judges to continue to issue quality decisions. EEOC's final Strategic Plan calls for "[r]igorous implementation of a new case management system for Federal sector hearings and appeals that will enable the agency to bring consistency and greater efficiencies to the processing of Federal sector complaints." EEOC formed a workgroup that created a draft case management system and in FY14 began pilots in at least three offices. While EEOC hopes to triage all Federal sector inventory by FY16, categorizing cases without staff or other efficiencies simply leaves a pool of cases yet to be decided.

The danger of these pilots is a permanent triage system that threatens judicial independence in favor of numbers. Managers seeking to improve closure rates should not be allowed to categorize cases after a cursory review. This scheme results in summary judgment dismissals of complainants' requests for a hearing prior to allowing the parties an opportunity for adequate discovery. Moreover, EEOC should not attempt to adapt the Priority Charge Handling Procedures utilized in the private sector investigations to Federal sector hearing process, which differs because it is adjudicatory.

It is critical that the AJ retains independence and control throughout, including the initial discovery conference. AFGE Council 216 will demand that the EEOC release the final proposed version of the piloted case management system for stakeholder comments, hold a public hearing prior to finalizing the system, and submit the final version for Congressional oversight.

A newer challenge is also ensuring that EEOC itself and all Federal agencies follow the regulations and provide timely processing of Federal sector claims.

AFGE Council 216 also will continue to address the loss of EEOC Administrative Judges (AJs), who leave to become Administrative Law Judges. AFGE Council 216 will support changes that

can be accomplished under the regulations and statutes. AFGE Council 216 will continue to urge the Chair to ensure EEOC AJs are competitive with other agencies by addressing classification and regulatory issues that deny these employees the judicial independence necessary to adjudicate and provide appropriate relief for Federal sector claimants. Subpoena authority will be sought to improve the due process afforded to both Federal sector claimants and Federal agencies.

The EEOC admits in its Strategic Plan that: “As in the private sector, budgetary constraints have led to fewer available Administrative Judges and Office of Federal Operations Appellate Attorneys at a time when requests for hearings and appeals are increasing.” The EEOC’s FY14 performance report confirms requests for hearings rose from 7,077 in FY13 to 8,086 in FY14. Yet, EEOC’s FY15 budget made no mention of hiring additional AJs or AJ support staff. AFGE Council 216 will maintain pressure to backfill AJ positions and provide them support staff.

AFGE Council 216 will vigilantly monitor EEOC’s implementation of its revised regulation that allows Federal agency complaint processing pilots. While the EEOC adopted AFGE Council’s 216’s recommendation that Federal employees must voluntarily opt-in, these pilots still must provide for complete, timely, and impartial investigations. AFGE Council 216 will call for a report on these pilots and take necessary action to protect Federal employee rights.

6. EEOC’s New Strategic Plan Raises Concerns

- *AFGE Council 216 Will Fight for the Plan to Best Serve the Public*

EEOC’s Strategic Plan, approved on December 18, 2012, continues to leave much open to further development and implementation. The most important element, which remains to be finalized, is a Quality Control Plan. Until now, the EEOC has focused on touting its annual closures as a measuring stick of its success even though it concedes that due to lack of resources, 9,810 fewer cases were resolved in FY14. However, closure rates, whether up or down, do not necessarily represent justice served. AFGE Council 216 welcomes the acknowledgment in the Strategic Plan that, “One of the EEOC’s greatest challenges has been to create a system that rewards effective investigations and conciliations and does not incentivize the closure of charges simply to achieve closures.”

Instead, the Strategic Plan seeks to develop “Quality Control Plans” for the private and public sectors. However, adoption of these plans has continually been postponed. In the mean time, frontline staff are pressured to continue to focus on closures, as well as on undefined quality goals. Worse still, EEOC is nonsensically rushing to implement a new employee evaluation program to align performance with these not yet completed plans. The performance system will cause confusion and unfairness and should wait.

AFGE Council 216 will fight to ensure that the quality control plan’s emerging focus on charge processing time is not used to create a backdoor quota system that robs the public of justice. EEOC’s complex work of enforcing discrimination does not lend itself to a widget scorecard. EEOC’s drive for numbers has never served either its employees or the public well.

The Strategic Plan continues EEOC's renewed emphasis on systemic cases. AFGE Council 216 recognizes that both individuals as well as large groups of affected employees deserve protection from discrimination. AFGE Council 216 supports a more strategic and coordinated approach to systemic cases to better utilize existing resources.

The Union's Accomplishments

In 2014, AFGE Council 216 aggressively raised awareness with Congress, the civil rights community and the press about sequestration cuts and furloughs at EEOC that harmed service to the public. As a result of AFGE Council 216's efforts this year:

1. AFGE Council 216 played a major role in organizing to end the harmful sixteen day government shutdown. AFGE Council 216 leadership and members coordinated and attended rallies across the country, were featured in national and local media outlets, and published letters to the editor.
2. In a tough budget year, the administration actually requested a modest FY15 \$1.5M budget increase for EEOC. The requested \$365.5M would have still fallen below EEOC's FY10 \$367M budget. Senate appropriators recommended \$365M. Congress ultimately funded EEOC at \$364.5M for FY15.
3. AFGE Council 216 provided written and oral testimony at the House CJS Subcommittee open witness hearing in support of an increased budget.
4. Both House and Senate Appropriators included report language requiring EEOC to prioritize the backlog. Appropriators also direct EEOC to examine other efficiencies to improve customer service. AFGE Council 216 supports this language which clearly encompasses the Council Intake Plan.
5. AFGE 216 attended the White House Summit on Workplace Flexibilities and AFL-CIO related events, pressing EEOC to be the model employer it claims and stop blocking the additional day of telework agreed to in the new CBA. AFGE 216 used QR codes at the summit as a new messaging strategy.
6. AFGE 216 issued "Top Ten Challenges" for the new EEOC Chair, upon her announcement as the new agency head.
7. AFGE 216 Council has continued to represent affected employees and retirees in the ongoing overtime case claims process, occurring pursuant to a March 23, 2009 Federal arbitrator's ruling that EEOC had committed a nationwide practice of willfully violating overtime laws. EEOC may owe its employees over \$10M in unpaid overtime and liquidated damages.

8. AFGE 216 negotiated a new CBA, with improved workplace flexibilities, that went into effect in FY14. The Council continues to fight to implement local memoranda of understanding consistent with the CBA, where EEOC has attempted to block an agreed upon additional telework day. The Council has also championed a robust maxiflex pilot, despite EEOC's attempt to limit it to two offices and not follow OPM definitions. When the agency's new space requirements failed to include negotiated space for nursing mothers to pump milk, AFGE Council 216 successfully got space included. The CBA also added discrimination protection for genetics and gender identity.
9. AFGE 216 filed comments to the Federal Register Notice by EEOC for making the Federal Government a model workplace for disabled employees.
10. AFGE Council 216 has kept up the pressure on EEOC's administration to act on the Union's National Intake Plan.
11. AFGE Council 216 successfully used its Facebook page to provide information to employees during the government shutdown and to post activity by its members, including local and national press coverage.

AFGE Activists should urge their lawmakers:

- To request FY16 funding for EEOC of at least \$367M, i.e., the agency's FY10 budget.
- To permanently end sequestration, which would exacerbate EEOC's already diminished ability to enforce workplace discrimination laws.
- To direct EEOC to focus available hiring, up to the staff ceiling, on frontline staff to help workers, whose cases are trapped in EEOC's backlog and are waiting almost 9 months to receive help.
- To smart-staff EEOC's frontlines.
- In the event of sequester cuts, to make EEOC avoid or reduce furloughing frontline staff by eliminating unnecessary contracts and implementing efficiencies.
- To require EEOC to quickly implement Council 216's Cost-Efficient Intake Plan to provide timely and substantive assistance to the public.
- To make EEOC finally compensate its employees for willful overtime law violations, per the current claims process following a Federal arbitrator's final decision dated March 23, 2009.
- To direct EEOC to flatten the staffing ratio to 1 supervisor to 10 employees.
- To demand that EEOC comply with applicable agency, regulatory, and Congressional oversight requirements before implementing a new case management system pilot that could threaten a Federal employee's right to discovery and a hearing or limit Judicial independence.
- To demand that EEOC provide a plan, supported by Federal constituency groups to ensure judicial independence and subpoena authority in the Federal hearings process.

- To fight to ensure that any quality control component of EEOC's Strategic Plan is vetted by stakeholders, including the Union, will go to Commission vote and best serve the public.

One America, Many Voices Act

Introduction

According to the U.S. Census Bureau, 60.6 million people currently living in the U.S. speak a language other than English. Of those, 22.4% self-reported that they either did not speak English “very well” or “at all.” They are considered linguistically isolated, meaning that they lack a command of the English language and have no one to help them with language issues on a regular basis. A growing number of federal employees provide services to the linguistically isolated by using multilingual skills in their official duties to explain application processes, determine benefit eligibility and provide public safety. Increasingly, the multilingual skills of federal employees are an absolute necessity to serve the public and accomplish the mission of federal agencies. Yet there is no standard across federal agencies to provide compensation for federal workers who make substantial use of their multilingual skills in the workplace.

The “One America, Many Voices” Act

During the 111th Congress, Representative Mike Honda (D-CA) introduced the "One America, Many Voices" Act to ensure that all federal workers who use their multilingual skills in the workplace on a regular basis are fairly compensated. The bill would have amended 5 U.S.C. §5545 by adding multilingual skills to the list of factors for which a differential might be paid. Current law provides for a pay differential to federal workers for night, standby, irregular, and hazardous duty work. The modification authorizes the head of an agency to pay a 5% differential to any employee who makes substantial use of a foreign language in his or her official duties.

The necessity for a multilingual pay differential has been recognized by federal law enforcement agencies. Agencies such as the Border Patrol recognize multilingual skills through either a pay differential or bonuses. Other agencies require employees to have multilingual skills in certain languages without a bilingual pay differential while other employees serving other populations with limited English proficiency in the same manner are not required to speak a second language and are provided interpreters. Although employees who can communicate effectively with the populations federal agencies are mandated to serve greatly assist the agencies in carrying out their respective missions, there is no standard for compensating those skills across the Federal government.

In addition to adequately recognizing the skills of current federal workers, a multilingual pay differential would also help to entice young workers with multilingual skills into federal civil service. Although the private sector often pays a substantial dividend for the ability to speak fluently more than one language, many young workers with a commitment to their communities would be more likely to consider federal employment as a career option if they were to receive adequate compensation for their much sought-after language skills.

A number of federal agency offices are located in areas with a large and growing population of citizens with limited English speaking ability, such as California, New Mexico, Texas, New York, and Hawaii. An August 2013 report of the Census Bureau notes the percentages of people with limited English abilities increased in Alabama, Kentucky, Mississippi, Arkansas, and Oregon. Multilingual skills will become increasingly necessary to foster client communication for effective delivery of services and for the successful function of federal agencies. If enacted, the One America, Many Voices Act would provide both a mechanism to pay current federal workers using their bilingual skills on the job, and work as an incentive to aid in the future recruitment of bilingual applicants.

Conclusion

AFGE will work for the reintroduction of the One America, Many Voices Act or similar legislation in the House and Senate during the 114th Congress. Lawmakers elected since 2010 have brought an increase in the number of members of both chambers who were raised in homes where a language other than English was spoken. This increased diversity should yield support for bilingual skills compensation legislation. The benefits of a more efficient government and better services to the public will far outweigh the modest cost of paying this differential.

