

# AFGE 2022 Issue Papers

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# Federal Pay

## Introduction

Wages and salaries paid to federal employees are governed by statute. Two pay systems cover the vast majority of federal employees. Hourly workers in the skilled trades are paid under the Federal Wage System. Salaried workers in professional, administrative, and technical occupations are paid under the General Schedule's Locality Pay System. Both pay systems are based on the principle of local labor market comparability. Successive Congresses and administrations have failed to adhere to this principle, causing federal wages and salaries to fall far below the standards set in the private sector and state and local governments. Federal employees are underpaid relative to their non-federal counterparts and have experienced a decline in living standards over the past decade.

Federal wages and salaries need a substantial adjustment both to restore the living standards of federal employees and to help agencies recruit and retain a federal workforce capable of carrying out the crucial missions of our government. Not only are federal employees paid less than their counterparts in the private sector and state and local government, but their wages and salaries do not begin to keep up with the cost of living. This practice is penny-wise and pound foolish, undermining agencies' best efforts at recruitment and retention and imposes tremendous costs associated with hiring and training. Throughout the government, experienced and highly effective federal employees reluctantly leave federal service in order to obtain higher wages and salaries from other employers.

## White Collar Pay

The Federal Employees Pay Comparability Act (FEPCA) provides the basis for the operation of the pay system that covers most salaried federal employees. The law defines market comparability as 5% below salaries paid in the private sector and state and local government for jobs that are performed by federal employees. Recognizing that labor markets vary by region, FEPCA created distinct pay localities among urban areas with large concentrations of General Schedule, or salaried, federal employees.

Under FEPCA, annual pay adjustments are supposed to include two components. The first is a nationwide, across-the-board adjustment based on the Bureau of Labor Statistics (BLS) Employment Cost Index (ECI), a broad measure of changes in pay in the private sector and state and local government. The second is the locality adjustment. Locality adjustments are based on the size of gaps between federal salaries and those paid to workers in the private sector and state and local government who perform the same jobs as federal employees. Pay gaps are calculated using BLS Occupational Employment Statistics data.

For 2022, the nationwide ECI-based adjustment should have been 2.2% (full ECI of 2.7% minus 0.5 percentage points), which the Biden administration provided through an "alternative pay plan" authorized under the law for extraordinary situations. However, instead of providing locality payments that would close remaining gaps to the law's definition of comparability, 5% below market, the administration allowed just 0.5% of payroll to be distributed as locality pay.

The law originally envisioned gradual closure of gaps until 2002 when full comparability payments would be made. However, remaining pay gaps still average around 23%. In fact, no administration or Congress has provided pay adjustments according to the law's schedule for closing locality pay gaps since 1994. Nevertheless, in 2021 the Trump administration had frozen locality rates, so the 0.5% allotted to locality increases in 2022 was welcome even though it was completely inadequate.

For 2023, AFGE urges the Congress to provide at least a 5.1% federal salary adjustment, as described in the bill introduced by Rep. Gerry Connolly (D-Va.), chairman of the House Subcommittee on Government Operations, and Sen. Brian Schatz (D-Hawaii), the Federal Adjustment of Income Rates or FAIR Act (H.R. 6398 / S. 3518). This bill's proposed increase is based on FEPCA's half-point reduction in the relevant ECI (September 2020 to September 2021 of 4.6%) plus an additional 1% to be distributed among the localities. Thus for 2023 federal employees would receive a 4.1% across-the-board increase (4.6% minus 0.5 percentage points) plus one percent for locality. While modest relative to the size of the pay gap between federal and non-federal salaries, and low compared to the current rate of inflation, this increase would begin to restore purchasing power and living standards for federal workers and would demonstrate respect for their hard work and dedication. It would also facilitate recruitment and retention of the next generation of federal employees which is so important to the proper functioning of federal agencies.

### **Blue-Collar Pay**

Federal blue-collar workers' pay is governed by a statutory "prevailing rate" system that purports to match federal wages with those paid to workers in skilled trades occupations in the private sector. That system has never been permitted to function as intended. Instead, annual adjustments have been capped at the average adjustment provided to white collar federal employees under the General Schedule (GS). Prevailing rates are defined in the law as fully equal to market rates paid in the private sector, unlike "comparability" in the white-collar system, which is defined as 95% of market rates.

The white-collar system uses BLS data to determine non-federal rates and thus the gap between federal and non-federal pay. However, the blue-collar system relies on surveys conducted by local teams that include union and management representatives from the agency in the local wage area with the largest number of blue-collar employees. These local survey teams are prohibited from using any data from local building trades union scales. The data are used to create wage schedules that describe local prevailing rates.

For the past two decades, Congress has added language to appropriations bills that guarantees that blue-collar federal employees receive the same annual adjustments as their white-collar coworkers. Although the boundaries of local wage areas are different from the General Schedule, the language grants the same annual pay adjustment to all salaried and hourly workers within a given white-collar locality.

This policy of equal annual pay adjustments solves just one inequity between the two systems. The GS locality boundaries are drawn according to commuting rates, which is the proper way to

define local labor markets. The FWS locality or wage area boundaries were drawn mostly in the 1950s, reflecting the location of large military installations that employed the majority of federal hourly workers at that time.

Today, some GS localities include several FWS wage areas. Thus, while everyone in a given GS locality receives the same annual raise, hourly workers in a given GS locality may receive vastly different base wages. For example, the salaried workers at the Tobyhanna Army Depot in Monroe County, Penn., are paid according to salaries in the New York City locality because according to census commuting data, Monroe County is part of the overall New York City labor market. However, the hourly workers there are considered to be in a different local labor market. Hourly and salaried workers at Tobyhanna who work side-by-side in the same place for the same employer and who travel the same roads to get to and from work are treated as though they are in different locations.

### **Efforts to “Reform” the Federal Pay Systems**

Over the past several years, there has been a concerted effort to disparage and discredit the locality pay system for General Schedule employees. It has been derided as inflexible, antiquated, and inadequate for recruiting and retaining a talented federal workforce. The pay gap calculations have been ridiculed as “guesstimates” despite being based on BLS data using sound and objective statistical methods. These arguments are window-dressing for a much more malign agenda. Advocates of replacing the GS locality system with a so-called pay-for-performance system actually propose to reallocate federal payroll dollars in ways that will disadvantage lower paid employees.

The outlines for a new system received backing from the former Trump administration and supporting organizations like the Heritage Foundation, the Cato Institute, and the government contractor Booz Allen Hamilton. They have proposed paying higher salaries to those at the top of the current scale and lower salaries to those in the middle and bottom. This reallocation would occur through a formal system that considers both market data by occupation and individual performance. Although the reallocation is not explicit, in the absence of a large increase in the overall federal payroll, some salaries would have to fall to pay for increases for those at the top. The Trump administration used the Federal Salary Council and the Pay Agent to advance just such a plan.

The National Security Personnel System (NSPS), a short-lived experiment in “performance pay” in the Department of Defense during the George W. Bush administration, provides ample evidence of the pitfalls of such a plan. Indeed, Congress repealed authority for this system a mere three years after its inception because the discretion given to Pentagon managers over pay adjustments produced larger raises for white males and much lower raises for everyone else. It was found to be profoundly discriminatory in outcome with no measurable improvement in productivity or performance. Morale and trust in the integrity of the system both plummeted.

Contractors posing as “good government” groups have also argued against paying federal employees market-rate salaries by claiming that non-salary benefits should be included when comparing private and public sector compensation. This approach would penalize federal

employees for the fact that their employer provides subsidized health insurance and retirement benefits unlike some of the largest private employers in the U.S. The fact that roughly half of American workers receive no retirement benefit from their employer<sup>1</sup> should not be grounds for denying federal employees pay adjustments that allow them to keep up with the cost of living.

The virtues of the current system are rarely acknowledged. A December 2020 study by the Government Accountability Office (GAO) confirmed that the federal pay system does a far better job of avoiding pay discrimination by gender than private-sector pay systems, which allow broad discretion in pay-setting and pay adjustments. The GAO study<sup>2</sup> found that the gender pay gap in the federal government was 7 cents on the dollar as of 2017. Similar studies of the private sector reveal a gender pay gap of 18 cents on the dollar, more than double that of the federal sector. On average, for every \$35,000 earned by males, women in the private sector are paid \$28,700 and in the federal sector are paid \$32,550. Of course, these gender-based differences should not exist at all, but the federal government has made more progress than the private sector in closing these gaps.

This relative advantage in the area of pay equity is not the only systemic virtue of the current pay system. Its structure is designed to create a good balance among several factors: market sensitivity, career mobility, internal equity, flexibility and recognition of excellence. All of these are attributes of a functional pay system if the system receives adequate funding. However, budget politics, “bureaucrat bashing,” and a lack of understanding of the statistical processes used to compare federal and private sector pay combine to deprive a very fair system of the funds it needs to operate well. There is no fundamental problem with the GS system that adequate funding would not solve.

### **Congressional Requests:**

1. Provide at least a 5.1% federal pay increase for 2023. This amount reflects pay adjustments in both the private sector and state and local government.
2. Resist the calls for pay “reform” that will reduce pay and benefits for federal employees who are in the middle and lower grades of the General Schedule by reallocating their pay toward those in the top grades. Any system that rewards those at the top by providing less to those at the bottom and middle of the pay system should be strongly opposed, no matter how compelling the obfuscating rhetoric of modernization might sound.
3. Pass H.R. 3086 and S. 1561, the “Locality Pay Equity Act of 2021,” that would codify the directive report language from the prior two National Defense Authorization Acts and require equalization of non-Rest of US local pay area boundaries between the Federal Wage System and the General Schedule.

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<sup>1</sup> <http://www.pensionrights.org/publications/statistic/how-many-american-workers-participate-workplace-retirement-plans>

<sup>2</sup> U.S. Government Accountability Office, “GENDER PAY DIFFERENCES: The Pay Gap for Federal Workers Has Continued to Narrow, but Better Quality Data on Promotions Are Needed,” GAO-21-67 (<https://www.gao.gov/assets/720/711014.pdf>)

# Federal Retirement

## Introduction

In the decade since 2011, federal workers have contributed more than \$200 billion to deficit reduction. One source of this deficit reduction derived from the cumulative effect of three years of pay freezes followed by nominal pay adjustments far below the amounts called for by law. Federal employees hired in 2013 have also faced mandatory increases in employee pension contributions of 2.3% of salary; for those hired after that year, the mandatory increases amount to an additional 3.6% of salary. There was no increase in retirement benefits associated with these salary reductions; the effect has only been to shift costs for retirement from the government to workers in the name of fiscal austerity.

These austerity-inspired increases in mandatory pension contributions for federal employees hired after 2013 make it all but impossible for lower-graded federal employees to take full advantage of the government's defined contribution retirement benefit. That is, federal employees whose salaries have been reduced to finance a flat defined benefit often must forgo the full matching funds for their Thrift Savings Plan (401(k) equivalent) accounts, resulting in a serious shortfall in their retirement income security, and a substantial lowering of their standard of living.

## **AUSTERITY BUDGET POLITICS HAS CAUSED SEVERE HARM TO FEDERAL EMPLOYEES**

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 have occurred were it not for the perverted logic of austerity budget politics. The Budget Control Act of 2011 was a grave mistake, and the spending cuts it imposed year after year have been ruinous for federal employees, and for the government services on which all Americans depend. Spending cuts hurt not only the middle class, 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

At the end of 2013, the then House and Senate Budget Committee 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 mandatory pension contributions/salary reductions for employees hired after 2013 to 4.4% of salary.

Using federal retirement to facilitate budget deals must not happen again. It was entirely unjustified and unjustifiable in 2013 and 2014 and the ongoing salary reductions first imposed during those years should be repealed. The \$195 billion forfeited by the middle- and working-class Americans who make up the federal workforce has been an unconscionable tax increase on



just one small group of Americans. In wake of the recent tax cuts granted to wealthy individuals and corporations, AFGE urges lawmakers not to repeat the mistakes of the past and require federal employees to make up for revenue losses from those whose ability to pay far exceeds the modestly paid federal workforce.

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. Now that the deficit will balloon as a result of tax cuts to corporations and wealthy individuals, it is even more unconscionable to reduce the pensions of working-class federal employees as a means of deficit reduction. AFGE will continue to oppose any additional efforts to undermine the statutory retirement promises on which federal employees rely.

There have been repeated efforts to increase federal employee retirement contributions so that employees pay fully half of the cost of the FERS defined benefit amounts to a reduction in salary of 6.2% for those hired before 2013. These proposed cuts have been justified on the absolutely false argument that private sector workers with defined benefit pensions pay this amount of salary for similar benefits. According to the Bureau of Labor Statistics, 96% of private sector and state and local government employees with defined benefit pensions pay nothing for this element of their compensation. That is, 96% of American workers who receive a defined benefit from their employer are not required to make any “contribution” from their salaries for this benefit.

Because federal pension assets are invested exclusively in Treasury bonds, they have a lower rate of return than private-sector pension assets that can be invested in both public and private equities. Because of this investment restriction (that AFGE strongly supports), the cost of providing/saving for a dollar of retirement income to a federal worker is higher than that for a private-sector worker. The federal government needs to save more to provide the same benefits to its employees than a private-sector employer. Federal employees should not be forced to pay this differential and the unique circumstances of the federal retirement system must be taken into account in all situations where federal retirement benefits are compared to those in the private sector and state and local government.

### **Congressional Requests:**

- Support legislation that repeals the draconian increases in employee contributions to retirement for those hired after 2012.
- Support the First Responder Fair RETIRE Act, which allows federal law enforcement officers injured on the job to retain their 6c retirement benefits.
- Oppose efforts to enact legislation that would allow the government to force employees to forfeit their earned pensions under any circumstances apart from those currently in law.

## **Federal Employees Health Benefits Program**

The Federal Employees Health Benefits (FEHB) Program, which covers more than eight million federal employees, retirees, and their dependents, is the nation's largest employer-sponsored health insurance program. FEHB Program is also a target of those who would force federal employees to forfeit their earned benefits to finance deficit reduction. The attacks on FEHB Program are likely to continue in Congress this year as part of any focus on deficit reduction by conservative members. AFGE strongly opposes dismantling either the FEHB Program or Medicare, including by replacing the current premium-sharing financing formula with vouchers.

### **Issue and Background - Maintain Quality and Control Escalating Employee Costs for the FEHB Program**

At present the FEHB Program is a cost-sharing program. On average, the government contributes approximately 70 percent of the premium cost for most employees, although this number can vary considerably depending on the plan chosen by a covered employee and his/her family. (This formula is 72 percent of the weighted average premium; in practice, this has meant an average contribution of 70 percent.)

In order to lower the overall costs of the program, the Office of Personnel Management (OPM), the federal agency administering the FEHB Program, has been promoting employee enrollment into lower premium plans, e.g. the Blue Cross/Blue Shield Blue Focus plan. While this plan and other lower premium plans may appeal to those seeking to pay lower upfront costs, the plans offer inferior benefits, and out-of-pocket costs to employees can be quite high, especially if an employee and his/her family experience high overall health care costs in a given year.

It is vital to federal employees that the government's current premium sharing formula for the FEHB Program be maintained, and that the share of cost attributable to employee-paid premiums be kept as low as possible, consistent with plans that offer comprehensive benefits. That is, the FEHB Program must continue to be financed with the government's paying a percentage of premiums, not a flat rate or cash voucher.

The largest FEHB Program plans contract with OPM on a fixed price re-determinable basis with retroactive price redetermination. This means that even as the insurance companies receive only a fixed amount per contract year per "covered participant," 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 FEHB insurance companies' interests to keep costs and profits high and benefits low.

AFGE will continue to monitor OPM's administration of the FEHB Program and urges all members to actively engage with their Congressional representatives to ensure that any attempts to scale back the government's FEHB Program share of premiums be defeated.

### **Issue and Background - Turning FEHB Program into a Voucher System**

House Republican Members of Congress have recommended changing FEHB Program into a "premium support system." This is a euphemism for vouchers. Acting through the Republican Study Committee (RSC), a powerful caucus of conservatives, these Members suggest that because the government covers a set percentage of an employee's health premium, FEHB participants have an incentive to choose higher-priced health plans.

Under the RSC proposal, the government would offer a standard, i.e., fixed dollar amount, federal contribution towards the purchase of health insurance and employees would be responsible for paying the rest. The RSC has said, "This option would encourage employees to purchase plans with the appropriate amount of coverage that fits their needs."

What this means is that they propose turning the FEHB Program into a defined-contribution or voucher system. Premium support or voucher plans provide a fixed subsidy that is adjusted by an amount unrelated to changes in premiums. One proposal would adjust the voucher by the growth in Gross Domestic Product (GDP).

The voucher plan would change the FEHB Program 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 coordinated by the Office of Personnel Management, 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 FEHB Program 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. With a voucher-based plan, the government's "defined contribution" or voucher would not rise in step with premium increases and thus, every year, employees would have to pay a larger percentage of the cost of their insurance. AFGE expects Congressional Republicans to "rediscover" deficit spending as an inherent evil, much as they did during the Obama Administration, and push for controls on healthcare costs, including the FEHB Program. We will carefully guard against using federal employee or retirees as scapegoats for these types of cuts.

### **FEHB Program – Employee Share of Premium Increases**

Between 2012 and 2019, FEHB premiums increased by about 4.0 percent per year. For 2020, federal employees and retirees saw an average increase in their FEHB premiums of 5.6 percent. This was the largest increase since the 2018 plan year, when premiums for employees jumped 6.1 percent. For 2021, the average enrollee premium increase was 4.9 percent. For 2022, FEHB premiums increased 2.4% above the previous year. As in prior years, due to the statutory FEHB

cost sharing formula, the government's share of the premium will only increase by 1.9% while the employee share will increase on average by 3.8%. This is less than the FEHB Program premium increase of 4.9% in 2021 and the 5.6% increase in 2020, but still more than the 1.5% increase in 2019.

For 2022, federal pay increased on average by about 2.7% (including locality pay). Thus, the percentage increase in the employee's share of the FEHB Program premiums (3.8%) will again outstrip the pay raise. Retirees, for whom CSRS or FERS COLAs increased by 5.9% or 4.9% respectively, will receive COLA adjustments exceeding the premium increases.

Since the government's share of the premium increase for 2022 is only 1.9 percent, again more of the increased costs of healthcare insurance is falling on employees rather than agencies. Combining the employee increase of 3.8 percent with the pay raise of 2.7 percent, means that the employee premium increase percentage will be almost one-third larger than the pay raise.

During the past five FEHB premium setting years (2018–2022), the government's percentage contribution increase has been less than the increase in the employee contribution. In 2018, the government contribution increased only about half as much as the increase in the employee contribution. In 2019, the government's increased contribution was 20 percent less than the employee's increased contribution. In 2020, the government's contribution was 40 percent less than the increase in the employee contribution. In 2021, it was about 33 percent less than the employee contribution. Now in 2022, the government's increased contribution is about 25 percent less than the increase in the employee contribution. If a voucher proposal was in effect, the government's "contribution" or voucher would have gone up by GDP + 1 percent. During periods of slow growth, the voucher program could be significantly less than premium increases; for example, GDP in 2015 was estimated to have grown by 2 percent. Adding an additional percentage point to that, the voucher would have risen by 3 percent, not enough to cover the 4.1 percent average rise in premiums over the last 5 years. This amounts to additional cost shifting to employees.

### **Issue and Background - Scaling Back FEHB Program for Retirees**

Yet another attack on the FEHB Program is likely to be continued by conservatives and their allies, based on a Heritage Foundation proposal. Again, the proposal will likely be justified on the basis of the "urgent need" for deficit reduction, a rather familiar refrain when a Democratic president is in office.

The key part of the Heritage proposal, which has Republican support, is to shift more federal retiree health care costs away from the FEHB Program. Heritage proposes that all federal retirees be required to purchase Medicare Part B insurance even if they already have better FEHB Program coverage and do not have either the means or the desire to pay two insurance premiums instead of one. Mandatory Medicare Part B coverage would be useless to veterans who use the FEHB Program in combination with Department of Veterans Affairs (VA) care to

cover their costs. Heritage includes in its proposal a loss of all health insurance for retirees who refuse to pay two premiums.

The Postal Reform plan currently working its way through Congress, establishes a bad precedent regarding FEHB and Medicare Part B premiums. Under the Postal Reform bill, all newly retiring Postal Service employees will be required to pay Medicare Part B premiums to maintain the Postal Service equivalent of the FEHB Program. While the Postal Reform bill has no direct effect on non-Postal employees, it can reasonably be expected that Congressional Republicans will push mandatory Part B premiums on retiring federal employees at some point in the future to maintain their FEHB Program coverage.

### **Congressional Requests Needed to Address FEHB Program Issues**

- During the past 11 years, including the three-year pay freeze, federal pay raises totaled just 16 percent (0 percent for 2011-2013, 1 percent for 2014 and 2015 and 1.3 percent in 2016, 2.1 percent in 2017, 1.9 percent in 2018 and 2019, 3.1 percent in 2020, 1 percent in 2021, and 2.7 percent in 2022). The compounded rate of increase in pay is just shy of 20 percent. But in that same period, federal employees' FEHB Program premiums are approximately 50 percent higher in 2022 than they were in 2011. The cost to employees of participating in FEHB Program continues to rise by more than either the general rate of inflation or the rate of growth of their ability to pay, i.e., average pay adjustment rates, including locality pay. Congress should ensure that federal employee pay raises are at least sufficient to offset the ever-increasing cost of FEHB health insurance premiums, which consistently outpace inflation.
- FEHB Program's funding structure should be maintained in its current form. All attempts to convert the formula into a voucher or "premium support system" should be rejected.

## Government-Wide Sourcing Issues

### Issue

The Office of Management and Budget (OMB) and agencies have not addressed specific problems with public-private competitions with OMB Circular A-76 that prompted a congressional moratorium on use of A-76. The moratorium was first imposed as a result of an investigation that followed from a scandal at the Walter Reed Army Hospital, when wounded warriors were provided inadequate care resulting from staffing shortages caused by an A-76 outsourcing project. Numerous GAO and DoD Inspector General audits found that A-76 competitions had substantial unprogrammed investment costs and over-stated savings, even after the establishment of a so-called “Most Efficient Organization.” Additionally, there is a virtual absence of contractor inventories, contract services budgets, and adequate review processes to prevent awarding inappropriate contracts or contracts involving inherently governmental functions.

Many government service contracts have been found to involve “personal services,” which are unlawful under existing statutory authority for most agencies. OMB has also allowed continuing abuses with contracts for services that are “closely associated with inherently governmental functions.” OMB has even allowed such contracts to be classified as “commercial” in nature, a characterization criticized by both Congress and the Commission on War Time Contracting. These concerns were embodied in Congressional findings with direction to OMB to revise the inherently governmental guidelines. To date, neither OMB nor any agencies has fully addressed these findings.

Sourcing of work among civil service employees, contractors, and other labor sources is affected by pro-contractor procurement policies, anti-civil service hiring limitations, and the absence of planning to encourage a strong career civil service. Also contributing to a pro-outsourcing agenda are weaknesses in agency budget development and execution and the lack of adequate compliance mechanisms with existing sourcing laws, including the current A-76 moratorium.

Congress and the Trump administration pushed for outsourcing many medical functions at the Department of Veterans Affairs, such as critical compensation and pension examinations. This was done despite the superior quality and lower cost of having the exams performed by VA’s own clinicians. As a result, the VA has had to reperform many improperly or hastily conducted contractor provided exams, which are incentivized by contract to be performed as quickly as possible.

In a related vein, despite knowing exactly how many civil servants are employed at any given federal agency, the Government Accountability Office (GAO) continues to criticize agencies -- especially the Department of Defense -- for not even having an adequate inventory of its service contracts, let alone any idea of how many people are employed on these contracts. (GAO-17-17, DOD Inventory of Contracted Services: Timely Decisions and Further Actions Needed to Address Long-Standing Issues.) Indeed, the Trump DoD discontinued using the more robust Enterprise Contractor Manpower Reporting Application (ECMRA) in favor of the far less useful

government-wide System for Award Management (SAM). The GAO recently documented the detrimental effects of this action, which cost DoD the ability to calculate the fully burdened costs for services contracts, to identify what government customer originated the requirement, to determine the location of the work, and to track funding sources. See, GAO 21-267(R) “SERVICE ACQUISITIONS: DoD’s Report to Congress Identifies Steps Taken to Improve Management, But Does Not Address Some Key Planning Issues” (Feb. 22, 2021).

## **Background/Analysis**

Sourcing of work among the federal government’s civil service workforce and contractors or other sources of labor is affected by:

1. Procurement policies devised to promote contracting-out of so-called “commercial” functions – very loosely defined and without regard to sufficient oversight over costs.
2. Hiring restrictions (such as Full Time Equivalent personnel caps imposed by OMB) and limitations on insourcing disconnected from human capital planning and agency workload requirements or cost considerations.
3. The way agencies develop, defend, and execute their budgets for the civil service workforce as opposed to contractors, who are not subject to any personnel ceilings (including inventories of contractor performed work). The focus is on fully executing agency budgets, too often resulting in wasting resources in the fourth quarter of each fiscal year by awarding contracts to fully obligate agency funds. Once contracts are awarded, there is little concern about the cost of performance, and various “acquisition reforms” have focused on weakening oversight and audit capabilities – leaving agencies defenseless before contractors. The civilian workforce is used as an offset or billpayer for under execution of an agency’s budget or to fund new requirements not fully funded by OMB or Congress. Insourcing is discouraged even when allowed by statute. Vacant civil service positions are not automatically filled but often cut during this process. Contractor inventories exclude so-called “commercial item or service” contracts and are otherwise curtailed and sabotaged.
4. The absence of oversight mechanisms to ensure an agency complies with the A-76 moratorium and other legal limitations on contracting-out.

Congress has recently sought to mitigate some of these problems at DoD through Section 515 of the Fiscal Year 2022 National Defense Authorization Act, “Modification to Procurement of Services, Data Analysis, and Requirements Validation,” which requires senior officials to complete and certify a checklist ensuring that statements of work and task orders comply with longstanding statutes that prevent replacing DoD civilian employees with contractors and require that service contract budgets comply with these requirements. The list of statutes covered by these standard guidelines is based on an Army total force management checklist

issued during the Obama Administration in 2013<sup>3</sup> and subsequently referenced in a Defense Acquisition University guidebook.

These include:

- a. The prohibition against contracting-out inherently governmental functions, using the complete definition and all the examples in the Office of Federal Procurement Policy guidance and the Federal Acquisition Regulation, as well as the FAIR Act definition;
- b. The requirement to perform such “risk mitigations” required by title 10 to give “special consideration” to federal government performance of both “closely associated with inherently governmental functions” and “critical functions” for contracts currently being performed by contractors; as well as for any new requirements; as well as to reduce to the “maximum extent practicable” contractor performance of such functions as well as for any functions performed by federal employees in the last ten years;
- c. The prohibition against contracting security guards and firefighters in CONUS;
- d. The prohibition against using personal services contracts unless covered by a statutory exception using the full definition of personal services contracts under the common law and Federal Acquisition Regulation; and ensuring the criteria for each statutory exception authorizing personnel services contracts in particular circumstances are met; and that all appropriate “risk mitigations” required by law are documented and performed.
- e. Providing special consideration for insourcing contracted requirements when there are at least 10 percent savings to the federal government within the Department of Defense; or if there has been a specific finding that contractors have been performing contracts with excessive costs or quality performance problems.

In addition to the requirement for standard guidelines, Section 515 of the Fiscal Year 2022 National Defense Authorization Act specifically requires the following separate certifications:

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<sup>3</sup> The GAO documented how the Army checklist more accurately identified the substantial number of “closely associated with inherently governmental” contracts, which carry the risk of becoming inherently governmental if there is inadequate government oversight. Other than the Army, every other Defense Component identified incredibly low numbers of such high-risk contracts. See GAO-16-46, “DOD INVENTORY OF CONTRACTED SERVICES: Actions Needed to Ensure Inventory Data are Complete and Accurate” (Nov. 18, 2015). (Only the Army identified a reasonable accurate percentage of “closely associated with inherently governmental” high risk contracts in its inventory reviews through the use of its checklists compared to other Defense Components which inaccurately identified an incredibly low number of such contracts when compared to contracts deemed by OMB and the GAO to the most likely to include “closely associated with inherently governmental functions.”)



- a. That a task order or statement of work being submitted to a contracting office is in compliance with the standard guidelines;
- b. That all appropriate statutory risk mitigation efforts have been made (this includes insourcing the work); and
- c. That such task order or statement of work does not include requirements formerly performed by Department of Defense civilian employees. NOTE: This certification is independent of whether the A-76 moratorium continues; whether various statutory or regulatory exceptions allowing for direct conversions outside of the A-76 process otherwise would apply; whether the National Security waivers of the A-76 process are ever invoked; and whether the privatization uses a direct conversion process.

**Congressional Requests:**

- Continue the OMB A-76 moratorium and mandate enforcement mechanisms for all statutory sourcing limitations for the rest of the Federal Government modeled after section 515 of the Fiscal Year 2022 National Defense Authorization Act;
- Eliminate FTE caps on civilian hiring, allow insourcing; and promote better human capital planning informed by workload and costs;
- Improve agency budgets to highlight contractor workforce costs informed by comprehensive contractor inventories. Inform Senate Homeland Security and Government Affairs Committee, House Oversight and Reform Committee and the Financial Services and General Government Appropriations subcommittees that their continued acceptance of SAM as meeting meaningful contractor inventory requirements has resulted in providing DoD the excuse to divest their more robust ECMRA contractor inventory capability, to the detriment of the entire government. Recommend CBO do a specific comparison, pulling from prior work done by GAO and DoD IG, and prior Army testimony on its ECMRA effort in 2013 to HSGAC, to establish that it is, indeed feasible and cost effective to do ECMRA type contractor inventories that are actually useful, to upgrade the currently defective SAM contractor inventories.

# **Official Time is Essential to Federal Government Efficiency and Productivity**

## **Protect the use of Official Time Within the Federal Government**

Official time is a legal term that describes time spent by federal employees who volunteer to be union representatives and who are engaged in representational duties required by the Civil Service Reform Act of 1978. According to that law, the amount of official time granted by a federal agency to volunteer union representatives is subject to collective bargaining and should be granted in amounts that are “reasonable, necessary, and in the public interest.” (5 U.S. Code § 7131).

Official time is a longstanding, necessary tool that gives federal agencies and their employees the means to expeditiously and effectively utilize employee input to address mission-related challenges, as well as bring closure to conflicts that arise in all workplaces. No official time is utilized that has not been approved by management.

## **Bipartisan Congressional Coalitions Have Supported the Use of Official Time for Decades**

The Civil Service Reform Act of 1978 requires federal employee unions to represent all federal employees in a bargaining unit, even employees who choose not to pay union dues, and therefore gives unions the right to bargain over amounts of official time. Over the years, repeated legislative attempts to eliminate official time have been defeated with strong bipartisan support. During the first session of the 117<sup>th</sup> Congress, no official time legislation has come to the floor for a vote in the House or Senate.

In 2018, the previous administration issued an executive order to eliminate federal employees’ right to bargain over this aspect of union representation. The executive order prohibited official time for the purpose of pursuing grievances or representing employees in negotiated grievance procedures. The executive order also set an arbitrary limit on the number of hours of official time that agencies could grant union representatives. Congress soundly rejected the executive order with statements of bipartisan opposition.

On August 29, 2018, a federal judge ruled that the executive order was in violation of current law; however, the administration successfully appealed this decision to the U.S. Court of Appeals for the D.C. Circuit, which ruled that the District Court did not have jurisdiction to rule on the lawsuit. Thus, the executive order was in effect until 2021, when the Biden administration revoked the anti-official time order to restore federal employees’ collective bargaining and representation rights.

## **Official Time Legislative Action**

On April 29, 2015, Rep. Jody Hice (R-GA) offered an amendment to the Military Construction-Veterans Affairs Appropriations bill to eliminate official time for all Department of Veterans Affairs (VA) employee union representatives. The House of Representatives soundly rejected the amendment by a vote of 190-232, with all Democrats and 49 Republicans voting against the elimination of official time within VA. This was the last occasion when official time received a vote in either the House or the Senate.

However, official time is brought up by its opponents in Congress in each Congress. There have been several anti-official time actions in the 117<sup>th</sup> Congress:

- H.R. 2793 “Official Time Reporting Act” by Rep. Jody Hice (R-GA) requiring OPM to report to Congress on the use of official time, how much is granted to personnel, the actions for which it is granted and the total compensation of those utilizing official time.
- H.R. 1902 “Do Your Job Act of 2021” by Rep. Dan Bishop (R-NC) to completely repeal official time as allowed under title 5 U.S. Code.
- S.Con.Res. 5 During consideration of FY 2022 budget reconciliation, Sen. Rand Paul (R-KY) proposed Senate Amendment 375 to eliminate all official time. The amendment did not receive a vote in the Senate.
- On July 30, 2021, Sen. James Lankford (R-OK) and others sent a letter to OPM and 54 agency heads calling for an accounting of what he dubbed “taxpayer-funded union time.” The letter, which was co-signed by Senators Richard Burr (R-NC), Ron Johnson (R-WI), Rand Paul (R-KY), Mitt Romney (R-UT) and Mike Braun (R-IN), called for the job titles and total compensation of every employee utilizing this misnamed activity.

### **How Official Time Works**

In the federal government union membership is optional – it is a choice. Employees join the union and pay dues only if they choose to do so. By law, federal employee unions are required to provide services to all employees in units that have elected union representation, even for those who choose not to join the union and pay dues. Federal employee unions are forbidden from collecting any fair-share payments or fees from non-members for the services the union must provide.

In exchange for the legal obligation to provide 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 duties while on duty status.

### **Legally Permitted Representational Activities are Limited to:**

- Creating fair promotion procedures that require that selections be based on merit, to allow employees to advance their careers;
- 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;
- Participating in improvement of work processes;

- Providing workers with a voice in determining their working conditions.

The law limits the amount of time to what the labor organization and the agency agree is reasonable, necessary, and in the public interest. The law states that “(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 that may **not** be conducted on official time include:

- Solicitation of membership;
- Internal union meetings;
- Elections of officers.

To ensure its continued reasonable and judicious use, all federal agencies report basic information on official time annually to the Office of Personnel Management (OPM), which then compiles a governmentwide report on the amount of official time used by agencies. In March 2017, OPM reported that the number of official time hours used per bargaining unit employee increased from 2.81 hours in FY 2012 to 2.88 hours in FY 2014, and that official time costs represented just 0.1% of the total of federal employees’ salaries and benefits for FY 2014.

### **Official Time Makes the Government More Efficient and More Effective**

Through official time, union representatives can work with federal managers to use their time, talent, and resources to make our government even better. Improvements in quality, productivity, and efficiency across the government would not be 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 operational efficiency 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 will be successful if labor and management maintain an adversarial relationship. In an era of 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 communicating effectively, workplace problems that would otherwise escalate into costly litigation can be dealt with promptly and more informally.

### **Official Time Produces Cost Savings from Reduced Administrative Expenses**

Union representatives use official time for joint labor-management activities that address operational, mission-enabling issues in agencies. Official time is used for activities such as joint design of training for employees on work-related subjects and the introduction of new programs

and work methods initiated by the agency or by the union, or both.

Union officials use official time for routine 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 gives federal employees the ability to provide input to improve workplace policies and procedures, as well as protection if they are discriminated against or treated unfairly. Any prohibition on the use of official time eliminates basic, much-needed protections for America's public servants—federal workers who support our military, make sure the Social Security checks are sent out on time, ensure a safe food supply, enforce clean water and clean air laws, and care for wounded veterans.

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. For instance, 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**

Congress must protect federal employees' official time rights and oppose any attempts to eliminate the use of official time within the federal government. AFGE strongly opposes any legislative effort to erode, restrict, or eliminate the ability of elected union representatives to use official time to represent both dues and non-dues paying federal employees.

# **Congress Must Protect Federal Employees' Right to Choose Payroll Deduction of Union Dues**

## **Federal Employee Payroll Deduction of Union Dues**

Federal employees in bargaining units choose whether to join the union and pay dues. Federal employee unions do not collect fair share fees. **Federal employees only pay dues if they choose to join the union.** It is both the right and choice of federal employees who have chosen to join the union to elect 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 in 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 to join the union, nor are they under any obligation to pay for that representation or pay any other fee to the union.*** When federal employees choose to join the union, they sign a form, most file a Standard Form (SF) 1187 or other form which establishes their union membership and sets up the payroll dues deduction. When federal employees choose to pay union dues, most utilize this process, one that was established by the agencies to facilitate deductions for many purposes, not just collecting union dues.

## **Legislative Background**

During the 113<sup>th</sup> Congress, Rep. Mark Meadows (R-N.C.) and Sen. Tim Scott (R-S.C.) introduced legislation (H.R. 4792 / S. 2436) to prohibit federal agencies from allowing federal employees to pay union dues through automatic payroll deduction. In 2013, Senator Scott also offered a Senate floor amendment to eliminate payroll deduction of union dues. This amendment was rejected, 43 to 56. During the 114<sup>th</sup> Congress, Rep. Tom Price (R-Ga) introduced H.R. 4661, the "Federal Employees Rights Act," which likewise proposed elimination of automatic payroll deduction of federal union dues.

In the 115<sup>th</sup> Congress, Rep. Todd Rokita (R-Ind.) introduced H.R. 3257, the "Promote Accountability and Government Efficiency Act." This legislation would have made all new federal employees "at will," would have eliminated employee due process rights, and potentially prohibited all federal agencies from allowing voluntary payroll union dues deduction. AFGE strongly opposed this legislation. No legislation to eliminate payroll deduction of union dues advanced during the 116<sup>th</sup> Congress.

Opposition to payroll deduction of union dues is rooted in the false premise that elimination of payroll deduction would produce cost savings to the government. Since payroll deductions are

done electronically, it costs the government virtually nothing to deduct union dues. The federal government currently provides payroll deductions for the following:

- Combined Federal Campaign (Charities)
- Federal, state, and local taxes
- Federal Employees Retirement System annuity funding
- Thrift Savings Plan (TSP) contributions and TSP loan repayments
- Federal Employees Health Benefits (FEHBP) and Federal Employees' Group Life Insurance (FEGLI) 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, bankruptcy, and commercial garnishment
- Flexible spending accounts for payment of health costs not covered by insurance
- Collection of debts owed to the United States
- Professional Association dues
- Personnel account Allotments (savings accounts)
- IRS Paper Levies
- Military Service Deposits

If it were wrong to provide employees with electronic payroll deductions for union dues, then it would be equally wrong to provide the service for these other worthy and important goals.

## **Conclusion**

AFGE 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. Any legislation that aims to eliminate payroll deduction of union dues is a blatant political attack on federal employees' wages, benefits, collective bargaining rights, and jobs. Such attacks 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. Congress must protect federal employees' right to join a union and have their dues automatically deducted.

## **PRESERVING AND DEFENDING THE COMPETITIVE CIVIL SERVICE**

In late October 2020, then-President Trump issued an Executive Order (EO)<sup>4</sup> creating a new Schedule F in the excepted service. The EO creating Schedule F, which was never implemented, would have permitted the transfer of tens of thousands and potentially hundreds of thousands of positions from the competitive civil service into the excepted service. These newly transferred excepted service positions would have been “at will” positions, with no tenure protections, regardless of employees’ prior years of service or quality of performance.

Newspapers were filled with stories about the Schedule F plan, most decrying it as a politicization of the career civil service.<sup>5</sup> Had President Trump received a second term, it is likely that many long-time federal employees would have found themselves effectively serving as political appointees, subject to removal without cause or any due process rights. Although the Trump Schedule F plan was dodged, there remain many continuing threats against the competitive civil service.

The threat to the competitive service posed by expansion of the excepted service is multi-faceted. It emerges when agencies seek and exercise excepted service hiring authority for positions where competitive service hiring authority exists – that is, in cases where there is no rationale inherent to the position that justifies an excepted service designation. These cases expose the dangers of the excepted service. In order to understand how the excepted service threatens the competitive service, it is necessary to clarify the differences between the two.

### **What is the Competitive Civil Service?**

The competitive civil service consists of all civil service appointments in the executive branch other than Senate-confirmed presidential appointments and other positions excepted by statute, or a presidential or Office of Personnel Management (OPM) determination.<sup>6</sup> In contrast to the competitive service are positions placed into the excepted service.<sup>7</sup> The excepted service is in many ways an alternative framework that is a legacy of the patronage system that may be contrasted to the competitive service. After the competitive service was created and expanded for almost one hundred years, positions not placed into the competitive service were known as excepted or unclassified positions, i.e., excepted from the competitive service (also sometimes referred to as unclassified jobs).

Positions in the competitive service have full civil service tenure and due process rights after completion of a probationary period. “Competitive service” status confers the ability to compete for or transfer to any other competitive service position for which an employee qualifies without

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<sup>4</sup> EO 13957 dated October 21, 2020

<sup>5</sup> Washington Post, “Trump’s newest executive order could prove one of his most insidious” available at: [https://www.washingtonpost.com/opinions/trumps-newest-executive-order-could-prove-one-of-his-most-insidious/2020/10/23/c8223cac-1561-11eb-bc10-40b25382f1be\\_story.html](https://www.washingtonpost.com/opinions/trumps-newest-executive-order-could-prove-one-of-his-most-insidious/2020/10/23/c8223cac-1561-11eb-bc10-40b25382f1be_story.html)

<sup>6</sup> 5 U.S.C. § 2102

<sup>7</sup> 5 U.S.C. § 2103



further examination by the U.S. Office of Personnel Management (OPM) or any agency. Until relatively recently, virtually all initial appointments, i.e., generally a person's first appointment into a position in the competitive service, were filled only after an applicant had been competitively "examined" by OPM or an agency with delegated examining authority. The examination requirement<sup>8</sup> was designed to achieve four objectives:

1. Ensure there is actual documented competition for jobs in the civil service by publicly posting openings;
2. Ensure that only qualified or highly qualified people are appointed after a thorough examination of a candidate's knowledge, skills and abilities to perform the work of the position(s);
3. Ensure diversity in the most efficient way by enabling large numbers of candidates to be evaluated in the least burdensome way by having their knowledge, skills and abilities assessed as general "competencies" that can generate referrals to multiple jobs rather than placing the burden on job applicants to apply for similar jobs; and
4. Ensure that qualified veterans<sup>9</sup> are given appropriate credit for consideration in filling positions.

### **What is the Excepted Service?**

The alternative to the competitive service is the excepted service. Prior to passage of the Pendleton Act<sup>10</sup> in 1883 following the assassination of President Garfield in 1881 by a disappointed office-seeker there were no laws requiring merit-based selection of employees. After President Garfield's assassination, the public recognized that partisanship needed to be removed from day-to-day government administration and that professionalism should be at the core of the government workforce. Before the Pendleton Act, the civil service had become highly partisan, with frequent turnover when a new administration took office. Because of a lack of merit-based hiring, unqualified people were appointed to offices that required more and more technical expertise in an emerging modern state. The notion of a professional civil service, hired based upon merit, and removable only for "good cause" rather than partisan loyalty to a particular president became a potent political force in the 1880s. It was the "good government" program of its time.

Although the term "excepted service" did not exist at the time, the effect of the Pendleton Act was to create the modern civil service by placing more and more positions into the "competitive service," with competitive service jobs being filled based solely on the basis of merit and not political connections.

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<sup>8</sup> See generally 5 U.S.C., Chap 33

<sup>9</sup> 5 U.S.C. § 2108

<sup>10</sup> 22 Stat. 403

Over time, the competitive service encompassed more than 85% of the federal workforce, with excepted service positions covering the remaining 15%.<sup>11</sup> Today most positions in the excepted service are exempt from competitive service hiring requirements due to statutory provisions, e.g., healthcare positions at the Department of Veterans' Affairs and Transportation Security Officers at the Transportation Security Administration, or because of regulatory exemptions issued by OPM, e.g., attorneys under Schedule A excepted service appointing authority (required based on an appropriations restriction prohibiting "examinations" of attorneys).<sup>12</sup> In some instances, entire agencies are exempt from the competitive service, e.g., the Nuclear Regulatory Commission and the Federal Bureau of Investigation.

The excepted service consists of all positions *not* in the competitive service (with the exception of the "Senior Executive Service" which is the third service in the civil service that is not relevant to this discussion).

Unlike the competitive service, there are no generally applicable rules for the excepted service. Some positions in the excepted service have due process rights (although they are not usually as robust as those for competitive service positions). Some positions have a few rights, and others serve at the will of the appointing agency. There are many variations among excepted service appointments, and each excepted service appointing authority must be closely examined to determine what, if any, rights apply. At some agencies, most excepted appointments are made without competition or even a public notice posting. Other agencies use a hybrid form of competition either with or without public notice. Rules for selection to excepted service positions are essentially non-existent unless an agency chooses to develop its own. Excepted service appointment authority is quite discretionary and often occupies an ill-defined world between the competitive civil service and political appointments, even when the excepted service position is nominally classified as a "career" type appointment.<sup>13</sup>

In some instances, excepted service appointments represent a long-established approach to federal hiring, e.g., for all federal attorneys. However, in many instances, excepted service appointments are authorized solely in order to deny statutory rights to groups or classes of employees, e.g., healthcare professionals at VA and Transportation Security Officers (TSOs) at TSA. The examples of VA healthcare professionals and TSOs are instructive, because both of these groups have experienced expansion and contraction of rights according to the political inclinations of different presidential administrations. In the case of VA healthcare professionals, the previous administration eliminated some collective bargaining and union representation rights. In the case of TSOs, the current administration is attempting to expand collective bargaining and due process rights.

### The Consequences of "Fast and Easy"

The benign rationale offered for most of the recent upsurge in excepted service hiring is that it is faster and easier than competitive service hiring. Agencies lament the time it takes to examine

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<sup>11</sup> See generally, "Biography of an Ideal, A History of the Federal Civil Service," U.S. Office of Personnel Management, 2003.

<sup>12</sup> Public Law 35, 78<sup>th</sup> Congress (1944).

<sup>13</sup> <https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf>

and select from qualified candidates and insist that excepted service hiring is merely expedited hiring that allows agencies to fill positions quickly and efficiently. They insist that there is no intention to bypass veterans' preference or merit principles; the entire motivation is speed and ease. They make false assertions about private sector practices, arguing that to compete for "talent" they must be able to move as swiftly as private firms or risk losing high quality job candidates, ignoring the fact that best practices in the private sector involve extensive evaluations and rigorous scrutiny of job candidates, as well as widespread advertising to find qualified candidates.

Excepted service hiring is not just a matter of speed and ease at the beginning of the employment relationship. A position in the excepted service is not merely one that allows fast and easy hiring. It also often allows for faster and easier firing. And once there is a faster and easier way to fire for one group of federal employees, agencies want the same speed and ease for competitive service hiring and firing. As such, the most serious problem caused by the expansion of the excepted service is that in pursuit of ways to hire quickly and without competition, basic merit system principles become obscured or eviscerated.

As the excepted service becomes a larger part of the overall civil service, it undermines merit as the principal basis for obtaining and keeping a federal job. Merit-based factors like knowledge, skills, and abilities can be replaced by non-merit factors like political loyalty or other affinities. When it becomes very easy to hire people, it also makes the case that it should be just as easy to dismiss them. Some recent expansions of the excepted service, such as through the Pathways program, use excepted service appointments as a conduit for placing people into the competitive service without competition after only one or two years. This is nothing more than a workaround to avoid competitive service hiring procedures.

#### Excepted Service Hiring's Impact on Diversity

Recently, some have claimed that that excepted service appointments help achieve diversity because their expanded use makes it easier to disregard veterans' preference and consider other candidates. This claim is specious as the military (and thus the population of those who can claim veterans' preference) has a higher percentage of minority members than the general population or most private sector employers.<sup>14</sup> We do not have data on the demographics of those hired in the excepted service as compared with those hired in the competitive service; however, such data would have to be adjusted to reflect the composition of jobs and occupations between the two groups.

We contend that reducing the burdens of applying for federal jobs through the competitive service examination requirement, when objective skills assessment tools are used to evaluate broad competencies, rather than tailored to specific individuals, is the most effective and efficient way of generating broader numbers of job applicants from a broad array of demographic groups.

The current process, as administered by the agencies, is in dire need of reform. Agencies have circumvented the competitive examination requirement with various workarounds so that the

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<sup>14</sup> <https://www.statista.com/statistics/214869/share-of-active-duty-enlisted-women-and-men-in-the-us-military/>

primary means for applying for a federal job is through submission of a resume on the USAJOBS website. Resumes are then evaluated mechanically, using word matches, or candidate self-assessments, rather than an actual assessment of knowledge, skills and abilities of a candidate. Many members of the public are overwhelmed and discouraged by this process. Being required to check for job postings that are limited to a narrow window of time – and having resumes evaluated in ways that seem arbitrary and opaque – discourage applicants and lead to a cynical view that unless one is a favored insider who has already been pre-selected by a hiring manager, one has no chance of success.

## **The Future of the Competitive Service**

Former President Trump’s attempt at a wholesale transfer of competitive service positions into the excepted service was an obvious attempt to politicize and corrupt the civil service. But there are ultimately even more pernicious and less well-known initiatives to place more jobs into the excepted service than the notorious Schedule F. In recent years, agencies have increasingly sought, and Congress has authorized excepted service appointing authorities throughout the executive branch. A 2018 OPM report<sup>15</sup> shows that from 1995 – 2015, the percentage of civil service positions in the competitive service declined from 80.5% to 69.9%. Conversely, excepted service appointments increased by more than half, from 19.1% to 29.7% of the entire civil service. By 2021, the competitive service was reportedly down to only two-thirds of the workforce, with excepted service positions comprising the rest. This is a far cry from a merit-based civil service system which once reached a peak of 86% of all positions being in the competitive service.<sup>16</sup>

The most frequent reason given by agencies and Congress for expanding the excepted service is the common misconception that hiring for competitive service positions hamstring federal agencies or prevents them from competing with the private sector for top talent. Existing civil service laws already allow higher pay for critical government needs – as much as 50% above the rates of basic pay, with OPM approval – in order to recruit for an “important agency mission.”<sup>17</sup> In our experience, many agencies’ demands for competitive-service hiring exceptions arise from a lack of proper knowledge, training or utilization of existing title 5 hiring and/or pay flexibilities including recruitment bonuses of up to 25% of pay.

While agencies’ desire to recruit quickly for new initiatives may be well-intentioned, various excepted service hiring authorities are ripe for misuse, often resulting in the hiring of friends and political allies who may be difficult to hold accountable subsequently. One particularly prominent misuse of excepted hiring authorities resulted in a nominee for Under Secretary of Defense withdrawing his nomination while under Inspector General scrutiny.<sup>18</sup>

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<sup>15</sup> OPM Special Study – “Excepted Service Hiring Authorities” available at: <https://www.chcoc.gov/content/opm-special-study-%E2%80%93-excepted-service-hiring-authorities-their-use-and-effectiveness>

<sup>16</sup> See generally, “Biography of an Ideal, A History of the Federal Civil Service,” U.S. Office of Personnel Management, 2003.

<sup>17</sup> See 5 CFR § 575.109

<sup>18</sup> <https://www.fedscoop.com/mike-brown-withdraws-nomination-for-dod-acquisition-and-sustinament/>

Following controversy over prior administrations' use of scientific information, the Biden Administration last year commissioned a high-profile 46-member task force on scientific integrity, with the stated purpose of reinforcing "robust science" that was "unimpeded by political interference." The panel's first report, issued in January 2022, concludes that one of the principal ways that scientific integrity can be undermined is the "selection or appointment of scientific staff based on non-science qualifications."<sup>19</sup>

Ironically, just days after the Biden Administration report, a bill was introduced in the House that includes provisions that further institutionalize excepted service hiring of scientists and other technical personnel. In practical terms agencies would have enormous discretion to hire individuals, many of whom may not be the best qualified, or even highly qualified, but rather those who have some connection to the hiring official(s) or have espoused ideological views that align with whatever administration is in power. The recent creation of the Defense Cyber Excepted Service (CES) and the Defense Cyber Intelligence Personnel System are two prime examples of broad non-competitive excepted appointing authority coupled with potentially limited due process rights. Both claim to "always [be] merit based and sometimes noncompetitive if conditions warrant." They also claim the veteran's preference will apply "if administratively feasible," but with "no points assigned."<sup>20</sup> Translated into English, the Defense CES has almost no basic hiring criteria other than the ability to hire whomever they want to hire.

### **"Direct Hire" – Another Threat to the Merit System**

While the growth and expansion of the excepted service represents a threat to the continuing viability of the competitive service, yet another competitive service hiring technique also represents a challenge to merit. Under 5 U.S.C. § 3304, agencies may directly hire employees into the competitive service, without competition or consideration of veterans' preference. Direct hire authority (DHA) was originally designed to promote and expedite hiring when OPM has determined that there exists a "severe shortage" of candidates. However, increasingly Congress has bypassed OPM and authorized various agencies, most notably the Department of Defense (DoD), to utilize DHA on a greatly expanded basis. Perhaps concerned that failure to grant agencies DHA upon request will result in even more Congressional expansion of direct hire, OPM has been granting use of this authority to many civilian agencies.

Unlike excepted appointments, DHA allows appointees to be directly hired into the competitive service without any comparative examination of qualifications. In fact, DHA requires only that an appointee meet minimum qualifications for the position. DHA also bypasses veterans' preference. Agency use of DHA is as varied as use of excepted service appointing authorities, but it is clear that DHA represents a real threat to merit and much like the excepted service has the potential to create a civil service staffed at least in part on patronage or favoritism principles – a return to the 19<sup>th</sup> century.

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<sup>19</sup> Scientific Integrity Fast-Track Action Committee and National Science and Technology Council, "Protecting the Integrity of Government Science," January 2022 ([https://www.whitehouse.gov/wp-content/uploads/2022/01/01-22-Protecting\\_the\\_Integrity\\_of\\_Government\\_Science.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/01/01-22-Protecting_the_Integrity_of_Government_Science.pdf))

<sup>20</sup> DoD Cyber Excepted Service (CES) Personnel System: Authorities Comparison (Dec. 2021).

Among its duties, the Merit Systems Protection Board (MSPB) performs studies of civil service hiring issues. A February 2021 MSPB Report shows that DHA has expanded from less than 5% of all new hires in the competitive service in the early 2000s to nearly 30% of such hires in 2018, including almost half of all new DoD hires.<sup>21</sup> Between the increasing use of excepted service appointments and DHA, policymakers cannot help but recognize that the merit-based system created by the Pendleton Act is slowly being eroded with expedient hiring authorities. At what point will policymakers begin to question why federal employees who were hired non-competitively should be entitled to any due process rights when facing adverse actions.

### **Strengthening the Competitive Service to Ensure the Continued Integrity of the Civil Service**

The emphasis on use of excepted service and DHA appointments – effectively non-competitive hiring practices – tends to reduce the pool of candidates (often internal candidates) considered for jobs. Requiring employees to continuously check USAJOBS on a daily basis and hunt for job announcements is a transaction-heavy, burdensome process that tends to discourage candidates unless someone in management tells a candidate about the job posting. The situation favors managers’ cherry-picking by informing preferred candidates of a job announcement (if there even is one) and leaving it posted for a limited time to reduce the number of candidates to be considered. In many instances qualified persons may never learn that jobs are available before they are filled.

To counter these negative trends, AFGE has offered its support for a significant piece of legislation which was recently approved, on a unanimous basis, by the Senate Committee on Homeland Security and Governmental Affairs (HSGAC). The “Chance to Compete Act of 2022” (S. 3423) seeks to promote competitive service hiring as a key to a strong professional apolitical federal workforce that is free of personal or political patronage. Over the years, our highly trained apolitical competitive civil service – representing the best workers the country can produce – has helped the nation to overcome the Great Depression, put astronauts on the moon, and won the Cold War.

The need for a strong professional civil service has never been greater, as the country confronts the ongoing pandemic, global tensions with rival powers, and numerous economic challenges resulting from COVID-19, supply chain shortages, and global technological competition. Yet today both houses of Congress are weighing various pieces of legislation that would actually further weaken the competitive service, as various agencies seek additional exceptions to competitive hiring. AFGE commends the Senate HSGAC for moving in the opposite direction by modernizing and streamlining the competitive hiring process.

The Senate bill would help to re-establish competitive service hiring as the preferred method for staffing the civil service. Specifically, it would ensure that vacancies are open to the public and to other qualified federal workers, bringing needed talent and diversity to the candidate pool.

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<sup>21</sup> Direct-Hire Authority Under 5 U.S.C. § 3304: Usage and Outcomes February 2021, available at: [https://www.mspb.gov/studies/researchbriefs/Direct\\_Hire\\_Authority\\_Under\\_5\\_USC\\_%C2%A7\\_3304\\_Usage\\_and\\_Outcomes\\_1803830.pdf](https://www.mspb.gov/studies/researchbriefs/Direct_Hire_Authority_Under_5_USC_%C2%A7_3304_Usage_and_Outcomes_1803830.pdf)

The bill would make the system for assessing applicants fairer and more objective. It would provide for panels of knowledgeable subject-matter experts to assist with screening applicants, instead of using rigid and arbitrary criteria and buzzwords. Importantly, agencies could share certificates, so that once an applicant was determined to be qualified for certain kinds of work, he or she could be considered for multiple jobs across the federal government without having to identify and reapply for each one separately. Finally, by strengthening the competitive service, the bill supports longstanding Congressional policy that qualified veterans have an advantage – but not a guarantee – when seeking federal jobs.

It is no secret that the federal government is in constant competition to recruit the best talent, especially in today’s tight labor market. The Chance to Compete Act goes a long way to help the government in this competition as well as helping job-seekers, and it will help to ensure that the federal government is well positioned to meet 21<sup>st</sup> century threats and challenges.

### **Congressional Requests**

- Enact S. 3423, the “Chance to Compete Act of 2022” to further improve competitive hiring procedures.
- Reject further agency requests for expanding excepted service or direct-hire authorities.
- Support agency requests for additional HR staffing and training to conduct competitive-service hiring, where needed.

## **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. Our members perform a wide range of civilian functions, from maintaining weapons to overseeing contractors to guarding installations. The Pentagon's own data prove that of the department's three workforces—military, civilian, and contractor—the civilian workforce is the least costly and the most efficient but is nevertheless targeted for the largest cuts. AFGE is honored to represent civilian employees on a wide range of issues, both on Capitol Hill and within the department.

### **KEY POINTS**

To strengthen the Department's critical civilian workforce, prevent waste and inefficiency, and strengthen national defense AFGE urges Congress to:

1. Prevent further wasteful outsourcing of civilian Defense jobs by continuing the moratorium on A-76 public/private competitions until process flaws are corrected.
2. Restore military commissaries to their traditional role supplying affordably priced food and staples to military families.
3. Improve military health care by backfilling medical vacancies resulting from realignment with civilian medical staff instead of outsourcing health care to an overburdened private sector.
4. Support more merit-based competitive hiring, instead of using excepted hiring authorities, through measures such as streamlining the job application process, creating standing registers of qualified applicants, and using panels of subject-matter experts to make selections instead of using rigid qualifications.
5. Repeal the authority for alternative performance management systems such as AcqDemo that are bureaucratic, inefficient, and result in favoritism and discrimination.
6. Improve acquisition, readiness, and sustainment by narrowing the definition of "commercial items," expanding DoD access to contractors' technical data, and supporting the government's right-to-repair military hardware.
7. Enforce existing statutory prohibitions against outsourcing governmental functions by requiring improved contract and budget guidance, withholding appropriated funds from noncompliant service contracts, and re-establishing and expanding contractor inventories that were discontinued during the prior administration.
8. Reduce contract waste and inefficiency and improve the availability of contract cost data by reinstating the Army's acclaimed Enterprise Contractor Manpower Reporting



Application (ECMRA) instead of OMB's failed System for Acquisition Management (SAM).

9. Withhold authority for any further rounds of Base Realignment and Closure (BRAC) and eliminate a loophole that allows the privatization of functions at bases facing closure.
10. Eliminate the remaining arbitrary personnel caps governing certain headquarters activities in favor of comprehensive cost reporting for military, civilian, and contract personnel.
11. Ensure that commission reforms to the Department's Planning, Programming, Budgeting, and Execution (PPBE) process protect readiness and lethality, accurately present the costs of contracts, and end misleading claims of future "savings" when cutting the civilian workforce in favor of contractors.
12. Prohibit the use of appropriated funds for hiring term or temporary employees to perform enduring work.
13. Improve procedures for adjudicating decisions on security clearances (a requirement for many DoD positions) and commission a joint survey to determine if past security clearance decisions show a pattern of discrimination or have overlooked membership in hate groups.
14. Reinstate the statutory requirement for the Department to perform an independent estimate of manpower costs prior to deploying major weapons systems, including the appropriate balance of military, civilian, and contractor personnel for operation, training, and sustainment.

## **RETAINING THE MORATORIUM ON PUBLIC-PRIVATE COMPETITIONS PURSUANT TO OMB CIRCULAR A-76**

### **Issue**

Despite previous Congressional direction, DoD is not prepared to conduct viable A-76 competitions. In fact, the disruptive impact of A-76 competitions on the care provided to wounded warriors being treated at the former Walter Reed Army Medical Center in February 2007 led to multiple investigations, resignations of senior officials, hearings and legislation by Congress prohibiting the conduct of A-76 competitions, initially at military medical treatment facilities, and the Department of Defense, as currently reflected in Fiscal Year 2010 NDAA section 325, and later extended to the entire federal government through annual appropriations restrictions.

## Background/Analysis

Section 325 of the FY 2010 NDAA made congressional findings on the flaws of public-private competitions as devised by OMB Circular A-76 and implemented within DoD. These flaws included:

1. The double counting of in-house overhead costs as documented by the DoD IG in D-20090-034 (Dec. 15, 2008).
2. Failure to develop policies that ensured that in-house workforces that had won A-76 competitions were not required to re-compete under A-76 competitions a second time.
3. The reporting of cost savings were repeatedly found by the GAO and DOD IG to be unreliable and over-stated for a variety of reasons, including:
  - a. Cost growth after a competition was completed because the so-called most efficient organization and performance work statements that were competed often understated the real requirement.
  - b. Military buy-back costs documented by GAO (GAO-03-214); A-76 competitions required a military department either to reduce its end strength or reprogram the funds to Operations and Maintenance appropriations in order to complete the competition.
4. As a result of these flaws, DoD was required to develop comprehensive contractor inventories, improve its service contract budgets, and to have in place enforcement tools to prevent the contracting of inherently governmental functions; to ensure that personal service contracts were not being inappropriately used; and to reduce reliance on, or improve the management over high risk “closely associated with inherently governmental” contracts.
  - a. The scope of contractor inventories has been limited to “closely associated with inherently governmental functions” and personal services contracts since SASC changes to the 2017 NDAA; the full scope of all services contracts must be included in contractor inventories by including:
    - i. All services contract portfolio groups as were required during the Bush and Obama Administrations.
    - ii. Including all commercial services contracts.
    - iii. Eliminating arbitrary dollar thresholds, as most services contracts are typically awarded through piecemeal task orders with low dollar threshold amounts, particularly due to the pervasiveness of continuing resolutions and incremental funding.
    - iv. Including critical functions as defined in title 10 and any function performed by military or civilian employees in the last ten years.
  - b. During the Trump Administration, the Department ended the Obama Administration’s commitment to implement the robust Enterprise Contractor

Manpower Reporting Application (ECMRA) by moving to the System for Award Management. This system, designed by OMB's Office of Federal Procurement Policy and implemented by the General Services Administration for the rest of the Federal Government, lost key functions that were part of ECMRA:

- i. Meaningful cost comparison capabilities because of the absence of indirect and other direct cost data from SAM.
- ii. The ability to track requiring activities.
- iii. The ability to track the location where the contract was performed.
- iv. The ability to track funding sources, including appropriations, object class, and program element information; and
- v. Coverage for most fixed price contracts, which currently comprise the majority of services, as SAM has excessive exclusion thresholds.

The GAO has repeatedly documented these flaws, and broken DoD commitments to Congress, most recently in GAO 21-267R, "SERVICE ACQUISITIONS: DoD's Report to Congress Identifies Steps Taken to Improve Management But Does Not Address Some Key Planning Issues" (Feb. 22, 2021).

These flaws have not been addressed and the conditions laid out in Section 325 have not been complied with (based on required GAO reviews and the lack of required DoD certifications of actions taken). In fact, June 28, 2011, is the last time DoD specifically reported to Congress on its plans to address problems specifically arising from section 325 of the FY 2010 NDAA.<sup>22</sup> Nonetheless, the Pentagon has incorrectly told the Congressional Research Service that it has met all the criteria identified in section 325 of the Fiscal Year 2010 NDAA for ending the moratorium on A-76 competitions.

### **Congressional Requests**

- Continue the public-private competition moratorium until such time as the flaws in A-76 are corrected and contractor inventories complete.
- Congress should require the department to address the requirements of section 325 of the FY 2010 NDAA in full, followed up by a GAO review.

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<sup>22</sup> Additionally, the department notified Congress on Nov. 26, 2019, that it would be transitioning from the Enterprise Contractor Manpower Reporting Application to the System for Award Management (SAM), and that it would provide a summary of FY 2020 data by the end of the third quarter of FY 2021. The DoD notification did not explain that SAM excludes most services contracts and does not address the analytical review requirements of section 2330a of Title 10, as the statute requiring SAM across non-DoD agencies had a much narrower scope than the DoD statute.

## **PRESERVING THE DOD COMMISSARY NON-PAY BENEFIT SAVINGS (WHICH ARE PARTICULARLY IMPORTANT IN REMOTE AND OVERSEAS AREAS) AND ITS WORKFORCE (THAT INCLUDES VETERANS AND MILITARY SPOUSES AND FAMILY MEMBERS) AND A NECESSARY INGREDIENT TO COMBATING FOOD INSECURITY AMONG SOME MILITARY FAMILIES**

### **Issue**

DoD's continuation of the flawed variable pricing program has damaged the Commissary brand, resulting in significant revenue losses that were further exacerbated by the pandemic. This damage has occurred during a period when some military families have been suffering from food insecurity, necessitating a Basic Needs Allowance and consideration during the last NDAA process of providing free produce to some military families. In the past, commissaries offered military members and their families the lowest pricing available anywhere for brand name items.

### **Background/Analysis**

The commissary benefit is a crucial non-pay benefit for the military and their family members, particularly in remote and overseas locations. As a result of recent variable pricing "reforms" developed by the Boston Consulting Group, sales have dropped by nearly 25% and coupon redemption has been reduced by more than half from 113 million in 2012 to 53 million in 2017. SNAP usage has dropped by 947,000 down to 550,000. There is broad coalition support for preserving the commissary benefit led by the American Logistics Association.

### **Congressional Requests**

- Establish pilot programs for providing free produce to military families affected by food insecurity through the Commissaries.
- Require Commissaries to stop profiting like private businesses through variable pricing and return to the low-cost model that provided a clear benefit to military families.

## **PRESERVING THE PROVISION OF QUALITY HEALTH CARE TO MILITARY MEMBERS, THEIR FAMILIES, AND RETIREES IN MILITARY MEDICAL TREATMENT FACILITIES BY BACKFILLING MILITARY MEDICAL STRUCTURE PLANNED FOR REALIGNMENT TO OPERATIONAL REQUIREMENTS WITH CIVILIAN EMPLOYEE BACKFILLS**

### **Issue**

The department is downsizing military medical treatment facilities by shifting beneficiaries to TRICARE for any functions performed by military structure that does not deploy into combat zones to improve readiness.

## **Background/Analysis**

In the 2017 NDAA, Congress directed the department to reorganize the Defense Health Program and provided authority to convert military medical structures to civilian performance. To that end, Congress repealed requirements that military department surgeon generals certify to Congress about the impact on readiness and quality of care before privatizing any military medical structure. The Trump administration further misused this authority with plans to downsize both military and civilian structures in military medical treatment facilities. For any function that did not involve a military occupational specialty that was deployable into combat zones, the administration planned to shift care into already oversaturated local TRICARE markets. The administration claimed these actions were intended to improve readiness.

The effects of these actions have degraded the quality and level of health care provided to military beneficiaries and their families because the local markets, as Congress and the GAO found, lack the capacity to provide this care. These local health care network capacity problems were exacerbated further by the COVID-19 pandemic.

AFGE lobbied Congress during the course of the FY 2021 and FY 2022 NDAA to consider inclusion of H.R. 2581, “Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act of 2019,” sponsored by Rep. Schakowsky (and others), and the corresponding S. 1357 sponsored by Sen. Warren (and others). Section 716 of the FY 2021 NDAA requires the department to develop and report a proposed quality of care standard to Congress, which must be approved by Congress, before further action can be taken to downsize or reorganize military medical treatment facilities. Section 715 bars downsizing military medical structure until the department reports to Congress its rationale for determining what medical structure is related to readiness. Additionally, Section 722 of the FY 2021 NDAA requires the department develop a “COVID-19 global war on pandemics” plan. And finally, Section 757 of the FY 2021 NDAA requires a study on force mix options and service models to enhance readiness of the medical force of the Armed Forces. The Defense portion of the omnibus appropriations bill for FY 2021 includes direction for a GAO review of the military medical treatment reorganization and similarly puts a pause of reorganization efforts until GAO findings are addressed in a report to Congress.

However, the Biden Administration, the Trump Administration, and Congress have all failed to require the Department to backfill planned realignments of military medical structure with civilian employees, which would be an important way to mitigate the damage from past policies.

## **Congressional Requests**

- Require the Department to take more pro-active steps to backfill military medical structure planned for realignment to operational requirements with civilian employees.

# **IMPROVING THE CIVILIAN HIRING PROCESS BY ESTABLISHING A PREFERENCE FOR COMPETITIVE SERVICE HIRING IN LIEU OF NON-COMPETITIVE HIRING THROUGH DIRECT HIRES, EXPANSIONS OF THE EXCEPTED SERVICE, OR TITLE 10 EXCEPTIONS TO TITLE 5 OVERSIGHT BY THE OFFICE OF PERSONNEL MANAGEMENT**

## **Issue**

DoD's hiring problems arise from the piecemeal expansion of non-competitive hiring and "flexibilities" provided to DoD management that are exceptions to title 5 procedures.

## **Background/Analysis**

- Section 1109 of the FY 2020 NDAA consolidates various direct hire authorities established on a piecemeal basis over the course of several NDAA's into a single provision, which sunsets on September 30, 2025. Section 1109 also requires the Secretary of Defense, in coordination with OPM, to provide for an independent study to identify steps that could be taken to improve the competitive hiring process consistent with ensuring a merit-based civil service and diverse workforce in DoD and the federal government. The study is required to consider the feasibility and desirability of using "cohort hiring" or hiring "talent pools" instead of conducting all hiring on a "position-by-position basis." The study is to proceed in "consultation with all stakeholders, public sector unions, hiring managers, career agency and Office of Personnel Management personnel specialists, and after a survey of public sector employees and job applicants."
- The National Security Commission on Artificial Intelligence, the Government Accountability Office, the Congress, and the Department of Defense have all recognized that the Department has significant skills gaps in various Scientific, Technological, Engineering, Mathematical, and Manufacturing (STEMM) fields as well as acquisition, financial management, cyber, artificial intelligence, and foreign language skills. Recruiting in these fields is critical to meeting 21<sup>st</sup> century threats to our national security as articulated in President Biden's National Defense Strategy.
- These skills gaps have persisted after numerous "flexibilities" have been provided to the Department of Defense, including:
  - The Secretary of Defense has since 1989 had broad authority to establish hiring levels and compensation for civilian faculty at the National Defense University and Defense Language Center.
  - The Secretary of Defense has since 2011 had authority to deviate from title 5 in a so-called "pay for performance" demonstration project for the acquisition workforce.
  - The Cyber Excepted Service is exempt from OPM oversight and from the Classification Act, does not allow non-veterans to appeal adverse actions to the

Merit Systems Protection Board, and has an excessive three-year probationary period.

- Section 9905 of Title 10 provides the secretary various direct hire authorities for depot maintenance and repair; the acquisition workforce; cyber, science, technology and engineering or math positions, medical or health positions, childcare positions, financial management, accounting, auditing, actuarial, cost estimation, operational research, and business administration.
- The perspective of the Department of Defense leadership has consistently been one of seeking and obtaining exemptions from the government-wide processes administered by the Office of Personnel Management that are intended to ensure an apolitical civil service. The Department of Defense has sought these authorities purportedly in the quest for greater management flexibility, often to the detriment of the long-term job security of employees being hired into the Department.
- In fact, the misuse of these authorities arguably has been one of the primary factors leading to persistent skills gaps in the workforce. There is an inherent contradiction between unfettered management “flexibility” to set the terms and conditions of employment and the very idea of human capital planning that views employees as possessing both existing skills and potential talent that can only be developed through a long-term commitment. There is a flawed perception that an employee has only a single skill that cannot be adapted and developed as the Department’s missions change. Personnel caps have been used to discard employees and their skills through the egregious misuse of term and temporary appointments.
- Another contributing factor to these management problems in the Department has been lax oversight by the Office of Personnel Management of the delegated examining authority provided to the Department, a delegation that has persisted over a couple of decades. As a result of this lax oversight, there has been a proliferation of separate career programs within each military department for the same kinds of skills.
- For anyone concerned with civilian control of the military, the likely genesis of this proliferation of separate civilian career programs within each military department for the same sets of skills in the Department resides in the preference of military supervisors for managing a civilian workforce in the kind of framework they are accustomed to for the military. Sometimes this cultural propensity manifests itself in lack of recognition that the Americans with Disabilities Act or other Civil Rights laws applicable to the federal government workforce must be applied to the civilian workforce in DoD.
- Sometimes this results in each Military Department creating separate developmental paths and certification requirements for similar sets of skills, a practice that creates significant barriers for promotion of internal candidates or lateral entry for external candidates.

- Moreover, management practices and culture often erect barriers to hiring more than any lack of authorities. For example, the National Security Commission on Artificial Intelligence reported that the Department failed to recognize experience as a substitute for educational credentials when determining appropriate compensation for Cyber workers, something that title 5 already allows without any legislative action.
- Congressional “reforms” – frequently the result of Department or study commission recommendations - often emulate the highly expensive accession methods used by the military, such as recent recommendations by the National Security Commission on Artificial Intelligence for a Digital Academy—based on the military academy model.
  - There are less expensive alternatives to fill skills gaps, if only the Department, with the assistance of a reinvigorated Office of Personnel Management, were to revive the objective assessment tools that had been successfully used before to generate larger lists of qualified and diverse candidates.
  - Larger numbers of diverse candidates (at less cost than the Digital Academy) could be generated by expanding the existing three-year Cyber Scholarship programs for federal government employees to make them as generous as ROTC commissioning programs which pay for four years of college and even for graduate and professional school, with a comparable service commitment.
  - Additionally, a larger population of qualified and diverse candidates could be generated by expanding the use of cohort hiring or standing registers, a method that can only practically be used through objective assessment tools for screening candidates, in lieu of the burdensome practice of requiring job applicants to separately apply for similar jobs on the website USAJOBS. The paucity of qualified and diverse candidates on referral lists is in large part due to the failure to generate standing registers of qualified candidates from objective assessment tools that require applicants to apply only once rather than separately to each job opening.
- AFGE’s position, in general, has been to oppose direct hiring because exceptions to full and fair open competition for jobs have been used to circumvent consideration of internal candidates for jobs, weaken diversity, and exclude otherwise qualified candidates from consideration. Sometimes in the past AFGE has supported, purely on an exception basis, direct hire for depots but has seen these authorities later illegitimately expanded to cover areas such as installation support services in public works offices.
- Direct hire authorities work “well” for a hiring manager when one knows specifically whom one wants to hire for a job by cutting off competition and shortening the length of the hiring process. But they completely undermine recruiting the best qualified candidates from a diverse pool and largely perpetuate a “closed system” of hiring in the federal government, where getting hired means “knowing someone on the inside.”



- The Merit Systems Protection Board recently suggested in November 2019 that agencies can hire better, not just faster and cheaper, by bringing subject matters experts into the hiring process and “ensuring that the advertised qualifications of a job posting more accurately line up to the competencies needed to be successful.” Direct hire authorities are typically justified as a means of streamlining the lengthy hiring process to fill positions that would otherwise be filled with other labor sources (contractors or military). However, direct hire is a band-aid that fails to deal with the root causes of hiring delays and largely circumvents other Congressional objectives such as veterans’ preference, hiring military spouses, allowing for internal competition for jobs, and promoting diversity of the workforce.
- There are four root causes to hiring delays, none of which is addressed by direct hire authorities:
  1. Budgetary uncertainty arising from continuing resolutions, hiring freezes, sequestration, furloughs, and arbitrary caps on the size of the civilian workforce reflected in Full-Time Equivalent projections in the budget or the number of authorized positions on an organization’s manning documents. Virtually every management layer of the DoD can create impediments to hiring by requiring organizations to seek their approval prior to initiating a hiring action with the human resources departments.
  2. Restrictions on the use of “over hires” for civilian positions even when a workload requirement exists, and funding is available to a local manager to initiate hiring for that position. These restrictions create incentives for managers to use available funding for civilian employment to hire contractors instead, even for inherently governmental functions that by law, cannot be contracted out. The GAO recently found that the depots in the organic industrial base sometimes commence hiring at 80% of their authorizations on a position-by-position level waiting for vacancies to occur, rather than a more proactive approach of hiring at some percentage above 100% of authorizations to account for hiring lags.
  3. Downsizing and centralization of human resources offices, in the name of “efficiency,” which severs the relationship between hiring managers and the human resource “recruiters” who have been asked to do more with less.
  4. The processing of security clearances is an entirely separate function within the hiring process. Security clearance processing and adjudication is by far the most time-consuming part of the hiring process, and it has an enormous impact on the time it takes to fill many positions, regardless of whether direct hire authority is used.

### **Congressional Requests**

- Oppose adding additional direct hire authorities or expansions of the excepted service.
- Support preferences for competitive hiring.

- Require the Department to respond to recent Senate Armed Services Committee report language, which identified deficiencies in the hiring, development, and retention of STEMM, Cyber, and other critical personnel and directed the Department to develop a coherent plan for greater use of competitive hiring, subject matter expert hiring panels, and use of standing registers of qualified candidates, among other measures. Follow up on Department of Defense response to Senate Armed Services Committee markup directive report language: “Department of Defense civilian workforce career developmental programs,” at page 168: “The committee notes that skill gaps in hiring, development, and retention of personnel in Science, Technology, Engineering, Mathematics, and Manufacturing (STEMM), Cyber, Artificial Intelligence, acquisition workforce, financial management, and critical functional areas required by the National Defense Strategy (NDS) persist, even after numerous legislative initiatives that provided greater flexibility in setting the terms and conditions of employment. Each military department has created its own separate career program brands for the same kinds of skills, often with their own separate developmental paths and certification and training requirements that create a cumbersome application process and may at times impede consideration of otherwise qualified candidates for civilian jobs. The committee believes that this fragmented approach does not meet the needs of the Department. Accordingly, the committee directs the Secretary of Defense to provide a report to the Committees on Armed Services of the Senate and the House of Representatives not later than January 1, 2022, on its plan to streamline civilian personnel management across the Department of Defense (DoD) with the goal of further developing the skills the Department needs to meet the priorities of the NDS while maintaining an apolitical civilian workforce. The plan should at least address the following elements:

- (1) Emphasis on competitive hiring using objective assessments of qualifications in lieu of rigid tools for classification;
- (2) Promoting innovative management of the Federal workforce;
- (3) Using data analytics to establish a systematic process to ensure the current and future DoD workforce is aligned with the current and future mission of the Department;
- (4) Use of subject matter expert hiring panels to limit rigid assessments of qualifications;
- (5) Recognition of alternative developmental paths to establish qualifications required for positions;
- (6) Emphasis on diversity and inclusion;
- (7) Increasing use of standing registers of qualified applicants to fill open positions;

- (8) Emphasis on active recruitment methods through visits to high schools, trade schools, colleges, universities, job fairs, and community groups rather than passive recruitment through job postings;
- (9) Utilizing standardized and uniform Government-wide job classification;
- (10) Reducing cumbersome application processes, including the requirement to use Federal resumes;
- (11) Legislative proposals required to achieve these outcomes.”

## **REPEAL AUTHORITY FOR ACQDEMO AND OPPOSE OTHER SO-CALLED PERFORMANCE MANAGEMENT SYSTEMS SIMILAR TO THE FORMER NATIONAL SECURITY PERSONNEL SYSTEM (NSPS)**

### **Issue**

The AcqDemo is plagued with the same problems that occurred under the NSPS, described below. Recommendations from the section 809 Panel to make its authority permanent and expand it to the entire acquisition workforce are flawed and should be opposed.

### **Background/Analysis**

A recent RAND review of the AcqDemo identified the following problems:

1. It is not clear whether the AcqDemo flexibility has been used appropriately, as starting salaries for AcqDemo participants were about \$13,000 higher than starting salaries for “comparable” GS employees in DoD.
2. As occurred in NSPS and similar pay-banding structures, “female and non-white employees in AcqDemo experienced fewer promotions and less rapid salary growth than their counterparts in the GS system.”
3. Only about 40% of respondents to the RAND survey perceived a link between their contribution and compensation, a figure that “is lower than comparable survey statistics from other demonstration projects.”
4. Subject matter expert interviews and survey write-in responses opined that AcqDemo was overly bureaucratic and administratively burdensome – taking time away from actual mission performance: appraisal writing, feedback sessions, and pay pool administration, in particular, were perceived to be time-consuming and inefficient.

Additionally, the claim by AcqDemo proponents that it “links employees pay and awards to their contribution to mission outcomes rather than longevity” is unsupported. In fact, some employees at APG support AcqDemo precisely because it provided greater salary increases overall than the

GS system for every employee and had good grievance outcomes, largely because of the failure of management to do all the bookkeeping required on a timely basis with respect to setting objectives and counseling, which would seem to run counter to the argument of its proponents in management and the 809 Panel that describe it as rewarding and recognizing excellent performers.

### **Congressional Requests**

- Oppose expansion of AcqDemo and consider repealing authority for AcqDemo.

### **EXPANSION OF “COMMERCIAL ITEM” DEFINITIONS HAVE ENCOURAGED SOLE SOURCE PROCUREMENTS THAT WEAKEN TECHNICAL DATA RIGHTS ACCESS, ORGANIC INDUSTRIAL BASE SUPPORT, AND GOVERNMENT COMMAND AND CONTROL OF WEAPON SYSTEMS**

#### **Issue**

In the FY 2018 and 2019 NDAAAs, the definitions of “commercial items” were expanded very broadly in ways that could easily mischaracterize many weapon systems and components as commercial and thereby inappropriately shift the sustainment workload from the organic industrial base to the private sector. Military leaders could lose command and control, and depots could lose the ability to perform maintenance efficiently and effectively on new weapon systems. Government access to technical data rights and cost or pricing data could be diminished and the ability of the government to insource contract logistics support could also be affected.

#### **Background/Analysis**

The following definitional changes are of concern:

- Changing the standard for designating the level of modifications to an item that would be required to deem an item as military unique. Many weapons and components that are only suited for military purposes could be modified to no longer be compatible with their civilian origins and yet would no longer be considered military unique.
- Changing the standard from multiple state “and” local governments to multiple state “or” local governments “or” foreign governments. This greatly expands the list of military unique items that could be considered commercial even though they have never been sold in the commercial marketplace.
- A single determination made by any contracting officer anywhere in the world designating an item as commercial stands as the final determination for that item for all purposes throughout the lifetime of that item for all acquisition actions unless the Secretary of Defense determines otherwise in writing.

A joint hearing between the House Armed Services Committee (HASC) Readiness and Tactical Land and Air Forces Subcommittees on Nov. 11, 2019, focused on sustainment problems with

the F-35 fighter jet, which is DoD's costliest weapons system with acquisition costs expected to exceed \$406 billion and sustainment costs estimated at more than \$1 trillion over its 60-year life cycle. According to an April 2019 GAO-19-321 audit, "F-35 Aircraft Sustainment: DoD Needs to Address Substantial Supply Chain Challenges," the F-35 aircraft performance is "falling short of warfighter requirements - that is, aircraft cannot perform as many missions or fly as often as required ... due largely to F-35 spare parts shortages and difficulty in managing and moving parts around the world." For example, F-35 aircraft were unable to fly nearly 30% of the May-November 2018 time period due to spare parts shortages and a repair backlog of about 4,300 F-35 parts. Certain sets of F-35 parts are acquired years ahead of time to support aircraft on deployments, but the parts do not fully match the military services' needs because the F-35 aircraft have been modified over time. For example, 44% of purchased parts were incompatible with aircraft the Marine Corps took on a recent deployment. The GAO, the DOD IG and some in Congress during this hearing acknowledged that these problems are rooted in the government's lack of access to intellectual property.

However, these same members of Congress do not seem to recognize that the goal post has been moved even further with additional impediments to the government obtaining access to intellectual property in response to the Section 809 and Section 813 panels' recommendations that were recently enacted by Congress. For instance, a change made in Section 865 of the FY 2019 NDAA is currently being implemented in departmental rulemaking to remove an exception for major weapon systems to the presumption, for purposes of validating restrictions on technical data, that commercial items were developed exclusively at private expense. Currently, the general presumption of private expense at DFARS 227.7103-13(c)(2)(i) is subject to an exception in subparagraph (c)(2)(ii) for certain major weapon systems and certain subsystems and components. The rulemaking deleted the exception, making the presumption apply to all so-called "commercial items" (in reality faux commercial items). Under the rulemaking, "Contracting officers shall presume that a commercial item was developed exclusive at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice." See 84 FR 48513 (Sept. 13, 2019).

The industry members of the Section 813 Panel, who comprise a majority, are recommending that Congress rewrite federal acquisition law to allow for greater negotiation between government and industry on intellectual property developed with **governmental funding**. According to the minority members of that panel (from the government) this will "further remove any risk from the contractor and to transfer that risk to the government" by allowing "a contractor, through negotiation, to transfer all R&D risk to the government, accept billions of dollars in government funding, and retain all intellectual property rights without providing any intellectual property rights to the government."

The GAO itself, depending on who is leading the audit and when they did the audit, have sometimes supported industry's position on intellectual property (IP) and sometimes supported the notion that the government needs greater access to IP. See, e.g., GAO-06-839, *Weapon Acquisition: DoD Should Strengthen Policies for Assessing Technical Data Needs to Support Weapon Systems* (July 2006); versus GAO-17-664, *Military Acquisitions: DoD? Is Taking Steps to Address Challenges Faced by Certain Companies* (July 2017).

Some of the members of Congress who expressed great concern with these issues during the November 2019 hearing seem to have backed away in response to industry assurances that they are negotiating in good faith with the government to give the government access to all technical data “consistent with contractual arrangements,” which were established when the government decided to shift all sustainment responsibility to the contractor in a performance-based logistics contract.

Section 807 of the Fiscal Year 2022 National Defense Authorization Act requires an “Assessment of Impediments and Incentives to Improving the Acquisition of Commercial Products and Commercial Services” by the Under Secretary of Defense (Acquisition and Sustainment) and the Chairman of the Joint Requirements Oversight Council (JROC), with a briefing to Armed Services Committees within 120 days of enactment covering the following topics:

- Relevant policies, regulations and oversight processes with respect to the issue of preferences for commercial products and commercial services.
- Relevant acquisition workforce training and education.
- Role of requirements in the adaptive acquisition framework as described in DODI 5000.2.
- Role of competitive procedures and source selection procedures.
- Role of planning, programming, and budgeting structures and processes, including appropriations categories.
- Systemic biases in favor of custom solutions.
- Allocation of technical data rights.
- Strategies to control modernization and sustainment costs.
- Risks to contracting officers and other members of acquisition workforce of acquiring commercial products and services, and incentives and disincentives for taking such risks.
- Potential reforms that do not impose additional burdensome and time-consuming constraints on the acquisition process.

### **Congressional Requests**

- Our members should in particular work through their uniformed leadership through the JROC to ensure the issues of cybersecurity risks, access to technical data rights, interoperability concerns and Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities (DOTMLEPF) issues are properly considered; as well as work through the DUSD(A&S) community which should be particularly concerned

about the effects of the preference for commercial products and services has on escalating sustainment costs.

- Ask for additional GAO, DoD IG and FFRDC studies of the impact of recent acquisition reforms on sustainment and readiness costs, focusing on access to IP and “right to repair” issues in depot and operational environments for the military departments.
- Scale back the commercial items application in the case of foreign military sales.
- Repeal section 865 of the FY2019 NDAA that changes the presumptions for weapon systems against governmental access to IP.
- Raise jurisdictional concerns when the Armed Services Committees deal with further expansion of commercial products and services with the following Committees:
  - Judiciary Committee; Antitrust and Competition Subcommittees.
  - Banking and Commerce with respect to Defense Production Act.
  - Oversight and Reform and Homeland Security and Governmental Affairs, the presumptive committees with jurisdiction that have routinely waived jurisdiction in favor of the Armed Services Committees.

**PROVIDE EXAMPLES TO CONGRESS OF PRIVATIZATIONS THAT ARE INCONSISTENTLY WITH STATUTORY REQUIREMENTS AND ENSURE APPROPRIATE IMPLEMENTATION OF SECTION 815 OF THE FISCAL YEAR 2022 NATIONAL DEFENSE AUTHORIZATION ACT**

**Issue**

The Department currently does not prioritize and validate services contract requirements in its programming and budgeting process over the course of the Future Year Defense Program (FYDP), subjecting the civilian workforce instead to programmatic offset drills. Loopholes to the public-private competition moratorium are used to directly convert civilian jobs to contract, usually by not backfilling positions and then contracting the function; or reorganizing and claiming a new technology or business process has changed the work previously performed by civilian employees. Statutory insourcing requirements that give “special consideration” to federal government employee performance of new requirements “closely associated with inherently governmental functions” or “critical functions” as defined in section 2463 of title 10 are ignored. Additionally, statutorily required contractor inventory reviews to reduce contractor performance of “closely associated with inherently governmental functions” to the “maximum extent practicable” through insourcing or to mitigate risks of performing “personal services contracts” with insufficient statutory authority by insourcing are likewise ignored. These examples are not exhaustive but illustrate the statutory compliance problems within the Department. Section 815 of the Fiscal Year 2022 National Defense Authorization Act establishes a statutory framework for improving Departmental compliance with statutory

limitations against privatization and to ensure contract services requirements are eventually included in Departmental programming and budgeting prioritization, giving due consideration to insourcing government jobs rather than cutting them, with full compliance to be reflected in the Fiscal Year 2023 budget submission to Congress for services contracts. During this implementation period for section 815 it is important to provide examples to Congress of compliance problems and to ensure full implementation with section 815.

## **Background/Analysis**

- DoD ignored FY 2015 NDAA conference report language that directed DoD to adopt a checklist used by the Army to improve consistent compliance with sourcing statutes for all contracted services, including: the statutory definitions of “inherently governmental” and “closely associated with inherently governmental”; the statutory and regulatory definition of “personal services” and the various statutory exceptions; the statutory restrictions on contracting firefighters and security guards; the statutory restrictions on contracting for publicity; the statutory definitions and requirements for the contracting of critical functions; and the statutory prohibitions against contracting functions except through public-private competitions and the existence of the moratorium against public-private competitions.
- The GAO (GAO-16-46) found that the Army’s use of this checklist resulted in considerably more consistent and accurate identification of “closely associated with inherently governmental” functions than other Defense components, reporting nearly 80% of the \$9.7 billion it obligated for the kinds of contracting activities where such contracts would likely be found. By contrast, because they did not use the checklist, Navy, Air Force, and other Defense components identified only a small fraction of what should have been identified. The checklist requires senior leader certification of all service contract requirements as part of the procurement package processed by contracting officers and is further reviewed after a contract is awarded as part of the post-award administration and service requirements validation.
- The Fiscal Year 2018 National Defense Authorization Act established a framework involving Service Requirements Review Boards (SRRBs) under the Under Secretary of Defense (Acquisition and Sustainment) to purportedly improve the rigor and transparency of service contract requirements in the budgeting and programming process. This included an uncodified note for total force management standard guidelines to assist the SRRBs, with directive report language that the SRRBs become more strategic and less transactional in their reviews. Initially, the Defense Acquisition University (DAU) updated its services contract handbook with the Army checklist in response to this uncodified note. Unfortunately, the SRRB’s primary focus remained transactional and was focused mainly on “better buying practices” as part of year end acquisition planning to support contracting officers, rather than a more strategic programmatic prioritization and validation of contract services requirements. The SRRB’s performed their work in a silo completely disconnected from the Department’s programming processes under the purview of CAPE, resulting in continued delays in fulfilling the purposes of the statute. The statute was subsequently clarified in the 2020 NDAA to fix responsibility for



program requirements on CAPE and budget requirements on the Comptroller. However, implementation in the SRRBs continued to flounder and the DAU eventually de-emphasized the Army checklist in its guidebook and incorrectly limited statutory restrictions solely to inherently governmental functions, ignoring “closely associated with inherently governmental” and “critical functions” and the existence of a moratorium on public-private competitions.

- Section 815 of the Fiscal Year 2022 National Defense Authorization Act, amending section 2329 of Title 10, requires senior officials to complete and certify a checklist ensuring that statements of work and task orders submitted to contracting officers comply with longstanding statutes that prevent replacing DoD civilian employees with contractors, subject to annual DoD Inspector General reviews, and require that service contract budgets comply with these requirements.
  - The Joint Explanatory Statement accompanying this provision requires that the Secretary of Defense submit a plan for implementation to Congress not later than June 1, 2022. The plan must address:
    - Responsibilities assigned to the offices of the Under Secretary of Defense (Comptroller), the Under Secretary of Defense (Acquisition and Sustainment), and the Under Secretary of Defense (Personnel and Readiness), as well as the Office of Cost Assessment and Program Evaluation.
    - Identify changes needed to Military Department and Defense Agency programming guidance.
    - Establish milestones to track progress and ensure that projected spending on services contracts is integrated into and clearly identified in the Department of Defense’s Future Year Defense Program (FYDP).
    - Issue standard guidelines for the evaluation of service contract requirements based on the May 2018 Handbook of Contract Function Checklists for Services Acquisition, which is modeled on the Department of the Army’s Request for Services Contract Approval form.
  - The Committees also required a Government Accountability Office review of the Department’s Service Requirements Review Board process established by the Under Secretary of Defense (Acquisition and Sustainment).
  - The FY 2022 NDAA also requires standard guidelines be developed to reflect statutory total force management policies and procedures related to the use of Department of Defense civilian employees to perform new functions and functions that are performed by contractors.

- The statute requires the services contract budget submitted in February 2023 include FYDP level of detail and be informed by the contractor inventory review required by section 2330a(e) using the standard total force management guidelines.
- The statute requires acquisition decision authorities to certify for each service contract that:
  - A task order or statement of work being submitted to a contracting officer is in compliance with the standard total force management guidelines.
  - That all appropriate statutory risk mitigations have been made (such as insourcing new work or previously contracted work).
  - That each task order or statement of work does not include requirements formerly performed by Department of Defense civilian employees.
- The statute requires annual Inspector General reviews to ensure compliance.

### **Congressional Requests**

- Ensure CAPE and the Comptroller issue programming guidance for services contracts.
- Defense appropriators should withhold funds for defective budget exhibits and restrict the use of appropriated funds for services contracts that have not complied with the statutory requirements codified in Section 2329 of Title 10.
- Ensure USD (P&R) re-establishes the contractor inventory review process formerly performed during the Obama Administration in conjunction with the USD (A&S).
- Ensure USD (P&R) participates in CAPE program reviews with military departments to ensure compliance with total force management policies and consideration of contractors as offsets in lieu of civilian workforce.
- Ensure USD (P&R) issues Army Checklist standard guidelines in an updated DODI 1100.22, the instruction governing total force management.
- Follow up with Department when AFGE reports examples of non-compliance or inadequate or delayed compliance with section 815.

## **FIXING THE DAMAGE DONE TO THE SCOPE OF THE CONTRACTOR INVENTORY STATUTE IN THE FISCAL YEAR 2017 NDAA**

### **Issue**

DoD incurs waste and promotes inefficiency because Section 812 of the FY 2017 NDAA reduced the scope of the contractor inventory by excluding 56% of service contracts. This occurred because the law: (1) limited the contractor inventory to four “service acquisition portfolio groups;” (2) excluded service contracts below \$3 million (the majority of contract actions for services task orders fall below \$3 million); and (3) limited the inventory to “staff augmentation contracts” (defined as “personal services contracts”). Section 819 of the FY 2019 NDAA would have repaired all these problems based on the House Chairman’s mark, but in conference the SASC majority only agreed to expanding the contractor inventory to cover “closely associated with inherently governmental” contracts, a move that could potentially increase the inventory by 25%. (However, the GAO documented that all but the Army have underreported “closely associated with inherently governmental” contracts, so an increase by 25% is optimistic.) Finally, the Department notified Congress in 2019 that it would be transitioning from the Enterprise Contractor Manpower Reporting Application to the System for Award Management (SAM), and that it would provide a summary of FY 2020 data by the end of the third quarter of FY 2021. The DoD notification did not explain that SAM excludes most service contracts and does not address the analytical review requirements of Section 2330a of Title 10, as the statute requiring SAM across non-DoD agencies has a much narrower scope than the DoD statute.

### **Background/Analysis**

The USD (Acquisition and Sustainment) conceded in a February 2018 contractor inventory report to Congress that the FY 2017 changes had reduced the inventory to approximately 25% or just under \$42 billion of the department’s more than \$160 billion in contracted services spending. An October 2019 information paper prepared by the Office of the USD (Acquisition and Sustainment) misleadingly claimed that the department’s purported “implementation” of the Enterprise Contractor Manpower Reporting Application (ECMRA), modeled on a prior successful Army initiative, was unsuccessful. The Department claimed that ECMRA only had a 20% reporting compliance rate and the Department would fully meet the requirements of Section 2330a of Title 10 through the OMB-developed SAM used by the rest of the government under statutory authority requiring far less coverage and analysis than currently required for DoD.

An October 2016 GAO report (GAO 17-17) amply documents the vacillations, delays and deficient implementation by USD A&S and USD P&R of ECMRA. The 20% compliance figure cited in the 2019 paper was foreordained by the Trump Administration’s prolonged efforts to reverse Obama-era decisions. Additionally, the 2012 Army testimony before the Senate HSGAC contracting subcommittee documents the successful Army ECMRA contractor inventory initiative, which was never implemented by OSD. The lack of a viable contractor inventory is one of the conditions underlying the continuation of the public-private competition moratorium.

Prior Army and departmental testimony, as well as several GAO and DoD IG reviews, had established the importance of the contractor inventory in determining the direct labor hours and associated costs (direct and overhead) for service contracts and for improved total force management planning. SAM does not address this nor does the underlying statutory requirement for SAM, which is far narrower in scope than the section 2330a requirement in Title 10.

The testimony and audits also established that the contractor inventory was important not just for identifying the size of the contractor labor component of the total force of military, civilian and contractors, but also posed the question: “Who was “the customer.” The financial accounting systems and Federal Procurement Data System-Next Generation were not designed to identify who was the ultimate governmental customer for service contracts, but instead identified the funding source (in the case of the accounting system) and the contracting activity (in the case of FPDS-NG).

The lack of a comprehensive and viable contractor inventory may very well hinder efforts to improve contract services planning and budgeting. Indeed, it will be difficult to validate projections of contract spending without a credible baseline for comparison of past expenditures by requiring activities and funding sources. For instance, it is only through contractor inventories that the Army was able to ascertain that over 90% of the funding sources for headquarters contracts resided in mission areas that were budgeted outside of headquarters accounts, making any future directed congressional efforts to cut contract costs an easily evaded shell game. SAM does not address this problem.

When implemented in the manner of the Army, industry reporting burdens were reduced and accuracy increased through accommodation of industry reporting with a bulk loader for spreadsheets and use of a centralized help desk and data management capability. None of these features exists when implemented through a standard clause, resulting in less comprehensive and accurate inventories and even complaints from industry on reporting burdens. Again, SAM does use a standard clause for reporting because very little is actually reported in comparison to what was collected by the Army in response to the broader requirements in section 2330a of Title 10.

Under the government-wide SAM, “non-labor costs” are not collected, a major defect earlier noted by CBO, and the scope is limited to exclude fixed price contracts in excess of \$2.5 million. This makes SAM, according to the CBO, virtually useless.

### **Congressional Requests**

- Repeal the \$3M title 10 reporting threshold limitation for service contracts.
- Repeal the limitation of the contractor inventory to just four service portfolio groups.
- Amend the scope of the inventory to include all contract services, or alternatively expand the “staff augmentation” (personal services) and “closely associated with inherently governmental” categories to include critical functions and any function performed by military or civilian force structure in the past 10 years.

- Consider expanding the prior DoD statutory framework, which led to ECMRA, to be a government-wide requirement in lieu of the current OMB-developed SAM to improve data accuracy and completeness and reduce reporting burdens.
- Reject any DoD efforts to rescope or repeal Section 2330a of Title 10, which provided the authority for developing ECMRA.
- Ensure that services characterized as “commercial” that correspond to the scope of reporting are included.

**RATIONALE FOR OPPOSING ANOTHER ROUND OF BASE REALIGNMENT AND CLOSURES (BRAC) AND FOR CLARIFYING THE RECENTLY ENACTED LIMITED AUTHORITY FOR BRAC WHEN SELF-NOMINATED BY A STATE GOVERNOR**

**Issue**

Another BRAC round would undermine DoD’s efforts to rebuild its readiness and result in excessive unprogrammed investment costs in a politically divisive process with adverse economic impact and community dislocations.

**Background/Analysis**

- Section 2702 of the FY 2021 NDAA prohibits another round of BRAC.
- DoD has undergone five BRAC rounds from 1988 to 2005.
- The Cost of Base Realignment Actions (COBRA) model used by DoD has typically underestimated upfront investment costs and overstated savings (see GAO 13-149). This occurred because:
  - There was an 86% increase in military construction costs in the last BRAC round caused by requirements “that were added or identified after implementation began.”
  - DoD failed to fully identify the information technology requirements for many recommendations.
  - There was no methodology for accurately tracking recommendations associated with requirements for military personnel.
- GAO found that stated objectives of consolidating training so that the military services could train jointly failed to occur in two thirds of the realignments for this purpose (see GAO-16-45).
- Section 2702 of the FY 2019 NDAA provided authority for DoD to realign or close certain military installations when self-nominated by a state governor, subject to the

Secretary of Defense, and reporting that savings will exceed the costs of implementation by the end of the fifth fiscal year after completion of the realignment. However, this provision contains a loophole that could allow privatizing activities on a base being closed, defeating the ostensible purpose of becoming more efficient. Additionally, section 2702 did not include a process ensuring meaningful input from affected employees and the labor unions representing them.

### **Congressional Requests**

- Do not authorize another BRAC round or alternative to BRAC. Carry forward section 2703 of the FY 2020 NDAA.
- Eliminate loophole in section 2702 permitting privatization and clarify process for employee and union input.

**ALTHOUGH CONGRESS SIGNIFICANTLY IMPROVED STATUTORY LANGUAGE CLEARLY PROHIBITING PERSONNEL CAPS IN MOST OF THE DEPARTMENT OF DEFENSE, ARBITRARY PERSONNEL CAPS STILL REMAIN IN USE IN SOME HEADQUARTERS ACTIVITIES THAT EXTEND AS FAR AS ORGANIZATIONS COMMANDED BY ONE STAR LEVEL GENERAL OFFICERS OR CIVILIAN EQUIVALENTS**

### **Issue**

Although Congress prohibited arbitrary personnel caps for most of the civilian workforce in the Department of Defense in the Fiscal Year 2021 National Defense Authorization Act (and are expected to follow course in section 8012 of the Defense Appropriation once there is an appropriation for Fiscal Year 2022), inappropriate and wasteful arbitrary personnel caps remain in place for various kinds of headquarters activities throughout the Department of Defense. These headquarters activities exist throughout the entire Department, sometimes down to one star level organizations.

### **Background/Analysis**

The Fiscal Year 2022 National Defense Authorization Act section 1102 (and presumably section 8012 of the Defense appropriation) specifically provides that:

- The DoD civilian workforce is to be “solely” managed based on the total force management principles of section 129a of title 10, that specifically prohibit arbitrary reductions of Full Time Equivalent projections of the civilian workforce over the Future Year Defense Program Years absent an appropriate analysis of the impact of those reductions on military force structure, operational effectiveness, stress on the force, lethality, readiness, workload, and the fully burdened costs of the total force (of military, both active and reserve components, civilian employees and contractor support); and the workload and funds made available by Congress; and

- The DoD civilian workforce may not be arbitrarily constrained with personnel caps in any form, whether as numerical limits or maximum number of employees; Full Time Equivalent (FTE) projections; or an end strength. (NOTE: the dual status military technicians are a legitimate recognized exception, as they are managed based on an end strength and corresponding military force structure.)

However, the Goldwater-Nichols era personnel caps established in 1986 in sections 143, 155, 194, 7014, 8014 and 9014 of title 10 currently remain in place and:

- Do not serve their intended purpose of controlling overhead costs for headquarters activities;
- Are not at all related to the workload requirements needed for appropriate civilian oversight of the command, control, communications, and intelligence capabilities needed to meet 21<sup>st</sup> century threats;
- Are implemented with draconian business rules that require arbitrary cuts unrelated to funding or workload to the civilian workforce to offset growth in any functional area;
- Have the following two effects of shifting headquarters oversight functions to: (1) field operating agencies established to evade the limits; and (2) temporary, less transparent forms of labor, such as contractors or military detailees<sup>23</sup>;
- The actual funds expended to operate headquarters functions often do not include contract expenditures which are identified in non-headquarters accounts.

In summary, the personnel caps result in diminished civilian control of the military, distort the true costs of overhead functions, and should be repealed and replaced with a reporting requirement that fully captures the costs of management headquarters functions, including all forms of labor and field operating agencies. Reporting requirements should account for inflation, as well as how changed missions and business processes changed spending levels. Congress can and should cut funding if changes in spending are not justified. The timing of repeal should be conditioned on a full accounting for all spending actually executed in headquarters organizations (as validated by GAO).

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<sup>23</sup> The Fiscal Year 2022 National Defense Authorization Act Readiness Subcommittee markup had directive report language requesting a report on the effect of personnel caps on inappropriate contracting in the USD (Policy) office; See also, GAO 21-295, “DEFENSE INTELLIGENCE AND SECURITY: DoD Needs to Establish Oversight Expectations and to Develop Tools That Enhance Accountability (May 2021) (As missions grew, only 22 percent of the USD (Intelligence and Security) were civilian employees, with the remainder comprised of 78 percent “non-permanent personnel – consisting of contractors, joint duty assignees, military/reservists, and liaison officers or detailees” resulting in a loss of accountability).

## **Congressional Requests**

PROPOSED LANGUAGE: Strike sections 143, 194, 7014, 8014 and 9014 of title 10 and replace with a new section entitled “Department of Defense Management Headquarters Reporting.”

“Not later than February 1 each fiscal year, effective within two years of the date of enactment, the Department of Defense (DoD) shall report with the budget submission the total costs of performing Major DOD Headquarters Activities:

- (a) as defined in Department of Defense Instruction 5100.73,
- (b) including all Field Operating Agencies and Staff Support Activities; and
- (c) including military, DoD civilian employees and contract services supporting the headquarters by appropriation.

The nature of the function being performed, and not the location where it is performed, is the determining factor on whether it should be reported as supporting the headquarters.”

**IDENTIFY IMPEDIMENTS TO TOTAL FORCE MANAGEMENT BEST PRACTICES IN THE PLANNING, PROGRAMMING, BUDGETING AND EXECUTION SYSTEM (PPBES) AND ENSURE THE PPBES COMMISSION ADDRESSES CURRENT DEFECTS IN THE PPBES THAT CUT CIVILIAN EMPLOYEE STRUCTURE AND REALIGN THESE REQUIREMENTS TO MORE EXPENSIVE CONTRACTORS OR MILITARY IRRESPECTIVE OF COST AND IMPACT ON READINESS, LETHALITY OR STRESS ON THE FORCE**

### **Issue**

Programmatic “savings wedges” that arbitrarily cut civilian employee Full Time Equivalent (FTE) projections and associated funding over the course of the Future Year Defense Program (FYDP) have become standard bad business practices during Defense Wide Reviews and during the Program Objective Memorandum process. When a civilian position is not filled or is cut, and the requirement remains, the work shifts to more expensive contractors or military, creating the very conditions of a hollow force and phantom “savings” that never materialize. This is a classic example from behavioral economics of “externalities” or the shifting of costs or risk to meet parochial needs to the detriment of the enterprise over the long term.

### **Background/Analysis**

- Current Deputy Secretary of Defense Hicks has accurately summarized countless GAO audit findings that document the bad business practice of cutting civilian structure in the quest for phantom “savings” that merely shift the work to military or contractors: “Predictably, for example, even though Congress directed the Defense Department to cut \$10 billion through administrative efficiencies between 2015 and 2019, the Pentagon



failed to substantiate that it had achieved those savings. The reason these efforts rarely succeed is that they merely shift the work being done by civilians to others, such as military personnel or defense contractors.” DepSecDef Kathleen Hicks, “Getting to Less: The Truth About Defense Spending,” *Foreign Affairs* (March 2020), p. 56.

- These bad business practices result in excessive levels of civilian under-execution documented by the Government Accountability Office over Fiscal Years 2015-2019, when civilian pay under-execution averaged \$1.8 billion overall.
- Both Section 8012 of Defense Appropriations and Section 129a of title 10 pertaining to “total force management” prohibit the use of appropriated funds to arbitrarily cut projected civilian FTEs over the Future Year Defense Program (FYDP) years without analyzing the impact on workload, the fully burdened costs of the total force (of military, civilian employees and contract support), operational effectiveness, lethality, readiness, stress on the force, and military force structure.
- Directive report language from H.R. 2500, The National Defense Authorization Act for Fiscal Year 2020, “Optimizing Total Force Management,” at pp. 254-5 of the House Report requested a Federally Funded Research and Development Center study “to review the Department’s force structure decision-making processes in the Office of the Secretary of Defense, Joint Staff, and in each of the Military Departments to verify the Department is planning, programming and budgeting for a force structure that optimizes lethality by using military for warfighting functions and ensures that planned operational capabilities are fully executable and sustainable.” The study was to include:
  - *an identification of best practices as well as impediments to the optimum sizing of each component of the Total Force of active military, reserve component military, civilian workforce, host nation support, and contract support;*
  - *recommendations on how to leverage the Military Department’s modeling efforts in order to achieve a more balanced Total Force mix;*
  - *“the effects of Full Time Equivalent (FTE) caps and associated business processes resulting either from legislation or departmental policy or practice that would impede the use of more holistic analytical tools for linking the enabling civilian to supported force structure.”<sup>24</sup>*

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<sup>24</sup> In addition to force structure modeling done by the Military Departments, the Congressional Budget Office has a force costing utility, “The U.S. Military’s Force Structure, a Primer (FY2021 Update); see, <https://www.cbo.gov/publication/57088>; GAO 16-327, “ARMY PLANNING: Comprehensive Risk Assessment Needed for Planned Changes to Army Force Structure (Apr. 2016) (“the Army performed considerable analysis of its force structure requirements, but did not assess mission risk for its enabler units”); GAO 17-413, NAVY FORCE STRUCTURE: Actions Needed to Ensure Proper Size and Composition of Ship Crews (May 2017) (“The Navy’s process to determine manpower requirements -the number and skill mix of sailors needed for its ships – does not fully account for all ship workload.”); GAO 19-385, “DEFENSE STRATEGY: Revised Analytic Approach Needed to Support Force-Structure Decision-Making (Mar. 2019) (“Analysis does not significantly deviate from services’ programmed force structures or test key assumptions.”)

- Section 1004 of the Fiscal Year 2022 National Defense Authorization Act establishes a “Commission on Planning, Programming, Budgeting, and Execution Reform,” not later than 30 days after enactment, comprised of 14 civilians not employed by the Federal Government who are recognized experts with relevant professional experience related to PPBES processes; iterative design and acquisition process; innovative budgeting and resource allocation methods of the private sector; budget or program execution data analysis. Appointments to the Commission will come from the Chair and Ranking Members of the Armed Services Committees and Appropriation Committees, Speaker of the House and Minority Leader of the House, the Majority and Minority Leader of the Senate, and the Secretary of Defense. The purpose of the Commission is to:
  - *Examine the effectiveness of the planning, programming, budgeting, and execution process and adjacent practices of the Department of Defense, particularly with respect to facilitating defense modernization;*
  - *Consider potential alternatives to such process and practices to maximize the ability of the Department of Defense to respond in a timely manner to current and future threats;*
  - *Make legislative and policy recommendations to improve such process and practices in order to field the operational capabilities necessary to outpace near-peer competitors, provide data and analytical insight, and support an integrated budget that is aligned with strategic objectives.*
  - *Additionally, the Commission will review the financial management systems of the Department with respect to effective internal controls and “the ability to achieve auditable financial statements.*
- The issue of the Department obtaining “auditable financial statements” is a red herring because the audits solely relate to the development of a balance sheet of assets and liabilities for a sovereign entity funded with Congressional appropriations on an annual cash basis rather than on an accrual basis. There is no bona fide private market for most of the services and assets being assigned a “value” on a consolidated balance sheet for governmental sovereign entities, making the entire enterprise lacking in economic substance. The Department could conceivably still receive an unqualified audit opinion and be wasting billions of dollars or have mission failures.<sup>25</sup>

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<sup>25</sup> In FY 2020, Independent Public Accounting (IPA) firms conducted 24 standalone audits of DoD reporting entities, of which eight received unqualified opinions, one received a modified (or qualified) opinion and the remaining 15 reporting entities, as well as the overall DoD consolidated audit, received a disclaimer of opinion. The FY 2022 DoD budget estimated it would spend about \$1.281 billion on the financial audit.

## **Congressional Requests**

- Ensure PPBE reform recommendations are not skewed to favor force modernization to the detriment of readiness, stress on the force, lethality, workload, and fully burdened costs of the total force (active and reserve component military, civilian employees and contract support).
- Ensure PPBE reform recommendations include the full direct and indirect costs of contract support and establish transparency for contractors in PPBE requirements validation.
- Ensure PPBE reform recommendations address the longstanding problem of cutting civilian employee structure mischaracterized as “savings” and then realigning the requirements to more costly contractors or military to the detriment of readiness, lethality and stress on the force.
- Ensure financial auditing is not used to deflect attention from current defects in the PPBE process in providing balanced total force management within the Department’s budget submissions.

## **PROHIBITING USE OF APPROPRIATED FUNDS FOR TERM OR TEMPORARY HIRING FOR ENDURING WORK**

### **Issue**

The department sometimes misuses term or temporary hiring authorities, most often to avoid personnel caps and to circumvent Budget Control Act caps, to the detriment of retaining and developing high-performing employees. Some of the Department’s actions have been ideologically motivated, seeking a less secure “at will” workforce rather than a professional, apolitical civil service.

### **Background/Analysis**

- According to Government Accountability Office analysis of Department of Defense (DoD) data, during Fiscal Years 2016 through 2019, “approximately 35 percent of DoD term and temporary personnel were converted to permanent civilian positions within the federal government [after DoD had] increased term personnel by 40 percent.” See GAO 20-532: “DEFENSE WORKFORCE: DoD Needs to Assess Its Use of Term and Temporary Appointments” (Aug. 2020).
- The Defense Language Institute – Foreign Language Center (DLI-FLC) at Monterey, California, operates under a draconian personnel cap regime where any increase in a foreign language requirement in one area (e.g., Russian or Chinese instructors) results in an arbitrary reduction in other areas (such as Farsi, Arabic, Hebrew, Turkish, or other Middle Eastern languages).

- Highly trained foreign language faculty are arbitrarily terminated, ignoring long-term human capital planning that would emphasize retaining faculty with such specialized skills.
- To implement this draconian policy of treating faculty as “at will” employees, the Commandant of DLI-FLC hires faculty using annual renewable term appointments, which are extended or not on a completely arbitrary basis, year after year, and sometimes improperly replaced with private contractors.
- This mistreatment of faculty at DLI-FLC as expendable “at will” employees is occurring at the same time that the Senate Appropriations Committee drafted directive report language to "encourage the Department of Defense to continue placing a high priority on the Language Training Centers and the Language Flagship strategic language training program” and designated the funding for these programs as a “congressional special interest.”

### **Congressional Requests**

- Prohibit use of appropriated funds for hiring term or temporary employees to perform enduring work.

## **ESTABLISH FACTUAL BASIS FOR DUE PROCESS APPEALS FOR SECURITY CLEARANCE DETERMINATIONS**

### **Issue**

Most federal employees in DoD must obtain and retain a security clearance as a condition of employment, and those not requiring a security clearance may still be subject to the same clearance procedures if they have access to sensitive, unclassified information. These procedures are established pursuant to a Clinton-era executive order and afford insufficient due process protections for federal employees.

### **Background/Analysis**

- AFGE lost a case in federal court involving a Defense Finance and Accounting Service (DFAS) employee whose job did not require access to classified information (only sensitive information) and who was fired from their job after incurring credit problems arising from health issues while this person had inadequate insurance coverage. The dismissal was based on the application of the procedures for determining access to classified material. See, e.g. *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (en banc), cert. denied sub nom. *Northover v. Archuleta*, 134 S. Ct. 1759 (2014).
- The Senate version of the FY 2022 NDAA bill included language (“Exclusivity, Consistency and Transparency in Security Clearance Procedures, and Right to Appeal”) sponsored by Sen. Warner (D-VA) purporting to establish transparent appeal procedures

for adverse security clearance determinations. The language was accepted for inclusion in a managers' package; additionally, similar language was included in section 9401 of the Senate version of the FY2021 NDAA.

- The Senate language had several defects, including:
  - Lack of clarity on whether the appeal procedures could be applied to positions not requiring security clearances but merely requiring access to sensitive information.
  - No clear provision for judicial review of appeals.
  - A provision allowing an agency head to waive the procedures.
  - Summaries of testimony were permissible in lieu of verbatim transcripts.
- The Senate language was struck in conference in FY 2021 and not included in the final conferee agreement in the FY 2022 NDAA. There was little significant change between both versions.
- AFGE attempted to request a GAO review on whether DoD and other agencies had applied the executive order procedures in a discriminatory or retaliatory manner against classes protected under equal employment opportunity laws, or in retaliation for whistleblowing activity. Unfortunately, AFGE learned just prior to the August HASC markup that the GAO was not equipped to do a review where no established system of records for adjudications and appeals existed for them to audit. An attempt was made to develop an alternative framework of review based on a Federally Funded Research and Development Center demographic survey and a review of the effectiveness and fairness of the security clearance procedures by the Administrative Conference of the United States, an independent government agency specifically set up to perform legal analysis of administrative processes. However, it was too late in the process to work this as an amendment during markup, but HASC Readiness staff indicated a willingness to work on this issue in next year's NDAA.

### **Congressional Requests**

- Request following directive report language in either House or Senate version of NDAA as follows: Administrative Conference of United States and Federally Funded Research and Development Center Survey of Security Classification Procedures. Not later than 60 days from enactment, the Under Secretary of Defense, Personnel and Readiness, and the Under Secretary of Defense, Intelligence and Security, shall contract with the Administrative Conference of the United States and Federally Funded Research and Development Center to jointly survey employees, supervisors, job applicants, public sector unions, Civil Rights organizations, Whistleblower public interest organizations, and lawyers representing employees who incurred adverse actions as a result of a revocation of their security clearance or as a result of the applications of these procedures to positions that did not require access to bona fide classified information. The survey

will be oriented on whether respondents believe or have examples of where the Department of Defense and other Executive Agencies have misapplied Executive Order Number 12968, "Access to Classified Information," as amended, as a condition of employment to federal government employee jobs where the requirements of the job did not require access to classified information. The surveyors shall review and summarize the extent to which any such misapplication reported by respondents in the survey negatively affected a protected class under Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, and The Americans with Disabilities Act of 1990. The surveyors shall further assess the availability of data systems in each Department, and review, summarize, and analyze any such data, on the demographics of revocations, and the adjudications of those revocations, with respect to each class protected under Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, and The Americans with Disabilities Act of 1990, including veterans with post-traumatic stress symptoms and employees with indebtedness problems attributable to health care emergencies and the lack of adequate insurance. The surveyors shall make recommendations on the best processes for developing systems to track demographic information on these issues with estimates of the costs. Additionally, the surveyors shall make recommendations on the degree to which any such misapplications could have been mitigated with telework arrangements, where workspace location rather than actual access and use of classified information were the basis of requiring a security clearance as a condition of employment. Finally, the surveyors shall analyze and summarize the degree to which individuals associated with neo-Nazi or white supremacist hate groups or ideologies were granted or retained clearances under these procedures. Not later than one year from enactment, the surveyors shall report their findings to the U.S. Senate Select Committee on Intelligence, the House Permanent Select Committee on Intelligence, the Senate Committee on Homeland Security and Governmental Affairs the House Committee on Oversight and Reform, the House Armed Services Committee, and the Senate Armed Services Committee.

## **IMPROVE STRATEGIC WORKFORCE PLANNING FOR MAJOR WEAPON SYSTEM ACQUISITIONS**

### **Issue**

The Fiscal Year 2017 NDAA repealed the requirement in 10 USC Section 2434 for cost estimate reports on the military, civilian, and contract support employee mix needed to operate, train, and sustain major weapon systems prior to milestone B and C decisions.

### **Background/Analysis**

- Improve strategic workforce planning requirements on the mix of active and reserve military, civilian workforce, host nation support and contractors needed to operate, train and sustain major weapon system acquisitions.

- Deferring this planning until after deployment of a system may adversely affect sustainment costs, readiness, and create incentives for over-reliance on contractor sustainment of major weapon systems.
- This flawed repeal effort had been opposed by the MANPRINT, the Force Management communities within the Pentagon, and the HASC, but was successfully promoted by the acquisition community and the SASC.
- This action reflected a further erosion of USD P&R total force management responsibilities for strategic manpower planning that accelerated during the Trump Administration.
- The long-range strategic effects of this statutory change cause the deferral of manpower decisions until after a system is deployed and operational risks and sustainment costs have escalated.
  - This encourages more performance-based logistics arrangements at the root of the F-35 sustainment cost problem where the government has had problems in accessing technical data from the contractor in a timely way resulting in escalating sustainment costs and reduced flying hours and readiness of approximately 30 percent reduction in flying hours.
  - Another example concerns the Army STRYKER infantry carrier vehicle which initially could not deploy without contractor logistics support, prompting the Vice Chief of Staff of the Army to have to belatedly establish processes to in-source the capability to military and civilian performance.

### **Congressional Requests**

- Reinstate the manpower estimate reporting requirement for major weapon system acquisitions that formerly was in section 2434 of title 10. Language follows:

#### **§2434. Independent cost estimates; operational manpower requirements**

(a) Requirement for Approval. — (1) The Secretary of Defense may not approve the system development and demonstration, or the production and deployment, of a major defense acquisition program unless an independent estimate of the full life-cycle cost of the program and a manpower estimate for the program have been considered by the Secretary.

(2) The provisions of this section shall apply to any major subprogram of a major defense acquisition program (as designated under section 2430a(a)(1) of this title) in the same manner as those provisions apply to a major defense acquisition program, and any reference in this section to a program shall be treated as including such a subprogram.

(b) Regulations. —The Secretary of Defense shall prescribe regulations governing the content and submission of the estimates required by subsection (a). The regulations shall require—

(1) that the independent estimate of the full life-cycle cost of a program—

(A) be prepared or approved by the Director of Cost Assessment and Program Evaluation; and

(B) include all costs of development, procurement, military construction, and operations and support, without regard to funding source or management control; and

(2) that the manpower estimate include an estimate of the total number of personnel required—

(A) to operate, maintain, and support the program upon full operational deployment; and

(B) to train personnel to carry out the activities referred to in subparagraph (A).



# Department of Veterans Affairs

## Introduction

Effective workforce policies are critical for the Department of Veterans Affairs to deliver the exemplary health care and other services that veterans have earned through their sacrifice and service. Chronic short staffing, hostile management practices that ignore collective bargaining rights, and unsafe working conditions are further eroding this essential safety net for veterans – a net that is already severely strained by the pandemic and the relentless greed of privatizers.

In 2022, AFGE and its National VA Council (NVAC) will work to ensure that the VA fully utilizes all available tools to recruit and retain a strong workforce. We will continue to fight for the full restoration of employees' rights to due process, collective bargaining, and official time. We will take an unwavering stand against privatization, whether it occurs through the MISSION Act's contract care policies, the AIR Commission facility review process, new legislation, or VA policies that promote outsourcing over hiring. AFGE will also seek comprehensive Congressional oversight of VA spending and operations in the Veterans Health Administration (VHA), Veterans Benefits Administration (VBA), Board of Veterans Appeals (BVA), National Cemetery Administration (NCA), and other VA components.

## COVID-19 PANDEMIC

### Background

During the early stages of the COVID-19 pandemic, VA developed new policies without adequate national guidance or input from labor unions. The policies were implemented in a chaotic and uneven manner, leaving employees already dealing with the stresses of the pandemic uncertain about whether they would be protected adequately in their workplaces. While many facilities no longer have severe personal protective equipment (PPE) shortages, management practices for PPE distribution are still inconsistent and arbitrary. Similarly, policies for paid leave and pandemic pay continue to vary widely across facilities. These inconsistencies in addressing the pandemic continue to affect many VA facilities.

In addition, managers regularly worsen working conditions by refusing to comply with collective bargaining rights when mandating overtime and reassignments to solve the staffing crises they created. Instead of collaborating with and benefitting from the expertise of their labor partners engaged in direct patient care, many medical centers have shut labor out of pandemic response teams and unjustifiably invoke COVID to ignore workers' rights.

*Management's chaotic and unfair COVID leave policies continue to place employees, their families and the veterans they care for in harm's way.*

VA's handling of COVID-related leave requests since the beginning stages of the pandemic left too many employees confused, stressed and unsafe. Managers across the system unfairly denied employee requests for administrative ("weather and safety") leave and emergency paid leave (EPL) provided through the Families First Coronavirus Response Act (FFCRA) and later, the

American Rescue Plan Act of 2021 (ARPA). These arbitrary leave denials have put VA employees, their families and the veterans they care for at greater risk of COVID infection and hindered their ability to quarantine and regain their health after infection. Mismanagement also resulted in a significant amount of unused emergency leave funds when the authorization for EPL under the ARPA expired on September 30, 2021.

The Department's handling of weather and safety leave continues to be problematic. Employees' ability to access this leave continues to depend on whether their supervisors exercise their discretion fairly. While the Office of Personnel Management and the Safer Federal Workforce Task Force recommend that agencies grant weather and safety leave in certain circumstances, requests from frontline VA workers are still being regularly denied. The arbitrary and inconsistent practices across facilities for this critical workplace protection are unacceptable.

Similarly, managers have widely varying practices concerning benefits available to employees under workers' compensation, such as continuation of pay. VA leadership has not taken adequate steps to ensure that all employees who are infected with COVID at the workplace are aware of their right to file a workers' compensation claim and to use leave and other benefits under that program.

*PPE Inventory and Distribution Problems Continue to Put Employees and Veterans at Risk at Many Facilities.*

It is unacceptable that at this stage of the pandemic, PPE management practices are still inconsistent across facilities despite fewer supply chain problems. Some employees are still being deprived of sufficient access to N95 respirators and other PPE, especially when managers incorrectly claim that the equipment is only needed by employees assigned to COVID units and "hot zones." Some of our members also continue to report unreliable inventories of PPE at their facilities as well as PPE that are of poor quality or expired.

AFGE commends VHA leadership for expanding access to N95 masks early in 2022 to address risks from the omicron variant. Every VA employee who works at a medical facility should have easy access to N95 masks. All VA employees can suddenly be caught in high-risk situations – even if their official duties are not within a "hot zone" – because of a reassignment to a short-staffed area or an unexpected medical emergency involving a COVID-positive patient.

## **Pandemic Pay**

VA's policies on pandemic pay and bonuses have suffered from the same lack of national and local consistency and abuse of discretion as other VA policies related to COVID-19. VA's failure to properly utilize these essential recruitment and retention tools have greatly weakened its ability to staff its medical facilities. VA's capacity to deliver high quality, timely care was already adversely impacted by hiring obstacles created by its human resources reorganization, a severe national shortage of health care personnel, and a loss of bargaining rights for many VA clinicians.

While certain VISNs and medical centers have allowed for special pandemic pay or special pandemic awards, neither Congress nor the VA has required or directed a uniform system to compensate frontline health care workers. Individual supervisors have been making the decisions whether an employee receives extra compensation for working in hazardous conditions during the pandemic. AFGE received reports of grossly unfair pandemic pay policies, such as supervisors with no patient contact receiving pandemic pay while front-line employees got far less or none, contractors receiving pandemic pay working alongside VA employees receiving none, and employees denied pandemic pay because they took quarantine leave.

## **OSHA COVID Protections**

The OSHA Health Care Emergency Temporary Standard (ETS) issued last year provided employees working at VA medical facilities with increased protection from COVID by mandating that employers provide PPE, physical barriers, ventilation and screening of individuals entering facilities. It also provided paid leave to employees quarantining due to infection or exposure and required the VA and other employers to develop a workplace plan with involvement from employees and their representatives.

The Department did not fully implement the protections required by the ETS. For example, members have expressed frustration at management's failure to fully comply with cleaning procedures required by the ETS in high-risk areas of hospitals and clinics.

At the end of 2021, OSHA announced the withdrawal of the ETS, leaving only a few provisions in place while OSHA works on a permanent infectious disease standard (a process likely to take several years.) AFGE is urging the Biden administration to reinstate the ETS in the interim, as the nation struggles through the COVID variants.

## **Congressional Requests**

- Authorize an extension of emergency sick leave provided by the American Rescue Plan Act of 2021 for FY 2022, including retroactivity for employees who were forced to use their own personal leave after the September 30, 2021, expiration date.
- Conduct oversight of the VA's policies and practices for providing weather and safety leave and require clear national guidance.
- Conduct oversight of the VA's administration of pandemic pay differentials and awards to date and require consistent national mandates to facilities.
- Demand that the Biden Administration reinstate the OSHA COVID-19 emergency temporary standard.

## **PRIVATIZATION OF VA HEALTH CARE**

### **Background**

Privatization of VA health care comes in many shapes and forms. Members of Congress continue to introduce legislation for new programs that would immediately divert medical and mental health care to the private sector. Commissions that recommend the closing of VA facilities or entire service lines within facilities also have a sledgehammer privatization effect by immediately requiring the outsourcing of more veterans' care.

Incremental privatization threatens to destroy the VA health care system's ability to continue to provide veterans with world-class, specialized care. A "death by a thousand cuts" can occur through repeated Congressional appropriations that are skewed toward costly contract care while starving VA facilities of staff and resources for medical equipment, patient space and modernization. The Department's own human resources (HR) policies can also effectively freeze hiring by creating obstacles to the recruitment and retention of staff. Slow but irreversible privatization can also occur through efforts to conceal rather than address severe short staffing. Hiding the VA's growing staffing crisis by manipulating public vacancy data and instituting HR policies that eliminate unfilled positions reduce pressure on the Department to hire in-house staff, thus paving the way for more outsourcing of care.

In 2022, AFGE will be fighting all forms of health care privatization to preserve the integrity of the VA health care system and ensure that veterans continue to get the exemplary, specialized, integrated care that they have earned and that they prefer.

### **Overview of the VA MISSION Act of 2018**

The VA MISSION Act of 2018, Public Law 115-182 (MISSION Act) was signed into law in June 2018. This major VA health care legislation established a new, vastly expanded permanent private sector care program, the Veterans Community Care Program (VCCP) and its "community care network" (CCN) and an Asset and Infrastructure Review (AIR) Commission to determine the fate of VHA medical facilities, among other provisions. The Act set in motion a chain of events that continues to threaten the existence of the VA as we know it today. AFGE and the NVAC argued from the beginning that this would lead to the cannibalization of the VA and its core services. Over the last three years our view has been validated. The proceedings of the AIR Commission, to commence in 2022, further threaten the VA's long-term viability.

#### *Outsourcing through the "community care network"*

The Act and its implementing regulations established deeply flawed CCN criteria to determine when veterans are eligible to go outside the VA for care. These wait time and geographic criteria only measure care provided by the VA, but do not take into consideration or measure the wait times and travel time that will be required to use a CCN provider. Veterans are the ones most harmed by this double standard because they often end up with non-VA care that is uncoordinated, unspecialized and different from the established standard of care and best practices developed for veterans within the VA. In addition, veterans can end up waiting longer and traveling further by using CCN because they lack the comparative data to make an informed

choice about whether to wait for VA care or use CCN. Veterans are regularly referred to CCN providers even when they prefer to receive their care from their VA providers. Some veterans even end up being hounded by bill collectors because of VA's failure to promptly reimburse CCN providers.

The snowball effects of this expanding mismanaged contract care program are undeniable. Increases in contract care are never matched by equivalent increases in staff to manage these consults and the coordination of care as patients move between CCN and the VA. This leaves VA health care personnel less able to take care of veterans within the VA in a timely manner, which in turn increases the share of VA care that leaves the system. **Over one-third of all VA care is now provided by non-VA providers.**

As CCN visits increase, so does the enormous bill for taxpayers for providing this high-cost outsourced care. Congress has responded by repeatedly providing skewed funding to make sure CCN providers get paid, at the expense of desperately needed funds to hire VA staff and keep VA's own facilities from closing more patient beds and shutting down emergency rooms, intensive care units, and medical surgery units. The problem is exacerbated when medical centers with diminished capacity are unable to attract clinicians or perform as many procedures.

In 2022, AFGE will work with to educate Congress and the public about the true costs of VA health care contracting. We will work to eliminate the double standards that allow VA health care contractors to profit off veterans without having to comply with the same requirements as other federal contractors. We will also expose the significant increase in workload placed on VA staff to manage CCN consults. Finally, we will educate lawmakers and the public about the quality and access problems that veterans are facing when using the CCN.

### **Asset and Infrastructure Review Commission**

The MISSION Act also established a nine-member Asset and Infrastructure Review (AIR) Commission to make recommendations regarding "closure, modernization and realignment" of VHA facilities. The Commission's start date was delayed as part of a compromise over its controversial provisions. In 2019, Senators Joe Manchin (D-WV) and Mike Rounds (R-SD) introduced legislation to eliminate the AIR Commission, but the bill did not progress and has not been reintroduced. It now appears the Commission's work will commence in late March of 2022 with publication of the Secretary's recommendations for which specific facilities should be closed, expanded, realigned, or built. Then the Commission will review the VA's recommendations, hold public hearings, gather additional information, and present its final recommendations to the administration and then to Congress for an up-or-down vote. AFGE is already speaking out about the flawed assumptions and outdated data being used to conduct the market assessments that will guide the Commission. The data on the availability of health care resources in local communities is several years old and was collected before the pandemic, which radically altered local health care markets. AFGE commends Secretary McDonough for his public commitment to analyzing the effect of the pandemic on market assessments and the need to consider new data.

We are troubled by the narrow view in the media and among many lawmakers and stakeholders regarding the scope of the Commission’s work. AIR is frequently described as a “BRAC” facility closing process – similar to the process of base closure in the military. In fact, Section 201 of the MISSION Act states that its role is to consider “closures, modernization and realignment.” More specifically, the Commission must also consider how an underused facility can be “reconfigured, repurposed, consolidated [or] realigned” as well as the “need of the Veterans Health Administration to *acquire* infrastructure or facilities that will be used for the provision of health care and services to veterans.” Another factor that speaks to expanding, rather than shrinking VA capacity, is the “extent to which any action would impact other missions of the Department (including education, research, or emergency preparedness.)” Perhaps most importantly, the Commission must consider the “extent to which the Veterans Health Administration has appropriately staffed the medical facility, including determinations whether there has been insufficient resource allocation or deliberate understaffing.”

AFGE will continue to educate lawmakers and stakeholders about all the options that need to be on the table during the Commission’s proceedings. In addition, AFGE has made clear to the Secretary and lawmakers that we and other union partners must have a meaningful role in the Commission process, where our unique frontline experiences and perspectives can be considered.

### **VA’s Staffing and Human Resources Crises Are Further Fueling Privatization**

VHA has always had to compete with other health care employers for physicians, nurses and other clinical shortage occupations. While VHA cannot be a pay leader, it has always competed by serving a unique patient population and offering good working conditions and a labor-management partnership. Sadly, the pandemic and years of intense management hostility toward rank-and-file VA employees and their labor representatives have made the VA a less attractive employer, at a time when the pandemic has greatly increased healthcare staffing shortages across the nation. Chronic short-staffing increases wait times, which in turn diverts more patients and resources outside the VA to the CCN.

AFGE won an important victory in our campaign for full VHA staffing with Section 505 of the MISSION Act that requires “personnel transparency.” More specifically, the MISSION Act requires the Department to publish quarterly data on the VA’s recruitment, losses, and time to hire (T2H) for various occupations.

At the outset, the VA reported roughly 50,000 vacancies every quarter. At the end of 2019, that number specifically dropped by over 20,000 through a secretive “position reclassification” process. To date, this significant change in vacancy data remains in place without explanation from the VA Secretary.

AFGE is also concerned about recent reports of the tremendous difficulties that managers in both VHA and VBA are facing due to VA’s HR reorganization several years ago. A group of managers recently described the near impossibility of bringing on new clinical staff in a timely manner and voiced alarm about new policies that appear to void positions if they are not filled within six months. Our members have confirmed that the removal of human involvement in the

hiring process through “HR modernization” and centralization to the VISN level have led to widespread frustration among managers and employees alike, as well as further excluding the union from recruitment and retention efforts.

### **Congressional Requests**

- Establish new standards for the CCN that hold contract care networks and providers to the same access and quality standards as the VA’s own facilities.
- Require more transparency and accountability for VA health care contractors using the same standards applicable to other federal contractors, including audits and CEO pay caps.
- Ensure that the AIR Commission utilizes appropriate data and considers *all* options for modernizing and realigning facilities, not just facility closures, as well as the impact of facility changes on VA’s essential role in national emergencies, medical training and education, and medical research.
- Require the VA to actively engage its labor partners throughout the Commission process.
- Increase appropriations for VA internal capacity building and protect those funds from being diverted to contract care by maintaining a firewall between CCN funding and VA medical services/infrastructure accounts.
- Ensure that an adequate number of HR staff, who were diverted to the VISNs through the recent reorganization. are returned to the medical centers and that they are adequately trained and compensated to maintain in-house expertise.
- Conduct oversight of the MISSION Act Section 505 vacancy data reporting process.

## **FIGHTING THE VA ACCOUNTABILITY ACT**

### **Background**

On June 23, 2017, the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (the Accountability Act) was signed into law (P.L 115-182). This law, pitched as a remedy to hold bad managers accountable and give employees the chance to report wrongdoing, has failed to achieve its goal. Instead, the VA has wielded its newfound powers under the Accountability Act to fire employees, many of whom are veterans themselves and dutifully served their fellow veterans at the VA, for relatively minor infractions that do not merit termination, resulting in thousands of employees either being terminated or preemptively resigning from the VA since the law’s enactment.

## **Critical Problems with the Law**

While several provisions of the statute have worked against VA employees and in turn interfered with their ability to best serve veterans, there are two critical provisions of the law that are the most glaring and used by the VA to unnecessarily discipline and terminate employees. These two provisions are the change in the standard of evidence used to sustain discipline that is appealed to a neutral, third party and the elimination of the ability of the Merit Systems Protection Board (MSPB) and arbitrators to mitigate (or lessen) a punishment:

### **Standard of Evidence**

Prior to the enactment of the Accountability Act, the VA's burden of proof at both internal proceedings and at the appellate level was that the employee's misconduct met the "preponderance of evidence" standard, meaning that the majority, or at least 50 percent of the evidence is on the VA's side. When the Accountability Act was enacted, the law implemented a "substantial evidence" standard, meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Richardson v. Perales, 402 U.S. 389 (1971).) The "substantial evidence" standard is a considerably lower bar to meet than the "preponderance of evidence" standard and can allow a case where the balance of evidence is on the employee's side to still result in termination. Court cases were filed challenging the use of this standard, with the decision in Rodriguez v. Dep't of Veterans Affairs, 8 F.4th 1290 (Fed. Cir. 2021), resulting in the court striking down the VA's use of this standard at the internal discipline stage, as the law as drafted only allowed for the lower standard to be used on the appellate level. Regardless, this standard continues to harm employees and is abused by the VA because it results in employees losing their jobs even when evidence of their innocence is predominant.

### **Ability to Mitigate**

Prior to the passage of the Accountability Act, the MSPB had the power to mitigate a sentence when an employee is disciplined for misconduct, allowing the MSPB to agree with the VA's determination that the employee had committed misconduct under the preponderance of the evidence standard, but that the discipline chosen by the VA was too severe given the nature of the infraction. The Accountability Act removed the MSPB's and arbitrators' ability to mitigate in these misconduct cases, making the MSPB either accept the totality of the VA's determination, or rule that it was too severe, and allow the employee to receive no punishment. This paradigm led the VA to charge more aggressively and punitively than when the MSPB had the ability to mitigate, knowing that the MSPB is more likely to uphold a harsher sentence than overturn a punishment entirely. This has been a severe detriment to employees and unnecessarily resulted in an uptick in terminations. However, in the case Connor v. Dep't of Veterans Affairs, 8 F.4th 1319 (Fed. Cir. 2021), this practice was found to be a violation of precedent, concluding that the VA had to continue to use the "Douglas Factors" when determining the appropriateness of a punishment.



## **Remedy**

On February 9, 2022, Rep. Conor Lamb (D-PA) and Rep. Brian Fitzpatrick (R-PA) introduced H.R. 6682, the “Protecting VA Employees Act.” If enacted this bill would make two critical changes to the Accountability Act. First, it would restore the “preponderance of the evidence” standard for internal VA discipline, making the VA prove with at least 50 percent of the evidence that an employee committed the misconduct he or she is being accused of. This will help eliminate overzealous punishment and prevent disciplining employees who have likely not committed misconduct. Second, the bill would restore the ability of the MSPB to mitigate a punishment imposed by the VA. Restoring this power to the MSPB and arbitrators will prevent the VA from charging either unnecessary or extra punishment, with the knowledge that unfair punishments will be overturned, and will result in unnecessary, costly, and time-consuming appeals.

## **Congressional Requests**

- Enact H.R. 6682, the “Protecting VA Employees Act.”

## **RESTORING VA WORKPLACE RIGHTS**

### **Title 38 Collective Bargaining Rights**

The Title 38 collective bargaining rights law, 38 U.S.C. 7422 (“7422”) excludes “professional conduct or competence” from the scope of collective bargaining and grievance procedures for covered VA employees. But the VA has interpreted and applied this section in an arbitrary and expansive manner for many years. As a result, the employees covered by 7422 have not been able to bargain or grieve over a wide range of routine workplace issues that are subject to bargaining by other VA employees and health care professionals at other agencies. All too often, the VA weaponizes its use of its 7422 power to nullify valid and binding arbitration decisions or other administrative judicial decisions, and to challenge contractually bargained provisions that have survived Agency Head Review. These 7422 determinations are often unreasonably late and follow extensive litigation before arbitrators, administrative agencies, and federal courts. Finally, the 7422 determinations unreasonably expand the scope of statutory exclusions well into peripheral matters.

In both 2003 and 2017, the White House voided a commonsense Memorandum of Understanding (MOU) that had expanded Title 38 collective bargaining rights and improved labor management relations. In the 117<sup>th</sup> Congress H.R. 1948 and S. 771, the “VA Employee Fairness Act,” was re-introduced respectively by Rep. Mark Takano (D-Calif.) and Sen. Sherrod Brown (D-Ohio) to eliminate the three exceptions in current law that VA has applied to deny every labor request to grieve, arbitrate or negotiate over workplace matters, including schedules, fixing incorrect paychecks, overtime pay, professional education and many other matters. Since its reintroduction in the House of Representatives, H.R. 1948 has gained 152 cosponsors and was reported favorably from the House Veterans’ Affairs Committee on May 4, 2021. It now awaits a vote from the full House of Representatives. In the Senate, S. 771 currently has 10 cosponsors, and is currently waiting for consideration in the Senate Veterans’ Affairs Committee.

## **Congressional Requests**

- Enact legislation to provide full collective bargaining rights to Title 38 employees.
- Enact legislation to allow Title 38 employees, like Hybrid Title 38 and Title 5 employees, to file a grievance against the VA when their paychecks are incorrect.
- Reform and strengthen pay-setting processes for VA physicians, dentists and podiatrists including restoration of an independent, transparent market pay panel, and a fair process for setting performance pay criteria and determining performance pay awards.
  -
- Conduct oversight into the workload and work hours of VA providers (physicians, nurse practitioners, dentists, physician assistants, therapists) and the leave policies affecting them.
- Enact legislation to ensure that VA physicians and dentists on alternative work schedules are covered by fair leave accrual policies that recognize all their hours of work.

## **IMPROVING BENEFITS FOR VA WORKERS**

### **Increasing Continuing Professional Education Benefits for VA Clinicians**

Many VA clinicians are required to have a professional license as a condition of employment within the VHA. In order to maintain these licenses, many of these employees are required to complete what is known as “Continuing Professional Education” (CPE), depending on their profession and the state in which they are licensed. In the private sector, many employers reimburse employees for the costs associated with CPE to maintain their licenses. However, opportunities in the VA are significantly more limited.

In 1991, Congress enacted a law that allowed “Board Certified Physicians” and “Board Certified Dentists” to be reimbursed up to \$1,000 annually for CPE. This law has not been updated in over 30 years and is extremely limited. The current statute also ignores a large swath of practicing physicians and dentists who work at the VA but are not “Board Certified” and ignores the entirety of other professions that have CPE requirements. Additionally, \$1,000 a year in CPE may have been adequate 30 years ago, but costs for CPE have only gone up, and the VA has failed to keep pace with escalating costs and inflation. Beyond this narrow and small benefit, Medical Center Directors have the authority on an ad hoc basis to reimburse their clinicians for CPE costs, but this practice is haphazard and not evenly distributed within a medical center, and even less so when looked at through the VISN or national level.

To address this issue, Congresswoman Julia Brownley (D-CA), Chairwoman of the House Veterans’ Affairs Committee Subcommittee on Health, and Congresswoman Mariannette Miller-Meeks (R-IA), a medical doctor and member of the Health Subcommittee, introduced H.R. 3693, the “VA CPE Modernization Act.” If enacted this bill would significantly expand the CPE benefit throughout the VA. Specifically, the bill would reimburse physicians and dentists, up to \$4,000 annually, regardless of whether they are board certified. Additionally, all other

healthcare professionals in Title 38 and Hybrid Title 38 would be eligible for up to \$2,000 annually for CPE. Lastly, the bill creates a mechanism that gives the Secretary discretion to increase the amounts for clinicians based on inflation.

The bill was considered at a legislative hearing of the Health Subcommittee in July 2021 and received endorsements from Democrats and Republicans on the panel, a variety of Veteran Service Organizations, as well as the VA itself. The bill is currently waiting a committee markup in the House Veterans Affairs Committee. The bill has yet to be introduced in the Senate.

### **Congressional Requests:**

- Enact legislation to expand eligibility and amounts for Continuing Professional Education Reimbursement for the Title 38 and Hybrid Title 38 Workforce.

## **VETERANS BENEFITS ADMINISTRATION**

### **National Work Queue**

The National Work Queue (NWQ) was created with the intention of relieving the claims backlog and improving the pace of claims processing. However, its implementation has had a negative impact on veterans and front-line VA workers. AFGE agrees with the Inspector General's (IG) position that eliminating specialization has had a detrimental impact on veterans with claims, particularly claims that are more complex and sensitive in nature. As the IG report explains, prior to the implementation of the NWQ:

“The Segmented Lanes model required Veteran Service Representatives (VSRs) and Rating Veteran Service Representatives (RVSRs) on Special Operations teams to process all claims VBA designated as requiring special handling, which included [Military Sexual Trauma (MST)]-related claims. By implementing the NWQ, VBA no longer required Special Operations teams to review MST-related claims. Under the NWQ, VSRs, and RVSRs are responsible for processing a wide variety of claims, including MST-related claims. However, many VSRs and RVSRs do not have the experience or expertise to process MST-related claims.” (VA OIG 17-05248-241).

Because of the level of difficulty in processing MST claims, AFGE is supportive of the VA's intent to send MST claims to a specialized team of claims processors that is still being established, though problems remain. At a recent House Veterans Affairs Committee Subcommittee on Disability Assistance and Memorial Affairs Hearing titled "Supporting Survivors: Assessing VA's Military Sexual Trauma Programs" on MST Claims, AFGE submitted a Statement for the Record on MST that highlighted the need for claims processors who develop and rate MST claims to get additional credit considering the complexity and time intensiveness of these claims.

Based on these changes with MST claims, AFGE is calling on VBA to send other former "Special Operations" cases including Traumatic Brain Injury, catastrophic injury, "Blue Water

Navy” claims, as well as new and future “Burn Pit” or “Gulf War Illness” claims to specialized Claims Processors, with a corresponding increase in performance credits for more difficult work.

Additionally, AFGE urges VBA to modify the NWQ so that cases remain within the same regional office while they are being processed, and that VSRs and RVSRs are more clearly identified on each case file. This will allow for better collaboration between VSRs and RVSRs (as was done prior to the implementation of the NWQ).

### **Congressional Requests**

- Conduct oversight of the National Work Queue and the challenges it creates for veterans and the VBA workforce including a study of the impact of transferring cases between Regional Offices while they are being processed.
- Introduce legislation to repair the NWQ by requiring specialized personnel including VSRs and RVSRs to process highly complex claims including Military Sexual Trauma and Traumatic Brain Injury.

### **Information Technology**

Information Technology issues continue to plague VBA, negatively affecting VA’s mission of serving veterans and AFGE members striving to fulfill that mission every day. The Government Accountability Office (GAO) has analyzed these problems, such as the processing of legacy appeals under the Appeals Modernization Act. In late 2018, the House Veterans’ Affairs Committee conducted a hearing criticizing the VA for IT problems that were causing delays in the processing of veteran education benefits and housing stipends under the 2017 Forever GI Bill. Since then, the committee has examined how technology issues are delaying both disability and pension claims. AFGE is working with the committee to show how these delays negatively affect the ability of AFGE members to do their jobs. AFGE members face unfair negative performance appraisals and potential disciplinary action due to delays and malfunctions caused by IT problems beyond their control, adding to the problems by the VA Accountability Act and ever-changing performance standards.

### **Congressional Requests**

- Conduct oversight on the impact of IT shortcomings on both the performance ratings of VBA employees and number of employees removed or disciplined under the VA Accountability Act.
- Encourage the VA to provide adequate training time for employees on new IT systems and ensure VA employees are not penalized for IT problems beyond their control.

## **Compensation and Pension Exams**

Disability exams are required for many veterans applying to receive VA benefits related to their military service, and Compensation and Pension (C&P) exams are the most common type of exam. The VA started to contract out these examinations in the late 1990's and has been increasing the number of contracted exams ever since. Currently, approximately 90 percent of all VA disability exams are now contracted out by VBA instead of being processed by VA's own clinicians. AFGE is proud to represent clinicians who perform C&P exams for VA, as well as VA clinicians who perform similar Integrated Disability Examination System (IDES) exams for service members prior to their separation from service.

AFGE has long argued that VA clinicians are far better prepared and more likely to diagnose veterans correctly compared to private contractors without expertise in the unique and complex problems that veterans present. This is particularly true of medical issues that are more common or exclusive to the veteran community, including military sexual trauma, traumatic brain injury, and toxic exposure. To underscore this point, AFGE has submitted several statements to the House and Senate Committees on Veterans' Affairs as they considered issues related to disability exams.

Additionally, AFGE's continued advocacy resulted in a letter by then-Senate Veterans' Affairs Committee Ranking Member Jon Tester (D-MT) and signed by nine other Democratic Senators to then-VA Secretary Wilkie questioning the outsourcing of these exams in the wake of an exam backlog exacerbated by the COVID-19 pandemic. The letter led to a significant victory in the 116<sup>th</sup> Congress by helping to enact legislation that required the VA to maintain the same number of C&P positions that it had in March 2020. This requirement will remain in place at least until the backlog of C&P Exams is reduced the March 2020 level. Vigorous advocacy by AFGE led to this victory and heightened interest in the issue from the Congress.

AFGE will continue to lobby on this issue, demand strong oversight, and fight for the VA to bring C&P exams, particularly specialty exams, back within the VA.

## **Congressional Requests**

- Conduct oversight on the current status of contract C&P exams including a comparison between the quality, timeliness, and cost of internal VHA and outsourced exams.
- Enact legislation that requires the VA to bring C&P exams back in-house where they are performed with a higher degree of accuracy and at a lower cost.

## **Performance Standards**

Performance standards exist to measure employee performance against a specific set of written criteria, so that managers and employees have a consistent understanding of what is expected on the job. These standards should be fair and attainable for all employees while retaining the flexibility to adjust for changing circumstances in an employee's workload. While this should be the case, VBA management has found different ways over the years to alter or mishandle

performance standards in ways that negatively impact employees and veterans. Some of examples include:

- VBA has instituted counterproductive restrictions on excluded time. Excluded time is the time removed from an employee's production quota to account for situations that would make it more difficult to reach production goals. The most basic example of this would be if an employee is expected to process 50 transactions a week (10 per day), and they are on work travel for a day, the travel day would be granted excluded time and reduce the weekly quota to 40 transactions. Reducing the excluded time for training claims processors in new procedures and technology also sets up employees to fail and hurts veterans by sacrificing quality for quantity.
- VBA has created standards that do not fairly award claims processors credit for work completed. One critical example is that Rating Veteran Service Representatives (RVSRs) who defer a case for further review (because it is not ready to rate) do not receive production credit for that work. For many VBA employees, production credit is not allocated fairly based on the complexity and specialization of a claim or the amount of work involved. Employees should not be penalized for being assigned work that requires more information or analysis. Some of the VBA's performance measures have created a system that serves neither the worker nor the veteran.
- In the name of efficiency, VBA has reduced the amount of time that Legal Administrative Specialists, who assist veterans with questions about their claims, can speak to a veteran on the phone and still meet the criteria for an "outstanding" or "satisfactory" rating on a call. This system makes no allowance for calls with veterans who have highly complex questions or are disabled and need additional assistance to communicate. VA should not set standards that reward rushing veterans.
- VBA management has failed to consistently conduct five quality reviews each month with claims processors. Failing to do so sets up the employee to repeat the same mistakes, harming employees as well as veterans.

### **Congressional Requests**

- Increase oversight on the status of VBA performance standards and if they are fair to employees and are serving veterans' best interests.

## **BOARD OF VETERANS' APPEALS**

### **Workload and Performance**

The workload and performance metrics for attorneys in the Board of Veterans Appeals are a major factor harming the Board's recruitment and retention efforts. Several factors contribute to this problem, including:

- **Workload:** The Board has made significant changes over the past several years regarding the number of cases and issues a Board attorney must complete annually. Prior to the implementation of the Appeals Modernization Act (AMA), Board attorneys were expected to complete 125 cases a year, a pace that averaged 2.4 cases per week. Each case, regardless of the number of issues decided, carried the same weight towards an attorney's production quota. In FY 2018, the Board increased its production standards from 125 to 169 cases per annum, (or 3.25 cases per week), a 35% increase in production requirements which was overwhelming for Board attorneys. In FY 2019, the Board created an alternative measure of production for Board attorneys which evaluated the total number of issues decided by an attorney, regardless of the number of cases completed, setting that number at 510 issues decided. AFGE supports the creation of this alternative metric as it better accounts for the work required to complete each case. However, we caution that measuring the number of issues can also be manipulated to create unfair metrics. Unfortunately, this manipulation appeared in FY 2020, the first full year the AMA was fully implemented, because while the case quota remained at 169, the issue quota was raised to 566. Finally in FY 2021, the quota was changed to a more manageable but still difficult 156 cases or 491 issues.
- **Judicial Sign Off:** A Board attorney may only receive credit for a case once a judge signs off on the work. While this requirement may appear reasonable, delays caused by overburdened judges can cause attorneys to miss their quotas through no fault of their own. When attorneys are adjudged to be performing poorly based on such missed quotas, it violates Article 27, Section 8, Subsection E of AFGE's collective bargaining agreement with the VA, which states "When evaluating performance, the Department shall not hold employees accountable for factors which affect performance that are beyond the control of the employee." The VA should adhere to the terms of the collective bargaining agreement.
- **Processing of Legacy Appeals:** a critical issue that affects the Board's productivity is its transition from older/legacy appeals to AMA appeals. AFGE supports the Board's efforts to complete all legacy appeals but believes that the Board can be more strategic in its approach. As one Board attorney and Local 17 member described it, because of the differences in processes and rules governing the different types of appeals, an attorney is speaking French when evaluating one claim, and Italian with the other. Unfortunately, the Board does not distinguish between the two types of claims when assigning work to attorneys, and Board attorneys often experience whiplash going back and forth between the two. AFGE has urged the Board to consider allowing some Board attorneys to exclusively process legacy appeals until that backlog is complete, and other attorneys to exclusively work on AMA appeals, with an adjustment period when switching between appeals categories. This would allow attorneys to specialize, making their work easier and allowing them to better serve veterans.

### **Congressional Requests**

- Increase oversight on the current status of Board attorney performance standards and if they are best serving veterans.

- Continue fighting for funding allowing the Board to hire more attorneys.
- Lobby Congress to raise awareness about the need to eliminate the judicial sign off requirement.
- Increase oversight of the processing of AMA claims and legacy claims.

## **Recruitment and Retention**

The Board of Veterans' Appeals is a place where attorneys should have a path to work for their entire careers. To accomplish this goal, the Board needs to establish a journeyman non-supervisory GS-15 Board Attorney position. Currently, Board attorney grades range from GS-11 to GS-14. Of the 871 attorneys currently at the Board, 439 attorneys are at the GS-14 level. While not all attorneys would qualify or choose to advance to a GS-15 position, creating the possibility for 100 to 200 GS-15 attorneys would help with long-term recruitment and retention. It is also important to note that there are non-supervisory journeyman GS-15 attorneys within the VA Office of General Counsel, thus setting a precedent. As Board attorneys are in the Excepted Service, it is within the Secretary's discretion to create and fill these new positions. AFGE has encouraged the Secretary to create this advancement opportunity and has asked Congress to voice its support for this change or pass legislation establishing its creation.

Another tool that would help with recruitment and retention is for the VA to utilize its existing authority under 5 U.S.C. § 5757 to reimburse Board attorneys for the costs associated with maintaining their memberships in one state bar, as is done at many agencies, including for attorneys at the VA Office of General Counsel. As all Board attorneys are required to be admitted to a bar, this would be a simple, equitable, and non-cost prohibitive way to retain employees at the Board and help maintain parity with the private sector, where many law firms pay for such fees. Reimbursement for Continuing Legal Education (CLE), similar to what exists for VA clinicians under 38 U.S.C. § 7411, would also be beneficial for attorneys licensed in states that require CLE, and would further help with recruitment and retention.

## **Congressional Requests**

- Encourage the VA to create journeyman GS-15 attorney positions at the Board of Veterans' Appeals.
- Apply pressure on the Secretary to use his power under 5 U.S.C. § 5757 to reimburse Board attorneys for the bar dues necessary to maintain a law license.



## **Federal Prisons**

### **INCREASE HIRING AND STAFFING OF FEDERAL CORRECTIONAL WORKERS**

#### **Issue**

Congress must conduct oversight and hold the Federal Bureau of Prisons (BOP) accountable for its recent spending decisions. To remedy the serious correctional officer understaffing and prison overcrowding problems, the appropriations committees in both chambers have substantially increased the funding of the BOP over the past two years. However, the BOP's staffing crisis continues with little to no increase in overall personnel. The FY 2022 Commerce, Justice, and Science (CJS) appropriations bill included the following specific report language:

Vacancies – BOP is directed to improve hiring policies to ensure that, within the funding provided, it can promptly fill existing and future vacancies to staff its 122 Federal facilities at January 2016 levels and forgo further position eliminations. BOP shall report not later than 90 days after the date of enactment of this Act on the number of vacancies at each facility, further detailed by job title, job series, and General Schedule level as well as the number of applicants going through the hiring process for each vacant position. DOJ is directed to explore ways to expedite BOP hiring, such as working with OPM to provide expedited hiring for BOP facilities with vacancy rates exceeding ten percent and making use of recruitment and retention bonuses. BOP shall describe such efforts in the aforementioned report. BOP is directed to continue to ensure at least two correctional officers are on duty for each housing unit for all three shifts at all high-security institutions, including United States Penitentiaries and Administrative and Federal Detention Centers. BOP is directed to continue to submit quarterly reports showing compliance with this directive and to provide a cost estimate and strategic plan for implementation at medium-security institutions that currently do not have a second officer for all three shifts.

#### **Background/Analysis**

More than 152,000 prison inmates are confined in BOP correctional institutions today. More than 124,000 of those inmates are confined in BOP-operated prisons, while approximately 28,700 are managed in private prisons and other facilities. Staffing at our federal prisons has not kept up with this explosion in the federal prison inmate population.

Serious correctional officer understaffing and prison inmate overcrowding problems have resulted in significant increases in prison inmate assaults against correctional officers and staff. Illustrations of violence against BOP officers 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, Calif.; (2) the lethal stabbing of Correctional Officer Eric Williams on Feb. 25, 2013, by an inmate at the United States Penitentiary in Canaan, Pa.; and (3) the murder of Lieutenant Osvaldo Albarati on Feb. 26, 2013, while driving home from the Metropolitan Detention Center in Guaynabo, Puerto Rico. This past year, a correctional officer at FCC Allenwood was stabbed in the eye with a homemade weapon. This staff member lost his eye and suffered brain injuries.

Yet even after correctional workers lost their lives in the line of duty, and continue to be seriously assaulted, BOP has failed to adequately remedy chronic understaffing. One troubling practice in place at nearly every BOP installation across the country is “augmentation” which allows wardens to use non-custody employees to fill custody vacancies. For example, if a correctional officer calls out sick, that correctional officer position could be filled by a teacher, case manager, secretary, or other non-correctional officer. The bureau has used augmentation to meet staffing needs and to get around paying officers overtime; this irresponsible practice puts lives in danger and must be stopped.

The overuse of augmentation is also one factor leading to higher rates of attrition in the BOP. While 15 years ago employees would often work past their minimum retirement eligibility dates, the current trend is to leave the agency as soon as an employee is eligible to retire. This results in a rapid loss of experienced, highly qualified employees who keep our facilities safe and secure. The attrition rate has increased as the agency struggles to recruit new employees. Federal correctional officers are some of the lowest paid federal law enforcement officers. Some state correctional officers make over \$10,000 more a year than their BOP counterparts. A substantial number of new officers start their federal careers at the BOP, but quickly leave for other federal law enforcement agencies with higher pay. BOP pay bands should be comparable to the U.S. Marshals Service and the Border Patrol. The BOP’s current pay bands are GL-5, 6, and 7 (with a competitive GL-8) but should be raised to GL-7, 9, and 10, with a competitive GL-11. AFGE’s overall position on improving federal hiring is described in the issue paper on Preserving and Defending the Competitive Civil Service, which notes that agencies may offer 25% pay premiums where necessary for recruitment and retention (up to 50% with OPM approval). AFGE supports the “Chance to Compete Act” to further improve and streamline hiring on a government-wide basis. AFGE’s Council of Prison Locals urges OPM to use its existing authority to grant BOP limited, temporary direct-hire authority for urgently needed additional corrections officers at specific prisons with severe shortages of candidates.

On December 17, 2021, Western Regional union leaders reached out to Regional Director Rios demanding immediate action to properly staff regional facilities and to ensure competitive pay for all employees.

The same month, Senator Chris Murphy (D-CT), Senator Richard Blumenthal (D-CT) and Representative Jahana Hayes (D-CT) wrote a letter to Bureau of Prisons Director Michael Carvajal and U.S. Office of Personnel Management Director Kiran Ahuja expressing their concern for the current staffing shortages at the Federal Correctional Institution (FCI) Danbury.

### **Congressional Requests**

AFGE strongly urges the Administration and the 117<sup>th</sup> Congress to:

- Increase federal funding of the BOP Salaries and Expenses account and **require** BOP to hire additional correctional staff to return to at least the January 2016 levels as directed in the language included in the FY 2022 and FY2023 CJS Appropriations bill. Any increase in funding for new hires must be strictly enforced/controlled by appropriations language.

- Demand that BOP hire the necessary staff to fill custody positions instead of relying on augmentation.
- Bring federal correctional officer pay levels up to the levels of similar federal law enforcement agencies such as the U.S. Marshals Service and U.S. Customs and Border Patrol.

## **INTERDICT / ELIMINATE DANGEROUS CONTRABAND IN OUR FACILITIES (DRUGS/MAIL/CELLPHONES)**

### **Issue**

Federal prisons are being inundated with illegal and synthetic drugs and other contraband items that often cause harm to staff members. The flood of uncontrolled drug use is the direct result of years of agency-wide staffing shortfalls and a deliberate reduction in inmate supervision.

### **Background/Analysis**

Many BOP facilities have seen a major increase in the number and scale of contraband introductions in recent years, including synthetic drugs such as K-2, Spice, and fentanyl, which create potentially life-threatening exposures for correctional staff. This epidemic is a direct result of the chronic understaffing plaguing BOP facilities. With less staff supervising more inmates, inmates have become increasingly brazen in the acquisition of cell phones, drugs, and other forms of contraband items.

One of the major ways synthetic drugs are getting into federal prisons is through the mail. As an example, in second half of 2019, approximately 40 federal prison employees from three different facilities were taken to local emergency medical facilities for exposure to synthetic drugs. Last year, in response to numerous incidents of staff members being sickened by mail tainted with synthetic drugs, the Pennsylvania Department of Corrections instituted a new system in which nearly all mail is sent to an off-site facility where it is opened, scanned, and emailed to prisons, much the same way mail is processed for Congress.

A current federal pilot program of scanning mail has been extremely successful in curtailing the introduction of these hazardous drugs.

### **Congressional Requests**

AFGE strongly urges the administration and the 117<sup>th</sup> Congress to:

- Immediately expand this pilot program, without delay, to best protect the employees of the BOP.

## **PROTECT EMPLOYEES FROM SEXUALLY AGGRESSIVE/DEVIANT INMATE PREDATORY BEHAVIOR**

### **Issue**

As staffing levels have continued to fall, inmate assaults on BOP staff have risen, including sexual assaults. The bureau has failed to protect prison employees from sexually aggressive/deviant inmate predatory behavior, has willfully not held inmates accountable for this criminal behavior, and has failed to correct the callous management culture across the agency that has let these abuses persist. The BOP's lack of protection for employees has led to multiple class actions suits and left employees with the long-lasting effects of their abuse.

### **Background/Analysis**

In one recent high-profile incident in November 2019, the Occupational Health and Safety Administration (OSHA) issued a "Notice of Unsafe and Unhealthful Working Conditions" to the low-security Federal Correctional Institution Miami for assaults on staff members by inmates. OSHA labeled this violation as "serious" and stated, "The Agency head did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were exposed to the hazard of being assaulted by inmates with a history of violent behavior." It then cited two specific incidents in which inmates, one "with a history of exhibiting sexually aggressive disruptive behavior," assaulted prison staff members. These assaults at FCI Miami are hardly an isolated incident, however. The BOP has systematically failed to hold inmates accountable for violent abuses and has failed to foster a responsible management culture that protects employees.

### **Congressional Requests**

AFGE strongly urges the administration and the 117<sup>th</sup> Congress to:

- Conduct congressional oversight and hearings concerning prisoner attacks on BOP employees.
- Enact stricter penalties for inmates who are found guilty of sexually aggressive or deviant behavior.

## **PASS THE THIN BLUE LINE ACT**

### **Issue**

Congress should pass the Thin Blue Line Act (H.R. 72), which would make targeting and killing a law enforcement officer or first responder an "aggravating factor" in sentencing for a capital crime when a jury evaluates whether to impose the death penalty.

## **Background/Analysis**

Congress must authorize stronger punishments for those who actively target and kill federal law enforcement officers. Too many times we have witnessed our fallen brothers go without justice. Our fallen officers deserve respect, and their families deserve better than plea bargains. These men and women are heroes, and we demand that Congress treat them as such. The Thin Blue Line Act will ensure that any time a member of the law enforcement community is targeted and killed; the murderer will have a greater chance of facing the death penalty.

## **Congressional Requests**

AFGE strongly urges the administration and the 117<sup>th</sup> Congress to:

- Pass this important legislation introduced by Representative Vern Buchanan (R-FL) because there is no justice in giving second-consecutive life sentences to cold-blooded killers. The AFGE Council of Prisons refuses to stand by while our men and women are put in harm's way every single day.
- Send a message that our lives and our safety matter. We demand action on this legislation so that every inmate will know that if they target and kill one of our brothers or sisters, they will be facing the possibility of the death penalty.

## **PASS ERIC'S LAW**

### **Issue**

Congress should pass Eric's Law, which is named for slain officer Eric Williams and would require the court to impanel a new jury if a jury in a federal death penalty case fails to reach a unanimous decision on a sentence.

### **Background/Analysis**

Far too often law enforcement officers fall victim to violent assaults. Our officers put their lives on the line every day to keep our communities safe – and sometimes, they don't come home. In the most extreme cases we have seen officers murdered by an inmate – like Correctional Officers Jose Rivera and Eric Williams.

There must be an adequate deterrent in place to show criminals that murdering a law enforcement officer will have serious consequences. If capital punishment isn't on the table, how can Congress ask our officers to do these dangerous jobs and make these officers feel reasonably safe on the job? What deterrent is adequate for a repeated murderer?

### **Congressional Requests**

The AFGE Council of Prisons strongly urges the administration and the 117<sup>th</sup> Congress to:

- Pass H.R. 3151 / S. 1721, “Eric’s Law” introduced by Senator Pat Toomey (R-PA) and Representative Fred Keller (R-PA).

## **PROHIBIT BOP FROM EXPANDING THE USE OF PRIVATE PRISONS**

### **Issue**

Congress should prohibit BOP from expanding its use of private prisons, as they are not more cost-effective than public prisons, nor do they provide higher quality, safer correctional services.

### **Background/Analysis**

In August 2016, a Department of Justice Inspector General report found that prisons run by private companies have greater problems with contraband, inmate discipline and other issues than those run by BOP. According to the report, “In recent years, disturbances in several federal contract prisons resulted in extensive property damage, bodily injury, and the death of a correctional officer.” Shortly thereafter, in August 2016, AFGE and the Council of Prison Locals (CPL) were successful in lobbying the previous administration to phase out its private prison contracts. This was the first major rollback of private prisons since the bureau began contracting services out in the mid-1990s.

In February 2017, however, this policy was reversed. For the remainder of 2017, BOP continued to use private prisons but did not actively attempt to move inmates from BOP-operated facilities into private facilities. In February 2018, BOP issued a memo<sup>1</sup> espousing a new goal of “increasing population levels in private contract facilities.” The memo directed BOP managers to “submit eligible inmates for re-designation” from low-security BOP facilities to private contract facilities. DOJ said that this decision was made “in order to alleviate overcrowding” in federal prisons, but this was nothing more than a thinly veiled excuse to privatize government work and federal jobs without regard to cost or safety.

The author of that memo, Assistant Director for Correctional Programs Division Frank Lara, retired a few months later and took a senior-level job at one of the biggest private prison operators, GEO Group.<sup>2</sup> On Oct. 19, 2018, eighteen senators and members of Congress wrote to the DOJ IG asking him to investigate this potential conflict of interest.

BOP must stop relying on private facilities to supervise and rehabilitate inmates. These facilities fail to provide adequate safety, security, and rehabilitative services as compared to federal prisons. Further, the real problem of prisoner overcrowding involves medium- and high-security BOP facilities. Pushing the least dangerous offenders into private custody does nothing to alleviate this problem, and it does nothing to keep correctional workers safe while on the job. Real lives are at risk when the bureau fails to address chronic and widespread understaffing, and it is foolish to believe this problem can be solved by more outsourcing. As research shows, BOP must abolish private prisons and reinvest those dollars into its fulltime law enforcement staff.

## **Congressional Requests**

The AFGE Council of Prisons strongly urges the Administration and the 117<sup>th</sup> Congress to:

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

## **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**

### **Issue**

Congress should continue to prohibit the privatization of BOP and FPI positions under OMB Circular A-76.

### **Background/Analysis**

The FY 2021 Consolidated Appropriations Act (P.L. 116-260), which contains the FY 2021 Commerce-Justice-Science (CJS) Appropriations bill, includes a general provision — Section 210 — to prohibit the use of funds for public-private competitions under OMB Circular A-76 for work performed by federal employees of the Bureau of Prisons (BOP) and the Federal Prison Industries (FPI).

Competing these BOP and FPI employee positions would not promote the best interests or efficiency of the federal government or help to ensure 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 and at a lower cost. It therefore would be ill-advised to privatize their positions merely to meet arbitrary numerical quotas.

It should also be noted that 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 compared 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, Ark.; Yazoo City, Miss.; and Elkton, Ohio). The study 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.).

## **Congressional Requests**

The AFGE Council of Prisons strongly urges the Administration and the 117<sup>th</sup> Congress to:

- Continue to include the moratorium on A-76 public/private competitions in the FY 2022 and FY 2023 CJS Appropriations bills.

## **HAZARDOUS DUTY PAY FOR BOP STAFF WORKING THROUGH THE COVID PANDEMIC**

### **Issue**

Federal law enforcement staff working in federal prisons have been working, and will continue to be required to work, in federal prisons that are superspreader locations for COVID-19.

### **Background/Analysis**

Inmates are housed in quarters that are not set up for social distancing. Prisons are built to house large numbers of inmates in one location. Even as inmates are released under provisions to help with reduce the spread of COVID, prison staff still must work in close quarters with inmates in this environment. To date, some 285 inmates and seven staff members<sup>3</sup> have perished from COVID-19. This is a stark reminder of the hazardous conditions that employees of the Bureau of Prisons must work in.

Although requested by the Council of Prisons and multiple members of Congress to halt the practice, the Bureau of Prisons and the U.S. Marshals Service have continued to move inmates around the country, assisting in spreading COVID-19 from one region to another. On Jan. 31, 2020, President Donald Trump declared a public health emergency for COVID-19. He then declared a national emergency on March 13, 2020. OPM has stated that an agency head can request hazardous duty pay for exposure to COVID-19. Every Bureau of Prisons location has experienced COVID-19 infections at some level, affecting both staff and inmates. Despite constantly using PPE, staff members have still contracted COVID-19 and brought the disease home to family members.

### **Congressional Requests**

The Council of Prisons strongly urges the administration and the 117<sup>th</sup> Congress to:

- Pay hazardous duty pay at the rate of 25%, retroactive to the date the public health emergency was declared (Jan. 31, 2020), to all Bureau of Prisons staff except those working in the agency's Central or Regional Offices.



# **Transportation Security Administration**

## **TITLE 5 FOR TRANSPORTATION SECURITY OFFICERS**

### **What is Title 5?**

Title 5 is the section of the U.S. Code that establishes labor rights and protections for almost all federal workers, including:

- Collective bargaining rights, including exclusive representative elections, subject to oversight by the Federal Labor Relations Authority;
- Establishing a list of prohibited personnel practices (discrimination based on age, race, national origin, religion, marital status, enforcement of legal recourse, political affiliation or retaliation for filing a discrimination, work safety complaint or whistleblower disclosure) as well as mechanisms to correct violations;
- Pay under the General Schedule (GS) system, including overtime and night differential pay;
- The consistent grading and classification of positions based on job duties;
- Worker protections under the Family and Medical Leave Act and the Fair Labor Standards Act;
- The right to appeal adverse personnel actions to the Merit Systems Protection Board (MSPB).

### **Why Are TSOs Denied These Rights and Protections?**

The Aviation and Transportation Security Act (ATSA) was passed by Congress to correct inadequacies in aviation security identified after 9/11. The law created the federal Transportation Security Administration (TSA) and a force of federal uniformed security screeners, the Transportation Security Officers (TSOs). The law included a statutory footnote that granted the TSA administrator the authority to set the terms and conditions of employment for TSOs.

### **What Does the TSO Workforce Lose Without Title 5 Rights?**

- TSO pay is determined by the administrator, not federal law. As a result, pay is below that of comparable federal jobs and TSOs do not receive longevity pay or step increases. Bonuses provided by TSA are arbitrary and unfairly dispersed.
- TSA does not follow the Fair Labor Standards Act that regulates overtime and work hours.

- TSA dictates the timeline for collective bargaining and what matters are subject to bargaining.
- TSA has refused to negotiate an objective grievance procedure like those at almost every federal agency with a union, including other components of the Department of Homeland Security, which are already under Title 5.
- Under executive orders of the previous president, TSA forced employees into a contract that undermined the union's ability to represent its members and maintain membership.
- TSA fires TSOs based on medical symptoms and diagnoses that do not affect their work performance.

**Congress Should Pass Legislation Providing Statutory Title 5 Rights Including the GS Pay Scale to the Entire TSA Workforce for the Following Reasons:**

- In the 116th Congress, the House passed H.R. 1140, Rep. Bennie Thompson's "Rights for Transportation Security Officers Act" by a bipartisan vote of 230-171. The bill was also added to H.R. 2, the "INVEST Act" which also passed the House but failed to be considered by the Senate. Sen. Brian Schatz (D-HI) introduced identical language in the Senate, S. 944. The bill garnered 34 cosponsors, many more than in the previous Congress, but the Senate did not take up the bill. AFGE will be encouraging co-sponsorship and an active push to gain Title 5 rights and better pay for TSOs.
- In the 117<sup>th</sup> Congress, Rep. Thompson introduced the "Rights for the TSA Workforce Act" (H.R. 903), with 227 cosponsors including 15 Republicans. The bill has been marked up in the Homeland Security Committee and awaits floor action. All Democrats and two Republicans on the Committee voted for its passage. The corresponding Senate bill is S. 1856 by Sen. Brian Schatz (D-HI), which has 43 cosponsors. Because the Senate bill has garnered no Republican support, Senator Schatz is working to reintroduce the bill in the form that passed the House Homeland Security Committee and to seek Republican support.
- On June 3, 2021, Homeland Security Secretary Alejandro Mayorkas issued a directive to TSA Administrator David Pekoske ordering the agency to expand collective bargaining rights for the screening workforce, provide access to the Merit System Protection Board (MSPB) for appeals of adverse actions, and to place TSOs on the GS pay scale. To date, the agency has acted only upon the MSPB order and claims it cannot expand bargaining rights or increase pay without additional appropriations from Congress. AFGE is appealing to Congress and the administration to provide funds to ensure the Secretary's directive is fully implemented.
- It is a matter of fundamental fairness that the entire TSA workforce be treated the same as other federal workers. TSA has become a revolving door for TSOs; between 2007 and

2018, roughly the entire agency was replaced due to attrition. During this time, 45,576 TSOs resigned from the agency. In 2017, one in five new hires quit within the first six months. These high attrition rates do not occur in other DHS components where the rank-and-file workforce have workplace rights and protections and a transparent pay system under Title 5.

- The TSO workforce is underpaid. TSA created its own pay band system lacking the stability and transparency of the General Schedule pay system used by most federal agencies. TSOs are not automatically covered by federal employee pay increases, but the TSA administrator has agreed, solely at his discretion, to comply with increases, including the most recent increase of 2.7 percent.
- TSA has promoted a career progression program, but there is no assurance of being promoted to a vacant, available position with higher wages for TSOs who complete training and certification requirements for various career paths. In March 2019, the Department of Homeland Security's Office of Inspector General issued a report, "*TSA Needs to Improve Efforts to Retain, Hire and Train Its Transportation Security Officers,*" which said TSA should develop better recruitment and retention strategies, pay TSOs better, and provide better training and advancement opportunities.
- TSOs face constant training to adapt to changing procedures and threats and are required to pass more certifications than armed federal law enforcement officers. The screening workforce deserves a pay system that is fair and adequately reflects the amount of training required, the complexity of the positions, and the seniority of experienced TSOs.
- TSA's failure to adequately staff checkpoint and baggage screening areas leads to overworked officers and less security for the flying public. TSOs at some airports are subject to ongoing mandatory overtime due to short staffing, while other full-time TSOs are working split shifts between two airports because of shortages. TSA has not reduced the average 252 days it takes from application to be a TSO to reporting for duty.
- AFGE is especially concerned that female TSOs continue to face denial of shift or line bids or delayed breaks due to chronic underrepresentation of women among the TSO ranks.
- Despite congressional investments in screening technology and canines, as many as two million passengers departing on flights from U.S. airports daily must be screened by a person, not by canines or solely using technology.
- Throughout TSA's history TSOs have faced discipline that is swift and severe without the ability to testify and challenge witnesses. There was no right to appeal to an objective body such as the Merit Systems Protection Board. This is the only change that has been implemented with Secretary Mayorkas's June directive. In September 2021 TSA signed a Memorandum of Agreement with MSPB to adjudicate appeals of adverse actions. Still, TSOs do not have progressive discipline; they can be arbitrarily removed from the

service for a series of minor or unrelated violations, such as tardiness, uniform violations, or the failure to properly report illness or other unexpected absence.

- Over 42,000 TSA employees are denied the protections of the Fair Labor Standards Act and the Back Pay Act simply because their job classification is that of Transportation Security Officer and TSA has blocked the application of those laws.
- Throughout the coronavirus pandemic, TSOs have been on the job even as their lives and health have been at risk. To date, over 21,000 TSA employees, mostly the screening workforce, have contracted the virus and 36 have died as of Feb. 2022, despite efforts to control viral spread at checkpoints.

Management misconduct, retaliation, and obstruction is all too common at TSA and is a direct result of the lack of accountability and transparency within TSA's personnel systems. The nation's security is enhanced when the workers who contribute to our protection have a personnel system that is fair, transparent, and consistent. For these reasons, legislation is needed in Congress that would apply Title 5 of the U.S. Code to the entire TSA workforce in the same manner as other security employees at the Department of Homeland Security (DHS).

The FAA Reauthorization Act of 2018 required the formation of a TSA-AFGE Working Group to recommend reforms to TSA's personnel management system, including providing for appeals to the Merit Systems Protection Board (MSPB) and grievance procedures. TSA did not utilize this Working Group as an opportunity to make many of the sensible changes to pay, discipline, grievance, and fitness-for-duty determinations proposed by AFGE Council 100 representatives. The agency only agreed to some nominal changes that went into effect in 2020.

It was wrong for Congress to deny TSA employees commonsense statutory workplace rights and protections in 2001, and it is wrong to continue this unfair system 20 years later.

### **CONGRESS SHOULD APPROPRIATE FUNDING TO RAISE TSO PAY**

The American public learned during the December 2018 – January 2019 shutdown that TSOs were among the lowest paid federal workers required to work without a paycheck for over one month. The average starting salary for a TSO is about \$32,600 (\$15.62/hour), and the average pay for a full-time TSO ranges between \$35,000 and \$40,000 a year. Depending on schedules, the lowest end of the current scale is lower than the mandatory \$15 per hour minimum wage in some jurisdictions. TSO pay increases should not continue to be the lowest priority for application of TSA appropriations.

Various actions by TSA have kept TSO wages low even for officers with many years on the job. Over a five-year period, there was no increase in TSO base pay. Because TSOs are not on the GS pay scale, they did not receive regular step increases to reward their successful performance and experience. For most TSOs, the agency's various pay-for-performance systems offered few promotion opportunities, meager pay raises, and only small bonuses that do not count toward base pay for determination of pensions. TSA imposes pay limitations that are unique among federal agencies. In December 2021, TSA announced a "Readiness Incentive" – a \$1,000 bonus

linked to full attendance between December 19, 2021, and January 15, 2022. During this time period the rate of COVID infections soared – as TSA incentivized workers to show up even if ill – with over 2,000 active cases among TSOs.

AFGE calls on Congress to appropriate dedicated funding in the FY 2023 DHS Appropriations bill to provide every TSO a pay raise. Congress must pass legislation that would apply title 5 to the TSO workforce, especially the application of the GS system of compensation.

## **CONGRESS MUST REFORM THE SCREENING PARTNERSHIP PROGRAM**

Following the terrible events of Sept. 11, 2001, the nation demanded that Congress improve the U.S. aviation security by federalizing the duties of screening passengers and baggage at airports. Most airport operators continue to depend on the experience, training, and commitment of federal TSOs and are uninterested in the opportunity to convert to private contractors under the Screening Partnership Program (SPP). Unlike other efforts to convert federal jobs to contractors, the SPP does not require the contractor to demonstrate taxpayer savings or allow the federal workforce to compete in the bid. Current law shortens the period TSA can consider an SPP application, requires collusion with the airport operator on contractor choice and limits the administrator's discretion to determine the appropriateness of privatizing screening at an airport. Jobs with an SPP contractor include salary stagnation and fewer and more expensive benefits. Unlike the constant scrutiny of the TSO workforce, there is almost no transparency regarding attrition rates or security breaches at SPP airports.

During 2018, AFGE prevented attempts to privatize screening under the SPP at Orlando International Airport and San Luis Munoz Marin (San Juan) Airport. In 2019, AFGE also fought efforts by the St. Louis Board of Aldermen to expand screening privatization under the FAA airport privatization program at St. Louis Lambert International Airport and an effort by the former governor of Georgia for a state takeover of the nation's busiest airport, Atlanta Hartsfield Airport. Atlanta Hartsfield currently uses private contractors to monitor exit lanes in direct violation of federal law. The Georgia legislature has just convened its 2020 session and promoters of the takeover are trying again.

AFGE strongly supports reintroduction of legislation similar to the Contract Screener Reform Act, introduced by Rep. Bennie Thompson (D-MS) during the 114<sup>th</sup> Congress. The Contract Screener Reform Act would apply transparency and accountability to the SPP. AFGE also calls on Congress to examine if the FAA's airport privatization program can open the door to private screening without consideration of national security risks.

## **HONORING OUR FALLEN TSA HEROES**

Rep. Julia Brownley (D-CA) reintroduced the "Honoring Our Fallen TSA Heroes Act," H.R. 2616 has 43 cosponsors and would grant TSOs Public Safety Officer benefits in the event of their death or severe injury while in the line of duty. AFGE strongly believes TSOs protect the public and are deserving of these benefits. We will continue our efforts to advance this legislation in the House and encourage introduction in the Senate.

## **FUNDING FOR AVIATION SCREENERS AND THREAT ELIMINATION RESTORATION (FASTER) ACT**

To fund aviation security, including the work of TSA, Congress passed an Aviation Passenger Security Fee. Since 2014, that fee is \$5.60 one-way and \$11.20 roundtrip. However, the increase that took effect in 2014 included a diversion of one third of the security fee funds to deficit reduction, costing \$19 billion over 10 years. The “FASTER Act” (H.R. 1813/S. 2717) would end that diversion and dedicate the fee entirely to aviation security operations. The funds would allow for more aviation security personnel and checkpoint and baggage screening technology. The legislation would also allow the administrator to pay TSOs in the event of a government shutdown.

## **FEHB COVERAGE FOR PART-TIME TSOs; WORKERS’ COMPENSATION; HAZARDOUS DUTY PAY**

In response to the coronavirus pandemic, members of the House Homeland Security Committee introduced legislation to restore the full federal share of health benefits to part-time TSOs, provide the presumption of workplace illness for those who contract the virus, and provide hazardous duty pay for TSOs who are on the job and risking their lives. Since that time, the TSA administrator has restored the part-time health benefit and directed the agency to presume workplace illness for Federal Employees’ Compensation Act coverage. Because these actions supporting the workforce remain at the discretion of the administrator, AFGE supports enacting legislative solutions to ensure TSOs have access to these crucial benefits.

## **CONCLUSION**

The TSO workforce is essential for preventing future terrorist attacks against the U.S. Continued second-class treatment of this workforce is not only detrimental to the agency and its employees, but also harmful to aviation security. Congress must pass legislation to ensure the TSO workforce has the same civil service protections as other federal workers and provide funding to compensate TSOs for the important service they provide in protecting the country.

## **Congressional Requests**

- Repeal the statutory provision that authorizes the TSA administrator to create a separate personnel system for the TSO workforce.
- Pass legislation to extend the title 5 rights and protections to all TSA employees, including TSOs, and place their positions on the GS pay scale used for other DHS and federal employees.
- Prevent privatization of passenger and baggage screening currently performed by trained, experienced federal workers.
- Provide fair compensation to the TSO workforce by appropriating funds for a pay raise.

- Support the Honoring our Fallen TSA Heroes Act.
- Support the Funding for Aviation Screeners and Threat Elimination Restoration (FASTER) Act.
- Support full-time health insurance, workers' compensation benefits, and hazardous duty pay.

# Voter Rights and Civil Rights

## Background

AFGE is a full and active partner in the traditional alliance between the civil rights and workers' rights movement. AFGE created the Fair Practices Department in 1968 to fight racial injustice in federal employment and expanded it in 1974 to become the Women's and Fair Practices Department protecting the federal workforce. AFGE leaders marched in Selma in 2015 and 2019 with many others to honor the sacrifice of those who fought for the Voting Rights Act of 1965 and to ensure those rights will not be denied or diluted by state legislatures or federal judges. AFGE has recognized disparities in the criminal justice system and has worked with advocates on sentencing reforms. AFGE fights for equal pay between men and women and against the use of discriminatory pay-for-performance schemes. AFGE fights for the federal government to become the model employer and for the rights and dignity of all federal workers regardless of race, sex, religion, orientation or gender identification, national origin, age, or disability status.

## Legislative and Judicial Attacks on the Right to Vote

The preclearance section of the Voting Rights Act blocked discriminatory voting changes before implementation. Fifty-three percent of the states covered by the preclearance requirements due to past discrimination passed or implemented voting restrictions that disenfranchised tens of thousands of voters. Immediately following the Supreme Court's decision in *Shelby County v. Holder*, striking the preclearance provision of the Voting Rights Act, states previously subject to preclearance (Texas, Alabama, and North Carolina) implemented restrictive identification requirements, purged voter rolls, eliminated same-day voting registration, and limited early voting. Since the beginning of 2019, bills to restrict voter access to the polls were introduced or extended in 14 states. The intent is clear: political control will be maintained by denying the ballot to those who may vote in opposition.

Voting rights restrictions have a direct impact on federal workers. Statistics from the American National Election Studies indicate that union household turnout is 5.7% higher than that of nonunion households. It is likely that voters who favor a strong federal government and recognize the contributions of the federal workforce are more likely to show that support when they cast a ballot.

## John Lewis Voting Rights Act

AFGE strongly supports H.R. 4 / S. 4 the John Lewis Voting Rights Advancement Act. This essential bill restores the Voting Rights Act of 1965 by outlining a process to determine which states and localities with a recent history of voting rights violations must pre-clear election changes with the Department of Justice. The House of Representatives passed this bill on August 24, 2021. The Senate companion bill was brought up in the Senate in January 2022 as part of a voting rights legislative package combined with the Freedom to Vote Act, after calls to change the filibuster rules.



AFGE also supports the Freedom to Vote Act introduced by Senator Amy Klobuchar (D-MN). This bill addresses voter registration and voting access, election integrity and security, redistricting, and campaign finance.

On January 19, 2022, the Senate failed to pass the John Lewis Freedom to Vote Act, a combined bill to advance voting rights. A vote to overturn filibuster rules and allow the voting rights measure to move forward failed because it lacked a simple majority.

### **Make Federal Elections a Federal Holiday**

AFGE supports legislative efforts to protect and extend the right to vote. Representative Anna Eshoo (D-CA) introduced H.R. 222, the “Election Day Holiday Act” establishing the Tuesday after the first Monday in November in the same manner as any legal public holiday for purposes of federal employment. The bill would create “Democracy Day,” a federal holiday to boost voter turnout on Election Day.

According to the U.S. Census Bureau, in 2016, 14.3% of the 19 million citizens who did not vote said they were “too busy” on Election Day to cast a vote. Currently 20 states have varying laws allowing workers paid time off to vote. Voting is a constitutional right supported by federal law. Over 30% of federal workers are veterans, many of whom fought in Iraq, Afghanistan, and Syria to protect the voting rights of citizens in other countries. One of the bill’s harshest critics is Senate Minority Leader Mitch McConnell (R-KY), who has dubbed efforts to make federal elections a federal holiday a “power grab” by one party. It is a “power grab” for democracy by U.S. citizens.

### **Equal Pay**

H.R. 7 / S. 205, the “Paycheck Fairness Act” introduced in the 117<sup>th</sup> Congress by Representative Rosa DeLauro (D-CT) and Senator Patty Murray (D-WA), passed in the House of Representatives on April 15, 2021. On June 8, 2021, the Senate voted on cloture on the motion to proceed to the measure which failed by a vote of 49-50. The bill has not received another vote in the Senate. AFGE continues to urge for passage of this bill in the Senate.

The bill closes loopholes that hinder the Equal Pay Act’s effectiveness, prohibits employer retaliation against employees who share salary information among colleagues, and ensures that women who prove their case in court receive awards of both back pay and punitive damages. A 2018 study by the American Association of University Women found that fulltime working women on average earn 80% of what men earn, and that the gap increases for working women of color. Working families can lose hundreds of thousands of dollars over the course of a woman’s lifetime due to the pay gap.

### **Discrimination Against Federal Workers with Targeted Disabilities**

Federal employees with “targeted disabilities” deserve to have their workplace rights respected. The EEOC defines “targeted disabilities” to include certain manifest disabilities such as developmental disabilities, blindness and hearing loss, brain injuries, and

disfigurement. Reports have shown that federal government agencies are most likely to remove employees with targeted disabilities just before the end of the probationary period.

The federal government should be a model employer of persons with targeted disabilities. Losing a job as a federal employee could plunge these disabled workers into financial peril. According to the 2017 Census Bureau Poverty and Income Report, the official poverty rate for those with disabilities is 24.9%. The unemployment rate is 15.1% for persons with disabilities. Only about one-third of persons with disabilities are working. There is no justifiable explanation for the disparity in retention between federal employees with targeted disabilities and other members of the federal workforce. It is important to ensure that workers with targeted disabilities are not victims of discrimination in the federal workplace.

AFGE is working with members of Congress to obtain data about the rates of people with targeted disabilities removed at the end of the probationary period. As these rates are documented, AFGE will call upon Congress to strengthen protections for federal workers with disabilities.

AFGE continues to work with Congress to draft stronger language to protect employees with disabilities being dismissed improperly on performance grounds. Additionally, we are working with Congress to emphasize the need for federal agencies to provide employees with disabilities with reasonable accommodations so they can have successful federal careers.

## **Paid Leave**

AFGE lobbied for inclusion of paid family leave in the Build Back Better Act. The Senate and the Biden Administration are still in negotiations around the scope of this legislation. While the Build Back Better Act does not include the full protections of the Federal Employee Paid Family Leave Act, AFGE still strongly supports the provision. Specifically, AFGE advocated that the Build Back Better Act paid family leave provision cover all forms of existing unpaid leave under the Family and Medical Leave Act (FMLA), not just when a new child joins a worker's family. AFGE also opposes restricting eligibility for paid leave to workers making less than \$100,000 per year, which would omit many union members.

AFGE strongly supports H.R. 564 / S. 1158, the "Comprehensive Paid Leave for Federal Employees Act," introduced by Representative Carolyn Maloney (D-NY) and Senator Brian Schatz (D-HI). This bill provides federal employees with twelve weeks of paid family leave for all situations covered under the FMLA. This includes paid leave to care for seriously ill or injured family members; to tend to an employee's own serious health condition; and to address the health, wellness, financial, and other issues that could arise when a loved one is serving overseas in the military or is a recently discharged veteran.

On June 24, 2021, AFGE National President Kelley testified at a House Oversight and Reform Committee hearing, "Leading by Example: The Need for Comprehensive Paid Leave for the Federal Workforce and Beyond" expressing strong support for H.R. 564.

Congressional opponents of paid family leave for federal employees have raised arguments largely based on cost. Unrealistic assertions about the ability of federal workers to accumulate and save other forms of paid leave continue. However, there is a clear cost for failing to extend this benefit to families. Productivity is lost when federal employees return to work too soon without securing proper care for loved ones or come to work when they themselves are ill because they used all their sick leave taking care of loved ones. The government also loses when a good worker, trained at taxpayer expense, decides to leave federal service for another employer, often a government contractor, who does offer paid family leave.

A growing number of private employers, including taxpayer-funded federal contractors, and most governments across the globe (as well as some U.S. states) have acknowledged the benefits to both workers and employers from paid family leave. However, only 12% of U.S. workers have paid family leave and only 61% have paid sick leave according to the Bureau of Labor Statistics.

### **Congress Should Recognize the Benefits of Leave to Workers and Agencies**

Congress should recognize the real difficulties federal workers face in accumulating enough annual leave to offset the lack of paid family and medical leave. For the first 15 years of service, most federal GS employees only accrue four to six hours of annual leave per biweekly pay period and can carry over no more than 240 hours from year to year. Even if this ceiling were eliminated, it would take a typical federal worker years to accrue enough sick and annual leave to prepare for the extended leave needs of parenting or other FMLA situations. The alternatives

suggested by federal employee paid family leave opponents are far too simplistic and unrealistic to adequately address the problem. Federal workers who are compelled to take unpaid FMLA leave too often fall behind on their bills and face financial ruin.

Paid leave 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 family leave. The federal government currently reimburses federal contractors and grantees for the cost of providing paid family leave to their workers. Surely if such practice is affordable and reasonable for contractors and grantees, federal employees should be eligible for similar treatment.

The need for expanding paid leave has been especially acute during the COVID-19 pandemic, with the skyrocketing need for dependent care. Paid family leave is critical to ensure federal employees can succeed in their jobs and support their loved ones.

## **The Equality Act**

AFGE strongly supports H.R. 5 / S. 393, the “Equality Act” introduced by Representative David Cicilline (D-RI) and Senator Jeff Merkley (D-OR). This bill will extend existing civil rights protections to LGBTQ Americans in the areas of employment, education, housing, credit, jury service, public accommodations, and federal funding. H.R. 5 passed in the House of Representatives on February 25, 2021. AFGE urges the Senate to pass the Equality Act.

The pursuit of justice has not always been easy or popular, but AFGE stands true to a basic tenet of fairness: all individuals should be judged by the same criteria. Accordingly, AFGE strongly opposes employment discrimination based on sexual orientation or gender identification. Currently it is not violation of federal civil rights law to fire or deny housing or educational opportunities to individuals simply because they are a member of the LGBTQ community – and that is wrong. Although this protection has 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. This demonstrated the need for statutory protections. The Equality Act extends protections against discrimination based on sexual orientation in employment, housing, and access to public places, federal funding, credit, education, and jury service based on orientation or gender identification.

AFGE supports the Equality Act and calls for Senate passage.

# **Equal Employment Opportunity Commission**

## **The Civil Rights Agency Must Hire to Rebuild from Record Low Staffing and Comply with Bargaining Obligations on Reentry to Negotiate a Future Workplace that Includes Greater Telework**

### **Summary**

AFGE's National Council of EEOC Locals, No. 216, is proud to represent investigators, attorneys, mediators, administrative judges and other Equal Employment Opportunity Commission (EEOC) staff who enforce civil rights laws protecting against discrimination on the job based on race, religion, color, national origin, sex, age, disability and genetics. EEOC needs resources so that there is adequate staff to enforce these civil rights.

EEOC ended fiscal year (FY) 2021 with a record low staffing of 1,927 full-time equivalents (FTEs) nationwide. It can take months for workers alleging discrimination to get an appointment, due to investigative staff shortages. It takes up to an hour on hold to get live help from the understaffed in-house call center. While staffing remains low, inquiries expand to include pandemic-related issues, such as disability accommodations, religious accommodations with regard to vaccines, and Asian hate crimes, as well as the nation's reckoning with racial injustice, #MeToo, and a rise in antisemitism.

Meanwhile, EEOC, which should be the model employer, has violated bargaining obligations by making unilateral reentry decisions, including refusing to expand its pre-pandemic telework program. AFGE Council 216 has filed two unfair labor-practice charges in its fight for safe reentry and increased telework, consistent with the Administration's priorities.

### **Summary of Priorities:**

For FY23, AFGE Council 216 will urge Congress to increase EEOC's budget and hire up to the staff ceiling of 2,365 FTEs. AFGE Council 216 will press agency leadership to reset its position on bargaining obligations during a pause on reentry attributable to omicron. The union will fight for a safe reentry and increased telework and remote options. The union will insist on a collective bargaining agreement (CBA) that protects rights and enhances working conditions, including making permanent a longstanding emergency Maxiflex pilot program.

### **Discussion**

#### **1) Congress should support robust funding for EEOC for FY22 and FY23**

- *AFGE Council 216 will urge Congress to boost EEOC's budget.*

EEOC's needs resources to accomplish the mission. EEOC is still recovering from the last administration's "do more with less" strategies, such as "C at intake" metrics,<sup>26</sup> which encouraged tagging more charges for quick closure and providing less substantive help to the public. With a significant budget boost EEOC could instead finally do "more with more." EEOC must not only rebuild but expand to handle a convergence of emerging issues: the impact of the pandemic on workers; Asian hate crimes; a national reckoning of racial injustice; the #MeToo era; and a confirmation of LGBT coverage in Title VII, per the Supreme Court's recent *Bostock* decision and the executive order implementing it within federal agencies. EEOC needs full-year funding for FY22 at the requested \$445.9M level. For FY23, we need a robust budget increase to support civil rights enforcement and customer service.

## **2) EEOC Must Rebuild from Record Low Staffing to Help the Public**

- *AFGE Council 216 will urge Congress to direct EEOC to hire frontline staff.*

EEOC ended FY21 with only 1,927 FTEs nationwide. This was a record low number of FTEs even for the chronically understaffed agency. While EEOC's new leadership began hiring last year, the effort needs to keep pace with attrition. End-of-the-year hiring may have brought up the number of actual personnel onboard to 2,100, but January retirements would have in turn brought that down. Even this modestly higher number is inadequate, especially when compared to staffing a decade ago, when EEOC finished FY11 with 2,453 FTEs.

Enforcing laws to prevent employment discrimination requires frontline staff. Staffing shortages have a direct effect on the ability of the public to get real help. EEOC typically receives over 180,000 inquiries annually from workers asserting employment discrimination. There must be adequate frontline staff to receive inquiries and process charges. EEOC's workload and inadequate staffing justify increasing the budget and directing the EEOC to target the funds to hire frontline workers.

EEOC must hire staff for charge intake and processing. Investigators are the primary resource in the agency's efforts to process discrimination claims. However, investigator staffing has sunk from a high of 917 in FY01 to approximately 548 available investigators (the last reported number, included in the FY19 budget). EEOC had planned to hire 135 new investigators in FY21, but others departed, so a large infusion is still needed.

EEOC's appointment calendars have been booked up since the digital appointment system kicked off in FY18. This is because there are simply not enough investigative staff to cover the appointment demand. Inquiries are mostly filed online, but filers are advised to keep checking back for an appointment, often requiring months of waiting. Meanwhile jobs are lost, and retaliation cases surge.

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<sup>26</sup> Under the EEOC's Priority Charge Handling Procedures, incoming cases receive a rating of A, B, or C depending on the likelihood of a cause finding; complaints with a "C" rating are those considered least likely to succeed.

Even worse, if a member of the public who made an inquiry was unable to secure an appointment after 90 days, the online system auto-deleted the inquiry. Since late summer 2021, EEOC sought to correct this problem by having investigative staff speak to each person that contacts the agency. However, without a significant infusion of staff, this has bogged investigators down with the intake function with little time for other critical tasks such as investigating claims. The EEOC should staff each office in direct relationship to the office's actual workload.

Likewise, EEOC's in-house call center is typically staffed by approximately 30 intake information representatives (IIRs), when it was intended for 65. The IIR shortage means the public often waits over 60 minutes to speak to a live person. More staff would alleviate wait times. Also, if there were more IIRs they could assist by taking inquiries over the telephone for members of the public without computer access. Currently, those inquiries are shifted to offices for investigators to call back, when they could be doing charge intake and investigation.

Additional support staff such as Investigative Support Assistants (ISA) and Office Automation Assistants (OAA) would allow EEOC to handle calls, mail, data input, and email better and relieve professional staff of clerical work that detracts from their primary duties.

In FY21, EEOC finally began hiring mediators, but more are still needed to fill vacancies left after several years of a hiring freeze on the position. EEOC supplements the program with contract mediators, who are paid \$800 per case. These mediations should be brought back in-house. COVID-19 demonstrates that EEOC's mediators could do more virtual mediations, also alleviating the need for contractors.

This past year there was also some limited hiring of administrative judges. But to account for the thinning ranks of AJs over the last decade, EEOC continues to focus on pilots and metrics that harm Federal complainants. Instead, EEOC should hire AJs, paralegals, and support staff to address the caseloads and support Federal agency compliance with EEO regulations.

EEOC's litigation program needs more trial attorneys, to help manage workloads and bring forward important cases that demonstrate discrimination laws will be enforced. Paralegals and clerical support are also necessary to assist in managing the litigation workload, especially systemic cases.

To account for inadequate staffing, EEOC continues to transfer thousands of old cases across the country from short-staffed offices to those with a few more personnel. Offices receiving the old cases simply close them to meet arbitrary performance requirements.

For FY23, AFGE Council 216 will urge Congress to direct EEOC to hire up to the staff ceiling of 2,347 FTEs. As EEOC hires up, the priority should be on frontline positions with an eye towards achieving a flatter, more efficient organization.



### **3) EEOC should comply with its Labor Management Obligations**

- *AFGE Council 216 will fight for EEOC to be the “model employer” and comply with labor-management obligations.*

Sadly, EEOC is a long way from realizing its goal to be the “model employer.” Despite the Administration’s support for collective bargaining, EEOC still fails to comply with its labor-management obligations under the statute and CBA.

#### **EEOC Must Bargain Reentry In Good Faith Without Lines in the Sand**

Due to COVID, EEOC staff transitioned to maximum telework and have been productively carrying out their functions remotely for two years. However, in November, EEOC blindsided the union at an agency-wide townhall when it announced unilateral plans for reentry into offices, including dates, phases, and telework schedules. This resulted in AFGE Council 216 filing two unfair labor practice charges to address EEOC’s failure to provide notice and an opportunity to negotiate in good faith and for continuing activities that frustrate bargaining. While EEOC paused its reentry plans due to omicron, EEOC should take the opportunity to reset its bargaining posture with no lines in the sand. Staff safety should be its primary goal.

#### **EEOC Should Expand its Pre-Pandemic Telework Program, Implement Remote Work Options for COVID Safety, and Embrace Workplace Innovations**

EEOC should strive to meet the Administration’s goal of adopting workplace innovations that arose from the maximum telework posture during COVID-19. For example, EEOC should stop refusing to expand its pre-pandemic telework program. Like other agencies, EEOC should increase telework and create a national remote-work option. In addition, EEOC should make permanent its Emergency Maxiflex Pilot program. These flexibilities also have helped protect worker health and safety since the onset of COVID-19.

Never has the importance of telework been more apparent than during the COVID-19 pandemic. The pandemic also sparked a nationwide focus on telework as an important tool for safely and efficiently delivering mission-critical services in the public and private sectors during both short- and long-term emergencies.

We know the benefits of telework for organizations and employers. Telework improves employee performance and engagement and supports mission productivity and efficiency. Telework enables the EEOC to meet mission-critical needs of the organization. Telework flexibilities help staff balance work and personal responsibilities and make use of beneficial work environments, thereby enhancing employee satisfaction and wellbeing, aiding retention, and serving as a draw to potential applicants.

The EEOC’s staff have demonstrated that they have been able to carry out their functions effectively. Accordingly, the EEOC now has an opportunity to revisit how they were operating prior to the pandemic and employ innovations learned during the pandemic such as expanded

telework, remote work, and flexible work schedules including Maxiflex. EEOC refers to its 2013 telework plan as “generous.” However, many agencies are adopting plans with up to eight days of telework per two-week pay period (as well as fully remote options), compared to EEOC’s five days per pay period with no nationwide remote plan.

As we look to office-reentry planning, the EEOC should strategically leverage telework, remote work and Maxiflex, to help attract, recruit, and retain a skilled and diverse workforce. Otherwise, EEOC, which is already short-staffed, risks an employee exodus to jobs at other agencies and the private sector that embrace greater workplace flexibilities.

## **CBA Negotiations**

For a successor CBA, AFGE Council 216 will ensure that rights are maintained and working conditions are safe and enhanced by new schedule flexibilities, including increased telework and a permanent Maxiflex program. The union has provided a list of articles to rollover into the new CBA to streamline the process. However, EEOC has failed to provide a response.

## **Addressing Violations in EEOC’s Own Workplace**

EEOC should reduce costly turnover by improving poor morale, including by improving its own internal EEO process, which rarely makes discrimination findings, and stemming fear of retaliation. When EEOC employees do not feel safe bringing forth complaints, problems are left to fester. EEOC field offices score approximately six percentage points below the government average on this FEVS inquiry: “I can disclose a suspected violation of any law, rule or regulation without fear of reprisal.” It is a sad irony that retaliation for protected activity is a legal basis that EEOC enforces.

### **4) Federal Employees Must Also Maintain Rights to Discovery and Full and Fair Hearings.**

- *AFGE will fight for Federal workers to have access to the full EEO process.*

AFGE Council 216 will also continue to protect federal workers’ rights to discovery and a full hearing. These rights are threatened by EEOC’s efforts to drive down its backlog with closure schemes. Performance plans for administrative judges (AJs) contain arbitrary closure quotas, which can create a strong pressure to find in favor of agencies that are the subject of discrimination complaints. The EEOC has hinted that it wants to increase the closure requirements making them even more unrealistic.

The standards direct AJs to achieve these quotas by relying on pilot initiatives that encourage denying discovery. Discovery is the only way to keep the EEOC process fair. The standards also promote unnecessarily quick closures, such as through micromanaged summary judgment and bench decisions. Dismissals to meet the numbers may not meet due process requirements. The standards also do not consider case complexity, varying caseloads, lack of support staff, and the problem of aged cases being transferred from other short-staffed offices.

Administrative judges should retain judicial independence to categorize cases, provide for and manage the discovery process, and not be forced to meet arbitrary numbers for processing cases. We will continue to seek subpoena authority to improve the due process rights afforded to both federal sector claimants and federal agencies.

**5) EEOC Should Improve Its Digital Charge Initiatives to Accomplish the Purported Goal of Efficiency.**

- *AFGE Council 216 will urge that EEOC improve ARC to support constituents*

The EEOC in January 2022 rolled out a new electronic charge data system called ARC. This system is also the platform used by state agencies and interfaces with the public portal. Generally, expanding technology enhances efficiency and access. However, since the EEOC went live with ARC with no pilot testing, the system has been plagued with problems. From day one, internal and external stakeholders alike have been faced with system shutdowns or lockouts, and with the inability to perform basic tasks that were previously allowed such as transferring a case from one unit to the next, entering case notes or uploading documents. The problematic launch of the new platform has added to the existing overwhelming workload of staff because now tasks that previously took two to three minutes are taking as long as a full hour to complete. Despite EEOC's bargaining unit being the primary end-user, the agency did not seek union input when designing ARC. Despite numerous union requests to consider certain workarounds before the official roll-out, the EEOC went live with the new platform and created the current functionality problems. The union should have been included in the planning of this platform in order to make sure that it was user-friendly for employees and the public.

**6) EEOC Should Adopt a Real Efficiency: Dedicated Intake Staff**

- *AFGE Council 216 will continue to promote ways for EEOC to work smarter.*

AFGE Council 216 has long promoted a Full-Service Dedicated Intake Plan to address the efficient use of resources to benefit the public. The heart of the plan is utilizing trained senior investigator support assistants in dedicated units to advance the intake process from pre-charge counseling through charge filing. Investigators, who now must stop investigating their cases to regularly rotate into intake, would be able to focus on their caseload.

In FY19, EEOC finally took a key idea from the plan and hired five GS-8 Senior Investigator Support Assistants (SISAs), to assist with intake appointments. But when EEOC finally created the SISA position, it only filled 10 slots. Finally, EEOC hired a handful more in FY21. Efforts to have these SISAs cover multiple offices have encountered problems, due to technical issues of the online appointment system, time zones, and cross-district priorities. Instead, EEOC should hire 100 SISAs, at least one for each of the 53 offices and more for larger offices with higher intake demands. With greater investment, the dedicated intake unit could finally come to fruition.

## **Congressional Requests**

- To enact full-year funding for EEOC in FY22 at the requested \$445.9M level and a budget increase for FY23.
- To direct EEOC to hire frontline staff up to the 2,347 FTE staffing ceiling to provide real and timely help to the public and federal sector.
- To ensure EEOC engages in good faith bargaining for safe office reentry plans, including dates, phases, and expanded telework and remote work options.
- To ensure EEOC engages in good faith bargaining on a successor CBA that maintains rights and enhances working conditions.
- To reduce costly turnover by improving poor EEOC morale, including a better process for finding and acting upon internal EEO violations and reducing the fear of reprisal.
- To maintain federal employee rights to discovery and full and fair hearings before Administrative Judges who retain judicial independence, are not forced to meet arbitrary metrics, and have subpoena authority.
- To hire dedicated intake staff, including at least 100 Senior Investigator Support Assistants.

# **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 did not speak English “very well” or “at all.” Many of these individuals 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.

AFGE calls on Congress to reintroduce and pass legislation to recruit, retain and reward federal workers with the bilingual skills necessary to serve our nation’s increasingly diverse population.

## **The “One America, Many Voices” Act**

It has been over 10 years since the “One America, Many Voices Act” was introduced in Congress. The bill would ensure that all federal workers who use their multilingual skills in the workplace on a regular basis are fairly compensated by amending 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 some employees to use multilingual skills who are paid at the same rate as other employees that are not required to use such skills. Multilingual skills are essential for federal agency mandates to serve the diverse public. These mandates can only be met with the skills of employees who can communicate effectively with Limited English Proficiency populations. Without legislation like the “One America, Many Voices Act,” 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 the 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 the civil service as a career option if they were to receive adequate compensation for their much sought-after language skills.

Many federal agency offices are in areas with a large and growing population of citizens with limited English proficiency, 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 for effective delivery of federal agency services. If enacted, the “One America, Many Voices Act” would provide 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.

### **Congressional Request**

AFGE will work for the reintroduction of the “One America, Many Voices Act” or similar legislation in the House and Senate during the 117<sup>th</sup> Congress. Passage will make better use of the multi-lingual skills of current and future federal workers and improve government efficiency. AFGE is working with Representative Nydia Velazquez (D-NY), Gregorio Sablan (D-NMI), Raul Grijalva (D-AZ), Judy Chu (D-CA), David Price (D-NC) and Al Green (D-TX) and Senator Martin Heinrich (D-NM) on this initiative.

## **Federal Employees' Compensation Act**

The Federal Employees' Compensation Act (FECA) is administered by the U.S. Department of Labor's Office of Workers' Compensation Programs and currently covers roughly three million civilian federal employees from more than 70 different agencies. When a death, injury, or illness occurs on the job, FECA provides payments for (1) loss of wages (2) loss of a body part or its use, (3) vocational rehabilitation, (4) death benefits for survivors, (5) burial allowances, and (6) medical care for injured employees.

The FECA program is particularly important to those men and women whose work is inherently dangerous – Bureau of Prisons correctional workers, U.S. Customs and Border Protection officers, federal firefighters, and other federal law enforcement officers. Its importance has expanded as front-line workers in dozens of agencies have been exposed to COVID-19 in the workplace. Among them are medical professionals at the Department of Veterans Affairs and the Department of Defense, food inspectors at the Department of Agriculture, and Transportation Security Officers at the Transportation Security Administration. Unfortunately, FECA has not been significantly reformed since 1974, and as a result, several challenges have emerged.

AFGE successfully lobbied for an automatic presumption of workplace illness for COVID-19 as part of the American Rescue Plan Act, which was signed into law on March 11, 2021. The act authorizes FECA benefits for federal workers who contract COVID-19 within 21 days of carrying out duties that required contact with patients, members of the public. This workplace presumption of illness allows eligible federal employees to make a FECA claim without facing a potentially lengthy denial and appeals process and help these workers receive much-needed benefits and health care services.

### **Support the Reintroduction of the Federal Workers' Compensation Modernization and Improvement Act**

AFGE strongly urges the reintroduction of the bipartisan Federal Workers' Compensation Modernization and Improvement Act, which the House passed by voice vote on Nov. 29, 2011, but has not been reintroduced or updated since that time.

New legislation is needed to enhance and update the FECA program, thereby ensuring the program meets the needs of both employees and taxpayers. Legislation should reform the FECA program by:

- Authorizing physician assistants and advanced practice nurses, such as nurse practitioners, to provide medical services and to certify traumatic injuries.
- Updating benefit levels for severe disfigurement of the face, head, or neck (up to \$50,000) and for funeral expenses (up to \$6,000) – both of which have not been increased since 1949.
- Making clear that the FECA program covers injuries caused from a terrorist attack.

- Giving federal workers who suffer traumatic injuries in a zone of armed conflict more time to initially apply for FECA benefits and extending the “continuation of pay” period from 45 days to 135 days.
- Including program integrity measures recommended by the Labor Department Inspector General and the Government Accountability Office.



# **Food Safety Inspection Service**

## **FILL VACANCIES AMONG INSPECTION STAFF TO HELP PROTECT OUR NATION'S FOOD SUPPLY**

### **Background/Analysis**

FSIS is the public health agency within the U.S. Department of Agriculture responsible for ensuring that the nation's commercial supply of meat, poultry, catfish, and egg products is safe, wholesome, and correctly labeled and packaged. Created in 1981, FSIS is federally mandated to continuously monitor the slaughter, processing, labeling, and packaging of the billions of pounds of meat and poultry products that enter the market each year.

Unfortunately, FSIS is suffering a serious shortage of inspectors, a shortage that is threatening our nation's food supply. This shortage is straining the inspection system to the point of breaking. There have been an increasing number of recalls of products under FSIS jurisdiction due to the lack of inspection.

For years, FSIS has acknowledged difficulties in recruiting and retaining personnel, resulting in double-digit inspector vacancy rates in many districts. Without a robust workforce of federal inspectors, important monitoring and reporting of foodborne pathogens will not occur, preventing timely interventions to preserve public health. In order to protect the public and workers, FSIS needs a full contingent of inspectors in every plant.

The National Joint Council of Food Inspection Locals (Council) of the American Federation of Government Employees, AFL-CIO, which represents the 6,200 FSIS inspectors, believes that hiring more meat and poultry inspectors by increasing salary and recruitment efforts, in addition to other priorities, would help those hardworking inspectors better accomplish the FSIS mission.

### **Congressional Requests**

- Congress should support efforts to overcome the longstanding problem of recruiting and retaining employees by increasing the starting wage for inspectors. Most inspectors start as a GS-5, which is below the starting wage for employees at packing plants. AFGE's FSIS Council recommends starting at GS-7 and offering the same retention bonuses that are offered to public health veterinarians (who are not bargaining unit employees).
- Congress should increase FSIS's budget for full-time employees, which would allow for all plants to have a full complement of government inspectors at all times.
- Congress should mandate that FSIS increase its outreach and recruiting efforts to fill all current vacancies of food inspectors and consumer safety inspectors.

## **SLOW DOWN SLAUGHTER LINE SPEEDS AND PUT THE SAFETY OF WORKERS AND THE AMERICAN PUBLIC FIRST**

### **Background/Analysis**

During the previous administration, the FSIS increasingly favored deregulation that allowed increased line speeds for all slaughtered species and in turn removed many federal inspectors from the lines. This has drastically increased profits for meatpacking companies and drastically decreased safety for inspectors, workers, consumers, and animals.

### **Congressional Requests**

- Congress should pass legislation to mandate slower line speeds in meatpacking plants and prohibit the inspection systems that have allowed these increased and unsafe line speeds including the New Poultry Inspection System, the New Swine Inspection System, the Egg Products Rule and Beef Slaughter line speed waivers. AFGE supports H.R. 1815 and S. 713, the Safe Line Speeds in COVID-19 Act, introduced by Rep. DeLauro (D-CT) and Sen. Booker (D-NJ).

## **D.C. Government**

### **SUPPORT STATEHOOD FOR THE DISTRICT OF COLUMBIA**

#### **Background/Analysis**

The United States of America is a nation that was founded on the belief that all people are endowed with certain inalienable rights and that to secure these rights, governments are instituted, deriving their just powers from the consent of the governed. The rights of the residents of the District of Columbia are abridged when Congress imposes its will on local matters and denies D.C. residents voting representation on federal issues in both houses of Congress. The residents of D.C. are Americans who bear all the responsibilities of citizenship, but who do not enjoy all the rights of citizenship.

States are the fundamental basis for our system of government and to deny a population the ability to form a state denies them the ability to fully participate in self-governance. The voters of the District spoke loud and clear on this issue when 86% approved a referendum in support of D.C. statehood on Nov. 8, 2016.

The District has a larger population, 693,000, than two states (Wyoming and Vermont). Over 192,000 District residents have served in the armed forces and sacrificed for our country. One in five residents of the District of Columbia – more than 140,000 in total – work for the federal government and yet do not have equal representation in the government for which they work.

Statehood will ensure that residents of the District of Columbia enjoy full rights in state and local matters and representation in both houses of Congress and is a matter of simple justice. Any solution short of statehood would simply continue the two-tiered system of citizenship the residents of the District of Columbia have endured for 200 years.

In 2020, for the first time, Congress passed legislation, H.R. 51, to make D.C. a state and preserve a constitutionally required Federal District that enshrines the area that houses the three branches of our federal government, our iconic monuments, and the National Mall. The House passed the bill again in April 2021. The Senate companion bill, S. 51, has over 45 cosponsors. AFGE strongly supports this bill.

#### **Congressional Requests**

- AFGE urges Congress to pass S. 51/H.R. 51, the “Washington, D.C. Admissions Act.”
- House Republicans seeking to increase federal control of the District have proposed introducing legislation to remove DC’s limited self-government. AFGE will oppose any plan that would restrict the District’s autonomy.

## **INCREASE LEAVE TIME AVAILABLE FOR DC WORKERS**

### **Background/Analysis**

No one should have to lose their income in order to care for themselves or the people they love. Having adequate time off to take care of a seriously ill family member, or for the birth or loss of a child is a critical part of a family's safety net. D.C. should be a model employer and pass legislation to ensure our public servants and their families have this important benefit.

### **Council of the District of Columbia Action**

- *The District Government Paid Leave Enhancement Amendment Act of 2022, B-24-616,* would enhance the District government's paid leave program for government employees by expanding the current paid leave program to welcome a new child or to care for a seriously ill family member from a maximum of 8 weeks to 12 weeks. The bill would also incorporate medical leave as part of the paid leave benefits program to allow workers to care for their own serious health condition, as well as provide an additional 2 weeks of prenatal leave. AFGE thanks the D.C. councilmembers who have sponsored and urges the council to pass this important bill.
- *The District Government Family Bereavement Leave Amendment Act of 2021, B24-53,* would expand the existing bereavement leave program for DC government employees by providing an additional 10 days of leave for workers who suffer the loss of a child or a stillbirth. AFGE thanks the D.C. councilmembers who have sponsored and urges the council to pass this important bill.

## **REPEAL THE ABOLISHMENT ACT**

### **Background/Analysis**

The first version of the Abolishment Act was passed in 1995 as a means of making it easier for the Control Board to quickly and easily cut the ranks of the District's workforce during the time of an unprecedented fiscal emergency. But D.C. is no longer in a fiscal emergency, in 2020 the district posted a \$552 million budget surplus. Prior to the Abolishment Act, the District's labor organizations routinely negotiated over and helped manage the procedures used in staff reductions. The Abolishment Act unfairly cuts unions out of the entire process and fosters distrust between workers and management.

### **Council of the District of Columbia Action**

- When downsizing is necessary, workers deserve to have a voice in the process. The D.C. Council should amend the D.C. code to effectively repeal the Abolishment Act.

# Expansion of the Law Enforcement Officer Statutory Definition

## Background

Federal personnel who are primarily involved in law enforcement currently exist within a two-tier system that provides enhanced pay and benefits to some agencies but not to others. Congress must amend title 5 of the United States Code to provide *all* federal law enforcement professionals with equal access to the enhanced pay and benefits currently only available to certain agencies such as the FBI, the Border Patrol, and the Drug Enforcement Administration. Under present law and regulations, the definition of a “law enforcement officer” (LEO) does not include positions such as officers of the Federal Protective Service (FPS) and police officers from the Department of Defense (DOD), Veterans Affairs (VA), and the U.S. Mint – even though their duties, responsibilities, training, and physical demands are generally similar to officers who are considered LEOs.

Despite the similarities, these law enforcement professionals have lower rates of pay and are not eligible for full retirement benefits until years after their LEO peers at other agencies. The law enforcement agencies with lower pay and benefits are greatly disadvantaged when recruiting and retaining professional officers and have far lower employee morale.

## Statutory Definition of a Law Enforcement Officer

As noted by the Congressional Research Service, Congress initially created an early retirement age and increased retirement benefits for FBI agents as a retention tool in 1947. Congress soon after established a generic definition for “law enforcement officers” (LEOs) to include other similar occupations. Other agencies and occupations have been added over the years either through administrative action or statutory change, such as U.S. Park Police officers, nuclear materials couriers, and air traffic controllers. But not all federal law enforcement personnel have been included.<sup>27</sup>

Because law enforcement positions require officers to be “young and physically vigorous,” and LEO positions have a mandatory retirement age of 57, the federal government makes special provision for unreduced retirement at a younger age than that applied to other federal employees. Under the Federal Employee Retirement System (FERS), an employee who qualifies for LEO retirement status is eligible to retire upon attaining the age of 50, after completing 20 years of eligible LEO service. To be eligible for LEO retirement coverage, positions must meet both the statutory definition under Title 5 U.S.C. Section 8401, as well as LEO requirements under FERS.

Under 5 U.S.C. Section 8401(17)(A), the term LEO means “an employee the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the U.S., or the protection of officials of the U.S. against threats to personal safety; and are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals.”

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<sup>27</sup> U.S. Congressional Research Service. [Retirement Benefits for Federal Law Enforcement Personnel \(congress.gov\)](#) (R42631, Sept. 5, 2017), by Katelin P. Isaacs.

To be eligible under FERS, the duties of the employee's position must be "primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." "Primary duties" means those duties of a position that:

1. Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position.
2. Occupy a substantial portion of the individual's working time over a typical work cycle; and
3. Are assigned on a regular and recurring basis.

The definition under FERS adds the further requirement that the duties of the position "are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals."

### **The Importance of LEO Status**

LEOs are entitled to many benefits that reflect the government's acknowledgement of their unique status. Under 5 U.S.C. Section 8336(c), a federal LEO with a minimum of 20 years of service at age 50, or 25 years of service, is eligible to retire with an unreduced federal annuity. In contrast, federal employees who are not LEOs may begin to collect their annuities only after reaching age 60 with 20 years in federal service. Law enforcement retirement rules mandate LEOs contribute more of their salary toward retirement than federal employees who are not LEOs. As a result of this contribution, LEOs are eligible to continue participation in the Federal Employees Health Benefits Program (FEHBP) and the Federal Employees Group Life Insurance (FEGLI) immediately after they retire.

In contrast, employees without LEO status are not eligible for continued FEHBP or FEGLI coverage after early retirement unless the retirement was a result of a downsizing, Reduction in Force (RIF), or offered in some other context under Voluntary Early Retirement Authority (VERA). Additionally, annuities for federal law enforcement officers and firefighters are calculated according to a substantially more generous contribution formula than that used for regular FERS employees.

Under FERS, LEOs also receive a "special retirement supplement" (SRS) if they retire when they are under age 62. This SRS provides an approximation of their Social Security benefit if they had retired at an age when they were eligible for Social Security retirement benefits. Legislation was recently signed into law that eliminated the early withdrawal penalty fee for LEOs who retire early after age 50. Congress passed this legislation in recognition of the fact that LEOs are often forced to retire before they become eligible to receive Social Security retirement benefits or can make withdrawals from their Thrift Savings Plan (TSP) without a financial penalty.

Early retirement without financial penalties, as well as the aforementioned benefits available to retired LEOs serve as recruitment and retention tools and reflect the government's interest in having "young and physically vigorous" individuals in law enforcement positions. All federal law enforcement personnel deserve equal treatment. The inequities in pay and benefits across law enforcement agencies lead to high turnover of trained law enforcement professionals, who often are recruited by other agencies that can offer them better status, pay, and benefits.

### **Expansion of LEO Statutory Definition**

AFGE strongly supports H.R. 962 / S. 1888, the "Law Enforcement Officer Equity Act." This legislation was introduced in the 117<sup>th</sup> Congress by Representatives Bill Pascrell Jr. (D-NJ), Gerry Connolly (D-VA), Brian Fitzpatrick (R-PA), and Andrew Garbarino (R-NY) in the House and Senators Cory Booker (D-NJ) and Rob Portman (R-OH) in the Senate.

The bill would expand the definition of the term "law enforcement officer" to include personnel from various agencies such as VA police and others who are authorized to carry firearms and are engaged in the investigation and apprehension of suspected criminals.

The primary duties of these law enforcement professionals include the protection of federal buildings, federal employees, officials, and the American public; as well as duties and responsibilities that are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the U.S., or the protection of officials against threats to personal safety. These professionals are trained to use and carry authorized firearms, yet they are only considered law enforcement officers in limited circumstances, such as when they are killed in the line of duty and their names are inscribed on the wall of the National Law Enforcement Officers Memorial.

FPS officers, and police officers from VA, DoD, and the U.S. Mint are honorable protectors of the public and they deserve recognition as law enforcement officers. The primary duties and responsibilities of these law enforcement professionals are not only rigorous but are essentially indistinguishable from other officers who are currently considered LEOs.

While H.R. 962 is under the Committee on Oversight and Reform's jurisdiction, the bill came up at a House Veterans' Affairs Subcommittee hearing titled "Modernizing the VA Police Force: Ensuring Accountability" for which AFGE submitted a Statement for the Record. During the hearing, Committee members (with AFGE's encouragement) asked about extending LEO retirement benefits to VA police, and the VA representative testified that such action would assist with recruitment and retention.

### **Congressional Requests**

AFGE strongly urges the 117th Congress to pass the Law Enforcement Officers Equity Act to amend 5 U.S.C. Section 8401 to include FPS officers, and police officers from the VA, DoD, and the U.S. Mint in the definition of a law enforcement officer. AFGE continues to gain cosponsors for these bills. The House bill has strong bipartisan support with 84 bipartisan cosponsors.

AFGE also strongly urges the 117<sup>th</sup> Congress to pass H.R. 521 / S. 129, the “First Responder Fair RETIRE Act.” This bill was introduced by Representative Gerry Connolly (D-VA) and Senator Jon Tester (D-MT). This bill would permit various law enforcement personnel who become disabled on the job – such as customs and border protection officers, firefighters, air traffic controllers, nuclear materials couriers, members of the Capitol Police, and others– to receive retirement benefits in the same manner as if they had not been disabled.



## **Census Bureau AFGE Council 241**

### **Census Bureau Funding**

AFGE represents over 1,500 members at the Census Bureau in Maryland, Kentucky, and Arizona. Our employees ensure accurate and comprehensive data collection and analysis which informs research and federal, state, and local funding initiatives. Census Bureau work ensures fair political representation from Congress down to local school boards—and the prudent distribution of federal aid to states and communities each year. Census Bureau data are central to sustaining democracy and facilitating informed decision-making. Census Bureau programs are irreplaceable sources of data for developing key economic indicators and socio-economic metrics that support government and private-sector decision-making.

AFGE is working with the Leadership Conference on Civil and Human Rights and with Members of Congress to secure adequate funding for the Census Bureau in future funding bills. AFGE supports adequate funding for the Periodic Censuses and Programs (PCP) account. AFGE was successful in maintaining consistent funding and avoiding the draconian cuts in President Trump's FY 2020 budget, which would have significantly depleted the Census Bureau's resources. AFGE is continuing to work with relevant committee members to ensure AFGE Census Bureau employees have the necessary resources to complete a fair and accurate census in 2030.

### **Congressional Requests**

AFGE will continue educating members of Congress and staff about the important work Census Bureau employees do for the American public to advance civil and human rights. AFGE will advocate for full funding and staffing for Census Bureau employees to perform the mission of the agency.

## Federal Firefighters

AFGE represents federal firefighters at DoD, VA, and other agencies across the country. Too many firefighters are suffering and dying from cancer and other chronic diseases in the United States every year. Firefighters are frequently exposed to smoke, asbestos, particulate matter, and various toxic chemicals, all of which can cause cancer. These civil servants and American heroes deserve the highest quality data and best public health solutions to help prevent, detect, and treat work-related illnesses.

Federal firefighters put their lives on the line every day to protect and serve the American people. Most federal firefighters are located at military facilities. These federal firefighters have specialized training to respond to emergencies involving aircraft, ships, and munitions. Federal firefighters at the Department of Veterans Affairs serve civilians and veterans including chronically ill and bedridden patients. Federal firefighters provide emergency medical services, crash rescue services, and hazardous material containment, as well as fighting fires.

The National Institute of Occupational Safety and Health (NIOSH) has conducted studies about the prevalence of cancer among firefighters; however, these studies have had two critical flaws: 1) the sample sizes were too small; and 2) they do not include many minority populations. This limited NIOSH's ability to draw productive statistical conclusions from their data. More comprehensive public health data must be collected to develop solutions to preventing the elevated rates of cancer in firefighters.

Despite these data limitations, NIOSH researchers recently completed a study of disease incidence and mortality among 30,000 urban firefighters, which confirmed an elevated risk of dying from mesothelioma, lymphoma, and other forms of cancer.<sup>28</sup>

The Centers for Disease Control and Prevention's (CDC) National Program of Cancer Registries (NPCR) provides support for states and territories to maintain registries that provide high-quality data. Data collection systems like cancer registries help to identify and categorize work-related illnesses. For instance, registries help bring attention to the fact that professional groups like firefighters are not getting access to much-needed cancer screening tests, and more efforts are needed to decrease the likelihood and severity of illnesses.

### Congressional Requests

- AFGE supports the bipartisan legislation H.R. 2499 / S. 1116, the "Federal Firefighters Fairness Act of 2021" introduced by Representative Salud Carbajal (D-CA) and Senator Tom Carper (D-DE). This bill creates a presumption under the Federal Employees' Compensation program that certain forms of cancer and other chronic diseases among firefighters are the result of workplace exposures, making the victims eligible for monetary and medical benefits. AFGE urges Congress to pass this legislation without further delay.

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<sup>28</sup> Pinkerton L, Bertke SJ, Yiin J, et al. *Occup. Environ. Med.* 2020;77:84–93.

- AFGE supports the bipartisan legislation H.R. 393, the “Federal Firefighter Pay Equity Act,” introduced by Representative Gerry Connolly (D-VA), to provide for the more accurate computation of retirement benefits for certain firefighters employed by the federal government. AFGE continues to encourage Congress to advance this legislation.

## **Issues Facing Federal Retirees**

### **COST-OF-LIVING ADJUSTMENT (COLA)**

In an unprecedented move, former President Trump's budget proposals would have eliminated the cost-of-living adjustment (COLA) for current and future Federal Employee Retirement System (FERS) retirees and cut the COLA for Civil Service Retirement System (CSRS) retirees by 0.5% per year. AFGE opposed these cuts that would have steadily eroded retirees' income. President Biden's Fiscal Year 2022 budget removed the proposed benefit cuts.

The 2022 COLA is 5.9 percent for those under CSRS and 4.9 percent for those under FERS. The FERS COLA is the same if the CPI is 2% or less; if the CPI is 2.01-3.0%, the COLA is 2%, and if the CPI increase is more than 3%, the FERS COLA is 1% less than the CSRS COLA. Rep. Gerry Connolly (D-Va.) has introduced H.R. 304, the Equal COLA Act, to bring the FERS COLA up to the same amount as the CSRS COLA. AFGE supports this legislation, which currently has 27 cosponsors.

Under current law, the COLAs for Social Security, CSRS and FERS are all calculated based on the Consumer Price Index for Urban Wage Workers (CPI-W). Rep. John Garamendi (D-CA) has introduced H.R. 4315, the Fair COLA for Seniors Act, which would base the COLA for federal retirees on the Consumer Price Index for the Elderly (CPI-E). The CPI-E better accounts for the spending habits for seniors, notably for medical care, reflecting the rising costs retirees face. This change would result in an increased COLA for retirees of around a quarter-percent per year. The Fair COLA for Seniors Act has 47 cosponsors.

#### **Legislative Action:**

1. Oppose any COLA cuts to federal retirement for active and retired employees.
2. Cosponsor and support H.R. 304, The Equal COLA Act, to increase the FERS COLA so that it is aligned with CSRS and Social Security.
3. Cosponsor and support H.R. 4315, the Fair COLA for Seniors Act, to change the way the COLA is calculated to better reflect rising costs for retirees.

### **GOVERNMENT PENSION OFFSET (GPO) & WINDFALL ELIMINATION PROVISION (WEP)**

AFGE supports the elimination of the Government Pension Offset (GPO) and the Windfall Elimination Provision (WEP), which unfairly reduce Social Security benefits for federal government retirees and their survivors. These provisions apply to federal CSRS retirees as well as many state, county, school district and municipal employees. For 74% of surviving spouses affected by the Government Pension Offset, Social Security benefits are reduced to zero.

These provisions have had the effect of disproportionately reducing the Social Security benefits Americans have earned. Many CSRS retirees have enough earnings from other work to qualify for Social Security, but unless this issue is addressed, they will receive little or no benefit.

### **Legislative Action:**

1. AFGE supports legislation to eliminate the GPO and WEP. In the 117<sup>th</sup> Congress, this legislation is H.R. 82 and S. 1302, the “Social Security Fairness Act of 2021,” authored by Rep. Rodney Davis (R-Ill.) and Sen. Sherrod Brown (D-Ohio). We are advocating for members to cosponsor H.R. 82 and S. 1302 and for leadership to advance these bills through committee and bring to the floor for a vote. Rep. Larson and Sen. Blumenthal’s bill, “Social Security 2100: A Sacred Trust,” would also eliminate the GPO and WEP.

### **INCREASING SOCIAL SECURITY BENEFITS AND SOLVENCY**

FERS retirees and some CSRS retirees are also beneficiaries of Social Security and could be affected by budget proposals and program improvement initiatives before Congress.

AFGE supports legislative efforts to address the long-term solvency of Social Security through progressive means such as eliminating or raising the cap on earnings subject to payroll tax. AFGE supports using part of this additional revenue to expand benefits, including:

- Enacting a Consumer Price Index-Elderly (CPI-E) to provide for a fairer COLA that reflects seniors’ expenditures;
- A 2% across-the-board benefit increase;
- Improving benefits for surviving spouses so that a household does not experience a devastating drop in income when one spouse dies;
- Increasing the Special Minimum Benefit for low-income earners; and
- Creating a caregiver credit for workers who have taken time out of the workforce to care for children or elderly family members.

AFGE strongly opposes legislation that would:

- Cut or eliminate Social Security’s annual cost-of-living adjustments, which would erode the value of Social Security benefits as people age into their most vulnerable years;
- Raise Social Security’s full retirement age of 67 years to 69 or 70, which would cut benefits across-the-board for all new retirees;
- Privatize Social Security, turning our guaranteed earned benefits over to Wall Street in the form of limited private accounts, subject to the whims of the stock market.

## **Legislative Action:**

- 1) Support legislation to expand Social Security benefits and extend solvency, including bills such as Rep. Larson and Sen. Richard Blumenthal's (D-Conn.) "Social Security 2100 Act: A Sacred Trust" (H.R. 5723/S. 3071). Call on leadership to bring legislation expanding Social Security to the floor for a vote.

## **THRIFT SAVINGS PLAN**

The G Fund is offered to federal employees and retirees through the Thrift Savings Plan (TSP) and invests in U.S. Treasury Bonds. Federal workers and retirees have more than \$210 billion invested in the G Fund, making it one of the most heavily invested funds within TSP. Because it is a stable fund that protects against loss, the G Fund is particularly important to retirees.

The previous president proposed to lower the interest rate paid on the G Fund. The proposal would have changed the return on U.S. Treasury Bonds held in the G Fund to shorter term bond yields paying about a full percentage point less than current yields. If enacted, this change would have cost federal workers approximately \$2 billion annually in lower TSP returns.

President Biden's budget proposal removed this provision, protecting the return federal workers receive from G Fund investments.

- 1) AFGE opposes proposals that would reduce the interest rate of the G fund and cut federal workers' retirement savings.

## **MEDICARE & MEDICAID**

AFGE has opposed efforts under the previous president to repeal the Affordable Care Act, raise the Medicare eligibility age from 65 to 67, and increase hospital co-payments and deductibles.

While around 45 percent of Medicare beneficiaries report difficulty hearing, Medicare currently does not cover hearing services. Hearing care is one of the most expensive services that Medicare does not currently cover. AFGE supports the provisions in the Build Back Better Act that would require Medicare Part B and Medicare Advantage plans to cover hearing services, such as hearing aids for those with severe hearing loss. AFGE also supports the expansion of dental and vision coverage under Medicare.

Medicaid provides health care for low-income children and families, but it is also the largest source of funding for long-term care and community-based support for the elderly and people with disabilities, providing about 62% of all such services. Right now, hundreds of thousands of older Americans are on waiting lists for home care services. The Build Back Better Act would help deliver affordable, high-quality care for older Americans by helping reduce these waiting lists. It would also improve healthcare for retirees by investing in the direct care workforce.

## **Legislative Action:**

1. Oppose budget cuts and eligibility age increases in Medicare.
2. Support efforts to enact hearing care and expand dental and vision coverage in Medicare.
3. Oppose cuts to Medicaid and the ACA through budget proposals and standalone legislation and support efforts to strengthen and broaden access to quality affordable health care.

## **Social Security Administration**

The General Committee represents the six AFGE councils at the Social Security Administration (SSA), including AFGE Council 224, AFGE Council (and Local) 1923, AFGE Council 109, AFGE Council 215, AFGE Council 220, and AFGE Council (and Local) 2809. The General Committee (GC) advocates for the large majority of bargaining unit employees who serve the American public.

### **BARGAIN A NEW CONTRACT**

The 2019 National Agreement (NA) was signed by the General Committee under duress and as a direct result of the former president's anti-employee executive orders. A year into the Biden administration, this agreement remains in effect with some small exceptions based on sidebar bargaining to temporarily increase official time until May 2022.

The NA severely cut official time to engage in representation matters, reduced union space, and hampered our ability to advocate on behalf of employees. The drastic reduction in telework at the Office of Analytics Review and Oversight, the Office of Hearings Operations, and Headquarters and the elimination of telework at field offices, teleservice centers, payment centers, and elsewhere was especially myopic and only served to undermine morale. The reduction made the agency far less prepared in the spring of 2020 when the pandemic made telework a necessity to protect our employees and continue the mission of serving the public. Since President Biden issued EO 14003, "Protecting the Federal Workforce," some official time has been restored temporarily, but the agency has insisted that little else in the NA is reflective of the previous president's EOs and has refused to reopen the contract.

The 2019 union-busting, anti-employee NA must be immediately discarded and replaced with the 2012 NA that was fair and balanced to protect our bargaining unit members. The GC has been insisting the agency must return to the bargaining table to work in good faith to create a contract that works for both the agency and employees. The continued existence of the 2019 NA is contrary to the Biden Administration's goals of restoring employee dignity, promoting collective bargaining, and making the federal government a model employer.

We are asking lawmakers to join us in contacting Acting Commissioner Kijakazi and urging her to move swiftly to restore the pre-2019 contract and bargain a new contract. Reopening our contract and negotiating in good faith with our representatives will benefit the Agency, the employees, and the public we serve.

### **NEW AGENCY LEADERSHIP**

In July 2021, then-Social Security Commissioner Andrew Saul was fired by President Biden after he refused to step down. At the same time, then Deputy Commissioner David Black had resigned at the President's request. Saul and Black had created an environment of anti-union, anti-employee hostility that undermined morale, harmed the productivity of countless SSA employees, and targeted union officials with discipline. They had forced the GC to accept the



2019 NA under threat of unilateral implementation of something even worse, referencing their authority under Trump's EOs.

In July 2021 President Biden announced his choice for Acting Commissioner, Kilolo Kjakazi, who has served as Deputy Commissioner for Retirement and Disability Policy at SSA since January 2021. She has a history as a Social Security policy expert but had little experience with workforce management. Unfortunately, this has led to continued enforcement of Trump policies and poor agency relations with its workforce. As noted above, the agency has not considered or properly engaged the union in plans to reopen offices, has not considered significant changes to telework and has refused to reopen the Trump union-busting contract forced on us in 2019.

AFGE calls upon President Biden to move swiftly to name a permanent Social Security Commissioner who is supportive of organized labor and understanding of the needs of the workforce.

### **ENSURE HEALTHY AND SAFE RETURN TO WORKSPACES FOR SSA EMPLOYEES AND THE PUBLIC WE SERVE – KEEP EXPANDED TELEWORK**

In bargaining the 2019 NA, SSA refused to bargain telework, citing its desire to give management total discretion in unilaterally determining telework policies. In October 2019, SSA announced it would end a longstanding and successful telework pilot in its Operations components (field offices, teleservice centers, payment centers, and data operations center), giving only four weeks' notice to the workforce. The agency did not provide a business rationale for ending telework. In January 2020, as COVID-19 was beginning to spread rapidly, SSA informed non-Operations components, including the Office of Hearings Operations, that telework would be reduced from up to three days per week to only one day per every two weeks. Employees using telework were informed that they needed to submit a new telework agreement within two weeks of the announcement.

By March 2020 most operations moved quickly to telework status because of the pandemic. At the outset, SSA employees were less well equipped to move to full telework. Had the agency not ended telework, more employees would have been able to move seamlessly to continuing to serve the needs of retirees, people with disabilities and their survivors. Some technologies could have been employed more rapidly to allow for verification of identification documents and a more efficient telephone appointment system. Despite these agency-driven shortcomings, SSA employees have stepped up over the past two years and have been able to provide most SSA services in a telework mode, protecting employees and the often-fragile members of the public they serve from exposure to the virus.

While field offices have been open to address dire need cases, to receive original documents, and to provide some recently expanded services, most employees have remained in telework. In January, we reached an agreement on post-COVID re-entry beginning March 30<sup>th</sup> that required separate partnership-like meetings and possible bargaining to address circumstances unique to various components. We quickly discovered the agency was simultaneously implementing an agency-wide re-entry program that it had instructed managers to put in place, effectively ignoring previous negotiations with the union. This new plan continues to impose a minimal

telework program on field offices. The new plan also all but ignores health and safety precautions to protect SSA's workers and the public we serve from COVID.

While Congress is deeply concerned that their constituents should have access to services, it is equally essential that re-entry be planned in cooperation with the workforce and its unions, and with consideration of the health and safety of employees and the people who come to Social Security offices. Most in-person work can be scheduled by appointment so that waiting rooms are not crowded, and in-office staffing levels can allow for distancing and cleaning protocols. AFGE has proposed novel ways of reforming operations in every component of the agency and wants to work cooperatively with SSA to modernize how we serve the public. SSA needs to engage AFGE with an open mind and a commitment to the future.

It is also important to continue expanded telework. Some employees have fragile health conditions, are taking care of family members who would be endangered by their exposure to the virus or have inconsistent access to school or childcare. Further, telework has long been recognized throughout the federal government as a means of promoting emergency preparedness, higher productivity, lower turnover, lower costs, and a cleaner environment. This is not a time to return to pre-COVID levels of telework. SSA can provide all the services Americans deserve and need while keeping the workforce safe and increasing retention, morale and productivity.

AFGE calls on Congress to join us in urging the agency to continue expanded telework as we return to workspaces for necessary in-person services. Further, we call on Congress to recognize the value of telework and promote its wide use as an essential component of delivering services to the American public.

### **Congressional Requests**

- Conduct oversight of the current SSA leadership to encourage the revocation of the anti-union 2019 collective bargaining agreement and the development of a new agreement
- Work with the Biden administration to confirm a new permanent Social Security Commissioner who is committed to a positive relationship with the agency workforce, including protecting health and safety, expanding telework, and modernizing agency processes in cooperation with the union

# **Environmental Protection Agency**

## **AFGE COUNCIL 238**

### **ENSURE ADHERENCE TO PRESIDENT BIDEN'S EXECUTIVE ORDERS FOR COLLECTIVE BARGAINING**

#### **Background**

On his first full day in office, President Biden issued an executive order revoking the illegal actions against federal workers committed by the Trump Administration. In the statement that accompanied EO 14003, President Biden proclaimed it is the “policy of the United States to protect, empower and rebuild the career Federal workforce.” And he further noted, “[i]t is also the policy of the United States to encourage union organizing and collective bargaining.”

It took EPA four months to comply with President Biden’s order and agree to mediation with AFGE Council 238, on behalf of 7,500 EPA employees. In April 2021, EPA agreed to a framework to undo the oppressive and illegal acts taken against AFGE EPA employees by the Trump Administration. In June 2021, EPA agreed on an interim contract, largely based on AFGE’s 2007 Contract, a placeholder until a new agreement can be negotiated. Even now, EPA is dragging its feet in restoring full union rights – specifically the use of official time and office space for union activities.

In the second half of 2021, AFGE came to the negotiating table to start discussions with the agency about “the Future of Work” at EPA. AFGE took the president’s words as a call to create a stronger federal workforce through collective bargaining. AFGE’s bargaining has resulted in significant improvements in EPA working conditions with negotiated agreements for telework, remote work and work schedules. However, EPA management continues to maintain the anti-employee goal to create bargaining agreements that prevent employees from taking “advantage” of flexibility. This framework gives disproportionate credence to rare incidents of employee misconduct, which the agency has tools to address separately. The agency insists on guarding against the false specter of waste, fraud, and abuse instead of honoring the faithful service that EPA workers have delivered to the agency before, during and after the pandemic. The agency seems stuck on offensive stereotypes about the ability of workers to be accountable and ignores the value of collective bargaining in achieving greater fulfillment of the agency’s mission. Without question, the EPA workforce has shown throughout this pandemic our commitment to EPA’s mission. We deserve the respect that has been earned from that service.

#### **Congressional Requests**

- Conduct oversight of EPA to ensure the agency’s management works collaboratively with the union and bargains in good faith on the remaining articles of a new contract in keeping with EOs 14003 and 14025.

## **ENSURE SAFE COVID-19 OFFICE RE-ENTRY FOR EPA EMPLOYEES AFTER PANDEMIC**

### **Background**

EPA proposes adopting generic COVID-19 safety measures developed by the Safer Federal Workforce Task Force and applying them rigidly across the board without due consideration to the variations between individuals and workplaces in the 123 EPA office locations throughout the United States. Moreover, EPA policies developed for office operations during the pandemic are subject to review by the Office of Management and Budget, rendering fair and open negotiations on EPA's safety measures impossible.

AFGE Council 238 finds it unfair that, as currently drafted, workers will be primarily responsible for enforcing and implementing EPA's policies for COVID-19 workplace safety and may have their work performance evaluated unfavorably when taking steps to protect their health and their loved ones.

### **Congressional Requests**

- Conduct oversight to ensure EPA develops a mission-based COVID-19 office reentry plan. The plan should provide that those in positions requiring a physical presence in offices, labs, and the field are able to report to work safely, while those in full telework-ready positions be given the resources and support to continue to perform remotely and effectively.
- Ask EPA to encourage telework to the maximum extent possible to protect the safety of both employees and our communities.
- Ask that representatives of the Office of Management and Budget who exercise veto power over negotiated agreements be present at the bargaining table.
- Include maximum telework flexibilities in future legislation to ensure employees who can perform their jobs outside of their duty stations can remain healthy and safe and ensure the safety of our communities.

## **2022 STAFFING AND SUFFICIENT FUNDING FOR 20,000 FTEs**

### **Background**

More people than ever before are required to protect human health and the environment and save the planet from the climate emergency. As EPA employees, we know that EPA has the potential to use our knowledge and tools to turn the tide on climate change. As the workers tasked with protecting human health and the environment, we have dedicated our careers to tackling these

challenges, including understanding how climate change impacts our lives and our planet. Our agency's work is at the forefront of addressing urgent climate threats and finding solutions to significantly reduce carbon emissions. But to tackle the massive threat of climate change, we need to invest in those working at EPA to find the solutions.

Moving forward, a fully staffed workforce reflective of the communities we serve is essential to protecting human health, enforcing environmental laws, and tackling climate change. To fully engage in the fight of our lives, we need to staff up the agency leading that fight. Congress needs to provide EPA with the full resources necessary to meet what is needed. And by resources, we mean people. And by reflective of the communities we serve, we mean hiring and promoting people of color.

The sad reality is that our agency has been decimated by budget cuts and staffing losses; EPA staffing is now down to its lowest level since 1988, even though in that time, our nation's population has gained more than 80 million people. Our mission has grown, and climate challenges continue to escalate. Right now, EPA like the rest of the federal government is under a continuing resolution (CR), which continues funding levels set during the prior administration. A CR effectively sabotages EPA by providing less than half, in real dollars, the agency's 1980 funding, and a workforce at its smallest level since 1987. It starves the agency of new resources to begin to rebuild, and to address the existential threat of climate change and the toxic legacy of environmental injustice. The CR limits EPA's funding to address forever chemicals to last year's level of \$65 million, including only \$6.5 million to implement the EPA's [PFAS action plan](#) announced in 2021 by Administrator Regan. The roadmap describes the pervasive scientific, regulatory, remedial and logistical challenges of characterizing, understanding and addressing PFAS. Using such limited funding to implement a meaningful PFAS program would be a travesty. EPA needs a funding appropriation robust enough to advance the priorities set forth in the 2022 EPA budget request, and to implement the bipartisan congressional priorities funded under the Bipartisan Infrastructure Law.

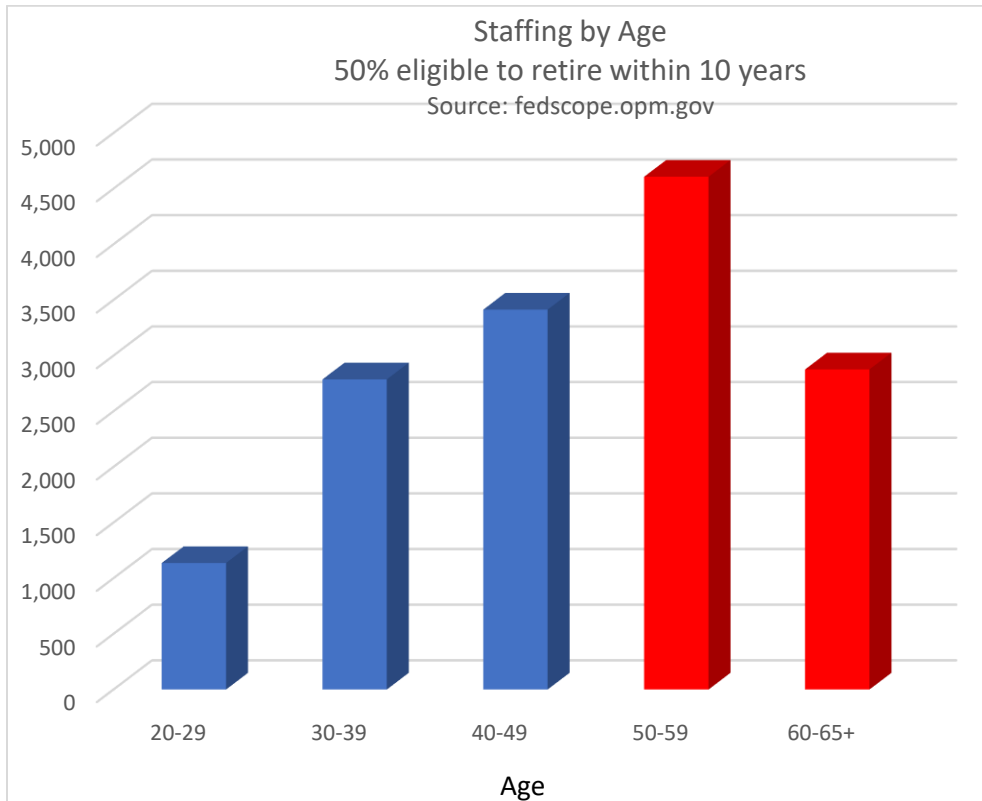
EPA's downsizing accelerated during Republican Congressional control and especially the Trump years, greatly reducing our ability to do what we must do in this critical moment to stem the tide of climate change. If we are serious about meeting the president's goals to combat the climate-related threats facing our country and our planet and lessen extreme weather events that we all witness on a regular basis, EPA must have the resources to meet those goals. Incremental increases are not enough.

We need to wholly reimagine the makeup of the EPA if we are committed to taking action on the climate emergency. Right now, EPA has just over 14,000 full-time employees. President Biden has proposed a budget plan that would increase Agency funding by \$2 billion and raise its headcount to more than 15,000. That's a good start. But it would only staff up the agency to pre-Trump levels. It would not cover the staffing and resources needed to meet the climate crisis. For that, EPA needs to expand to 20,000 workers.

AFGE Council 238 is concerned that EPA and other agencies continue to limp along under short-term funding agreements. Employees at the agency endured the longest shutdown in the history of the nation just three years ago. We ask that Congress take special care to ensure that

there is no lapse in funding for EPA because of our role in protecting human health and environment.

Finally, the staffing shortage will be exacerbated by the very high percentage of EPA employees who are eligible to retire in the next 5 years (see graph, below).



### **Congressional Requests**

- Provide the EPA with at least \$12 billion in funding, with enough funds in the Environmental Programs and Management (EPM) account to sustain 20,000 full-time equivalents, essential for the agency's work, emphasizing recruitment to reflect diverse communities as well as fair and equitable promotions
- Urge Chairwoman Chellie Pingree (D-ME) of the House Interior, Environment and Related Agencies Appropriations Subcommittee and Chairman Jeff Merkley (D-OR) of the Senate Interior and Environment Appropriations Subcommittee to increase EPA appropriations and promote staffing at EPA to protect human health and the environment.
- Urge EPA to hire junior rank employees to begin an effective transfer of institutional knowledge from long-term EPA workers nearing retirement to a new generation.

- End austerity measures at EPA, affecting staffing levels, compensation and workplace support, including equipment and training.

## **PROMOTE AND PRESERVE EPA’S CURRENT WORKFORCE**

### **Background**

To hire the top professional talent to best serve the public, EPA needs competitive salaries and opportunities for career growth comparable to the private sector. In 2020, a starting GS-7 scientist or engineer who joins the agency and starts working in Washington would make \$48,670 per year; 20% lower than the lowest entry-level salary for an environmental engineer with a private firm in the D.C. area, which is \$57,000. This disparity increases as career employees rise in the ranks, and locality pay adjustments fail to offset the high cost of living in areas where EPA personnel are concentrated, such as Boston, New York, D.C., Chicago, Denver, San Francisco, and Seattle. In short, EPA salaries are not competitive with private industry. Raising federal pay scales through the FAIR Act and other measures will help attract candidates and retain the best talent to take on science-based climate change work as well as rebuild work on existing environmental laws and regulations.

### **Congressional Requests**

- Please cosponsor the FAIR Act (H.R. 6398 / S. 3518), which provides a 5.1% pay adjustment as a partial offset of general inflation, higher healthcare premiums, and a decade of pay freezes and subpar raises. The purchasing power of federal employee pay is 9.5% lower than in 2011.
- Urge EPA to create more career ladder GS-13, GS-14, and GS-15 positions to encourage the development and retention of existing staff.
- Urge EPA to use existing authorities under title 5 to raise individual salaries by up to 25% in cases where pay is lagging the private sector.

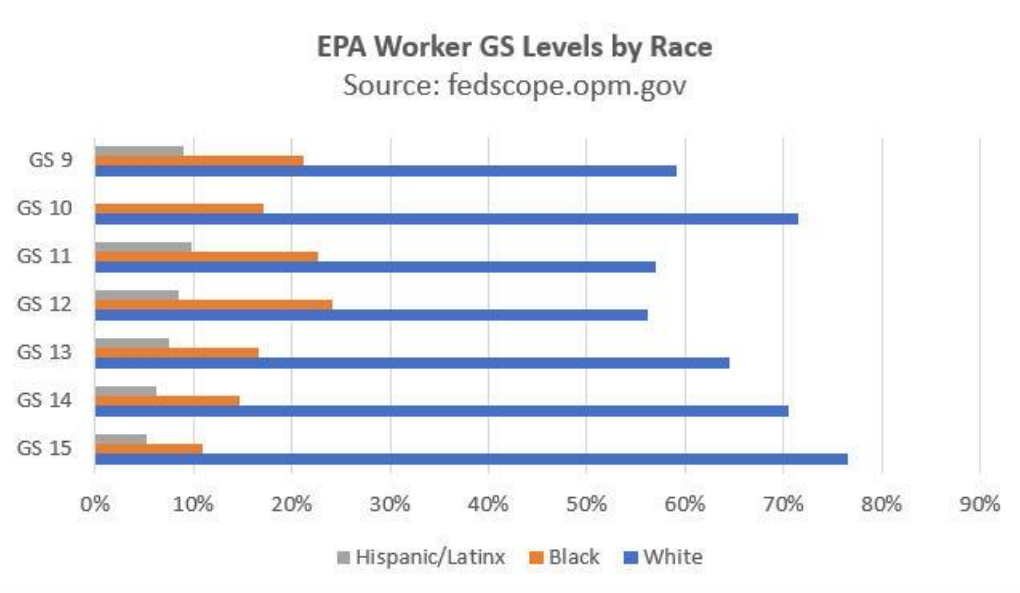
## **DIVERSIFY EPA’S PROMOTIONS AND WORKFORCE**

### **Background**

The union supports and embraces diversity, equity and inclusion at EPA. It’s a part of who we are as EPA as well as how we do our work. EPA needs more engineers and scientists of color. Right now, EPA is hiring people of color at a lower percentage than they are in the pool of applicants. This must change.

Also, EPA should provide more promotion opportunities to Black and Hispanic/Latino workers. Currently Black and Latino workers are underrepresented in higher graded positions, GS-13 and

above, and rarely can progress to the highest positions. White workers hold 71% of Grade GS-14 positions and 76% of GS-15 positions.



EPA	GS 15	GS 14	GS 13	GS 12	GS 11	GS 10	GS 9
White	76%	71%	64%	56%	57%	71%	59%
Black	11%	15%	17%	24%	23%	17%	21%
Hispanic/ Latinx	5%	6%	8%	9%	10%	0%	9%

### Congressional Requests

- Recognizing the Biden-Harris Administration’s support for Historically Black Colleges and Universities, Tribal Colleges and Universities, and minority-serving institutions, Congress should encourage EPA to conduct more outreach and recruitment from these schools and institutions.
- Increase training, development, and career ladder opportunities so that diverse candidates can reach higher grade levels in the agency

### RELOCATION OF EPA LABS AND OFFICES

#### Background

The relocation of EPA labs and offices away from important industrial and population centers must be stopped. If plans proceed, EPA personnel will be unable to conduct routine monitoring activities and as well as respond rapidly to catastrophic events. As an example, the plan to relocate the Region 6 Houston Lab to Ada, Oklahoma, removes an EPA analytic capacity from a main center of the petrochemical industry. This industrial hub a large affected population, including neighborhoods suffering from environmental injustice. The presence of the lab



preserves EPA's the ability to conduct sampling and process samples quickly to address the significant needs of the broader Gulf of Mexico region. AFGE has sent a letter to the EPA administration and launched a petition drive opposing the lab relocation (click [here](#) to view petition).

Office and lab moves are a significant driver in early retirements and resignations by knowledgeable and experienced staff who cannot be easily replaced. In addition to the offices and labs already moved, EPA offices in Michigan, Nevada, and California are all at some stage of relocation or as in the case of the Michigan facility, eliminated. Proposed moves to remote areas also expose real infrastructure and logistics issues, from reduced availability of needed chemical supplies to increased holding time for samples.

Importantly, the proposed move sites are not straightforward to implement. Facilities have required at least some renovation, often at significant cost, to bring the proposed new locations up to modern standards for laboratory functioning and safety. In Michigan, remaining emergency response staff were hurriedly moved to an EPA warehouse with no fresh air ventilation only a few months before COVID struck. A recent IG report found that the lab consolidations lacked planning and, as a result, had cost overruns that overshadowed the potential cost savings of any consolidation. The move of the Richmond, CA, lab to Corvallis, OR has been a recent real-world example of all these issues ranging from loss of experienced employees to challenges in the buildup of new lab space to match the standards for the closed one.

### **Congressional Requests**

- Require the EPA to abandon the plans to move its Houston lab or Ada, OK.
- Include appropriations language to prohibit funds from being used to close, relocate or consolidate existing EPA facilities, stations, and offices.
- Work with Representative Debbie Dingell (D-MI) and Senator Tammy Duckworth (D-IL) to reintroduce the Recognizing the Environmental Gains In Overcoming Negligence (REGION) Act (HR 4149). This bill prohibits funds made available for any fiscal year from being used to close, consolidate, or eliminate any office of the Environmental Protection Agency, including a regional or program office.

## **THRIFT SAVINGS PLAN DECARBONIZATION EFFORT**

### **Background**

EPA employees want to invest retirement savings in funds that provide a long-term sound financial investment *and* do not contribute to climate change or deforestation.

We applaud the Biden Administration's Executive Order that requires the Federal Retirement Thrift Investment Board to evaluate the risk of continued investment in fossil fuel securities.

We have committed to protect and defend the people of this nation's health and their environment. Yet, our Thrift Savings Plan retirement savings are invested in companies that are

driving the climate crisis. Recent federal government reports, such as those from the U.S. Federal Reserve, the U.S. Department of Defense, and the thirteen agencies in the Global Change Research Program, outline the risks posed by climate change to our nation's economy, national security, public health, and environment.

We want to have our investments reflect our values and the missions we proudly serve. As the economy has shifted to clean energy sources, the TSP has not kept up. The TSP Board has not met its fiduciary duty to provide investments in our best financial interests. While many other funds have sold low-return coal, oil, and gas investments, the TSP continued holding its position in the fossil fuel industry. Fossil fuel stocks have been in long-term decline and have underperformed the market for almost a decade. For example, the S&P 500 Fossil Fuel Free Total Return index has outperformed the S&P 500 Total Return index, namely the TSP C Fund, since 2012. Coal, oil, and gas companies are poor investments and present a palpable financial risk to TSP members' earnings. The United States has now rejoined the Paris agreement. As the nation accelerates the transition to a low-carbon economy, EPA workers want our retirement portfolios to benefit from clean energy investments and avoid the potential high risk and low returns of fossil fuels.

### **Congressional Requests**

- Require that the Thrift Savings Plan fund divests from low-return companies whose primary business is oil, natural gas, and coal exploration and production.
- Appoint members to the Federal Retirement Thrift Investment Board who understand that climate risk is a systemic risk to financial markets and will require the asset managers for the Thrift Savings Plan to support shareholder resolutions on climate change mitigation and deforestation.

## **National Energy Technology Laboratories (NETL)**

### **NETL FACILITIES ARE UNDER THE THREAT OF CONSOLIDATION**

AFGE represents engineers and scientists at National Energy Technology Laboratories across the country. NETL partners with universities and private institutions at hundreds of sites across the country. NETL has three main campuses in Pittsburgh, PA., Morgantown, WV, and Albany, OR which are under continued threat of consolidation and closure.

#### **Congressional Requests**

AFGE is working to maintain funding for NETL in the Energy and Water Subcommittee Appropriations Bill as well as the inclusion of report language that prohibits consolidation of NETL laboratories.

On AFGE supported the Fossil Energy Research and Development Act and worked with Committee staff to draft compromise language to fund innovative research, technology development, workforce development projects, manufacturing partnerships and most importantly revitalization, recapitalization, and construction of Laboratory infrastructure. We are working with our AFGE NETL members and key Members of Congress to address significant downsizing occurring at NETL due to outsourcing of positions as well as federal employees' retiring or leaving the workforce without being replaced.

### **ADVANCEMENT OPPORTUNITIES FOR NETL RESEARCHERS**

NETL scientists and researchers have stalled in their careers because of problems with the implementation of OPM's Research Grade Evaluation Guide or RGEG. This OPM guidance provided a system of grading criteria for non-supervisory research work, looking at such factors as the scope of research, extent of supervisory controls, originality, and impact. However, the evaluation process has broken down, with the result that promotions at NETL are stalled and employees leave, sometimes to be replaced with private contractors.

#### **Congressional Requests**

AFGE will work with Congress to urge NETL to develop an effective plan for recruiting, retaining, and promoting research staff. AFGE will educate Congress on the stalled OPM process for evaluating research positions and urge Congress to fully fund NETL with resources available to create promotional opportunities within the agency for full time NETL employees.

## **Federal Emergency Management Agency (FEMA)**

### **HIRE MORE FULL TIME TITLE 5 EMPLOYEES**

FEMA employees work long hours responding to national disasters and sometimes exceed the number of hours for which they are eligible to be paid. We urge the incoming FEMA Administrator to work with the Biden administration to institute a pay cap waiver to allow FEMA employees to be compensated for their work in these cases.

AFGE Local 4060 has a positive working relationship with the agency. FEMA only has 5,000 full-time permanent employees out of more than 20,000 total employees. Most FEMA personnel are temporary employees – brought in to assist with disasters for fixed terms – who receive substandard rights even though they often end up serving for many years at the agency. We strongly urge the FEMA administrator to prioritize hiring more full-time title 5 federal employees with collective bargaining rights. Hiring more title 5 employees would allow FEMA to avoid using temporary employees to perform work that should properly be directed to permanent staff. This action will improve recruitment and retention for all FEMA personnel. FEMA has had to rebuild its workforce during floods, fires, and the COVID-19 pandemic because many employees do not want to remain at an agency where working conditions are grueling, and they lack adequate workplace rights. AFGE Local 4060 also urges the FEMA administrator to work with Congress to increase hiring of full-time title 5 staff, consistent with the current workforce needs of the agency.

On January 20, 2022, the House Homeland Security Committee held a hearing on FEMA workforce issues and has scheduled a similar hearing in March. AFGE has urged the Committee to address the need for more permanent hiring at FEMA at both hearings.

### **Contracting Out of FEMA Positions**

FEMA has also been contracting out permanent full-time title 5 positions, such as flood plain management and Federal Insurance & Mitigation Administration (FIMA) positions, without proper labor-management negotiations.

### **Congressional Requests**

AFGE will work with the House and Senate Homeland Security Committees to conduct oversight of FEMA and urge the agency to hire more permanent title 5 employees. AFGE will also work with the House and Senate Homeland Security Appropriations Subcommittees to draft appropriations language to increase permanent staffing levels so that FEMA can successfully protect the American public from national disasters.

AFGE will urge Congress to amend language that allows FEMA Cadre of On-Call Response/Recovery (CORE) employees to be hired permanently without following standard hiring practices. AFGE will advocate providing pay cap waivers for FEMA employees so that FEMA employees can be fully compensated for hours worked in disaster zones.

# **Bureau of Labor Statistics**

## **Background**

AFGE represents employees at the Bureau of Labor Statistics (BLS), which provides objective data essential to the US economy, including generating the Consumer Price Index (CPI), productivity and unemployment data, and related analyses.

The Bureau of Labor Statistics (BLS) national office headquarters has been located at the Postal Square Building (PSB) in Washington, DC, since 1992. The GSA building lease will expire in May 2022. The Office of Management and Budget (OMB) has announced that BLS headquarters will be relocated from Washington to the Suitland Federal Center (SFC) to be co-located with the Bureau of Economic Analysis (BEA) and the Census Bureau.

AFGE continues to work with Representative Anthony Brown (D-MD) to urge BLS to work in collaboration with the union during the relocation.

On Oct. 8, 2020, AFGE Local 12 and AFGE Census Council 241 sent a letter to the Commissioner of the GSA Public Buildings Service commissioner and the GSA administrator expressing various concerns related to the move and urging health and safety be prioritized during the relocation. AFGE Local 12 has worked with Congress and reached out to the Biden administration to express concerns over the impact of relocating BLS from Washington to the Suitland Federal Center (SFC) in Suitland, Md.

Local 12's main concerns are:

## **Health and Safety of Employees**

Because of the current pandemic and any future similar public health crises, it is our contention that the proposed open floor plan will unnecessarily put bargaining unit employee health and safety at risk, contrary to evolving guidance. Employees should not be exposed to preventable hazards at work.

## **Space Equity**

The rentable square feet (RSF) per employee must be consistent among BLS and other similar agencies. The overall space needs to be consistent with the RSF per employee at the other federal statistical agencies' headquarters buildings. Employees need the agency to demonstrate that this is a fair process and GSA is not favoring one agency over another. Space equality is a basic principle that should be followed during this process.

## **Parking**

The Suitland Facility lacks adequate space for all employees to park. The renovated space must have adequate parking for all employees who chose to park in the garage near the building because of the health risks associated with use of public transportation.

## **Telework**

Local 12 requests GSA to accommodate all employee needs for maximum telework flexibilities, especially during the COVID-19 pandemic. Telework policies and capabilities must be consistent among BEA, BLS and Census. Bargaining unit employees need to be informed of the extent to which telework may be mandated due to space limitations. Employees must have access to the maximum telework flexibilities.

## **IT Modernization**

BLS and Census need upgrades to the IT infrastructure to accommodate current occupants of the Suitland Federal facility as well as provide for an additional 1,800 BLS employees. Upgraded IT infrastructure will allow the Census Bureau to support a mobile workforce, which will be necessary based on the planned occupancy levels after BLS moves.

## **Congressional Requests**

AFGE will continue to work with Congress to ensure employee health, safety and equity is prioritized during the relocation of 1,800 BLS employees from Washington to Suitland, Md.