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DEBT LIMIT

The United States government reached its legal debt limit on January 19, 2023. On that date, the Treasury Department announced that it had begun suspending new investments in the Civil Service Retirement and Disability Fund and the Postal Service Retiree Health Benefits Fund until June 5, 2023, as a means of continuing to meet all obligations until Congress acts to increase the debt limit. This suspension will have no impact on federal employees or federal annuitants. This suspension of new investments is an accounting device that has been used previously. As before, the Funds will be made whole once the debt ceiling is raised. Congressional Republicans have announced that they will not support an increase in the debt ceiling without concomitant reductions in spending, possibly in the form of reductions to federal employee compensation, as well as Social Security, Medicare, and Medicaid. The White House says it will not negotiate such an arrangement. The question is what will happen in June when the suspension of new investments in these retirement trust funds is no longer a means of averting the consequences of breaching the debt ceiling.

What is the debt ceiling?

The debt ceiling is the total amount of debt that the government can take on by issuing Treasury securities. The actual dollar amount of the limit is set by law. The current Treasury debt ceiling is \$31.8 trillion.

The reason that there is a debt ceiling “crisis” is that Congress has approved spending over many years that exceeds revenue and must use debt to finance the difference. Every time Congress agrees upon a budget resolution, an appropriation act or an authorization act that will cost more to implement than anticipated tax revenue, Congress is agreeing that the U.S. will incur debt. Congress is always fully aware of the need for issuing new debt whenever they approve new spending or the continuation of any category of previous spending. They know they are approving spending that exceeds revenue. But because of the way the U.S. budget operates, it is only *after* approving spending bills which require debt financing that Congress has approved new debt ceilings.

The debt ceiling itself does not authorize any spending, either new or old. It merely authorizes the Treasury to issue bonds to finance spending that Congress has already approved. There is nothing about the ceiling that is connected in any way to any particular law, program, or budget category.

The history of the debt ceiling relates to bond issuances beginning around World War I. For many decades, raising the debt ceiling was a routine function of Congress after it had approved spending bills. In fact, under a rule adopted in the House of Representatives over 30 years ago, increases in the debt ceiling occurred automatically when budgets and appropriations required the issuance of new bonds.

Today, the debt ceiling has become highly politicized. It's being used as a way to create a "crisis" that holds the world economy hostage unless and until certain demands are met. The worst-case scenario is that the United States would become unable to pay employees, contractors, social insurance claims, and bondholders what they're owed in a timely fashion. This is what is meant when people speak of default.

There is no legal way for the government to decide which bills to pay and which ones to leave for future payment. The law provides no "prioritization" option, as some have suggested. Such a default has never occurred in the history of the United States. The consequences of a Treasury default or delay in payments are potentially catastrophic. They would call into question the "full faith and credit" of the U.S., undermine the U.S. dollar as the world's reserve currency, and on a practical level, could lead to economic calamity across the globe.

Consequences of not raising the debt ceiling.

The members of Congress who have threatened to oppose an increase in the debt ceiling say that their aim is to win cuts in government spending for certain programs.

However, failure to raise the debt ceiling would not cut any spending on any program for which appropriations have already been approved. It would simply lead to chaos in the timing of payments as federal revenues are insufficient to meet already approved spending. Under budgets approved by Congress, the Treasury is anticipated to need approximately \$1 trillion in additional debt financing this fiscal year. This is about 20% of all approved spending, meaning that if payment patterns remain consistent, the Treasury would be at least 10 – 12 weeks behind in making valid payments by the end of 2023. Of course, if such a crisis emerged, the situation would quickly deteriorate, as economic uncertainty gripped worldwide markets.

The Treasury properly regards all authorized spending to be on an equal footing, and thus it cannot pay bondholders instead of federal contractors, for example. Even if some authority could be devised for this scheme, it would require cutting at least a trillion dollars from approved agency budgets, which is simply impossible without causing massive disruptions in the national economy and the operation of government.

Will the Debt Ceiling Standoff lead to a Government Shutdown?

Although creating a crisis by withholding a vote on routine budget matters is a tactic that Congressional Republicans have used in the past, this situation is different. In past government shutdowns, appropriations bills have been held hostage. The government had to shut down because it wasn't authorized to spend the money to operate. This year, there are enacted appropriations. The government is not only authorized to spend appropriations, it is actually obligated to spend appropriations. The problem is that because the required expenditures exceed revenues by about \$1 trillion, the government won't be able to pay its bills.

Although the Treasury might resort to a partial government shutdown as one response to a debt ceiling standoff, in doing so it would be entering new territory as current law does not even contemplate the idea of a government default.

Does the U.S. Treasury have too much Debt?

There is a difference between an economic crisis that is caused by a government that incurs too much debt and the debt ceiling “crisis” being manufactured by House Republicans in 2023. The amount of debt that the U.S. government has on the books right now is large, especially given that there was a surplus as recently as 2001. The biggest drivers of the debt in the past two decades were tax cuts for the wealthy pushed through Congress by George W. Bush and Donald Trump, the war in Iraq, the stimulus package passed in response to the 2007-2009 Great Recession, and the enormous costs associated with the Covid-19 pandemic, including President Biden’s American Rescue Plan.

Aside from the tax cuts for wealthy individuals and corporations, and a war based on false information, the expenditures that have driven up the debt were all necessary to address social needs and restore the health of the economy. The size of the debt is large but so is the size of the U.S. economy. The debt and debt service are eminently affordable.

The kinds of spending cuts that House Republicans are demanding as the price of their support for a debt limit increase have no relation to the size of the U.S. debt. Social insurance costs and federal employee pay and benefits are not the cause of the debt. Furthermore, even the discussion that the U.S. may default on its obligations (let alone an actual default) is likely to increase interest rates and borrowing costs, exacerbating the deficit, harming taxpayers and consumers, and threatening our economy which remains in danger of a recession following the pandemic.

Congressional Actions

Congress should raise the debt limit to avoid default and ensure the continuation of funding for the government and critical programs like Social Security, Medicare, veterans benefits and the U.S. military. Whether by means of a discharge petition to force a vote on raising the debt ceiling, the issuance and deposit of a \$1 trillion coin, or issuing high-interest premium bonds, the most important thing is to avoid a default that would harm families, crush the value of retirement savings, damage American credibility around the world, and permanently raise borrowing costs for both the government and consumers.

There need not be any cuts to Social Security, Medicare, Medicaid or federal employee pay or benefits, or federal retiree annuities. Congress should handle fiscal issues such as controlling the federal deficit through normal legislative processes, and the White House should not give in to any efforts to use the debt ceiling as a means of extracting budgetary concessions.

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 in both pay systems 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 imposing 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 2023, the nationwide ECI-based adjustment should have been 5.1% (full ECI of 5.6% minus 0.5 percentage points), which the Biden administration provided through an "alternative pay plan" authorized under the law for extraordinary situations. However, the administration allowed just 0.5% of payroll to be distributed as locality pay, resulting in a 4.1% ECI-based

across the board adjustment plus an average of just 0.5% distributed variously as locality pay increases for 2023.

FEPCA set a schedule for gradual closure of gaps until 2002 when full comparability payments would be made, with full comparability defined as five percent below market rates. 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 and again in 2023 were welcome even though they were completely inadequate.

For 2024, AFGE urges the Congress to provide at least an 8.7% federal salary adjustment, as described in the bills introduced by Rep. Gerry Connolly (D-Va.) and Sen. Brian Schatz (D-Hawaii), the Federal Adjustment of Income Rates or FAIR Act (H.R. 536 / S. 124). The formula used to arrive at 8.7% for 2024 follows FEPCA's calculation of the relevant ECI (September 2020 to September 2022) plus an additional 4.0% to be distributed among the localities. The ECI adjustment is 5.2% minus half a percent, or 4.7%. The locality adjustment is 4%, meant to begin to close the locality pay gap that currently averages in excess of 23% nationwide.

The proposed 8.7% adjustment for 2024 echoes the cost-of-living adjustment provided this year to Social Security recipients. While still modest relative to the size of the pay gap between federal and non-federal wages and salaries, and low compared to the lost purchasing power federal employees have suffered over the past decade, this increase would demonstrate respect for the hard work and dedication of federal employees and start to make up for losses imposed during previous budget battles.

Perhaps most important, it would do more for recruitment and retention of the next generation of federal employees than any of the changes to hiring practices being contemplated by those eager to weaken civil service protections. Direct hiring and excepted service hiring, both of which undermine the competitive service and the apolitical civil service, would be entirely unnecessary if federal wages and salaries were closer to market rates. Enacting H.R. 536 and S. 124 does right by the civil service and protects its integrity for future generations.

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. On the upside, it assures that no hourly worker's pay adjustment is less than the adjustment received by GS workers in that locality. The establishment of this floor on annual increases for FWS workers was a tremendous AFGE accomplishment. But the imposition of a ceiling in the annual Financial Services General Government Appropriations bill, which has been in effect for decades longer than the floor, actually reduces the size of the annual pay adjustment that some WG workers would receive if that ceiling were not in place. As such, AFGE supports retaining the floor but lifting the ceiling on annual pay adjustments for FWS workers.

The issue of equalization of local pay area boundaries is separate and apart from the issue of pay adjustment caps. 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 malicious 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 be reduced 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 wages and 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 employer¹ 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 study² 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

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

² 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>)

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 an 8.7% federal pay increase for 2024, as described in H.R. 536 and S. 124. The adjustments set forth in these bills aim to bring federal pay in line with private sector pay. In the 33 years since the passage of FEPCA, the nationwide average pay gap has barely budged. This is the year to make substantial progress on closing the pay gap for purposes of market comparability, retention, recruitment, and to help restore the living standards of federal employees.
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. Codify the directive report language from 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. Eliminate the cap on pay adjustments for Federal Wage System employees found in Section 737 of the Financial Services and General Government Appropriations bill so that the prevailing wage system can operate as intended.

FEDERAL RETIREMENT

Introduction

Since 2011, federal workers have involuntarily contributed more \$246 billion to deficit reduction. One source of this unwanted contribution is 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 more than what federal employees hired before those dates pay into the Federal Employee Retirement System (FERS). 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. During the Trump administration, Congress enacted massive tax cuts that primarily benefited corporations and the wealthy, but Congress has never revisited the permanent tax placed on federal salaries in 2011.

These 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 for decades into the future.

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.

Reducing federal workers' retirement security should not be used to facilitate budget deals. It was entirely unjustified and unjustifiable in 2013 and 2014 and the ongoing salary reductions first imposed during those years should be repealed. The \$246 billion forfeited by the middle- and working-class public servants who make up the federal workforce has been an unconscionable tax increase on 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 the wealthiest Americans 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 will harm the budget and economy in the long term. 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. As the deficit has ballooned 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 further increase federal employee retirement contributions so that employees pay fully half of the cost of the FERS defined benefit amounts, which would result in a 6.2% pay cut 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 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 (which AFGE strongly supports), the cost of providing a dollar of retirement income to a federal worker is higher than that for a private-sector worker. 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.
- Oppose efforts to expand the government's ability to force employees to forfeit their earned pensions apart from those currently in law.

- Support the Federal Retirement Fairness Act. Introduced last Congress by Derek Kilmer (D-WA), this bill will allow former seasonal and temporary federal employees the option to ‘buy back’ retirement contributions to retire on time.
- Support the Equal COLA Act so FERS retirees are not punished by receiving a COLA that is less than CSRS and Social Security and less than the cost-of-living increase calculated under the 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. AFGC 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. Congressional Republicans have already announced that they intend to hold the ability of the government to finance its operations hostage through limitations on the statutory debt ceiling. They tried this approach during the Obama Administration, and nearly wrecked the economy, causing U.S. Treasury securities to be downgraded by some bond rating agencies, now that Democrats are back in the White House, Republicans have once again rediscovered the "evils" of deficit spending (ignoring this completely during the Trump Administration) and will likely push for cuts in healthcare expenditures, including the FEHB Program. We will carefully guard against using federal employees 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%) outstripped the pay raise.

For 2023, FEHB premiums increased 7.2%, with the government contribution increasing 6.6%, and the enrollee share increasing an average of 8.7% above 2022 rates. AFGE notes that OPM’s description of premium increases for enrollees is the average of all FEHB plan premium increases. However, the largest plan by far, Blue Cross/Blue Shield Standard option increased premiums from 10.7 – 11.7% depending on whether an enrollee chooses self or family coverage. As in prior years, due to the statutory FEHB cost sharing formula, the government’s share of the premium increase will be significantly less than the employee share.

As Congress increased federal pay by about 4.6% (on average) for 2023, the increase in the employee’s share of the FEHB premiums will once again far outstrip the pay raise. The retiree COLA adjustment was 8.7% for CSRS annuitants (one percent less for FERS annuitants and they do not start until age 62).

During the past five FEHB premium setting years (2019–2023), the government’s percentage contribution increase has been less than 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. In 2022, the government’s increased contribution was about 25 percent less than the increase in the employee contribution. Now in 2023, it is effectively 50% less (more if one is enrolled in Blue Cross – Standard). If a voucher proposal had been 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 provide 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 4.3 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 bill recently enacted by Congress establishes a bad precedent regarding FEHB and Medicare Part B premiums. Under the Postal Reform law, as of January 1, 2025, all newly retiring Postal Service employees (with some few exceptions) 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 12 years, including the three-year pay freeze, federal pay raises totaled just 20.6 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, 2.7 percent in 2022, and 4.6 percent in 2023). The compounded rate of increase in pay is just shy of 24 percent. But in that same period, federal employees’ FEHB Program premiums are more than 60 percent higher in 2023 than they were in 2011. The cost to employees of participating in the 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.

TELEWORK AND REMOTE WORK

Long before the Covid-19 pandemic, the federal government was required to permit both remote work and scheduled telework. Telework and remote work are distinct from one another. Telework is defined by the Office of Personnel Management (OPM) as “a work arrangement that allows an employee to perform work, during any part of regular, paid hours, at an approved alternative worksite (e.g., home, telework center). It is an important tool for achieving a resilient and results-oriented workforce...” Remote work is “an alternative work arrangement that involves an employee performing their official duties at an approved alternative worksite away from an agency worksite, without regularly returning to the agency worksite during each pay period.”

The Telework Enhancement Act of 2010 allowed for the expansion and utilization of telework throughout the federal government for positions deemed telework eligible. It was enacted with the express purpose of achieving greater flexibility in managing the federal workforce, providing agencies with a valuable tool to meet mission objectives while helping employees enhance work-life effectiveness. Telework agreements are written agreements and between the manager and the employee.

While the benefits of telework were already well documented, some agencies were reluctant to permit its full use, and did not always allow its use by eligible employees for reasons having nothing to do with whether the job could be successfully performed away from the regular duty station. Some agencies such as the Social Security Administration had severely restricted the use of telework just before the pandemic, leaving the agency less prepared to serve the public when the pandemic hit. The necessary technology and equipment, along with policies and means to protect private information were and are available to agencies, but prior to the pandemic, they were not utilized at each agency.

When utilized fully and fairly, telework contributes to employee engagement and morale, and has a positive impact on recruitment and retention. Telework also reduces traffic and its attendant environmental effects, costs associated with office space and parking, as well as flexibility and continuity of operation in weather and other emergencies. Use of telework promotes healthier workers who do not endure as much burnout or use as much sick leave and can enjoy a more a more robust work-life balance.

Under the law, federal agencies, and workers and OPM must meet certain obligations regarding telework. Agencies’ responsibilities are as follows:

- Establish a policy under which eligible employees may be authorized for telework.
- Determine employee eligibility to participate in telework.
- Notify all employees of their eligibility to telework.

- Enter into a written telework agreement between supervisors and employees.
- Provide training for eligible employees and their managers.
- Be effective managers of telework to ensure employee performance and adherence to agency operations.
- Deny telework where on-site activity or handling of certain secure materials is required.
- Manage non-compliance with telework arrangements and potentially terminate a telework arrangement if non-compliance is not corrected.
- Treat teleworkers equitably with respect to performance appraisals, training and work requirements.
- Designate a Telework Managing Officer on behalf of telework matters at the agency.
- Incorporate telework into the agency's Continuity of Operations Plans (COOP).
- Satisfy collective bargaining agreements. (However, they are not required to bargain telework eligibility or terms. Some agencies have specifically refused to bargain telework.)

OPM's responsibilities to agencies are as follows:

- Maintain a central telework website (www.telework.gov).
- Consult with agencies and provide policy guidance on telework including pay and leave, agency closure, performance management, recruitment and retention, and accommodations for individuals with disabilities.
- Assist agencies with qualitative and quantitative measures of teleworking goals.
- Consult with other agencies including the General Services Administration, the Federal Emergency Management Agency and the National Archives and Records Administration on effective operations and record-keeping.
- Submit an annual report on the telework programs of each agency and identify successful practices and recommendations.

A key difference between "telework" and "remote work" is that a remote work arrangements do not require the employee to report to a physical work location. For pay purposes, the remote worker's duty station is their home and their locality pay is calculated based upon that location

Remote work arrangements have been effective tools for agencies experiencing difficulties with recruitment and retention of employees with rare or in-demand skills or disabilities that would limit or prevent reporting to a regular duty station. It also allows agencies to consider applicants from a wide geographic range and supports the competitive service and veterans preference in these respects.

In OPM's most recent annual report to Congress for Fiscal Year 2021, reported in September 2022, the following facts were noted:

- Of the 50 percent of federal employees who were eligible for routine or situational telework, 94 percent participated for a total participation rate of 47 percent in FY 21.
- Of those agencies that tracked cost savings from telework, the most significant savings were related to transit/commuting costs (47 percent) and reduced employee absences (16 percent).
- In response to the pandemic and positive telework trends 54 percent of agencies reported an intention to increase the use of telework and 26 percent revising employee telework eligibility requirements. Forty percent of agencies indicated they are not planning to make any changes – neither increases nor decreases – to their existing telework policies.
- In terms of routine telework, 62 percent teleworked three or more days per two-week period, 11 percent teleworked one to two days per two-week period, and three percent teleworked no more than once per month.
- Most agencies set both total participation and frequency of participation goals (72 percent for fiscal year 2022 compared to 70 percent).
- A decrease in commuting miles and a positive relationship between telework and job performance, a reduction in distraction and in real estate costs and energy use.
- “Agencies proved that the use of telework is critical in not only maintaining operations during exigent circumstances, but also in attracting, developing, and maintaining a highly qualified workforce.”

Despite this positive report on the benefits and increased use of telework, AFGE members continue to report that some agencies are denying workers the opportunity to telework. There is frustration across the government with agencies refusing to expand or continue successful teleworking arrangements as the severity of the pandemic eases. Some are insisting that federal employees cease telework in order to improve the business and commercial real estate climate in their cities. Those ignorant of the multitude of benefits of telework continue to assert that telework reduces productivity.

Legislative Action

- AFGE opposes the “Return to Work Act,” H.R. 101 by Congressman Andy Biggs (R-AZ) that would unilaterally return all agencies to pre-pandemic telework policies. Such an across-the-board approach does not take into account empirical data on the value to employees’ and agencies’ expanded telework.
- AFGE opposes the “SHOW UP Act (Stopping Home Office Work’s Unproductive Problems Act of 2023),” H.R. 139 by House Oversight and Accountability Committee Chair James Comer (R-KY) which would also require a return to pre-pandemic telework policies and a review of office usage and eligibility for locality pay. The name alone leads with an erroneous conclusion that telework is not productive, which is contrary to widespread data supporting the benefits of telework.

GOVERNMENT-WIDE SOURCING ISSUES

Issue

The Office of Management and Budget (OMB) and agencies have not addressed specific problems with public-private competitions pursuant to OMB Circular A-76 that prompted a Congressional moratorium on use of A-76. The moratorium was first imposed as a result of a scandal at the Walter Reed Army Hospital, staffing shortages caused by A-76 resulted in substandard care for wounded warriors. Numerous GAO and DoD Inspector General audits found that A-76 competitions had substantial unprogrammed investment costs and overstated savings, even after the establishment of a “Most Efficient Organization.” Additionally, there is a virtual absence of contractor inventories, contract services budgets, and adequate review processes to ensure that inappropriate contracts, and contracts involving inherently governmental functions, are not awarded.

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 to persist with contracts that are characterized as involving 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 have 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.

As a result of pro-contractor policies, 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, under the Trump Administration, the more robust Enterprise Contractor Manpower Reporting Application (ECMRA), which had been committed to DoD-wide, and potentially government-wide during the Obama Administration, was divested in DoD for the less useful government-wide inventories designed by OMB and issued by the GSA through the System for Award Management (SAM). The GAO recently documented this

move by the Department of Defense as resulting in a loss of ability to identify the fully burdened costs for services contracts, track requiring organization (the actual government customer for the contract, as distinct from the contracting activity, which simply awards the contract) and location where the work is performed by contracts, and tracking program and budget data through funding sources in the appropriations process. 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 and wasting resources in the fourth quarter of each fiscal year by focusing on 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 to 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” contracts and are otherwise curtailed and sabotaged.
4. The absence of oversight mechanisms to ensure an agency complies the A-76 moratorium and other legal limitations on contracting-out. Section 515 of the Fiscal Year 2022 National Defense Authorization Act, “Modification to Procurement of Services, Data Analysis, and Requirements Validation,” 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 statutes covered by these standard guidelines are based on an Army total force management checklist issued during the Obama Administration in 2013,³ and subsequently included in a Defense Acquisition University guidebook. They include:

³ 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

- a. The prohibition against contracting for 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 the Federal Acquisition Regulation; and ensuring the criteria for each statutory exception authorizing personal 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 requires the following separate certifications:

- a. That a task order or statement of work being submitted to a contracting officer 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 the 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 by the government; and whether the privatization uses a direct conversion process.

oversight, than every other Defense Component, which 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.”)

Congressional Action:

- Continue the OMB A-76 moratorium and mandate enforcement mechanisms for all statutory sourcing limitations for the entire 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; and
- Improve agency budgets to highlight contractor workforce costs informed by comprehensive contractor inventories. Inform Senate Homeland Security and Government Affairs Committee, House Oversight and Accountability 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 the 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 117th Congress, no official time legislation came 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.

In FY 2022, AFGE urged the inclusion of language in Financial Services and General Government (FSGG) Appropriations bill that would require agencies to bargain in good faith and give unions the opportunity to fairly negotiate the use of official time. The House-passed FY 2022 FSGG bill included the language: “None of the funds made available by this or any other Act may be used to prevent Federal workers from— (1) using official time for union activities;

(2) teleworking for telework deemed positions or when the health or safety of an employee is in question; or (3) using space in Federal buildings for union activities.”

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 117th 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 2017, OPM reported that the number of official time hours used per bargaining unit employee was 2.97 hours in FY 2016, and that official time costs represented just 0.1% of the total of federal employees’ salaries and benefits. With severe restrictions on the use of official time, which OPM then dubbed “Taxpayer Funded Union Time,” that number fell to 1.96 hours per bargaining unit employee in FY 2019, fully one third less representational time per employee.

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 113th 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 114th 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 115th 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 117th 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)⁴ 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.⁵ 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.⁶ In contrast to the competitive service are positions placed into the excepted service.⁷ The excepted service is in many ways an alternative framework that is a legacy of the patronage system. 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 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

⁴ EO 13957 dated October 21, 2020

⁵ 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

⁶ 5 U.S.C. § 2102

⁷ 5 U.S.C. § 2103

competitively “examined” by OPM or an agency with delegated examining authority. The examination requirement⁸ 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 veterans⁹ 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 Act¹⁰ 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.

Over time, the competitive service encompassed more than 85% of the federal workforce, with excepted service positions covering the remaining 15%.¹¹ 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

⁸ See generally 5 U.S.C., Chap 33

⁹ 5 U.S.C. § 2108

¹⁰ 22 Stat. 403

¹¹ See generally, “Biography of an Ideal, A History of the Federal Civil Service,” U.S. Office of Personnel Management, 2003.

OPM, e.g., attorneys under Schedule A excepted service appointing authority (required based on an appropriations restriction prohibiting “examinations” of attorneys).¹² 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 and 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.¹³

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 has expanded 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 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 claim 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

¹² Public Law 35, 78th Congress (1944).

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

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.¹⁴ 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 primary means for applying for a federal job is through submission of a resume on the USAJOBS website. Resumes are then evaluated by computer systems, using word matches, or candidate self-assessments, rather than an actual human assessment of the 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

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

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 ploy 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 report¹⁵ 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.¹⁶

The most frequent reason given by agencies and Congress for expanding the excepted service is the common misconception that hiring for competitive service positions hamstrings 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.”¹⁷ 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.¹⁸

Following controversy over prior administrations’ use of scientific information, the Biden Administration 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.”¹⁹

¹⁵ 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>

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

¹⁷ See 5 CFR § 575.109

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

¹⁹ 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)

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.”²⁰ Translated into English, the Defense CES has almost no basic hiring criteria other than the ability to hire whomever officials 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 19th century.

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.²¹ 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

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

²¹ 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

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 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. 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.

At the very end of the 2022 Congressional session, “Chance to Compete” was supposed to be considered in both chambers under suspension of the rules. However, given other pressing matters and the lack of time as the session came to a close. “Chance to Compete” was not enacted. In early 2023, bipartisan House members introduced H.R. 159, which is the latest version of “Chance to Compete.” On January 24, 2023, H.R. 159 was approved in the House by a lopsided majority of 422-2. Similar legislation (S. 59) has been introduced on a bipartisan basis in the Senate.

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 21st century threats and challenges.

Congressional Requests

- Enact H.R. 159/S. 59, the “Chance to Compete Act” 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 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 2023, 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, improve employee benefits, 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 proposed closures of VA facilities, 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.

ENSURING A SAFE HEALTHCARE WORKPLACE

Background

COVID-19 has become a long-term health and safety issue for VA health care employees. COVID-19 and other workplace safety risks need to be handled through sound management practices and meaningful, ongoing labor-management cooperation. Unfortunately, at most VA medical facilities, the workplace practices of the Trump administration that eliminated joint labor-management planning and problem solving continue. Instead of working with their labor partners to address the pandemic hazards, and the staffing shortages that management created and that worsened during the pandemic, management puts employees and patients at greater risk by refusing to recognize collective bargaining rights to address safety issues, overtime mandates and reassignments.

OSHA COVID-19 Standard

A permanent OSHA COVID-19 standard is essential to protect VA healthcare personnel and other federal employees from the ongoing risks presented by COVID-19. The OSHA Health Care Emergency Temporary Standard (ETS) issued in January 2021 pursuant to Executive Order 13999 provided clear requirements to be met by employers to ensure a safe VA health care workplace, including mandates for personal protective equipment (PPE), physical barriers, more extensive cleaning procedures in high-risk areas, 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. Employees could file OSHA complaints when the standard was violated.

Unfortunately, at the end of 2021, OSHA announced the withdrawal of the ETS, leaving only a few provisions in place while OSHA worked on a permanent standard. AFGE had urged OSHA to reinstate the temporary standard pending the development of a permanent standard. After withdrawal of the ETS, management at numerous VA facilities reverted back to pre-pandemic practices that left employees without protections that were still greatly needed as COVID-19 persisted.

AFGE provided many suggestions to OSHA during the review process for the permanent COVID-19 standard to strengthen and expand it, including requiring employers to provide medical leave for workers who become sick or have to quarantine after an exposure. OSHA sent the finalized permanent COVID-19 standard to the Office of Management and Budget for regulatory review in December 2022. AFGE urges prompt issuance of a permanent standard as the nation faces the long-term threat from COVID variants.

Workers' Compensation

AFGE urges reinstatement of the presumption of workplace illness for employees that was established by the American Rescue Plan Act of 2021 to streamline the workers' compensation process for employees disabled by COVID-19. The presumption expired on January 27, 2023. Without this presumption, many employees are forced to go on leave without pay when they have extended COVID-19 illness, causing them great financial hardship.

Managers and human resources (HR) personnel have further undermined the ability of disabled VA employees to secure workers compensation. They have failed to take 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. In addition, the counterproductive centralization of HR personnel has deprived employees of the assistance they need to file their claims in a timely manner.

Congressional Requests

- Ensure that the Biden Administration issues the final permanent OSHA COVID-19 standard. in a timely manner.
- Enact legislation to reinstate the COVID-19 presumption for filing workers' compensation.
- Conduct oversight of the VA's human resource practices regarding the filing of workers' compensation claims.

VA'S STAFFING AND HUMAN RESOURCES CRISES ARE FURTHER FUELING PRIVATIZATION

Background

VHA has always had to compete with other health care employers for physicians, nurses, psychologists and others working in 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, worsening staffing shortages and growing management hostility toward rank-and-file VA employees and their labor representatives have made the VA a less attractive employer. COVID-19 worsened health care staffing shortages, as has the VA's broken human resources (HR) infrastructure. The VA health care system reported 2,622 severe occupational staffing shortages across 295 occupations in fiscal year (FY) 2022, including severe physician shortages at 87 percent of facilities and severe nursing shortages at 91 percent of facilities (VA OIG 22-00722-197, July 7, 2022.) The VA reported 77,141 unfunded vacancies in the fourth quarter of FY 2022, up from 48,206 a year earlier.

Chronic short staffing also increases wait times, which in turn diverts more patients and resources outside the VA to the for-profit private sector where inferior, more costly care is provided to veterans without any accountability for quality or timeliness.

During pandemics and other national emergencies, VA especially needs to be adequately staffed to fulfill its fourth mission of emergency preparedness, when higher incidences of employee illness and attrition are likely to occur.

VA Must End to Its Failed HR Modernization Experiment

The VA's misguided HR practices that began in the prior administration continue to present severe obstacles to hiring staff throughout the department. Routine personnel actions such as job postings, hiring, credentialing, promotions and pay adjustments that used to be handled in person at the facility level have been replaced by "HR Smart" and other computerized, centralized systems at the VHA VISN level and the VBA regional level.

Our local leaders and members have lost virtually all involvement in the hiring process where they could once advocate for more staff and assist management in identifying hiring needs.

Centralization has also made it more difficult for our members to file for workers' compensation for disabilities caused by the COVID-19 pandemic or resolve pandemic-related leave issues.

We are encouraged by the enactment of an HR provision in the Honoring our PACT Act (PACT Act) which was signed into law on August 10, 2022. The PACT Act requires the Secretary to improve HR functions by establishing qualifications and standardized performance metrics for each HR position, as well as new systems to monitor hiring and other HR actions.

VA Needs Enforceable Safe Patient-Staffing Ratios

Minimum patient-staff ratios ensure that all veterans receiving treatment in inpatient units and nursing facilities receive safe, high-quality care. Nurses and other clinicians need to work at adequately staffed facilities where they can focus on the veterans they are caring for without fear of medical errors or threats to their state licenses.

AFGE has long supported the Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act, led by Representative Jan Schakowsky (D-IL) in the House and Senator Sherrod Brown (D-OH) in the Senate. This critical bill follows in the footsteps of the California safe staffing law that has been in place for nearly two decades which requires all state acute-care hospitals to comply with defined nurse-patient staffing ratios.

The Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act would set minimum nurse-patient staffing requirements for public and private health care systems, including VA and Department of Defense medical facilities. It includes critical whistleblower protections for nurses who speak up for their patients by reporting unsafe staffing conditions. AFGE was successful in its efforts to ensure that the bill provides equal protections to VA nurses despite their severely limited bargaining rights under VA's policy interpreting 38 USC 7422.

Currently, the only protection that VA nurses and other medical and mental health personnel have to ensure adequate staffing, and therefore safe and timely treatment for veterans, are VA's own staffing methodologies and guidelines. These VA staffing policies are not enforceable under law and provide no protections for personnel who report unsafe staffing levels. Nurses in intensive care units are forced to care for excessively large numbers of acutely ill patients without adequate backup or rest. Emergency room (ER) staff have no recourse when they cannot find beds for seriously ill veterans and are forced to keep them in the ER for several days because there are not enough nurses to reopen the thousands of closed beds at facilities around the country. Mental health clinicians cannot respond adequately to veterans with mental health crises when management overloads them with patients. Without enforceable staffing ratios, VA health care personnel and veterans remain at the mercy of management whims whether to implement effective staffing plans and whether to respond to complaints of unsafe conditions.

Congressional Requests

- Conduct oversight of VA's implementation of the HR improvement provisions in the PACT Act.
- Require the Secretary to immediately reverse the harmful regional centralization of HR personnel and to return adequate numbers of properly trained HR personnel to the facility level, in proportion to size of each workforce.
- Reintroduce the Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act of 2021 (HR 3165/S1567 in the 117th Congress)

- Conduct oversight of VA's implementation of staffing methodology and staffing guidance including frequency of incidences when staffing levels violate VA policy.

FIGHTING PRIVATIZATION

The AIR Commission

The VA MISSION Act of 2018 established a nine-member Asset and Infrastructure Review (AIR) Commission to make recommendations regarding “closure, modernization and realignment” of VHA facilities. AFGE took a cautious approach at first to the Commission, hoping that the process might result in more attention to the VA significant need for infrastructure investment and modernization. However, in March 2022, the VA announced its recommendations to the AIR Commission, calling for a vast privatization of VA services through the closure or downsizing of nearly 60 VA medical centers, around a third of the total across the country. The VA’s plan called for transferring these functions to new, mostly smaller facilities that had yet to be funded or built, or to the private sector, with almost no analysis of the quality, cost, or availability of those private services. The VA used outdated, pre-pandemic analyses to support its recommendations, an approach that was lambasted by its own OIG, the Government Accountability Office, and a panel of private experts the VA convened through MITRE Corporation. Despite the obvious frailty of the VA’s process, the MISSION Act established a fast-track process for approving the recommendations, with little opportunity for Congress or other stakeholders to exert any influence.

AFGE and the NVAC mobilized across the country in opposition to the AIR Commission, holding rallies, contacting members of Congress, publishing articles, and partnering with affected veteran organizations. As the result of these efforts, in June 2022 a bipartisan group of senators including many from the Senate VA Committee announced their opposition to confirming any AIR Commission members. In July 2022, a bipartisan House majority voted to strip funding from the AIR Commission and to deauthorize the commission in the annual NDAA. In December, Congress approved the 2023 omnibus spending bill which defunded the AIR Commission and imposed new restrictions on the VA ability to close or downsize rural healthcare facilities.

Nonetheless, the threat of privatization persists. A separate section of the MISSION Act, unaffected by Congress’s recent actions, directs the department to conduct strategic infrastructure reviews every four years, with the first review expected in 2023. In the late summer of 2022, following the collapse of the AIR process, several VISN’s contacted AFGE locals with plans to continue pursuing the hospital closures recommended to the defunct AIR Commission, with no apparent attempt to update the discredited market assessments behind those recommendations.

Congressional Requests

- Oversee the VA’s implementation of the strategic reviews under Section 106 of the MISSION Act to ensure that the VA uses accurate, up-to-date information about the

utilization of facilities, their benefits to veterans, and their future infrastructure needs and that the VA works in partnership with its workforce throughout the process

- Continue language from the 2023 omnibus appropriation bill that restricts VA's authority to close rural healthcare facilities without a thorough analysis of the impact on veterans' access to care
- Oppose efforts to codify in law the VA's current community access standards that are eroding the VA's healthcare budget and driving veterans into private care without regard to cost, quality, and timeliness of access. Instead, in order to sustain the viability of the VA, Congress and the Department should be limiting community care to instances where the VA is truly incapable of providing need healthcare and private care is demonstrably better and more readily available

Contract Care Access Standards

The MISSION Act required the Department to implement access standards to determine when veterans should be referred outside the VA health care system for care in the private sector through the Veterans Community Care Program (VCCP). These standards consider how long veterans wait to access VA in-house care and how long it takes for the veteran to drive to the closest VA medical facility in order to determine if the veteran should be referred to a VCCP provider. If a veteran has to wait more than 28 days for VA in-house care or drive more than 30 minutes for VA in-house primary care or 60 minutes for VA in-house specialty care, then he or she can choose to go outside the VA to a VCCP provider instead.

The access standards have been flawed from the outset and AFGE has continued to urge the VA Secretary to make several significant changes in order to ensure that veterans receive the most appropriate and highest quality care in a timely manner. In addition, changes are urgently needed to reign in the unprecedented number of costly VCCP referrals that are threatening the VA's long term capacity to carry out *all* its missions, including its core mission of providing comprehensive, integrated, specialized care to veterans, as well as medical training, medical research and emergency preparedness that yield tremendous benefits to all health care consumers.

First, the current double standard must be eliminated; a revised access standard must be applied equally to the VA and VCCP providers. Currently, the access standards do not consider the wait times and driving times that veterans will face to access care outside the VA. This double standard has resulted in many veterans waiting longer and driving further for non-VA care than they would have if they continued receiving VA in-house care.

In addition, the driving time component of the access standard is not restrictive enough and results in the overuse of contract care even when a veteran would be better served by in-house care. VCCP providers should be supplementing, not supplanting the VA. Multiple studies have

shown VA's own care to be of higher quality with better health outcomes, and less costly than private sector care.

The access standards also apply a double standard to care provided by telehealth and telemental health ("telehealth"). The VA has long been recognized as a leading telehealth model by other health care systems. Yet, the access standards do not count VA in-house telehealth services in determining if the VA has met the standard. As a result, veterans who would have not had any wait for VA-provided telehealth care are sent to VCCP providers who treat them through telehealth programs of unknown quality and at greater cost to taxpayers.

Last year, Secretary McDonough testified before the Senate Veterans' Affairs Committee that he was considering revising the access standards in order to address the skyrocketing costs of VCCP care. He also committed in his testimony to propose changing the way that telehealth is counted. Unfortunately, the Secretary has not taken any action to revise the standards since making those statements.

Lawmakers should also consider the burdens that the VCCP program are placing on VA's own staff, who are already struggling to take care of patients under chronic short staffing conditions. Additional VA staff have not been provided in any systematic way or in adequate numbers to assist with the large number of VCCP consults that VA medical personnel must now issue and manage as patients and their medical records move in and out of this chaotic contract care arrangement.

Congressional Requests

- Oppose legislation that would codify current VCCP access standards.
- End the current double standard and apply the same wait times and driving times to both in-house care and VCCP care.
- Require the VA Secretary to revise the current access standards to increase the drive time limit and count VA in-house telehealth when determining whether the VA has met the standards.
- Ensure that each facility receives additional staff at appropriate levels to ensure that veterans' needs for in-house care are not compromised by workloads associated with VCCP referrals.

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. Dept. 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.

This bill was not advanced out of committee, and AFGE is working to get the bill re-introduced in the 118th Congress.

Congressional Requests

- Enact the "Protecting VA Employees Act" and ensure that disciplinary proceedings against VA employees are handled in a similar manner to other federal workers, with adequate due process protections.

IMPROVING RIGHTS AND BENEFITS FOR VA WORKERS

Title 38 Collective Bargaining Rights

VA Employees appointed under 38 U.S.C. 7401(1), (exclusive to "physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries,") are subject to different collective bargaining laws than other VA employees. Specifically, this group is subject to the Title 38 collective bargaining rights law, 38 U.S.C. 7422 ("7422"). This law, enacted in 1991, excludes "compensation," "professional conduct or competence", or "peer review" from the scope of collective bargaining and grievance procedures for covered VA employees. For over 30 years, the VA has interpreted and applied this section in an arbitrary and expansive manner. 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, including the Defense Department. 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 VA policy based off of a Memorandum of Understanding (MOU) that had expanded Title 38 collective bargaining rights and improved labor management relations. The Biden Administration has not negotiated a new MOU or instituted a new policy. In the 117th 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.

At the end of 2022, H.R. 1948 had 218 co-sponsors, including two Republicans, more than the bill had ever received in any prior Congress. On December 15, 2022, the bill passed the House of Representatives by a vote of 219-201, including four Republican votes in support. Additionally, the White House issued a Statement of Administration Policy for the bill, which stated “[t]he Administration supports House passage of H.R. 1948, the VA Employee Fairness Act of 2022, to expand collective bargaining opportunities for covered Federal employees.” The statement went further by explaining that “[t]he Biden-Harris Administration supports worker organizing and empowerment as critical tools to grow the middle class and build an inclusive economy. The Federal government, consistent with its obligations to serve the public, can be a model employer in this regard.”

In the Senate, S. 771 had 11 cosponsors at the end of the 117th Congress. As the bill did not pass the Senate and was not signed by the President, the bill did not become law. AFGE is working to have the “VA Employee Fairness Act” re-introduced in the House and Senate for the 118th Congress and building on last year's momentum.

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.

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 at 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. In July of 2022, the bill was marked up and amended to address technical concerns raised by the VA and narrow the scope of the bill in order to make it more likely to pass the House. The bill was reported favorably by the House Veterans’ Affairs Committee but was not considered by the full House of Representatives.

Furthermore, the bi-partisan bill S. 4156, the “VA Workforce Improvement, Support, and Expansion (WISE) Act of 2022” contained a provision modeled off of the “CPE Modernization

Act.” In the 118th Congress, Senator Jon Tester (D-MT) has included the amended version of the “CPE Modernization Act” in his legislation, S. 10, the “VA Clinician Appreciation, Recruitment, Education, Expansion, and Retention Support (VA CAREERS) Act 2023.”

AFGE is working to have both the “CPE Modernization Act” introduced as standalone legislation and ensure that the “VA CAREERS Act” continues to include the expanded CPE benefits through the legislative process.

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 was and remains supportive of the VBA’s changes that now send MST claims to a specialized team of claims processors, though problems remain. At a recent House Veterans Affairs Committee Subcommittee on Disability Assistance and Memorial Affairs hearing entitled “Supporting Survivors: Assessing VA’s Military Sexual Trauma Programs” AFGE submitted a Statement for the Record 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).

To address and highlight this issue, AFGE secured in H.R. 2617, the Consolidated Appropriations Act, 2023, an oversight report that requires a VA study on the National Work Queue to “address specifically (1) how it plans to restore procedures to provide specialized assistance to and coordination with veterans’ accredited representatives; and (2) how it plans to evaluate VA employees fairly for their own work product.” AFGE legislative staff will use this report to highlight the need for additional oversight and lobby Congress to have the VA implement changes that will assist the VBA workforce.

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.
- Lobby for vigorous oversight and possible legislation to implement the recommendations made by the reports that study if VBA claims processors are getting fair credit for the work they perform.

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 created by the VA Accountability Act and ever-changing performance standards.

To address and highlight this issue, AFGE secured in H.R. 2617, the Consolidated Appropriations Act, 2023 an oversight report that requires VBA to “to complete an assessment of the Veterans Benefits Management System and develop a plan to modernize the system as appropriate.” AFGE will continue to use this report to lobby Congress to ensure the needs and success of VBA employees are considered when updating IT systems.

Furthermore, in a larger debate of IT systems in the 117th Congress, the House and Senate Veterans’ Affairs Committees have considered several ways to partially or fully automate certain

claims within VBA. The full automation of certain claims would be a gross disservice to veterans who require experienced and trained claims processors to ensure that claims are processed correctly and fairly and have personnel able to hand any unique intricacies a claim may present that are beyond the capabilities of artificial intelligence.

As part of this debate, AFGE has successfully argued that technology should supplement and not supplant the VBA workforce, and successfully obtained an amendment to-then Ranking Member Bost's bill, H.R. 7152, "Department of Veterans Affairs Principles of Benefits Automation Act," to state "[a]utomation of claims processing should not eliminate or reduce the Veterans Benefits Administration workforce." Furthermore, through AFGE's lobbying efforts, we have framed the debate within Congress to use new technology to better assist claims processors to handle increased demand to process claims and allow personnel to focus on the problems that cannot be handled by machines, instead of using technology as an excuse to shrink the VBA workforce while failing the needs of veterans.

Congressional Requests

- Conduct oversight on the impact of IT shortcomings on both the performance ratings of VBA employees and the 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.
- Maintain continued oversight over the use of automation in claims processing.

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 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 116th 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

- Fight for continued oversight on the 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.
- Conduct oversight to make sure limitations on contract exams are being enforced.

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 over the years altered or mishandled 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.

To address and highlight this issue, AFGE secured in H.R. 2617, the Consolidated Appropriations Act, 2023 an oversight reports that requires a VA study on the National Work Queue to “address specifically (1) how it plans to restore procedures to provide specialized assistance to and coordination with veterans’ accredited representatives; and (2) how it plans to evaluate VA employees fairly for their own work product.” AFGE legislative staff will use this report to highlight the need for additional oversight and lobby Congress to have the VA implement changes that will assist the VBA workforce.

Congressional Requests

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

Implementation of the PACT Act

AFGE proudly endorsed the passage of the Sergeant First Class (SFC) Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act. This law will affect millions of veterans by granting benefit eligibility for many conditions as well as granting a presumption of service connection for diseases linked to toxic exposure, which has been difficult to prove under prior rules.

Throughout the legislative process, AFGE has cautioned Congress that to implement the new law, the VA will require internal changes for claims processors, including the change of procedures, granting full credit for the difficulty of work performed by processors, adjusting performance standards, enhanced training for claims processors, and implementing systems to ensure consistent training throughout the country. Despite these warnings, the VA has yet to adopt these measures that will ensure the success of the PACT Act.

AFGE will continue to raise these concerns with Congress as it conducts oversight on the implementation of the PACT Act. In December 2022, AFGE submitted a statement for the record for a House Veterans’ Affairs Committee hearing titled “Fulfilling our Pact: Ensuring

Effective Implementation of Toxic Exposure Legislation” where we reiterated the need for VBA reforms to implement the law. We will continue to seek these changes in the 118th Congress.

Congressional Requests

- Increase oversight of the implementation of the PACT Act related to performance management and training claims processors.

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.

Congressional Requests

- Increase oversight on the current status of Board attorney performance standards and assess if they are best serving veterans.
- Increase funding for the Board to hire more attorneys.
- Encourage the VA to eliminate the judicial sign off requirement for Board attorneys' performance measures. **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 re-establish a standard career ladder for GS-14 Board Attorney positions which had until recently existed for new hires. Eliminating this level of growth and compensation for attorneys is a direct way of dissuading qualified applicants from joining the Board of Veterans Appeals or choosing to stay long term. The VA should reverse this shortsighted policy and attract the best candidates to the Board's ranks.

Additionally, AFGE strongly supports the creation of 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 affordable 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.

To address and highlight this issue, AFGE secured in H.R. 2617, the Consolidated Appropriations Act, 2023, language encouraging the Board to use "available tools to improve the recruitment and retention of attorneys, including the reimbursement of Bar Dues, and encourages the Board to use its discretion to lift the cap to reimburse attorneys for their Bar Dues."

The Board has also recently hired Veteran Law Judges ("Board Members") who have little to no experience in veterans law. In the past, Board Members were required to have seven years' experience in veterans law, but now are chosen for "leadership skills." This is a disservice to

veterans who now have claims before judges who are learning on the job, and whose inexperience is causing delays that veterans cannot afford. A request for information from the Board confirmed that the least productive Board Member who was appointed from within the Board was more efficient at moving cases than the most productive Board Members chosen from outside the board. This inefficiency, specifically new Board Members being slow in signing off on decisions, has negative impacts on the performance metrics for Board attorneys, and is another driver for Board attorneys' fleeing. Additionally, by eliminating the experience requirement for Board Members and not promoting knowledgeable Board attorneys to these positions, the Board is eliminating a natural path for promotion and harming recruitment and retention. AFGE urges the Congress to amend Title 38 to require that Board Members have substantial experience in veterans law.

Congressional Requests

- Encourage the VA to re-establish GS-14 attorney positions at the Board of Veterans' Appeals.
- Encourage the VA to create a journeyman GS-15 position 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 and comply with the report language in the Consolidated Appropriations Act, 2023.
- Introduce legislation to amend 38 U.S.C. § 7101A to require that Board Members have substantial experience in veterans law.

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 broad authority to set the terms and conditions of employment for TSOs, including pay.

What Does the TSO Workforce Lose Without Title 5 Rights?

- TSO pay is determined by the administrator, not federal law. As a result, pay has been below that of comparable federal jobs and TSOs have not received longevity pay or step increases. Bonuses provided by TSA have been 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.
- Throughout its 20-year history, 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. AFGC will be encouraging co-sponsorship and an active push to gain Title 5 rights and better pay for TSOs.
- In the 117th Congress, Rep. Thompson introduced the “Rights for the TSA Workforce Act” (H.R. 903), which gained 227 cosponsors including 13 Republicans. The bill passed the House on May 20, 2022, by a vote of 220-201. All Democrats and four Republicans voted for its passage. Some Republicans withheld their support, pointing to a Covid bonus in the bill for frontline personnel, including TSOs. The corresponding Senate bill S. 1856 by Sen. Brian Schatz (D-HI) garnered 45 cosponsors, but no Republican support. The House included the House-passed language of H.R. 903 in the National Defense Authorization Act (H.R. 7900) but the Senate refused to include these provisions in the final bill.
- 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 has long been underpaid. TSA Administrator Pekoske testified that the difference is about 30 percent and advocated for increased pay before the Congress and in national television interviews.

- 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 more than 20 years later.

What has changed under the Biden Administration?

- 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. Before December 2022, TSA acted only upon the MSPB order, and the Administrator made clear TSA could not expand bargaining rights or increase pay without additional appropriations from Congress.
- With the passage of the FY 2023 Omnibus Appropriations Act in late December 2022, we experienced our first **major breakthrough**. The bill included \$398 million to migrate TSA to a General Schedule equivalent pay scale, starting July 1, 2023, and funds for collective bargaining. Shortly after passage, TSA Administrator David Pekoske issued a letter to TSA employees informing them their pay would go up in July and he issued a new determination to begin bargaining on terms that include the expanded bargaining directed by Secretary Mayorkas. For most TSOs, pay will go up by about 30 percent.
- Before this breakthrough, TSA has been operating its own pay band system lacking the stability and transparency of the General Schedule pay system used by most federal agencies. TSOs have not automatically been covered by federal employee pay increases, but the TSA administrator agreed, solely at his discretion, to comply with increases, including the most recent increase of 4.6 percent. There is still nothing in statute that guarantees this new pay.
- 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. The FY 2023 funds change that trajectory so long as funds continue to be appropriated for the increased pay. We still face an uphill battle with right-wing groups

and many members of Congress who accept the notion that the GS pay scaled is “flawed” or “antiquated.” Pushing to make this pay permanent is a high priority.

Working Condition Challenges

- 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, an average of more than 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.
- 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 still 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).

CONGRESS SHOULD APPROPRIATE FUNDING TO CONTINUE NEW TSO PAY SCALES IN FY 2024

The American public learned during the December 2018 – January 2019 government shutdown that TSOs were among the lowest paid federal workers as they were 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.

- The new pay scale will take effect on July 1, 2023, for current and new TSA employees. It is imperative we advocate persistently for that pay level to be approved in the full-year FY 2024 appropriations bill.
- Congress must pass legislation that would apply title 5 to the TSO workforce, including statutory inclusion 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.

In 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.

AFGE strongly supports reintroduction of legislation similar to the Contract Screener Reform Act, introduced by Rep. Bennie Thompson (D-MS) during the 114th 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 had 49 cosponsors at the close of the 117th Congress 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 work to reintroduce the legislation in the House and encourage introduction in the Senate in this Congress.

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) in the 117th Congress would have ended that diversion and dedicated 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. We are working to reintroduce the legislation in the 118th Congress.

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 not only appropriate funds to continue the new pay scale; it must pass legislation to ensure the TSO workforce has the same civil service protections as other federal workers to recognize 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 \$1.4 billion in FY 2024 to extend the new pay scale in the Homeland Security Appropriations bill.
- Support the Honoring our Fallen TSA Heroes Act when reintroduced.
- Support the Funding for Aviation Screeners and Threat Elimination Restoration (FASTER) Act when reintroduced.
- Support full-time health insurance, workers' compensation benefits, and hazardous duty pay.

VOTER RIGHTS, CIVIL RIGHTS, AND JUDICIAL NOMINATIONS

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 percent higher than that of nonunion households. A 2010 article in the *Social Sciences Quarterly* stated that public sector voting turnout was 2 percent—3 percent higher than private sector union households. 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.

Freedom to Vote Act and the John Lewis Voting Rights Advancement Act

During the 117th Congress, S. 2747, the "Freedom to Vote Act" introduced by Amy Klobuchar (Minnesota), would have expanded voting rights protections. Specifically, this bill expands voter registration and voting access. It limits removing voters from voter rolls and establishes Election Day as a federal holiday. H.R. 4, the "John R. Lewis Voting Rights Advancement Act" introduced by Representative Terri Sewell would have restored 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 bill passed the House in August 2021.

Senate Majority Leader Chuck Schumer brought votes to the Senate floor to change the Senate's filibuster rules. Changing the filibuster rules would allow Leader Schumer to bring up votes on the two voting rights bills.

Senators Joe Manchin (West Virginia) and Kyrsten Sinema (Arizona) opposed changing the filibuster rules and as a result, the votes on the voting rights bills failed to pass in the Senate.

AFGE supports the reintroduction of the Voting Rights Advancement Act in the 118th Congress and will continue the fight to promote voter access across the country.

Make Federal Elections a Federal Holiday

AFGE supports legislative efforts to protect and extend the right to vote. AFGE calls on Congress to reintroduce the Election Day Holiday Act, which has been introduced by Representative Anna Eshoo (California) in past Congresses. While this vote did not receive a vote in the 117th Congress, it is an important piece of legislation to help people gain access to the polls.

This bill would establish the Tuesday after the first Monday in November in the same manner as any legal public holiday for purposes of Federal employment. This 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. Contrary to the statements of Senate Minority Leader Mitch McConnell, legislation offered to make federal elections a federal holiday is not a "power grab" by one party. It is a "power grab" for democracy by U.S. citizens.

Equal Pay

H.R. 7, the "Paycheck Fairness Act," introduced by Representative Rosa DeLauro (Connecticut), passed in the House of Representatives on June 8, 2021. AFGE supports reintroduction of this legislation in the 118th Congress by Representative Rosa DeLauro (Connecticut) and Senator Patty Murray (Washington). 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

Employees with targeted disabilities represented by the American Federation of Government Employees, AFL-CIO (AFGE) deserve to have their workplace rights respected. Reports have

shown that Federal government agencies are removing employees with targeted disabilities right before the end of their probationary period. Targeted disabilities are a subset of the larger disability category. The federal government has recognized that qualified individuals with certain disabilities, particularly manifest disabilities, face significant barriers to employment, above and beyond the barriers faced by people with a broader range of disabilities. These include developmental disabilities, deafness or serious difficulty hearing, and blindness. 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 1/3 of persons with disabilities are working. There is no explanation of 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 continues to work with Senator Tammy Duckworth (Illinois) and Representative Debbie Dingell (Michigan) to urge OPM to share data about the rates of persons with targeted disabilities who have been removed before or at the end of their probationary period. If problems are documented, AFGE will call upon Congress to strengthen protections for disabled federal workers.

AFGE urges Congress to:

- Reintroduce and pass legislation to protect the voting rights of each American, including a law establishing the day of federal elections as a federal holiday.
- Conduct oversight about possible discrimination against federal workers with a targeted disability.

PAID PARENTAL LEAVE

AFGE supports reintroduction of Federal Employee Paid Leave Act, by Representative Don Beyer (Virginia) and Senator Brian Schatz (Hawaii), to provide federal employees with twelve weeks of family leave for all instances covered under the Family and Medical Leave Act (FMLA).

This includes paid leave to care for a newborn, newly adopted, or newly placed foster child; to care for seriously ill or injured family members; to attend 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. No federal employee should have to choose between caring for a loved one and receiving a paycheck.

The COVID-19 pandemic has highlighted the critical need for expanded dependent care flexibility for federal and D.C. government workers. This bill would be a step in the right direction to help provide support to working families.

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. But the cost of failing to extend this benefit to families is clear. Productivity is lost when a federal employee returns to work too soon without securing proper care for a loved one or when federal employees come to work when they are ill because they used all their sick leave taking care of a loved one. A lack of paid family leave also negatively affects the government 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.

There is widespread agreement among employers that improving the quality of life for working families is a good policy. Growing numbers of private employers, including taxpayer-funded federal contractors, and most governments across the globe have acknowledged the benefits that accrue to employers when workers are provided paid family leave. Only 12 percent of U.S. workers have paid family leave and only 61 percent 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 difficulties federal workers face in accumulating annual leave. Federal employees are only able to accumulate a maximum of 30 days of annual leave, not an adequate amount of time for other potential instances covered under FMLA. By most conservative estimates it would take a federal worker who takes two weeks of annual leave and three days of sick leave per year close to five years to accrue enough sick and annual leave to receive pay during the 12 weeks of family leave allowed under FMLA. Even if a federal worker never got sick and never went on vacation it would take over two years to accumulate enough leave to pay for 12 weeks of family leave. The alternatives suggested by federal employee paid family leave opponents are far too simplistic and unrealistic to adequately address the problem.

Federal workers who take unpaid FMLA leave too often fall behind on their bills and face financial ruin.

AFGE believes a paid family leave benefit 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 EQUITY ACT

H.R.5, the “Equality Act,” introduced by Representative David Cicilline (Rhode Island), passed in the House of Representatives on February 25, 2021. This bill extends existing civil rights protections to LGBTQ Americans in the areas of employment, education, housing, credit, jury service, public accommodations, and federal funding. AFGE supports the reintroduction of the Equality Act in the 118th Congress.

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, deny housing, or educational opportunities to individuals simply because they are a member of the LGBT 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.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

To Carry Out its Civil Rights Mission, EEOC Should Hire Frontline Staff to Handle Rising Charge Filings and Ensure the Union and Employee Rights of its Own Workforce

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, which protect against discrimination on the job based on race, religion, color, national origin, sex, pregnancy, age, disability and genetics. EEOC needs adequate staff to effectively enforce civil rights.

EEOC ended FY22 with only 2,041 Full Time Equivalent (FTEs) nationwide. This is 300 FTEs below the staff ceiling. Short-staffing results in the public experiencing delays in getting help, such as the months it can take to get an appointment. While staffing remains low, discrimination charges, e-mails, and calls all increased significantly. Traditional inquiries have expanded to include emerging issues. As of December 29, 2022, Congress has also charged the EEOC with enforcing the Pregnant Workers Fairness Act.

Meanwhile, EEOC, which should be the model employer, has a poor history of failing to comply with Union rights and bargaining obligations, denying reasonable accommodations and FMLA requests, allowing harassment and fear of reprisal to fester, and resisting the expansion of efficient workplace flexibilities. It took AFGE Council 216 filing unfair labor practice charges and FLRA issuing a complaint before EEOC finally completed a required memorandum of understanding on office reentry. EEOC should practice what it preaches and support Union and employee rights, consistent with the priorities of this administration.

Summary of Priorities:

For FY24, AFGE Council 216 will urge Congress to increase EEOC's budget and hire up to the staff ceiling of 2,347 FTEs. The Union will continue to fight for safe working conditions in the office and serving the public during a continuing pandemic. The Union will advocate for the continuation of workplace innovations learned during COVID, such as virtual mediations, Zoom for office, expanded telework, making a long running emergency Maxiflex pilot a permanent option, and implementation of a national remote work program that has reasonable eligibility and approval mechanisms.

Discussion

- 1. Congress should support robust funding for EEOC for FY24**
 - *AFGE Council 216 will urge Congress to boost EEOC's budget.*

EEOC's needs resources to accomplish the mission. For FY23 EEOC did receive a budget increase, but it was \$9M below the administration request. EEOC is still recovering from the last administration's "do more with less" strategies, which came at the expense of providing substantive help to the public. Despite a budget increase, EEOC's hiring barely outpaced attrition. With a significant budget boost EEOC could finally do "more with more." EEOC must

not only rebuild but expand to handle a convergence of emerging issues: the recently passed Pregnant Workers Fairness Act; COVID; Asian hate crimes; 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 in Federal agencies. For FY24, a robust increase would allow EEOC to build up frontline staff to provide more effective help to the public when they face workplace discrimination.

2. EEOC Must Rebuild from Record Low Staffing to Help the Public

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

While new agency leadership began hiring last year, EEOC still ended FY21 with a record low 1,927 FTEs. EEOC saw a modest staff increase in FY22, ending the year with 2,021 FTEs. But compare this to staffing a decade ago, when EEOC finished FY12 with 2,346 FTEs. Unfortunately, EEOC only requested 2,145 FTEs for FY23, well below the staff ceiling of 2,347 FTEs.

Congress should direct EEOC to hire staff in frontline positions, which actually serve the public. Increasing frontline staff is warranted based on the rising workload. During fiscal year 2022, the charges of discrimination filed with the EEOC, as well as calls and emails to the agency's contact center, increased significantly compared with fiscal year 2021. EEOC emphasized this need in its FY22 Financial Report which stated that "[t]he addition of new employees in mission critical positions was essential but must be followed by additional investments to ensure that the EEOC has resources commensurate with its task and the increase in new charges filed in fiscal year 2022."

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 170,000 inquiries annually from workers asserting employment discrimination. There must be adequate frontline staff to receive inquiries, conduct intake, and process charges.

EEOC's appointment calendars are booked and have been since the digital appointment system started in in FY18. There is just not enough investigative staff to cover the appointment demand. Members of the public primarily file inquiries online but are advised to keep checking back for an appointment. This can leave the public waiting months for an appointment. During this time, jobs are lost, and retaliation cases surge.

Another consequence of staffing gaps is the unfortunate practice of transferring cases, which is bad for workers, employers, and EEOC staff. Starting in January 2023, EEOC began transferring thousands of charges from short-staffed offices to those with a few more personnel. This will drive up the caseloads of investigators in receiving offices beyond the 66 cases that EEOC used to refer to as a reasonable caseload. These investigators will be spread thin, resulting in less attention to their local cases. For the public, this means new staff will have to learn their cases and manage them away from the geographic location of the workers and employers. Historically, offices receiving old cases simply close them to meet arbitrary performance requirements. Rather than using a band aid, the cure is for all EEOC offices to be fully staffed, so they can manage their own caseloads.

Likewise, EEOC's in-house call center is typically staffed by approximately 35 intake information representatives (IIRs), when it was intended for 65. The IIR shortage means the public often waits 20 minutes or more to speak to a live person, with many giving up and leaving rather than wait on hold. A small increase in the number of IIRs has proved to reduce longer wait times. More IIRs would further alleviate hold time.

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.

After a multi-year hiring freeze, EEOC finally began hiring mediators in FY21, but more are still needed. EEOC's mediation program has a 20-year history of success. Due to COVID, EEOC pivoted to virtual mediations. Two recent evaluations reported overwhelming satisfaction with this new option. The popularity of virtual mediations alleviates the need for EEOC to supplement the overall mediation program with contract mediators, who are paid \$800 per case. These mediations should be brought back in-house.

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 has focused 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 forth 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.

For FY24, 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 Support Union and Worker Rights

- *AFGE Council 216 will fight for EEOC to be a model employer to improve morale and retention and comply with labor-management obligations and employee rights.*

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 and must improve on supporting Union and worker rights.

Labor Management Relations

In FY22, EEOC failed to complete required negotiations of a memorandum of understanding (MOU) and instead unilaterally imposed an office reentry plan. Employees were rushed back into offices that had not conducted health and safety inspections or remediated known problems. Many employees got COVID and in some instances passed it along to coworkers. The Union

filed unfair labor practice charges that resulted in the FLRA issuing a complaint. Only then did EEOC complete MOU negotiations.

Unfortunately, even after these events, EEOC has failed to provide notice of changes and continues to resist local bargaining.

Despite the administration's support for Unions, at EEOC Union officials and employees have been subjected to negative actions apparently stemming from union participation. These actions have included the EEOC attempting to evict two Union stewards from their offices this past year. This is particularly concerning since President Biden signed Executive Order 14003, rescinding Trump EO's targeting Unions, immediately upon taking office. The Union had to file Unfair Labor Practices to stop these actions. Nevertheless, even after an FLRA complaint, management persists in its campaign to evict a steward from the Union office.

It should not take ULP charges and the intervention of the FLRA for EEOC to follow the rules. EEOC should respect that Union rights are worker rights.

EEOC Should Expand its Pre-Pandemic Telework Program and Implement Remote Work Options for COVID Safety and to Embrace Innovations

EEOC should act consistently with the Administration's goal of capturing workplace innovations from the maximum telework experience during COVID-19. Like other agencies, EEOC should increase telework and implement a national remote work policy, with reasonable eligibility and approval mechanisms. EEOC should also make its Emergency Maxiflex Pilot permanent. These flexibilities also support health and safety concerns that persist due to COVID-19.

Telework improves employee performance and engagement and supports mission productivity and efficiency. Telework flexibilities help staff balance work and personal responsibilities and make use of beneficial work environments, thereby enhancing employee satisfaction and wellbeing.

The EEOC's staff demonstrated during COVID that they have been able to carry out their functions effectively while on maximum telework. EEOC can serve the public even better by incorporating the lessons learned working remotely during COVID into how we worked in the office in the past. During the pandemic EEOC employed innovations such as virtual mediations, zoom for office, online training, and Maxiflex, where employees can work extended hours, which can allow earlier or later times to interface with the public.

Many agencies are adopting plans with up to eight days of telework per two week pay period and fully remote options. According to OPM, federal employees are "agency hopping" to seek greater workplace flexibilities.

EEOC should strategically leverage telework, remote work and Maxiflex, to help recruit and retain a skilled and diverse workforce. Otherwise, EEOC, which is already short-staffed, risks an employee exodus to other agencies and the private sector where they embrace greater workplace flexibilities.

Addressing Violations in EEOC's own Workplace

EEOC should reduce costly turnover by addressing poor morale. This includes improving the internal EEO process that rarely makes discrimination findings. EEOC should also stop blocking reasonable accommodations and denying FMLA requests. EEOC must stem the fear of retaliation. When EEOC employees do not feel safe bringing forth complaints, problems are left to fester. EEOC field offices historically have scored 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. This may be addressed in part by EEOC adopting an anti-bullying policy.

Office Climate Assessments

EEOC has hired an outside contractor to conduct nationwide assessments of office climates. The focus includes diversity, morale, fear of reprisal for protected activities including Union participation. EEOC has a history of conducting employee surveys, but not taking action to address the problems raised. EEOC has several offices that are "hot spots," with ongoing EEO complaints, grievances, RESOLVE mediations, poor FEVS scores, unfair labor practices and high employee turnover. EEOC should take note and train or reassign managers who are negatively impacting employee working conditions, undermining morale, and disrupting positive work environments.

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 activities to drive down its backlog with closure schemes. Administrative judge (AJ) performance plans contain arbitrary closure quotas, which can create a strong pressure to find more often in favor of agencies.

The standards direct AJs to make these numbers by relying on pilot initiatives that are a recipe for denying discovery. Discovery is the only way to keep the EEOC process fair. The standards also press quick closures, such as through micromanaged summary judgment and bench decisions. Dismissals to meet the numbers may not meet due process. The standards also do not consider case complexity, varying caseloads, aged inventory transferred from other short-staffed offices, and lack of support staff.

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 case processing activities. Subpoena authority will continue to be sought to improve the due process 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*

In January 2022, EEOC 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, it has been plagued with problems and glitches. ARC has added to the existing overwhelming workload of staff because basic tasks take longer. Despite EEOC's bargaining unit being the primary end-user, the Agency did not seek Union input when designing ARC. The Union should have been included in the planning, to make sure that ARC was user-friendly for staff and the public. The Union should be included before expansion to the federal sector.

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 at intake with the booked appointment calendars. EEOC later hired a handful more. Efforts to have these SISAs cover multiple offices have encountered problems, due to technical issues with 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. With greater investment, the dedicated intake unit could finally come to fruition.

AFGE will urge Congress:

- For FY24, to enact a budget increase for EEOC from \$455M to at least \$464.6M, i.e., the level requested by the WH 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 expanded telework and remote work options.
- To reduce costly turnover by improving poor morale, including timely acting on and finding EEO violations, and addressing fear of reprisal.
- To maintain federal employee rights to discovery and full and fair hearing 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, 68 million people currently living in the U.S. speak a language other than English. Of those, 22.4 percent self-reported that they either did not speak English “very well” or “at all.” They are considered linguistically isolated, meaning that they lack a command of the English language and have no one to help them with language issues on a regular basis. A growing number of federal employees provide services to the linguistically isolated by using multilingual skills in their official duties to explain application processes, determine benefit eligibility and provide public safety. Increasingly, the multilingual skills of federal employees are an absolute necessity to serve the public and accomplish the mission of federal agencies. Yet there is no standard across federal agencies to provide compensation for federal workers who make substantial use of their multilingual skills in the workplace.

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 One America, Many Voices Act 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 percent 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 are only 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 federal civil service. Although the private sector often pays a substantial dividend for the ability to speak fluently in 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, including at the Small Business Administration, 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 client communication for effective delivery of services and for the successful functioning of federal agencies. If enacted, the One America, Many Voices Act would provide both a mechanism to pay current federal workers using their bilingual skills on the job, and work as an incentive to aid in the future recruitment of bilingual applicants.

Conclusion

AFGE will work with Representative Nydia Velazquez (New York) and Senator Ben Cardin (Maryland) for the reintroduction of the One America, Many Voices Act or similar legislation in the House and Senate during the 118th Congress. The skills of a federal workforce that uses multilingual skills to provide a more efficient government and better services to the public are advanced by the passage of legislation like the One America, Many Voices Act.

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 (OWCP) 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 for inherently dangerous occupations – 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.

However, this provision expired in January 2023. AFGE continues to urge Congress to extend the deadline for COVID FECA benefits as federal and D.C. workers continue to serve the American public during the COVID-19 public health crisis and are exposed to health and safety risks.

AFGE is also urging OWCP to extend this benefit through a policy change. COVID-19 claims filed after January 27, 2023, will have to meet the OWCP basic elements and will have to be filed on a CA-2 instead of a CA-1 as was allowed under ARPA provisions, except in cases where the employee can prove the exposure occurred at a specific time and place during a single work shift. This will make it more difficult for members to have COVID-19 claims accepted. Most agencies are not informing employees when they are exposed on the job, and some are already telling employees that all CA-1's will be challenged.

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. Last Congress, AFGE supported the Safe Line Speeds in COVID-19 Act, introduced by Rep. DeLauro (D-CT) and Sen. Booker (D-NJ). AFGE also supports Sen. Booker's Industrial Agriculture Act, which would increase funding for FSIS and prevent dangerous line speeds.

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 and again in 2021, the House has 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 Senate companion bill had over 45 cosponsors last Congress but was blocked in the Senate. AFGE strongly supports this bill. This Congress, H.R. 51 already has 172 cosponsors and is expected to shortly be re-introduced in the Senate.

Congressional Requests

- AFGE urges Congress to pass 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 further 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*, enhances the District's paid leave program for government employees by expanding the current 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 two weeks of prenatal leave. AFGE thanks the D.C. councilmembers who passed this important bill and encourage the mayor to fully fund and implement it as quickly as possible.
- *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 passed this important bill and encourage the mayor to fully fund and implement it as quickly as possible.

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

Congress should amend title 5 of the United States Code to include federal law enforcement professionals whose duties meet the current statutory definition of a federal Law Enforcement Officer (LEO) but are currently excluded and receive inferior benefits. Under present law, the definition of a LEO does not include officers of the Federal Protective Service (FPS), and police officers from the Department of Defense (DOD), Veterans Affairs (VA) the U.S. Mint, and other agencies. Despite having duties similar or identical to other LEOs, these law enforcement professionals do not receive equal pay and benefits compared to their occupational counterparts in other agencies. Specifically, they have lower rates of pay, lower pensions, and are not eligible for full retirement benefits until years after their LEO peers. As a result of this disparity, the law enforcement agencies with lower pay and benefits are greatly disadvantaged when recruiting and retaining trained law enforcement professionals and have far lower employee morale.

Statutory Definition of a Law Enforcement Officer

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, or at any age with 25 years of LEO service. To be eligible for LEO retirement coverage, positions must meet both the statutory definition under 5 U.S.C. 8401 as well as LEO requirements under FERS.

Under 5 U.S.C. 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.”

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. 8336(c), a federal LEO with a minimum of 20 years of service at age 50, or 25 years of service at any age 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 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) accounts 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 continues to lead to high turnover after law enforcement professionals are trained because they are recruited by other agencies that give them full respect, status, pay, and benefits.

Expansion of LEO Statutory Definition

In the 117th Congress, AFGE continued to support H.R. 3693/S. 771, the “Law Enforcement Officers Equity Act,” introduced respectively by Representative Bill Pascrell, Jr. (D-NJ) and Senator Cory Booker (D-NJ). This bill would amend the definition of the term "law enforcement officer" to include federal employees whose duties include the investigation or apprehension of

suspected or convicted individuals and who are authorized to carry a firearm. In a concerted effort from AFGE's legislative team, the H.R. 3693 gathered 105 bipartisan cosponsors from an ideologically diverse cross section of Representatives.

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 in too many cases they are only considered law enforcement officers 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 also in direct alignment with the statutory definition of a LEO. AFGE will continue to fight for this bill's re-introduction and passage in both chambers of Congress.

Congressional Action Needed:

- AFGE strongly urges the 118th Congress to reintroduce and enact 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, the U.S. Mint, and other agencies in the definition of a law enforcement officer.

CENSUS BUREAU AFGE COUNCIL 241

Census Bureau Funding

Congress passed a Fiscal Year 2023 omnibus package that funds the Census Bureau at \$1.48 billion with \$330 million for Current Surveys and Programs and \$1.15 billion for Periodic Censuses and Programs. AFGE continues to advocate for full and robust funding for the Census Bureau to ensure employees can successfully ensure the integrity and security of surveys and data. AFGE urges Congress to ensure that the Census Bureau ensures fair and accurate Censuses including the American Community Survey and the Economic Survey.

AFGE is working with the Census Task Force headed by the Leadership Conference and Members of Congress to secure adequate funding for the Census Bureau in future funding bills.

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 key economic indicators and socio-economic characteristics that support government and private sector decision-making.

Congressional Action Needed:

- Continue educating Members of Congress and staff about the important work Census Bureau employees do for the American public and to advance civil and human rights. 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 living with and dying from cancer in the United States every year. Firefighters are frequently exposed to smoke, toxic chemicals, and debris which can cause cancer. These civil servants and American heroes deserve the highest quality data and best public health solutions to help prevent 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, artillery, and ammunition. 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, hazardous material containment, and fight 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 high rates of cancer in firefighters.

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 identify and diagnose work related illnesses. For instance, registries help bring attention to the fact that professional groups like firefighters are not getting much needed cancer screening tests, and that more pefforts are needed to decrease the likelihood of illness.

After over 20 years of lobbying the Federal Firefighters Fairness Act was passed into law as an amendment to the FY2023 National Defense Authorization Act. This bill will help federal firefighters access health and safety benefits in the workplace. Specifically, this bill creates an automatic presumption of work-related disability for federal firefighters who apply for workers compensation benefits if they develop heart disease or certain forms of cancer.

There was also language in the FY2023 NDAA securing minimum staffing language and prohibiting purchase of PFAS-laden firefighting personal protective equipment (PPE).

Finally in late 2022, the AFGE-supported First Responder FAIR Retire Act was passed into law. This legislation was introduced in the House by Representative Connolly (Virginia) and in the Senate by Senator Jon Tester (Montana).

The Fair RETIRE Act allows federal first responders to stay in the expedited retirement system for emergency responders, known as the 6c system, if they become injured on the job prior to retirement and are placed in another civil service position.

AFGE will continue to advocate in support of legislation addressing firefighter hourly pay, retirement, and a weekly limit on the hours of work.

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 budgets have removed the proposed benefit cuts.

The 2023 COLA is 8.7 percent for those under CSRS and 7.7 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. Last Congress, Rep. Gerry Connolly (D-VA) and Sen. Alex Padilla (D-CA) introduced H.R. 304/S.4221, the Equal COLA Act, to bring the FERS COLA up to the same amount as the CSRS COLA. AFGE supports this legislation, which garnered over 40 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). In the 117th Congress, Rep. John Garamendi (D-CA) introduced H.R. 4315, the Fair COLA for Seniors Act, which would have based 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 received 47 cosponsors.

Legislative Action:

- 1) Oppose any cuts to the federal retirement COLA for active and retired employees.
- 2) Cosponsor and support The Equal COLA Act to eliminate the one percent penalty in the FERS COLA so that it is aligned with CSRS and Social Security.
- 3) Cosponsor and support 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 117th Congress, this legislation received over 300 cosponsors in the House and over 40 in the Senate. This Congress, it was introduced by Rep. Garret (R-LA) in the House again as H.R. 82, and already has 59 cosponsors. Sen. Sherrod Brown (D-Ohio) is expected to reintroduce it in the Senate in the coming weeks. AFGE is advocating for members to cosponsor these bills 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 and is fully paid for.

INCREASING SOCIAL SECURITY BENEFITS AND SOLVENCY

FERS retirees and some CSRS retirees are also beneficiaries of Social Security. 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, 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-CT) "Social Security 2100 Act: A Sacred Trust." We 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 \$200 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.

AFGE supported several important healthcare provisions in the Inflation Reduction Act (IRA), which was signed into law in 2022. The IRA protects Medicare recipients from catastrophic drug cuts, establishes a cap on insulin costs and allows Medicare to begin to negotiate prices for certain high-cost drugs. It also extends health insurance premium subsidies.

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 provisions 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. We need to help deliver affordable,

high-quality care for older Americans by reducing these waiting lists and 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 through the Social Security system.

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. The Biden administration has opened up limited parts of this contract for renegotiation but has refused to bargain on many important contract issues.

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 and promote attrition. 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 and some sections have been opened for negotiation, but the agency refused to reopen the full 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 2012 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.

FULLY FUND THE AGENCY

The Social Security Administration (SSA) is critical for Americans to access benefits in times of need but has faced years of underfunding. SSA's administrative funding for basic operations fell by more than 14 percent from 2010 to 2022, after accounting for inflation. From 2010 to 2021, SSA's workforce was reduced by approximately 8,500 full-time, permanent workers or 1 in 8 employees and 67 field offices have closed. Morale for workers is low; SSA has been ranked among the worst federal agencies to work for. Recent surveys also show that SSA employees

are very likely to leave the agency for better pay, benefits, telework, and working conditions. Meanwhile, the workload is set to increase as nearly twenty million Americans reach their retirement age over the next decade. AFGE requests SSA be funded at a level of \$16.5 billion in FY 24 to administer this critical program. The additional funding should be used towards staffing resources, the agency's Disability Determination Services, for IT modernization and towards increasing security in SSA field offices.

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.

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.
- Fund SSA at \$16.5 billion in the FY24 appropriations bill to ensure the agency can adequately serve the public.
- 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

Congressional Actions

- Congress should take immediate steps to address the staffing crisis at the Environmental Protection Agency (EPA).
- Implementation of the Inflation Reduction Act (IRA), the Bipartisan Infrastructure Law (BIL) and EPA's Fiscal Year 2023 funding increase will not be meaningful if EPA staff is so overburdened that they cannot bring home benefits to the American people. Steps we need from Congress include:
 - Creating a specific appropriation for promotion of experienced EPA staff.
 - Providing oversight of EPA's hiring including improved pay to attract in-demand STEM workers.
 - Urging EPA to use already-available workplace retention tools, including approving more remote work, preserving scientific integrity, creating a fair 4-tier performance system, and boosting workforce diversity and inclusion.
 - Working to avert a government default in FY 2023.
 - Congress should support the decarbonization of the Thrift Savings Plan (i.e. the removal of company stocks linked to global warming) as climate challenges faced by the nation continue to escalate.

Background

The members of AFGE Council 238, EPA's largest union at over 7,700 strong, commend our lawmakers' determination to limit harmful greenhouse gas emissions and avert the worst effects of climate change by passing the Inflation Reduction Act (IRA), the Bipartisan Infrastructure Law (BIL) and the Environmental Protection Agency's Fiscal Year 2023 Appropriation. EPA employees stand ready to address climate change, the most pressing environmental problem of our generation, as we have demonstrated over our 50-year track record at the Agency. But EPA is now facing a crisis that limits our path to success, and the Agency has yet to take simple steps to help avert it.

Congress must take immediate steps to address the EPA staffing shortage

EPA's staffing crisis is adversely affecting the Agency's mission and its work on climate. The EPA staffing shortage continues to thwart action by the Agency. Our mission has grown enormously, and climate challenges continue to escalate, but EPA's ability to hire and retain staff is at a crisis point.

In the past year, Congress has added many new responsibilities to EPA's plate. The BIL – a once-in-a-generation investment in our nation's infrastructure and competitiveness – enables us to rebuild America's roads, bridges and rails, expand access to clean drinking water, tackle the climate crisis and advance environmental justice. The IRA invests in clean energy and jobs, while lowering energy costs for families and slashing climate pollution in the U.S. by an estimated 40% by the end of the decade.

But new regulations reducing greenhouse gas emissions from power plants, cars and trucks must be enacted if the nation is to meet the goal of reducing those emissions in half by the end of the decade. Writing half dozen highly complex rules that are expected to reduce the most devastating effects of climate change demands an expert, highly trained EPA staff that must act with maximum speed to avert global catastrophe. And EPA staff must shepherd the new rules through complex regulatory hurdles within the next 18 months, a pace unheard of in the regulatory world. EPA has already missed its own self-imposed deadlines, which is not an encouraging sign for those tracking progress in the war on climate change.

Further, federal environmental enforcement must be reinvigorated. EPA's civil cases against polluters hit a two-decade low in 2022, with only 72 such enforcement cases closed in court. That number is even lower than during the Trump administration, which avoided restrictions on industry yet closed an average of 94 enforcement cases per year. In contrast, the EPA under the Obama administration closed an average of 210 enforcement cases per year. And on top of these challenges, EPA must enact a trailblazing environmental justice agenda.

EPA workers are implementing key provisions of groundbreaking regulatory efforts to protect the American people and our planet. The country is depending on them to help avert the worst effects of the climate crisis. But, EPA career employees report, and EPA management acknowledges "staff are being 'worked to death' and are under the greatest pressure they've ever encountered as Agency employees." Right now, EPA's 14,000 full-time employees are not enough to meet the demands posed by the climate crisis. To meet the current needs, EPA must expand its ranks to 20,000 workers.

Failure to retain staff is exacerbating the staffing shortage at EPA

Congress must take steps to prioritize staff retention at EPA and entice workers to stay at the Agency. EPA staffing levels are dependent on two factors: (1) hiring of new staff and (2)

retention of existing hires. Right now, EPA is focused on hiring but is ignoring retention. There is no net gain in staff as attrition accelerates.

EPA is hiring new employees at an impressive clip. But in the past two years, EPA's hiring spree has only upped staff by 3 percent, to 14,844 employees. It is not enough to reduce the staffing shortage. Total staff levels are still very low – and remain stuck at numbers only marginally above when Ronald Reagan was president. This is because even though hiring continues, employees are leaving EPA at a very high rate, draining the Agency of staff and, importantly, hard earned expertise. Over 3,000 employees are currently eligible to retire.

Unless incentives are provided, overworked staff are moving to retire rather than continue to shoulder a punishing workload, increasing the burden on remaining workers. Employees at the start of their careers are also leaving because of uncompetitive pay.

EPA workers are poised to tackle the steepest challenges of any workforce in history – averting climate change impacts that threaten most of our nation's communities. Solving the climate crisis is our generation's moonshot. There is too much at stake for EPA to maintain low pay and sustain failed retention policies. Tackling climate change will require dramatic change at EPA, and that starts with visionary, forward-looking hiring and retention policies for its workers.

Congress should provide funding and oversight for promotions and higher pay at EPA

Congress must provide funding and oversight for EPA promotions, higher pay and opportunities for career growth that are more comparable to the private sector.

AFGE Council 238 is grateful for the work of 80 House members and 29 Senators who joined in letters to Administrator Regan pushing for fair promotions for EPA scientists and engineers. Over 650 EPA workers followed up those Congressional appeals with a petition to Administrator Regan.

To retain the most talented environmental professionals and attract the next generation of the best and brightest technical workers, Congress should provide and specifically designate EPA funding that supports more career ladder GS-13, GS-14, and GS-15 positions and higher pay commensurate with private sector competition for STEM workers.

At present, EPA salaries are not competitive with private industry. 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. Even with the federal pay bump of 2023, a starting GS-7 scientist or engineer who joins the agency and starts working in Washington, D.C. would make \$53,105 per year; 30% lower than the average \$80,000 entry-level salary for an environmental engineer with a private firm in the D.C. area. Increasing pay for EPA staff by providing promotion potential will help attract candidates and retain the best

talent to enable the Agency to take on its science-based climate change work as well as rebuild our existing environmental laws and regulations.

More pay through promotions should be a critical component of EPA's retention plan. When EPA workers must take on more and more work but receive no recognition or compensation for doing so, they leave the Agency. Senior EPA staff are retiring at record rates, and those remaining must pick up the slack with no commensurate raise in pay or a promotion to the retiree's grade level.

Congress must: (1) urge EPA to use existing authorities to provide promotion potential for EPA jobs and raise individual salaries in cases where pay is lagging the private sector; and (2) carve out more of EPA's appropriations for promoting current staff.

Congress should provide oversight of EPA's incentives for allowing more remote work and telework opportunities as a cost savings and recruiting measure and, importantly, to reduce emissions

More remote work and telework opportunities will incentivize highly skilled employees to work at EPA. Since the COVID-19 pandemic began, many federal employees have been granted the ability to work remotely to protect their health and the health of their families and communities. EPA employees were praised by EPA management, even under the Trump administration, for their effectiveness working remotely – processing more environmental permit applications during the first year of the pandemic compared to a standard year working in-person.

As federal agencies began to return to work in-person, considering how effective EPA was during the COVID-19 pandemic, AFGE bargained with the Agency to allow EPA employees to continue to telework full time. After only nine months under this agreement, the Agency is quickly trying to limit the scope of the agreement by disapproving a large swath of applications for remote work. As acknowledged in the agreement itself, offering remote work is a selling point that helps recruit to EPA from the STEM applicant pool. The Agency has reported that, after remote work is ruled out in job offers, applicants have been turning down EPA's offers of employment. As it stands, fully one quarter of job offers tendered by EPA are not being accepted. Remote work is part of the employment package most STEM workers are looking for. And within EPA, we see more experienced EPA employees transferring to offices where remote work is possible. Some 85 percent of federal employees say working from home had benefits for their quality of life. Federal employees believe the benefits go beyond simple convenience. Over three-quarters believe their productivity is better when they work at home. Most say they took the extra time they had without a commute to learn new skills. And when it comes to the bottom line of productivity, nearly 70 percent of federal employees say there was no difference between working remotely or being in-person.

Importantly, reducing EPA's office footprint is both an environmental and a cost savings measure. Federal departments that cover transit costs were able to shed a considerable part of

that financial burden. Utility costs dropped. More employees working remotely created opportunities to reduce office space. The Department of Education, for example, saved over \$3 million on transit costs alone. When comparing EPA with other similarly situated agencies, EPA lags behind in approval of remote work even though EPA productivity has not suffered.

Investing in the work-life balance EPA's workforce will pay huge future dividends. The cost of that investment, in the form of approving more remote work, is minimal and in fact allowing remote work saves money. The investment in telework and remote work will attract the best and the brightest while at the same time retaining EPA's highly educated, highly trained workers. When the future of our planet and our people are at stake, approving more remote work is a low cost yet critical step.

Congress should demand EPA adopt a fair performance review process

EPA has imposed a three-tier performance system that has downgraded many hard-working employees' performance appraisals. Imposition of this system has caused widespread disaffection among employees, discouraged staff from taking on extra work, or caused them to leave EPA.

Results-oriented performance appraisal plans are central to linking individual achievement to organizational outcomes and building a high-performance governmental organization. Failing to provide a rating system that allows management to accurately reflect employees' performance harms employee morale and ultimately is counterproductive. If we are serious about meeting the president's goals to combat the climate-related threats facing our planet, EPA must put in place a fair workplace performance system to retain the best scientists in the nation.

Congress should demand more action to support diversity and inclusion at EPA

AFGE Council 238 supports and embraces equity and inclusion at EPA – it's part of who we are and how we do our work. The Agency must take more robust action to address diversity at EPA and must recruit and retain more engineers and scientists of color. Right now, EPA does not reflect our nation's diversity. EPA has admitted it is hiring people of color at a lower percentage than they appear in the pool of applicants. This must change.

EPA should specifically 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 GS-14 positions and 76% of GS-15 positions.

EPA's lack of diversity has exacerbated the staffing crisis, keeping the American public from being served by the most effective EPA possible. But EPA management has yet to meaningfully address diversity and inclusion at EPA. Congress should incentivize diversity goals in its

oversight of EPA's funding and should examine EPA's efforts to increase training, development, and career ladder opportunities for diverse candidates.

Congress should protect EPA's 2023 appropriation from erosion due to the debt ceiling crisis

In the coming conflict over raising the debt limit, we ask that Congress preserve the gains made by EPA under the BIL, IRA and the first increase in appropriations in many years.

The federal debt limit, set by law, restricts the total amount of money that the federal government can legally borrow. The Treasury Department reached the debt ceiling on January 19th of this year. It can no longer borrow money to cover government operations, so it is temporarily drawing on "extraordinary measures" – accounting maneuvers that allow the government to continue standard operations for a short period. At some point after early June, these extraordinary measures will be exhausted, and the Treasury will no longer be able to pay its obligations. At that point, given annual deficits, incoming receipts would be insufficient to pay daily obligations as they come due. This would cause the federal government to default on many of its obligations, including salaries for federal civilian employees and funding of measures to reduce climate change.

Failing to raise the debt ceiling would be disastrous for EPA's work. We no longer can say with certainty that the House majority will work promptly to raise or suspend the debt ceiling by the deadline. Worse, holdouts may attempt to extract concessions in return for raising the debt ceiling that could erode any progress gained by EPA in funding for staff or its mission.

\$90 billion was provided by Congress under the BIL and the IRA for climate projects. EPA must administer \$1.5 billion to develop the technology to monitor and reduce methane emissions from oil and gas wells, \$5 billion to lower emissions from school buses and \$3 billion to minimize pollution at ports.

Key provisions in this year's appropriation add nearly \$450 million to funding for programs and activities to protect the environment. EPA's 2023 funding finally began to address years of declining EPA resources, after the 2022 budget that was half the size, in real dollars, of EPA's budget 40 years ago. The 2023 EPA appropriation takes a tiny step forward, with \$575 million in new funding, much of which will help rebuild the Agency and restore its ability to implement and enforce the laws protecting our nation's environment. While the funding increase is only a modest 6 percent of the EPA budget — less than the current inflation rate and one-quarter of what EPA requested – it is a significant improvement on 2022 funding.

If, as some have suggested, a budget compromise protects defense spending while cutting the overall budget back to 2022 levels, the rest of domestic spending will take in a massive and devastating 18% cut. Moving backwards, and capping investments in EPA and climate resiliency at fiscal year 2022 levels will be disastrous to the planet.

Congress should guarantee scientific integrity at EPA that will protect the American people and EPA staff

Under our last administration, and previous ones, sound science was not safeguarded at EPA. EPA ignored its Scientific Integrity Program during the Trump years, even when multiple instances of abuse were reported. President Biden's attempts to address political interference in scientific decisions at EPA have failed to alleviate the pressure on scientists when upper management fails to support sound science. Scientists within EPA's Office of Chemical Safety and Pollution Prevention blasted the Scientific Integrity Program in 2021. More than 70% of scientists feared that "my confidentiality will not be protected" if they report a lapse in scientific integrity. Recently, a Scientific Integrity Officer revealed complaining scientists' identities in an unredacted complaint and proceeded to discuss how the scientists could be reined in by managers.

EPA's Scientific Integrity Program has been broken for so long nobody has any reason to trust it, demonstrated by the continuing stream of misconduct charges by scientists. EPA's lack of any action to remedy integrity breaches, no matter how egregious, only reinforces the sense of impunity among its managers. The quality of science within EPA will not improve until Congress demands a strong and independent capacity for adjudicating claims of alteration and suppression of science.

Congress should ensure that the Thrift Savings Plan includes indexes that exclude fossil fuel investments and fully staff the Federal Retirement Thrift Investment Board (FRTIB) with members who understand climate risk.

The Thrift Savings Plan serves 6.5 million federal employees, including civil servants and the military, and has \$762 billion in assets. EPA employees want to invest their retirement savings in funds that provide a long-term sound financial investment and do not contribute to climate change or deforestation.

We have committed to protect the health of this nation and our environment. We want our investments to reflect our values and the missions we proudly serve as well. As the economy has shifted to clean energy sources, the TSP has not kept up, and the TSP Board has not met its fiduciary duty to provide investments in our best financial interests.

The TSP is invested in companies that are driving the climate crisis. Recent federal government reports, including reports from the U.S. Federal Reserve, the U.S. Department of Defense, and the thirteen agencies in the Global Change Research Program, highlight the risks posed by climate change to our nation's economy, national security, public health, and environment.

While 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, this has not gone far enough. The TSP continues holding its positions in the fossil

fuel industry. Not only are these investments contrary to our Agency's mission, fossil fuel stocks have mostly underperformed the market for the past decade. 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 will be poor investments in our transformation to fossil-free energy, while also presenting palpable financial risk to TSP members' earnings. 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.

Investing in ESG (Environmental Social Governance) funds has only been offered in the limited and unfavorable circumstances through a mutual fund window. But the mutual fund window is not an attractive option for most investors, as it charges an annual \$55 administrative fee, an annual \$95 maintenance fee, and a per-trade fee of \$28.75. Moreover, it is only accessible to participants with balances over \$40,000, and those investors are limited to a contribution of 25% of their TSP balance. Publicity and training about the mutual fund window for federal employees has been minimal.

The FRTIB itself could recommend changing the existing index funds' strategies to make them ESG-friendly. According to the rules governing the TSP, the current funds in the plan must track indexes that are "commonly recognized" and a "reasonably complete representation" of the market.

The exposure of TSP's investment portfolio to risks from climate change is unfair to federal workers. The FRTIB has not addressed such risks. We ask that Congress require that the Thrift Savings Plan fund follow the GAO report recommending that the TSP Board investigate using indexes that exclude low-return companies whose primary business is oil, natural gas, and coal exploration and production. Further, we request that the president appoint members to the FRTIB who understand that climate change 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 has three main campuses in Pittsburgh Pennsylvania, Morgantown, West Virginia and Albany, Oregon, which are under continued threat of consolidation and closure. NETL partners with universities and private institutions at hundreds of sites across the country.

Congressional Action Needed:

- AFGE is working to keep the top line increase in 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.

Additionally, AFGE is working with Congresswoman Rosa DeLauro (CT) in the House to introduce an amendment into the Labor HHS Appropriations bill to appropriate \$200 million for equipment, repair, renovation and reconfiguration of the National Institute of Occupational Safety and Health (NIOSH) facilities across the country in next year's Labor HHS Bill.

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 minor construction of the Laboratory infrastructure. We are working with our AFGE NETL members and key Members of Congress to address significant downsizing occurring at NETL by not backfilling positions as feds leave the workforce, either through retirement or other job opportunities and increased contracting out of NETL positions.

FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)

AFGE continues to lobby in support of full FEMA funding and advocating for member pay and fair hiring practices. AFGE represents employees at FEMA whose mission is to make victims whole again after natural disasters. AFGE continues to urge Congress to amend language that allows CORE employees to become full time employees without the standard hiring practices and advocate for raising the Pay Cap Waivers for FEMA employees so that FEMA employees can be compensated for hours worked in disaster zones.

AFGE continues to work with Congress to ensure adequate funding for the safety and protection of FEMA workers. Additionally, AFGE is working to address language included in the FAA Reauthorization bill that would promote CORE employees to full time employees without going through the routine hiring process. In 2022, S. 2293, the “CREW Act” introduced by Sen. Gary Peters (D-MI) was signed into law. This bill expands employment protections for Federal Emergency Management Agency (FEMA) reservists who deploy to major disaster and emergency sites.

The Administration requested \$28.5 billion for FEMA including \$19.4 billion for the Disaster Relief Fund. AFGE advocates for robust funding for FEMA. The Disaster Relief Fund bill has passed in the Senate and the President supports the bill. Three House Republicans blocked an attempt to pass the \$19.1 billion disaster aid bill by unanimous consent the week of May 27th. The Disaster Relief Fund bill will likely pass when the House comes back into session the first week of June. AFGE supports this bill as it will provide much needed aid to communities ravaged by natural disasters. The FEMA budget has been reallocated throughout the Department of Homeland Security (DHS) to support other funding. For example, disaster assistance and prevention money has been diverted to pay for other Administration priorities. AFGE supports Stafford Act money being utilized for FEMA priorities and making victims whole again which includes supporting FEMA employees in order for them to be able to perform the mission of the agency. AFGE FEMA members also support Congressional oversight of Stafford Act spending. FEMA has been contracting out Permanent Full Time (PFT) title 5 employment to subcontractors. For example, flood plain management and Federal Insurance & Mitigation Administration (FIMA) positions are being contracted out without proper labor-management negotiation processes taking place.

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 expired 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 will continue to work with the House Transportation and Infrastructure Committee to ensure that BLS employees have full workplace rights and protections at the Suitland Federal Facility to be able to perform their work effectively. While Representative Anthony Brown (D-MD) who was a strong champion of this issue is no longer in Congress, we will continue to work with our champions on Capitol Hill to engage in strong oversight of this relocation.

DEPARTMENT OF DEFENSE: KEEPING OUR NATION SAFE AND SECURE

REINVIGORATING THE COMPETITIVE SERVICE TO ADAPT TO FUTURE TECHNOLOGICAL CHANGES

Issue

Federal employees bring skills, talents, and experiences that are all too often ignored as job requirements change through the introduction of new technologies and artificial intelligence applications. Managers give lip service to human capital planning, while in reality hiring processes for civilian employees often do not use any assessment tools (or unreliable ones when they do) to fill individual jobs rather than focusing on building important competencies in the civil service. There is a critical need for fair and objective tools for measuring the skills of job applicants.

Additionally, the Armed Services Committees and the Department of Defense have a tendency to create further impediments to recruiting and retaining scarce and valuable skills by viewing the civilian workforce as if they were members of the military committing to a prescribed term of enlistment rather than as a valuable assets that have options to leave and work elsewhere. Examples of these misconceptions include misguided efforts to expand the excepted service using the Cyber Excepted Service as a model; limiting competition through direct hire by exclusively focusing on time to hire rather than expanding the pool of candidates under consideration and improving the tools for inventorying the skills of job candidates; the use of bureaucratic pay for performance measurement systems such as AcqDemo; and expanding the use of term and temporary hires—all of which are incompatible with effective talent management and upskilling the workforce through human capital planning. The Defense Business Board is currently supposed to be addressing these issues in response to directive report language from the Fiscal Year 2022 National Defense Authorization Act (NDAA). Although AFGE has provided three written letters to the Defense Business Board (DBB) on these topics, it is unclear based on interim public results whether the DBB may be continuing down the same paths that have weakened, rather than strengthened, civilian hiring and talent management.

Background/Analysis

1. Section 1109 of the FY 2020 NDAA consolidates various direct hire authorities established on a piecemeal basis over the course of several NDAAAs into a single provision, which sunsets on September 30, 2025. Section 1109 also requires the Secretary of Defense, in coordination with the Office of Personnel Management (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 OPM personnel specialists, and after a survey of public sector employees and job applicants.” The results of that study were recently

- published by the Institute for Defense Analysis, but only shared with Congress after AFGE challenged a separate Department of Defense report sent to Congress on Oct. 14, 2022, that seemed to claim that no study had been contracted with IDA; misrepresented the communications between AFGE and IDA on the study; and rather than using a randomized statistical survey of job applicants, simply provided demographic data on the diversity of hires.
2. The National Security Commission on Artificial Intelligence, the Government Accountability Office, Congress, and DoD 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 21st century threats to our national security as articulated in President Biden's National Defense Strategy.
 3. These skills gaps have persisted after numerous "flexibilities" have been provided to the Department of Defense, including:
 - a) 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;ⁱ
 - b) 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;ⁱⁱ
 - c) The Cyber Excepted Service is exempt from OPM oversight and from the Classification Act, does not allow non-veterans in intelligence fields to appeal adverse actions to the Merit Systems Protection Board, and has an excessive three-year probationary period;
 - d) 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, child care positions, financial management, accounting, auditing, actuarial, cost estimation, operational research, and business administration;
 4. The perspective of DoD leadership has consistently been one of seeking and obtaining exemptions from the government-wide processes administered by OPM that are intended to ensure an apolitical civil service. The Department has sought these authorities purportedly for greater management flexibility, often to the detriment of retaining highly skilled employees recruited by the Department.
 5. 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.

6. Another contributing factor to these management problems in the Department has been lax oversight by OPM of the delegated examining authority provided to the Department, a delegation that has persisted over a couple of decades. As a result, there has been a proliferation of separate career programs within each military department for the same kinds of skills.
7. For anyone concerned with civilian control of the military, the likely genesis of this proliferation of separate, disjointed civilian career programs within 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 a 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.
8. 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.
9. 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.
10. 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 new “Digital Academy” – based on the military academy model.
11. There are less expensive alternatives to fill skills gaps, if only the Department, with the assistance of a reinvigorated OPM, were to revive the objective assessment tools that had been successfully used before to generate larger lists of qualified and diverse candidates.
12. The Fiscal Year 2023 NDAA in section 1535 responded in part to AFGE arguments that larger numbers of diverse candidates could be generated at less cost than a Digital Academy 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.ⁱⁱⁱ

13. 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.
14. 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.
15. Direct hire authorities work "well" for a hiring managers who know specifically whom they want to hire by cutting off competition and shortening the length of the hiring process. But these authorities 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.
16. The Merit Systems Protection Board suggested in November 2019 that agencies can hire better, not just faster and cheaper, by bringing subject matter 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 a "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 and open competition for jobs.
17. There are four root causes to hiring delays, none of which is addressed by direct hire authorities:
 - a) 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 staffing 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.
 - b) 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. 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 while 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.

- c) 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.
- d) Security clearance processing and adjudication, which is entirely separate from the hiring process, is by far the most time consuming part of the overall 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 or Agency Action

- Oppose adding additional direct hire authorities or expansions of the excepted service.
- Support preferences for competitive service hiring.
- Monitor and comment on the Department’s response through the Defense Business Board to the FY2022 NDAA Senate Armed Services Committee report language, which identified deficiencies in the hiring, development, and retention of STEM, 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.^{iv} Follow up on the Department’s response to the Senate Armed Services Committee markup directive report language: “Department of Defense civilian workforce career developmental programs,” at page 168.^v
- Prohibit the use appropriated funds that misuse term or temporary hiring for “enduring functions,” a business practice encouraged by the introduction of personnel caps and sequestration. During the McCain reductions of the civilian workforce, term or temporary hiring was statutorily exempted from those reductions.

ⁱ 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. 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.”

ii 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.

iii Section 1535 expanded these scholarships for up to six years, and allowed successful candidates who complete these scholarships to enter into not just Cyber Excepted Service but into competitive service jobs after AFGE clarified for SASC proponents that DoD had incorrectly claimed that military ROTC graduates incurred a six year probationary period when, in fact, AFGE showed that military had more due process protections available to them from adverse discharge determinations than civil servants separated within their probationary periods. The military had internal checks and balances from the chain of command for any adverse action, including independent separation boards, as well as the ability to litigate their separations in the federal courts right up to the Supreme Court; on the other hand, civil servants separated within their probationary period lack any recourse with the Merit Systems Protection Board. This point was made to argue against mandating that scholarship recipients be subjected to expanded probationary periods for the duration of their commitment after completing their scholarship on top of the 3 year Cyber Excepted Service probationary period.

iv

v “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.”

1. What could DoD do to improve its branding to attract DoD civilians (or all federal civilians for that matter).

AFGE ANSWER: Branding is very much affected by how employees are treated and how their work is characterized relative to the Department’s missions. When the Department testifies to Congress and gives exclusive attention to active component military, secondarily to reserve component military, a discussion of weapon system platforms, and only as an after-thought discusses the civilian workforce contribution, that messaging adversely affects the “branding”

for the civilian workforce. When some members of Congress disparage the civil service as the “deep state” or when the civilian workforce’s contributions to mission are mischaracterized as overhead and appropriate targets for reduction in the budget process, the instability in funding the civilian workforce creates a massive disincentive to using civilians where appropriate. The total force management function is broken and the value of the civilian workforce with respect to optimizing military force structure, lethality, readiness, reducing stress on the military force and the number of high demand low density military occupational specialties, and the opportunity costs from inefficient uses of military for functions that can more efficiently be performed by civilian employees are all issues that will not be recognized when civilian manpower program and budget issues, contract services requirements and the use of military are performed in a separate silos. This non-holistic analysis of the total force results in massive disincentives for human capital planning for the civilian workforce.

Branding efforts should not fall into the trap of suggesting that the civilian workforce is only valuable if they are managed like military. There are good reasons, as we have documented in the past, from a recruitment and retention perspective, of not taking a “one size fits all” approach and fully implementing the Americans with Disabilities Act and other civil rights laws in the way one recruits and develops federal government employees.

Successful branding is very much affected by transparent and predictable compensation; stability in retaining employment reflected by short and not lengthy probationary periods; and a commitment to developing the talents of the workforce, something that extended probationary periods and unstable appointments undermine. No one should ever disparage the federal workforce as “bureaucrats.” These are the mixed messages in current public discussion of the DoD civilian workforce and every effort should be made to make sure that the civilian DoD workforce is supported and acknowledged in a positive way.

2. **What ideas do the unions have to improve the recruiting process and reduce bureaucracy and time to hire?**

AFGE ANSWER: The first idea is to recruit for competencies rather than tailoring to jobs linked to specific individuals. This *requires* adhering to objective assessment tools that examine “learning agility,” which was a term the DBB itself used in an earlier draft study. Objective assessment tools have the potential to expand the pool of diverse and highly qualified candidates in the most efficient way, far more so than targeted visits to specific locations. The Department has been focused exclusively on time to hire and not on increasing the numbers of candidates or candidate quality. They claim to be focused on diversity, but because DoD often simply hires (using direct hire or excepted appointing authorities) the first candidates in a specific category they happen to encounter rather than seeking the broadest possible pool of candidates, diversity is undermined.

While the speed of hiring may be important, placing blame for delays on title 5 processes is entirely misguided and inaccurate. Even accounting for the time spent on personnel-related competitive examination processes, well over 50% of the calculated “time to hire” is spent on security-related background checks. Regardless of the hiring process or authorities used, security background checks are necessary, time-consuming and delay the ability of DoD (and other agencies) to make offers. Suggesting that “hiring delays” primarily relate to personnel processes when DoD’s own data show that security backlogs are the actual culprit in “hiring delays” is quite misleading. No one can fix a problem when the diagnosis of the cause of the problem is inaccurate, and the cause of this “problem” is not something that can or should be abandoned or relaxed.

3. **Are there any steps in the process that you feel are essential to safeguard the rights of current/future employee rights in the recruitment process?**

AFGE ANSWER: An open, transparent, and competitive hiring process that considers all qualified candidates is the key to protecting all employees’ rights. Use of excepted or direct hire authorities (which are typically used in a closed environment) is contrary to maintenance of a highly-qualified, diverse and dynamic workforce. It not only undermines employee rights, it undermines the apolitical, professional civil service. Open competition, transparent competition, not direct hire or excepted service -- these are the “steps” that are “essential” to safeguarding employees and the public interest in a civil service free from corruption.

4. **Are there any key metrics the unions believe may help steer the DoD toward civil service recruitment/talent pipeline improvements?**

AFGE ANSWER: While “time to hire” is an important metric, it should stop being the exclusive or even the most important metric used by the Department. The “size of the candidate” pool and the distribution of candidates relative to various objective metrics using objective assessment tools that rank the density of candidates over time relative to various competencies similar to the way the Armed Forces have used the ASVAB would be a step in the right direction.

This distribution could also be used to account for the diversity of candidates. None of these metrics should be used to unfairly alter or bias objective assessment tools but rather to objectively assess how the Department is doing and how this country is doing in investing in the future of its workforce. Retention and promotion data should also be included as metrics. Up or out policies as applied to the military should not be used for civilians, but instead talents in the workforce that might not have been the initial focus of hiring should be identified, particularly as workplace requirements change and persons hired for one skill develop other skills that are also important in meeting the Department's missions. The absence of objective assessment tools is a key impediment to inventorying those talents.

5. What results have initiatives like the Career Skills Program yielded? From your analysis, have the programs produced a high number of quality government employees? Are transitioning Vets aware programs like CSP and other DOD civilian opportunities?

We are not able to answer this question, as we do not have the relevant information.

6. Are there any regulations/legal changes that you would suggest to improve/streamline the hiring process?

AFGE ANSWER: Existing provisions in title 5 and the implementing regulations are more than sufficient and reasonable. Title 10 exceptions to title 5 should be repealed, such as:

- a. Section 1595 of title 10 which is being implemented through renewable term appointments of faculty at Defense language schools without any RIF protections. Hiring a temporary workforce is very different than hiring a workforce with a long term commitment to developing their talents. This provision is being implemented by jettisoning Farsi and Arabic speakers for Russian, without consideration of long term risks or how language skills in one language can translate to the acquisition of language skills in other languages. It treats faculty like disposable widgets rather than valuable employees.
- b. The Secretary of Defense has had authority to deviate from title 5 in a so-called "pay for performance" demonstration project for the acquisition workforce since 2011 (section 1762 of title 10). RAND studies found Acq Demo to be discriminatory with respect to women and minorities. Employees and managers found Acq Demo to be disruptive to missions and involve excessive record keeping.
- c. The cyber excepted service which is essentially exempt from oversight by the Office of Personnel Management, is also exempt from the Classification Act in a way that does not necessarily result in more competitive salaries—just more discretion for management to play favorites. At some DoD agencies, it only allows veterans to appeal to the Merit Systems Protection Board, and it is subject to a very demoralizing 3 year trial, i.e., probationary period (see 10 U.S.C. 1599f);
- d. Various direct hire authorities as exceptions to competitive hiring are authorized for the Secretary of Defense in section 9905 of title 10, including depot maintenance and repair, acquisition workforce, cyber, science, technology and engineering or math positions, medical or health positions, child care positions, financial management, accounting, auditing, actuarial, cost estimation, operational research, and business administration. Direct hire shortens the process of hiring at the expense of consideration of broader candidate pools, adversely affecting transparency, obtaining the best qualified candidates, and diversity.
- e. Since 2016, a two-year probationary period (in contrast to the government-wide one year period) applies to most of the DoD workforce (excluding the 3 year cyber trial period). A long and expanded probationary period is contradictory to a long-term commitment to developing employees. Some of the Department's explanations of the supposed benefits of an expanded probationary period can only be plausibly explained by confusing the way military are accessed with terms of enlistment and assuming that an expanded probationary period affords flexibility for the civilian workforce when, in fact, unlike military, they are free to leave at any time they want. The idea that an expanded probationary period would somehow be an inducement for a person to want to work for the federal government where they could be arbitrarily terminated is truly an odd way to look at this.

7. If you were king for a day, what would you change?

AFGE ANSWER: We would ensure that all hiring is done in an open, transparent, competitive, merit-based objective environment that considers all qualified candidates. This is key to a strong and highly motivated civil service. Protecting employee rights through reasonable probationary periods (no more than one year) and robust due process protections are also key. We would limit excepted and/or direct hire as these authorities are contrary to maintenance of a highly-qualified, diverse and dynamic workforce.

Rather than treat civilian employees as fungible and/or disposal, DoD needs to value its civilian workforce as something other than as an inferior/adjunct to the military.

PREVENTING DETRIMENTAL CONVERSION OF DoD JOBS TO PRIVATE CONTRACTORS OR MILITARY PERFORMANCE

Issue: DoD civilian employee jobs are being replaced with contractors, primarily by not backfilling vacant DoD civilian positions and reapplying the funds programmed or budgeted for those positions to services contracts to perform the same requirements; or by replacing the DoD federal employee jobs with active or reserve military, to the detriment of readiness, lethality, overall efficiency, and effective human capital planning, talent management for recruiting and retaining a skilled civilian workforce.

Background/Analysis:

1. Section 2461 of title 10 prohibits converting DoD civilian employee job requirements to private sector performance without first going through a public-private competition.
 - a) Special preference programs for various kinds of small businesses are exceptions to 2461, expanded on in Department of Defense Appropriation rider section 8046.ⁱ
 - b) Depots are another exception pursuant to section 2464 of title 10 and Defense Appropriation rider section 8026.
 - c) The Department of Defense may waive section 2461 completely during any Presidentially declared National Emergency, although no Administration has explicitly chosen to do so.
 - d) Section 2461 has been adjudicated by the GAO as not applying to the non-appropriated fund workforce.ⁱⁱ
2. 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, imposing a “temporary” moratorium until these conditions are addressed.ⁱⁱⁱ
 - a) The Department, during the course of the Trump and Biden Administrations, has periodically offered legislative proposals to repeal both sections 2461 of title 10 and section 325 of the FY 2010 NDAA.
 - b) Those efforts have failed so far, primarily because the Department does not need to go to Congress to waive public-private competition requirements and the moratorium on public-private competitions. Additionally, AFGE has successfully disputed the Department’s claims that the conditions laid out in section 325 have been met. The most persuasive argument has been that the requirement for comprehensive contractor inventories with contract services budgets and accompanying enforcement mechanisms to preclude contracting that has been prohibited or limited by statute, have not been met as documented most recently by GAO findings.^{iv}
3. The Department of Defense issued annual policy reminders to improve compliance with the public-private competition moratorium during the latter part of the Obama Administration, which carried through to May 11, 2018, the last such issuance by the

Department during the Trump Administration. These policy updates included specific language that applied the requirement not just to encumbered DoD civilian positions but also to vacant positions or positions subjected to downsizing or reorganizations, as well as to the replacement of DoD civilian jobs by municipalities through interservice support agreements, and not just private sector contractors. These policy reminders were generated primarily through the intervention of HASC readiness subcommittee staff with the Department of Defense.

4. The Department of the Army included compliance with the public-private competition requirement, along with other limitations on privatization and requirements to consider insourcing work in checklists required for every services contract before it could be processed by contracting officers. The Army required SES level certifications that the task order or contract was not replacing jobs currently or previously performed by DoD civilian employees. The HASC and Joint Conferees for the FY2015 NDAA directed the Department to use the Army Checklist as the basis for Department-wide enforcement of the various limitations on privatization, including the public-private competition moratorium.^v
5. Former HASC Chair Thornberry championed a provision in the 2017 NDAA (currently codified at section 4506 of title 10) to ensure service contract requirements were transparent in the Department's planning, programming, budgeting, and execution system in response to GAO findings. As he put it: "The first of the major reform elements is to **add oversight to service contracts**. In fiscal year 2015, the Pentagon spent \$274 billion through contracts, including big-ticket weapon systems like the Ford Class aircraft carrier and the F-35 fighter jet. But 53 percent (\$144 billion) of this sum was actually spent on services – everything from lawn mowing on military bases to maintaining equipment to hiring specialized experts and administrative support. Unfortunately, DOD – and Congress – have limited insight into how and where this money is spent. The bill **requires more specificity in the funding requests for service contracts**, which will now be submitted through the DOD budget process, forcing the Pentagon to analyze actual needs and spending patterns much like they do for weapons. Those within the DOD who need to contract for a service will have to specify their requirements early enough to have them validated, the contracts awarded, and the funding secured. Congress will have a better idea of what kinds of services are being contracted and their cost, **improving oversight and enabling efficiencies**."^{vi}
6. Unfortunately, former HASC Chairman Thornberry's reform has yet to be implemented by the Department, as recently documented by the GAO. This led Congress to enact section 815 of the FY2022 NDAA (codified at 10 U.S.C. § 4506); however, the HASC noted in directive report language in the 2023 NDAA that DoD had still not implemented the reform and requested a briefing from the Secretary of Defense concurrent with the President's Budget submission this year. Indeed, last year, the Department was relieved from submitting a services contract budget under the assumption it would submit a fully compliant budget submission this year. But unfortunately, the Department failed to comply with the Congressional reporting requirements for an implementation plan,^{vii} a problem noted in HASC directive report language for the FY2023 NDAA.^{viii}

7. When the Department last had contractor inventories, the growth in contract services spending relative to the civilian workforce was easily demonstrated and depicted in charts from the Defense Business Board.^{ix} These findings of excessive costs for contractors compared with the civilian workforce were also validated by study by CAPE submitted to Congress.^x And the current DepSecDef summarized the results of several GAO audits in a *Foreign Affairs* article depicting how the McCain reductions merely shifted work done by the civilian workforce to contractors or military undermining any claimed efficiencies: “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 those efforts rarely succeed is that they merely shift the work being done by civilians to others, such as military personnel or defense contractors.” DepSecDef Hicks, “Getting to Less: The Truth About Defense Spending,” *Foreign Affairs* (March 2020), p. 56.
8. These practices of using the civilian workforce vacancies as a slush fund for “false efficiencies” result in:
 - a) Massive levels of under-execution for the civilian workforce documented by the GAO, contributing to funding instability and massive disincentives to use civilian employees by managers, and are at the front end often not counted in the length of the hiring process for civilian employees.^{xi}
 - b) Reduced availability for military for operational deployments by using military for non-military essential functions that can be performed by civilian employees. This has an impact on military force structure, lethality, stress on the force for high demand low density military occupational specialties, readiness, and is a major opportunity cost to the detriment of force modernization. The original Defense Science Board that recommended establishment of the Defense Readiness Reporting System described the replacement of civilian structure with borrowed military manpower as a leading indicator of a hollow force. And more recently, the National Security Commission on Aviation Safety documented the adverse effects on retention of pilots and flying hours when pilots were repurposed to perform administrative tasks more efficiently performed by others.^{xii} These findings are repeatedly documented by RAND, IDA, CNA and the Congressional Budget Office.^{xiii}
 - c) Increased risk and costs when critical capabilities and intellectual capital are displaced into private sector control most recently exemplified by the reported use of U.S. technologies in the Iranian drones provided to Russian for use against Ukraine; Elon Musk’s control of STARLINK and threats to pull back from supporting Ukraine without additional funding from DoD; or when the GAO reports that most of the staff for the USD for Intelligence and Security are contractors or temporary reservists.
9. Section 129 of title 10 prohibits constraining the DoD civilian workforce with arbitrary personnel caps and requires reporting planned civilian increases or decreases and associated hiring plans over the course of the Future Year Defense Program years,

prohibiting converting to higher cost labor sources. The Department has ignored these reports since 2018.

10. Section 129a of title 10 prohibits downsizing the civilian workforce programmed over the Future Year Defense Program timeframe absent an appropriate analysis of the impact on workload, operational effectiveness, fully burdened costs of the total force of military, civilian employee or contract, readiness, lethality, military force structure and stress on the force. It further prohibits numerical goals or budgetary savings targets for converting civilian functions or the imposition of hiring freezes that inhibit total force management. Finally, it prescribes that any conversion of any civilian position to military performance must be approved at the Secretary of a Military Department level and must take into account the fully burdened costs of military versus civilian performance, as well as military necessity and career progression.
11. Section 8012 of the Defense Appropriation prohibits the use of appropriated funds to constrain the civilian workforce with personnel caps and further prohibits reductions of the civilian workforce that have not taken into account the metrics specified in section 129a.
12. The Department's regulation governing total force management is DODI 1100.22 and its regulation governing comparing the cost of Active Component Military to Civilian employee or contract performance is DODI 7041.04. No regulation yet exists for comparing reserve component military costs to civilian employee performance, but instead Congress and the Department have periodically contracted with federally funded research and development centers to perform that cost analysis.^{xiv}

Congressional Action

- Strengthen Congressional oversight by requiring statutory requirements for section 4506 of title 10 be enforced through an appropriation rider or requirement that no funds be expended for any services contract that has not had its requirements validated in the planning, programming, budgeting and execution process and included in a budget exhibit to Congress, just as is applied for the civilian and military workforce.
- Retain and enforce compliance with current language in section 129 of title 10 and corresponding Defense Appropriation section 8012 language prohibiting personnel caps on the civilian workforce that require reports to Congress on hiring plans over the Future Year Defense Program and any conversions to more costly labor sources.
- Retain and enforce compliance with current language in section 129a of title 10 and corresponding Defense Appropriation section 8012 language prohibiting reducing the civilian workforce programmed over the Future Year Defense Program years absent an appropriate analysis of the impact on workload, stress on the force, military force structure, operational effectiveness, readiness, lethality and the fully burdened costs of the total force of military, civilian employees and contracted services. Additionally,

enforce compliance with the approval process for conversions to military requiring Defense Component Head approval taking into account these factors.

- Ask for fund withholds for the USD (Comptroller), Director, Cost Assessment and Program Evaluation, Under Secretary of Defense for Acquisition and Sustainment and Under Secretary of Defense for Personnel and Readiness until each of them comply with their respective roles for implementing section 4506 of title 10 in the PPBES process.
- Provide examples to Congress of civilian positions not being backfilled and replaced with contractors in defiance of the public-private competition moratorium.
- 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.

ⁱ “The Department of Defense, without regard to subsection (a) of this section or subsection (a), (b), or (c) of section 2461 of title 10, United States Code, and notwithstanding any administrative regulation, requirement, or policy to the contrary shall have full authority to enter into a contract for the performance of any commercial or industrial type function of the Department of Defense that— (A) is included on the procurement list established pursuant to section 2 of the Javits-Wagner-O’Day Act (section 8503 of title 41, United States Code); (B) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or (C) is planned to be converted to performance by a qualified firm under at least 51 percent ownership by an Indian tribe, as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)), or a Native Hawaiian Organization, as defined in section 8(a)(15) of the Small Business Act (15 U.S.C. 637(a)(15)). (2) This section shall not apply to depot contracts or contracts for depot maintenance as provided in sections 469 and 2474 of title 10, United States Code. (c) The conversion of any activity or function of the Department of Defense under the authority provided by this section shall be credited toward any competitive or outsourcing goal, target, or measurement that may be established by statute, regulation, or policy and is deemed to be awarded under the authority of, and in compliance with, subsection (h) of section 2304 of title 10, United States Code, for the competition or outsourcing of commercial activities.”

ⁱⁱ GAO Decision, Matter of John P. Santry -Designated Employee Agent, B-402827 (Aug. 2, 2010).

ⁱⁱⁱ The genesis and legislative history of the public-private competition moratorium are summarized in a CRS publication dated January 16, 2013, by Valerie Ann Bailey Grasso: Circular A-76 and the Moratorium on DoD Competitions: Background and Issues for Congress. The only issue not adequately addressed in this CRS publication pertinent to DoD relates to the impact of A-76 competitions on “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. 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.

^{iv} 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).

^v See Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, pp. 820-1, “Requirement for policies and standard checklist in the procurement of services,” (Dec. 19, 2014). The Army checklist additionally helped identify “inherently governmental functions,” “closely associated with inherently governmental functions,” “critical functions,” authorized and unauthorized “personal services contracts,” limitations on contracting guards and firefighter positions; criteria for in-sourcing work pursuant to section 2463 of title 10, in addition to the public-private competition moratorium. The checklist was recognized by the GAO as contributing to the Army’s more comprehensive and accurate identification of “closely associated with inherently governmental” contracts to be considered for insourcing than every other

Defense Component. See GAO-16-46, DoD Inventory of contracted services: Actions needed to help ensure inventory data are complete and accurate (Nov. 18, 2015).

^{vi} HASC COMMUNICATIONS: 52539: Reform and Rebuild: National Defense Authorization Act for Fiscal Year 2018.

^{vii} Section 815 of the Fiscal Year 2022 National Defense Authorization Act, amending section 2329 of Title 10 (currently codified at section 4506 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 the Secretary of Defense to 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.

^{viii} H. Rep. 117-397, National Defense Authorization Act for Fiscal Year 2023, Report of the Committee on Armed Services, House of Representatives for H.R. 7900 (July 1, 2022). "Total Force Management," pp. 237-239: "The committee observes with concern that the Department has not submitted the plan, including in particular any changes to programming guidance, and the roles and responsibilities of the Under Secretary of Defense Comptroller, Under Secretary of Defense for Acquisition and Sustainment, Under Secretary of Defense for Personnel and Readiness, and Office of Cost Assessment and Program Evaluation, due June 1, 2022, for improving visibility on future services requirements in the future years defense program, as required by section 815 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117-81). The committee further observes that Department of Defense Instruction (DODI) 1100.22, the Under Secretary of Defense for Personnel and Readiness policy for total force management, has not been updated since December 1, 2017. Over one quarter of the Department's topline and the largest share of total force spending among military, civilian workforce, and contractors goes to service contracts, and yet their requirements still are not fully transparent or validated in the Department's planning, programming, budgeting, and execution system process.

Therefore, the committee directs the Secretary of Defense to brief the House Committee on Armed Services no later than March 1, 2023, on progress made to:

- (1) develop data analytics to specifically identify the quantitative and qualitative relationships of the sizing and composition of the Department of Defense civilian workforce to readiness, lethality, and stress on the force metrics,
- (2) to ensure that planning, programming, and budgeting reviews consider all components of the total force (active and reserve military, civilian workforce and contract support) in a holistic manner to avoid duplication and waste and ensure that risk, cost and mission validation and prioritization considerations consistent with this section and the National Defense Strategy inform the sourcing and prioritization of requirements, and
- (3) update DODI 1100.22 to reflect changes to section 129a and changes referencing total force management in other statutes, including sections 129 and 4506 of title 10, United States Code, to include the standard guidelines for the evaluation of service contract requirements.

The committee further notes that Government Accountability Office is planning to review the relationship between Department of Defense's management of its acquisition of services and the planning, programming, budgeting, and execution process. The committee directs the Comptroller General to provide, no later than March 1, 2023, a briefing on interim observations on the

department's use of Services Requirement Review Boards to review, validate, prioritize, and approve services requirements to inform the budget and acquisition process; and the Department's plans and progress towards ensuring that projected spending on service contracts is clearly identified in the Department's future years defense program. The Comptroller General will assess whether the Service Requirement Review Board's primary orientation on acquisition planning at a transactional level is impeding a more strategic, programmatic challenging of requirements and the inclusion of program data for services contracts in the program and budget data systems maintained by the Office of Cost Assessment and Program Evaluation and the Under Secretary of Defense Comptroller. The Comptroller General will also assess the impact the divestiture of the Enterprise Contractor Manpower Reporting Application on the Office of Cost Assessment and Program Evaluation's data analytics tools for comparing the fully burdened costs of service contracts by function and program to military and civilian workforces as required by DODI 7041.04."

^{ix} See Defense Business Board: "Fully Burdened and Lifecycle Costs of the Workforce," (DBB FY 18-01) at [https://dbb.defense.gov/Portals/35/Documents/Reports/2018/DBB%20FY18-01%20FBLCC%20Study%20Final%20\(Feb%202018\).pdf](https://dbb.defense.gov/Portals/35/Documents/Reports/2018/DBB%20FY18-01%20FBLCC%20Study%20Final%20(Feb%202018).pdf). See also, GAO-21-267R, "SERVICE ACQUISITIONS: DOD's Report to Congress Identifies Steps Taken to Improve Management, But Does Not Address Some Key Planning Issues," (22 Feb. 2021); GAO-16-46, "DOD INVENTORY OF CONTRACTED SERVICES: Actions Needed to Help Insure Inventory Data Are Complete and Accurate (18 Nov. 2015); GAO-16-119, "DOD SERVICE ACQUISITION: Improved Use of Available Data Needed to Better Manage and Forecast Service Contract Requirements (18 Feb. 2016); Section 815 of the Fiscal Year 2022 NDAA (codified at title 10 U.S.C. § 4506); Defense Business Board: "Fully Burdened and Lifecycle Costs of the Workforce," (DBB FY 18-01); "Pentagon buries evidence of \$125 billion in bureaucratic waste," by Craig Whitlock and Bob Woodward (Dec. 5, 2016); "The True Size of Government," Paul Light (Oct. 2017); AFGE Letter to DepSecDef Hicks on PPBE Reforms dated Jan. 21, 2022.

^x OSD, Cost Assessment and Program Evaluation, Comparing the Cost of Civilians and Contractors, January 2017 (responding to language from the 2017 NDAA).

^{xi} These bad business practices resulted in excessive levels of under-execution documented by the Government Accountability Office for the Fiscal Year 2015-2019 timeframe where civilian pay under-execution averaged \$1.8B overall. See also, GAO Report to HASC, HAC-D, SASC and SAC-D Congressional Staff, "Budget Justification Review: Analysis of Department of Defense Fiscal Year 2022 Civilian Personnel Budget Request (Aug. 9, 2021).

^{xii} "Diverting aviation professionals from their primary aviation duties with additional duties adds to an unsustainable workload. Due to personnel cuts, military aviation units have experienced cuts in administrative support over the past two decades, forcing aviators and maintainers to undertake additional administrative duties that interrupt their primary aviation tasks and contributed to fatigue and burnout." National Security Commission on Military Aviation Safety, "224 Lives, \$11.6 Billion, 186 Aircraft" (Dec. 2020). pp. 47-48; Institute for Defense Analysis: "Revisiting the Criteria for Military Essentiality in Total Force Manpower Management," Col Thomas C. Greenwood, USMC (Ret), Allison Abbe, Clark Frye, Anthony L. Johnson, Ani K. Khachatryan; Defense Science Board Task Force on Readiness; No 94-35783, June 15, 1994, Paul G. Kaminski and General Edward C. Meyer (Ret.); (December 2, 2015), <https://www.cbo.gov/publication/51012>; GAO-21-27R, Military Personnel: Perspectives on DOD's and the Military Services' Use of Borrowed Military Personnel (Nov. 18. 2020); see also, section 482 of title 10 requiring Defense Readiness Reporting System include: "Information regarding the extent to which any member of the armed forces is assigned or detailed outside the member's unit or away from training in order to perform any function that had previously been performed by civilian employees of the Federal Government." Note: Conversions of civilian positions to military performance can either be the result of a force structure change or from borrowed military manpower or through use of reservists.

^{xiii} Center for Naval Analysis (CNA) Study sponsored by P&R and published in September 2021 "Identifying Contributions of DoD's Civilian Workforce to Readiness;" CNA Study sponsored by P&R and published July 7, 2021: "Optimizing Total Force Management."

^{xiv} DODI 1100.22, "Policy and Procedures for Determining Workforce Mix," (April 12, 2010, Change 1, December 1, 2017); DODI 7041.04, "Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support," (July 3, 2013; with Change 1 effective July 1, 2020); Institute for Defense Analysis: Analysis of Alternative Mixes of Full-Time Support in the Reserve Components (Aug. 2017).

APPENDIX:

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- **Historically twice as much has been spent on services contacts than the civilian workforce for the same number of people.** (See Defense Business Board Slides below).
 - “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 those efforts rarely succeed is that they merely shift the work being done by civilians to others, such as military personnel or defense contractors.” DepSecDef Hicks, “Getting to Less: The Truth About Defense Spending,” Foreign Affairs (March 2020), p. 56.
 - CONGRESSIONAL ASK: Ensure program and budget reviews challenge, compete, and prioritize contract services requirements instead of the default practice of cutting the DoD civilian workforce. The Budget Control Act exacerbated these bad business practices through the sequestration rules, which were followed by the Section 955 of the FY2013 McCain cuts that were supposed to be applied to both civilian employees and contracts cut but ended up just being applied to civilian employees.

PRESERVING QUALITY HEALTH CARE FOR MILITARY MEMBERS AND THEIR FAMILIES

Issue

The Department is downsizing military medical treatment facilities by shifting beneficiaries to private healthcare (TRICARE) for any functions performed by military structure that does not deploy into combat zones.

Background/Analysis

1. In the 2017 NDAA, Congress directed DoD 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.
2. 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 necessary care. These local health care network capacity problems were exacerbated further by the COVID-19 pandemic.
3. 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. Members of Congress with rural hospitals blocked this effort out of concerns it would force their closure, notwithstanding waiver provisions within these bills. There is currently a growing nationwide nurse and medical worker shortage that will potentially lead to further shortages, reduced access to care, and reduce the quality of care provided to patients.
4. 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.
5. H.R. 7776, “James M. Inhofe National Defense Authorization Act for Fiscal Year 2023” contains the following provisions relevant to the medical reorganization:

- a) Sec. 706. Independent analysis of quality and patient safety review process under direct care component of TRICARE program.
 - b) Sec. 714. Maintenance of Core Casualty Receiving Facilities to improve medical force readiness.ⁱ This is notable for requiring the Secretary of Defense “to ensure the medical capability and capacity required to diagnose, treat, and rehabilitate large volumes of combat casualties and, as may be directed by the President or the Secretary, provide a medical response to events the President determines or declares as natural disasters, mass casualty events, or other national emergencies.” This further provides that the “[t]he Secretary shall ensure that the military medical treatment facilities selected for designation . . . are geographically located to facilitate the aeromedical evacuation of casualties from theaters of operations.” Finally, this provision requires Military Department Secretaries to assign military personnel to core casualty receiving facilities “at not less than 90 percent of the staffing level required to maintain the operating bed capacity necessary to support operation planning requirements” and further provides that these facilities “may be augmented with civilian employees to fulfill the staffing requirements.”
 - c) Sec. 715. Congressional notification requirement to modify scope of services provided at military medical treatment facilities.
 - d) Sec. 716. Improvements to processes to reduce financial harm caused to civilians for care provided at military medical treatment facilities.
 - e) Sec. 720. Modification of requirement to transfer research and development and public health functions to Defense Health Agency.
 - f) Sec. 731. Briefing and report on reduction or realignment of military medical manning and medical billets.
 - g) Sec. 741. Limitation on reduction of military medical manning end strength: certification requirement and other reforms. Among the certification requirements is a requirements to identify any plans of the Department to backfill military medical personnel positions with civilian personnel; and further requires a “plan to address persistent vacancies for civilian personnel in health or medical related positions, with a risk analysis associated with the hiring, onboarding and retention of such civilian personnel, taking into account provider shortfalls across the United States.” This plan is to include required funding across the fiscal years of the FYDP.ⁱⁱ
 - h) Sec. 746. Reports on composition of medical personnel of each military department and related matters. This annual reporting requirement from the Secretary of Defense is to be coordinated with the Secretaries of the Military Departments for a three year period and include any reduction plans for medical personnel with recommendations "for the number of covered positions for such medical personnel that should be required for purposes of maximizing medical readiness (without regard to current statutory limitations, or potential future statutory limitations, on such number), presented as a total number for each military department and disaggregated by grade."ⁱⁱⁱ
6. Even though the compliance with the public-private competition moratorium in the FY2010 NDAA section 325 and FSGG Appropriation section 742 would preclude the Department from privatizing work performed by federal government employees, the

USD (P&R) stopped issuing annual policy reminders to DoD components about this moratorium after 2018.^{iv} Additionally, statutory and joint conferee language from the FY2022 NDAA Section 815 directing the Comptroller, CAPE, USD (A&S) and USD(P&R) to establish compliance mechanisms and certifications for every services contract that they were not replacing civilian employees and complying with statutory requirements to use civilian employees for new requirements as well based on risk assessments, has not yet been implemented by the Department. The HASC version of the NDAA has directive report language strongly criticizing the Department's lack of action and requests a SecDef briefing with the next budget submission, coupled with several GAO reviews. This report language pertains to all civilian requirements and not just medical services.^v

7. The Department appears to be ignoring not only the public-private competition moratorium but also recent title 10 and Defense Appropriation clarifications that prohibit arbitrary personnel caps on the DoD civilian workforce, and in the case of section 8012 of the Defense Appropriation, stipulate that “[n]one of the funds appropriated by this Act may be used to reduce the civilian workforce programmed full time equivalent levels absent the appropriate analyses of the impact of those reductions on workload, military force structure, lethality, readiness, operational effectiveness, stress on the military force, and fully burdened costs.”
8. Sen. Gillibrand has championed addressing skills gaps in Cyber through a 6 year scholarship program intended to be as generous as the successful ROTC program for military.^{vi} AFGE convinced Sen. Gillibrand to make accessions into the civil service through this program either through the competitive service or excepted service rather than just the Cyber Excepted Service. AFGE did this by showing the caselaw that demonstrated how military in ROTC programs had more due process protections than civil servants separated within their probationary periods.^{vii} In order to compete better with the private sector in fulfilling skills gaps in military medical treatment facilities and the defense health activity, AFGE should advocate with Sen. Gillibrand to champion a similar program for nurses, medical technicians and doctors.

Congressional Action

- Take stronger action to ensure compliance with existing statutory prohibitions against converting DoD civilian jobs to contract by clarifying to the Pentagon that the USD (P&R) needs to issue an updated policy and start complying with the public-private competition moratorium and existing statutory prohibitions against arbitrary personnel caps and reductions that do not consider workload, cost and readiness impacts. The USD (P&R) and Department following their lead, including in the DHA reorganization, seem to be assuming that so long as there are no civilian RIFs, that they can convert the work to contract performance. That is a departure from their prior Departmental guidance since the Obama Administration and flouts the recent HASC “Total Force Management” directive report language.

- Monitor and provide questions for the record to Defense Appropriations and Authorizing hearings generally scheduled early in the year with respect to the various required briefings, reports and implementation plans required by the FY2023 NDAA.
- Revamp the “Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act of 2019,” into something that addresses the objections of rural hospitals and provides better incentives such as scholarship programs for attracting and retaining talent, Consider the Cyber Scholarship program established in as a model for addressing medical skills gaps.

ⁱ (a) In General.--Section 1073d(b) of title 10, United States Code, as amended by section 713, is further amended by adding at the end the following new paragraph:

“(5)(A) The Secretary of Defense shall designate and maintain certain military medical treatment facilities as core casualty receiving facilities, to ensure the medical capability and capacity required to diagnose, treat, and rehabilitate large volumes of combat casualties and, as may be directed by the President or the Secretary, provide a medical response to events the President determines or declares as natural disasters, mass casualty events, or other national emergencies.

“(B) The Secretary shall ensure that the military medical treatment facilities selected for designation pursuant to subparagraph (A) are geographically located to facilitate the aeromedical evacuation of casualties from theaters of operations.

“(C) The Secretary--

“(i) shall ensure that the Secretaries of the military departments assign military personnel to core casualty receiving facilities designated under subparagraph (A) at not less than 90 percent of the staffing level required to maintain the operating bed capacity necessary to support operation planning requirements;

“(ii) may augment the staffing of military personnel at core casualty receiving facilities under subparagraph (A) with civilian employees of the Department of Defense to fulfill the staffing requirement under clause (i); and“(iii) shall ensure that each core casualty receiving facility under subparagraph (A) is staffed with a civilian Chief Financial Officer and a civilian Chief Operating Officer with experience in the management of civilian hospital systems, for the purpose of ensuring continuity in the management of the facility.

“(D) In this paragraph:

“(i) The term ‘core casualty receiving facility’ means a Role 4 medical treatment facility that serves as a medical hub for the receipt and treatment of casualties, including civilian casualties, that may result from combat or from an event the President determines or declares as a natural disaster, mass casualty event, or other national emergency.”(ii) The term ‘Role 4 medical treatment facility’ means a medical treatment facility that provides the full range of preventative, curative, acute, convalescent, restorative, and rehabilitative care.”

(b) Timeline for Establishment.--

(1) Designation.--Not later than October 1, 2024, the Secretary of Defense shall designate four military medical treatment facilities as core casualty receiving facilities under section 1073d(b)(5) of title 10, United States Code (as added by subsection (a)).

(2) Operational.--Not later than October 1, 2025, the Secretary shall ensure that each such designated military medical treatment facility is fully staffed and operational as a core casualty receiving facility, in accordance with the requirements of such section 1073d(b)(5).

ⁱⁱ SEC. 741. LIMITATION ON REDUCTION OF MILITARY MEDICAL MANNING END STRENGTH: CERTIFICATION REQUIREMENT AND OTHER REFORMS.

(a) Limitation.--

(1) In general.--Except as provided in paragraph (2), and in addition to the limitation under section 719 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92; 133 Stat. 1454), as most recently amended by section 731 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117-81; 135 Stat. 1795), during the five-year period beginning on the date of the enactment of this Act, neither the Secretary of Defense nor a Secretary concerned may reduce military medical end strength authorizations, and following such period, neither may reduce such authorizations unless the Secretary of Defense issues a waiver pursuant to paragraph (6).

(2) Exception.--The limitation under paragraph (1) shall not apply with respect to the following:

(A) Administrative billets of a military department that have remained unfilled since at least October 1, 2018.

(B) Billets identified as non-clinical in the budget of the President for fiscal year 2020 submitted to Congress pursuant to section 1105(a) of title 31, United States Code, except that the number of such billets may not exceed 1,700.

(C) Medical headquarters billets of the military departments not assigned to, or providing direct support to, operational commands.

(3) Report on composition of military medical workforce requirements.--The Secretary of Defense, in coordination with the

Secretaries of the military departments, shall conduct an assessment of current military medical manning requirements (taking into consideration factors including future operational planning, training, and beneficiary healthcare) and submit to the Committees on Armed Services of the House of Representatives and the Senate a report containing the findings of such assessment. Such assessment shall be informed by the following:

(A) The National Defense Strategy submitted under section 113(g) of title 10, United States Code.

(B) The National Military Strategy prepared under section 153(b) of such title.

(C) The campaign plans of the combatant commands.

(D) Theater strategies.

(E) The joint medical estimate under section 732 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232; 132 Stat. 1817).

(F) The plan of the Department of Defense on integrated medical operations, as updated pursuant to paragraph (1) of section 724(a) of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117-81; 135 Stat. 1793; 10 U.S.C. 1096 note).

(G) The plan of the Department of Defense on global patient movement, as updated pursuant to paragraph (2) of such section. 724(a).

(H) The biosurveillance program of the Department of Defense established pursuant to Department of Defense Directive 6420.02 (relating to biosurveillance).

(I) Requirements for graduate medical education.

(J) The report of the COVID-19 Military Health System Review Panel under section 731 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283; 134 Stat. 3698).

(K) The report of the Inspector General of the Department of Defense titled "Evaluation of Department of Defense Military Medical Treatment Facility Challenges During the Coronavirus Disease-2019 (COVID-19) Pandemic in Fiscal Year 2021 (DODIG-2022-081)" and published on April 5, 2022.

(L) Reports of the Comptroller General of the United States relating to military health system reforms undertaken on or after January, 1, 2017, including any such reports relating to military medical manning and force composition mix.

(M) Such other reports as may be determined appropriate by the Secretary of Defense.

(4) Certification.--The Secretary of Defense shall submit to the Committees on Armed Services of the House of Representatives and the Senate a certification containing the following:

(A) A certification of the completion of a comprehensive review of military medical manning, including with respect to the medical corps (or other health- or medical-related component of a military department), designator, profession, occupation, and rating of medical personnel.

(B) A justification for any proposed increase, realignment, reduction, or other change to the specialty or occupational composition of military medical end strength authorizations, which may include compliance with a requirement or recommendation set forth in a strategy, plan, or other matter specified in paragraph (3).

(C) A certification that, in the case that any change to such specialty or occupational composition is required, a vacancy resulting from such change may not be filled with a position other than a health- or medical-related position until such time as there are no military medical billets remaining to fill the vacancy.

(D) A risk analysis associated with the potential realignment or reduction of any military medical end strength authorizations.

(E) An identification of any plans of the Department to backfill military medical personnel positions with civilian personnel.

(F) A plan to address persistent vacancies for civilian personnel in health- or medical-related positions, and a risk analysis associated with the hiring, onboarding, and retention of such civilian personnel, taking into account provider shortfalls across the United States.

(G) A comprehensive plan to mitigate any risk identified pursuant to subparagraph (D) or (F), including with respect to funding necessary for such mitigation across fiscal years.

(5) Process required.--The Secretaries of the military departments, in coordination with the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, shall develop and submit to the Committees on Armed Services of the House of Representatives and the Senate a process for the authorization of proposed modifications to the composition of the medical manning force mix across the military departments while maintaining compliance with the limitation under paragraph (1). Such process shall--

(A) take into consideration the funding required for any such proposed modification; and

(B) include distinct processes for proposed increases and proposed decreases, respectively, to the medical manning force mix of each military department.

(6) Waiver.--

(A) In general.--Following the conclusion of the five-year period specified in paragraph (1), the Secretary of Defense may waive the prohibition under such subsection if--

(i) the report requirement under paragraph (3), the certification requirement under paragraph (4), and the process requirement under paragraph (5) have been completed;

(ii) the Secretary determines that the waiver is necessary and in the interests of the national security of the United States; and

(iii) the waiver is issued in writing.

(B) Notification to congress.--Not later than five days after issuing a waiver under subparagraph (A), the Secretary of Defense shall submit to the Committees on Armed Services of the House of Representatives and the Senate a notification of the waiver (including the text of the waiver and a justification for the waiver) and provide to such committees a briefing on the components of the waiver. (b) Temporary Suspension of Implementation of Plan for Restructure or Realignment of Military Medical Treatment Facilities.--The Secretary of Defense may not implement the plan under section 703(d)(1) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 130 Stat. 2199) until the later of the following:

(1) The date that is one year after the date of the enactment of this Act.

(2) The date on which the Secretary of Defense completes the following:

(A) A risk analysis for each military medical treatment facility to be realigned, restructured, or otherwise affected under the implementation plan under such section 703(d)(1), including an assessment of the capacity of the TRICARE network of providers in the area of such military medical treatment facility to provide care to the TRICARE Prime beneficiaries that would otherwise be assigned to such military medical treatment facility.

(B) An identification of the process by which the Assessment conducted under subsection (a)(3) and the certification required under subsection (a)(4) shall be linked to any restructuring or realignment of military medical treatment facilities.

(c) Briefings; Final Report.--

(1) Initial briefing.--Not later than April 1, 2023, the Secretary of Defense shall provide to the Committees on Armed Services of the House of Representatives and the Senate a briefing on--

(A) the method by which the Secretary plans to meet the report requirement under subsection (a)(3), the certification requirement under subsection (a)(4), and the process requirement under subsection (a)(5); and

(B) the matters specified in subparagraphs (A) and (B) of subsection (b)(2).

(2) Briefing on progress.--Not later than two years after the date of the enactment of this Act, the Secretary of Defense shall provide to the Committees on Armed Services of the House of Representatives and the Senate a briefing on the progress made towards completion of the requirements specified in paragraph (1)(A).

(3) Final briefing.--Not later than three years after the date of the enactment of this Act, the Secretary of Defense shall provide to the Committees on Armed Services of the House of Representatives and the Senate a final briefing on the completion of such requirements.

(4) Final report.--Not later than three years after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the House of Representatives and the Senate a final report on the completion of such requirements. Such final report shall be in addition to the report, certification, and process submitted under paragraphs (3), (4), and (5) of subsection (a), respectively.

(d) Definitions.--In this section:

(1) The term "medical personnel" has the meaning given such term in section 115a(e) of title 10, United States Code.

(2) The term "Secretary concerned" has the meaning given that term in section 101(a) of such title.

(3) The term "theater strategy" means an overarching construct outlining the vision of a combatant commander for the integration and synchronization of military activities and operations with other national power instruments to achieve the strategic objectives of the United States.

iii SEC. 746. REPORTS ON COMPOSITION OF MEDICAL PERSONNEL OF EACH MILITARY DEPARTMENT AND RELATED MATTERS.

(a) Reports.--Not later than 180 days after the date of the enactment of this Act, and annually thereafter for three years, the Secretary of Defense, in coordination with the Secretaries of the military departments, shall submit to the Committees on Armed Services of the House of Representatives and the Senate a report on the composition of the medical personnel of each military department and related matters.

(b) Elements.--Each report under subsection (a) shall include the following:

(1) With respect to each military department, the following:

(A) An identification of the number of medical personnel of the military department who are officers in a grade above O-

(B) An identification of the number of such medical personnel who are officers in a grade below O-7.

(C) A description of any plans of the Secretary to--

(i) reduce the total number of such medical personnel; or

(ii) eliminate any covered position for such medical personnel.

(D) A recommendation by the Secretary for the number of covered positions for such medical personnel that should be required for purposes of maximizing medical readiness (without regard to current statutory limitations, or potential future statutory limitations, on such number), presented as a total number for each military department and disaggregated by grade.

(2) An assessment of the grade for the position of the Medical Officer of the Marine Corps, including--

(A) a comparison of the effects of filling such position with an officer in the grade of O-6 versus an officer in the grade of O-7;

(B) an assessment of potential issues associated with the elimination of such position; and

(C) a description of any potential effects of such elimination with respect to medical readiness.

(3) An assessment of all covered positions for medical personnel of the military departments, including the following:

(A) The total number of authorizations for such covered positions, disaggregated by--

(i) whether the authorization is for a position in a reserve component; and

(ii) whether the position so authorized is filled or vacant.

-
- (B) A description of any medical- or health-related specialty requirements for such covered positions.
 - (C) For each such covered position, an identification of the title and geographic location of, and a summary of the responsibility description for, the position.
 - (D) For each such covered position, an identification of the span of control of the position, including with respect to the highest grade at which each such position has been filled.
 - (E) An identification of any downgrading, upgrading, or other changes to such covered positions occurring during the 10-year period preceding the date of the report, and an assessment of whether any such changes have resulted in the transfer of responsibilities previously assigned to such a covered position to--
 - (i) a position in the Senior Executive Service or another executive personnel position; or
 - (ii) a position other than a covered position.
 - (F) A description of any officers in a grade above O-6 assigned to the Defense Health Agency, the Office of the Assistant Secretary of Defense for Health Affairs, the Joint Staff, or any other position within the military health system.
 - (G) A description of the process by which the positions specified in subparagraph (F) are validated against military requirements or similar billet justification processes.
 - (H) A side-by-side comparison demonstrating, across the military departments, the span of control and the responsibilities of covered positions for medical personnel of each military department.
- (c) Disaggregation of Certain Data.--The data specified in subparagraphs (A) and (B) of subsection (b)(1) shall be presented as a total number and disaggregated by each medical component of the respective military department.
- (d) Definitions.--In this section:
- (1) The term "covered position" means a position for an officer in a grade above O-6.
 - (2) The term "officer" has the meanings given that term in section 101(b) of title 10, United States Code.
 - (3) The term "medical component" means--
 - (A) in the case of the Army, the Medical Corps, Dental Corps, Nurse Corps, Medical Service Corps, Veterinary Corps, and Army Medical Specialist Corps;
 - (B) in the case of the Air Force, members designated as medical officers, dental officers, Air Force nurses, medical service officers, and biomedical science officers; and
 - (C) in the case of the Navy, the Medical Corps, Dental Corps, Nurse Corps, and Medical Service Corps.
 - (4) The term "medical personnel" has the meaning given such term in section 115a(e) of title 10, United States Code.
 - (5) The term "military department" has the meaning given that term in section 101(a) of such title.

^{iv} See Office of Assistant Secretary of Defense for Manpower and Reserve Affairs, Office of the Under Secretary of Defense (Personnel and Readiness), Memorandum distributed to all Defense Components, subject: update on OMB Circular A-76 Public-Private Competition Prohibition -FY2018, dated May 11, 2018: "These provisions [Section 325 of the 2010 NDAA and Section 742 from FSGG Approp] prohibit the conversion of any work currently performed (or designated for performance by civilian personnel to contract performance and apply to functions and work assigned to civilian personnel, regardless of whether a position or billet is established for that work, or whether that position or billet is encumbered. This includes workload and positions/billets that are impacted as a result of ongoing agency reform initiatives and/or position vacancies and workload impacted by hiring constraints or funding shortfalls."

^v H. Rep. 117-397, National Defense Authorization Act for Fiscal Year 2023, Report of the Committee on Armed Services, House of Representatives for H.R. 7900 (July 1, 2022), "Total Force Management," pp/237-239: "The committee observes with concern that the Department has not submitted the plan, including in particular any changes to programming guidance, the roles and responsibilities of the Under Secretary of Defense Comptroller, Under Secretary of Defense for Acquisition and Sustainment, Under Secretary of Defense for Personnel and Readiness, and Office of Cost Assessment and Program Evaluation, due June 1, 2022, for improving visibility on future services requirements in the future years defense program, as required by section 815 of the NDAA for FY2022. The committee further observes that the Department of Defense Instruction [DODI 1100.22], the Under Secretary of Defense policy for total force management, has not been updated since December 1, 2017."

^{vi} SEC. 1535. DEPARTMENT OF DEFENSE CYBER AND DIGITAL SERVICE ACADEMY.

- (a) Establishment.--
 - (1) In general.--The Secretary of Defense, in consultation with the Secretary of Homeland Security and the Director of the Office of Personnel and Management, shall establish a program to provide financial support for pursuit of programs of education at institutions of high education in covered disciplines.
 - (2) Covered disciplines.--For purposes of the Program, a covered discipline is a discipline that the Secretary of Defense determines is critically needed and is cyber- or digital technology-related, including the following:
 - (A) Computer-related arts and sciences.
 - (B) Cyber-related engineering.
 - (C) Cyber-related law and policy.
 - (D) Applied analytics related sciences, data management, and digital engineering, including artificial intelligence and machine learning.
 - (E) Such other disciplines relating to cyber, cybersecurity, digital technology, or supporting functions as the Secretary of Defense considers appropriate.

(3) Designation.--The program established under paragraph (1) shall be known as the ``Department of Defense Cyber and Digital Service Academy" (in this section referred to as the ``Program").

(b) Program Description and Components.--The Program shall--

(1) provide scholarships through institutions of higher education to students who are enrolled in programs of education at such institutions leading to degrees or specialized program certifications in covered disciplines; and

(2) prioritize the placement of scholarship recipients fulfilling the post-award employment obligation under this section.

(c) Scholarship Amounts.--

(1) Amount of assistance.--(A) Each scholarship under the Program shall be in such amount as the Secretary determines necessary--

(i) to pay all educational expenses incurred by that person, including tuition, fees, cost of books, and laboratory expenses, for the pursuit of the program of education for which the assistance is provided under the Program; and

(ii) to provide a stipend for room and board.

(B) The Secretary shall ensure that expenses paid are limited to those educational expenses normally incurred by students at the institution of higher education involved.

(2) Support for internship activities.--The financial assistance for a person under this section may also be provided to support internship activities of the person in the Department of Defense and combat support agencies in periods between the academic years leading to the degree or specialized program certification for which assistance is provided the person under the Program.

(3) Period of support.--Each scholarship under the Program shall be for not more than 5 years.

(4) Additional stipend.--Students demonstrating financial need, as determined by the Secretary, may be provided with an additional stipend under the Program.

(d) Post-award Employment Obligations.--Each scholarship recipient, as a condition of receiving a scholarship under the Program, shall enter into an agreement under which the recipient agrees to work for a period equal to the length of the scholarship, following receipt of the student's degree or specialized program certification, in the cyber- and digital technology related missions of the Department, in accordance with the terms and conditions specified by the Secretary in regulations the Secretary shall promulgate to carry out this subsection.

(e) Hiring Authority.--In carrying out this section, specifically with respect to enforcing the obligations and conditions of employment under subsection (d), the Secretary may use any authority otherwise available to the Secretary for the recruitment, employment, and retention of civilian personnel within the Department, including authority under section 1599f of title 10, United States Code.

^{vii} See links below to the due process afforded in Army Reserve Officer separations, a title 10 statute on officer separations, a Supreme Court case and Circuit Court case illustrating the levels of due process before separating officers; compared to a recent MSPB decision involving the two year probationary period for a nurse civil servant in DoD where the MSPB lays out why it lacks jurisdiction to consider the nurse's appeal of their separation during the two year probationary period. Indeed, it can be argued that commissioned officers are afforded a greater degree of due process and appeal rights than a title 5 civil servant separated during their probationary period.

[05/18/22 10:00AM](#)

Committee Reports: [H. Rept. 117-347](#)

Committee Prints: [H.Prt. 117-70](#)

Latest Action: 12/23/2022 Became [Public Law No: 117-263](#). ([All Actions](#))

Roll Call Votes: There have been [6 roll call votes](#)

Tracker: Tip This bill has the status Became Law
Here are the steps for Status of Legislation:

https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN18027_AR135-175_FINAL.pdf

<https://uscode.house.gov/view.xhtml?path=/prelim@title10/subtitleA/part2/chapter60&edition=prelim>

[10 USC Ch. 60: SEPARATION OF REGULAR OFFICERS FOR SUBSTANDARD PERFORMANCE OF DUTY OR FOR CERTAIN OTHER REASONS - uscode.house.gov](#)

Editorial Notes Amendments. 1998— Pub. L. 105–261, div. A, title V, §503(c)(2), Oct. 17, 1998, 112 Stat. 2004, struck out item 1183 "Boards of review" and substituted "inquiry" for "review" in item

1184. 1984— Pub. L. 98–525, title V, §524(b)(2), Oct. 19, 1984, 98 Stat. 2524, substituted
"Authority to establish procedures to consider the separation of officers for substandard ...
[uscode.house.gov](https://www.uscode.house.gov)

<https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0347.mer.aa.pdf>

https://cafc.uscourts.gov/opinions-orders/20-1856.OPINION.1-20-2022_1895442.pdf

United States Court of Appeals for the Federal Circuit

6 . NICELY. v. US. subject matter jurisdiction and (2) agreed with the BCNR that retired military officers qualify as
“civilians” within the meaning of 10 U.S.C. §1552(a)(1) and therefore are
cafc.uscourts.gov

[https://www.mspb.gov/decisions/precedential/BRYANT TAHUANA SF 315H 17 0558 I 1 OPINION AND ORDER 1910
305.pdf](https://www.mspb.gov/decisions/precedential/BRYANT_TAHUANA_SF_315H_17_0558_I_1_OPINION_AND_ORDER_1910305.pdf)

Tahuana Bryant, Appellant, v. Department of the Army, Agency. - United States Merit Systems Protection Board
UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD 2022 MSPB 1 Docket No. SF-315H-
17-0558-I-1 Tahuana Bryant, Appellant, v. Department of the Army,
www.mspb.gov

EXPANSION OF “COMMERCIAL ITEM” DEFINITIONS HAVE WEAKENED ORGANIC INDUSTRIAL BASE SUPPORT, AND GOVERNMENT COMMAND AND CONTROL OF WEAPON SYSTEMS

Issue

In the FY 2018 and 2019 NDAs, 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:

1. 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.
2. 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.
3. 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.
4. 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.

5. 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 exclusively 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).
6. 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."
7. 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).
8. 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.

9. 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.”
10. Title 10, Section 2464 of the *U.S. Code* (U.S.C.) states that “it is essential for the national defense that the Department of Defense maintain a core logistics capability that is Government-owned and Government- operated,” specifying further that this “shall include those capabilities that are necessary to maintain and repair” weapon systems and other military equipment. These capabilities reside in GOGO arsenals, depots, production plants, shipyards, readiness centers, and logistics complexes operated by each of the military departments.
11. Title 10 U.S.C. §2466 prohibits DOD from spending more than 50% of its annual depot-level maintenance funds on contracting with nonfederal entities in a given fiscal year (sometimes referred to as the *50-50 rule*).
12. Title 10 U.S.C. §2476 establishes capital investment and congressional reporting requirements for the 21 covered depots. Each MILDEP must annually invest at least eight percent of the total value of its depot workload (averaged over the previous three years) into the capital budgets of its depots. Of this annual investment, 25% must be used for facilities sustainment, restoration, and modernization (FSRM). In addition, DOD must annually submit a report to the congressional defense committees detailing the MILDEPs’ depot investments, including benchmarks, funded workloads, and any impediments.ⁱ
13. H.R. 7776, “the James M. Inhofe National Defense Act for Fiscal Year 2023 contained the following provisions relevant to the organic industrial base:
 - a) Sec. 371. Budgeting for depot and ammunition production facility maintenance and repair: annual report.ⁱⁱ
 - b) Sec. 372. Extension of authorization of depot working capital funds for unspecified minor military construction.ⁱⁱⁱ

- c) Sec. 373. Five-year plans for improvements to depot and ammunition production facility infrastructure.^{iv}
- d) Sec. 374. Modification to minimum capital investment for certain depots.^v
- e) Sec. 375. Continuation of requirement for biennial report on core depot-level maintenance and repair.^{vi}
- f) Sec. 376. Continuation of requirement for annual report on funds expended for performance of depot-level maintenance and repair workloads^{vii}
- g) Sec. 377. Clarification of calculation for certain workload carryover of Department of the Army.^{viii}
- h) Sec. 803. Data requirements for commercial products for major weapon systems.^{ix}
- i) Sec. 806. Life cycle management and product support.^x This requires the Department of Defense to make technical data requirements decisions and core logistics and total force management risk assessments to inform strategic workforce planning on the number of military, civilian employees, and contractors needed to operate and sustain major weapon systems early in the acquisition life cycle.
- j) Below map from Congressional Research Service Dec. 30, 2022. Update on depots from depicts organic industrial base facilities:



Congressional Action

- 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.
- Monitor HAC-D and SAC-D, DoD Comptroller and MilDep calculation of depot carryover and follow up as needed to ensure adequate funding of depot carryover.
- Monitor and follow up with any compliance concerns with respect to depot core logistics requirements in section 2464 and 2466 of title 10, asking for GAO review.

ⁱ In a 2022 report, GAO assessed the condition of most depot facilities and equipment as “fair-to-poor;” in response, some in DOD and Congress have raised concerns that the resourcing of maintenance depots is insufficient. These concerns informed Section 374 of the FY2023 National Defense Authorization Act (NDAA), which modified MILDEPs’ investment obligations by increasing the minimum investment requirement from 6% of the average annual depot workload to 8% of this total, with the further requirement that 25% of this investment be used for FSRM.

ⁱⁱ SEC. 371. BUDGETING FOR DEPOT AND AMMUNITION PRODUCTION FACILITY MAINTENANCE AND REPAIR: ANNUAL REPORT. Chapter 9 of title 10, United States Code, is amended by adding at the end the following new section (and conforming the table of sections at the beginning of such chapter accordingly):

“Sec. 239d. Budgeting for depot and ammunition production facility maintenance and repair: annual report”

(a) Annual Report. --The Secretary of Defense, in coordination with the Secretaries of the military departments, shall include with the defense budget materials for each fiscal year a report regarding the maintenance and repair of covered facilities.

(b) Elements. --Each report required under subsection (a) shall include, at a minimum, the following (disaggregated by military department):

“ (1) With respect to each of the three fiscal years preceding the fiscal year covered by the defense budget materials with which the report is included, revenue data for that fiscal year for the maintenance, repair, and overhaul workload funded at all the depots of the military department.

“ (2) With respect to the fiscal year covered by the defense budget materials with which the report is included and each of the two fiscal years prior, an identification of the following:

“ (A) The amount of appropriations budgeted for that fiscal year for depots, further disaggregated by the type of appropriation.

“ (B) The amount budgeted for that fiscal year for working-capital fund investments by the Secretary of the military department for the capital budgets of the covered depots of the military department, shown in total and further disaggregated by whether the investment relates to the efficiency of depot facilities, work environment, equipment, equipment (non-capital investment program), or processes.

“ (C) The total amount required to be invested by the Secretary of the military department for that fiscal year for the capital budgets of covered depots pursuant to section 2476(a) of this title.

“ (D) A comparison of the budgeted amount identified under subparagraph (B) with the total required amount identified under subparagraph (C).

“ (E) For each covered depot of the military department, of the total required amount identified under subparagraph (C), the percentage of such amount allocated, or projected to be allocated, to the covered depot for that fiscal year.

“ (3) For each covered facility of the military department, the following:

“ (A) Information on the average facility condition, average critical facility condition, restoration and maintenance project backlog, and average equipment age, including a description of any changes in such metrics from previous years.

“ (B) Information on the status of the implementation at the covered facility of the plans and strategies of the Department of Defense relating to covered facility improvement, including, as applicable, the implementation of the strategy required under section 359 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92; 133 Stat. 1323; 10 U.S.C. 2460 note).

“(c) Definitions. --In this section:

- “(1) The term ‘ammunition production facility’ means an ammunition organic industrial base production facility.
- “(2) The terms ‘budget’ and ‘defense budget materials’ have the meaning given those terms in section 234 of this title.
- “(3) The term ‘covered depot’ has the meaning given that term in section 2476 of this title.
- “(4) The term ‘covered facility’ means a covered depot or an ammunition production facility.”.

iii SEC. 372. EXTENSION OF AUTHORIZATION OF DEPOT WORKING CAPITAL FUNDS FOR UNSPECIFIED MINOR MILITARY CONSTRUCTION. Section 2208(u)(4) of title 10, United States Code, is amended by striking “2023” and inserting “2025”.

iv SEC. 373. FIVE-YEAR PLANS FOR IMPROVEMENTS TO DEPOT AND AMMUNITION PRODUCTION FACILITY INFRASTRUCTURE. Chapter 146 of title 10, United States Code, is amended by inserting after section 2742 the following new section (and conforming the table of sections at the beginning of such chapter accordingly): “Sec. 2473. Annual five-year plans on improvement of depot infrastructure

“(a) Submission. --As part of the annual budget submission of the President under section 1105(a) of title 31, each Secretary of a military department shall submit to the congressional defense committees a plan describing the objectives of that Secretary to improve depot infrastructure during the five fiscal years following the fiscal year for which such budget is submitted.

“(b) Elements. --Each plan submitted by a Secretary of a military department under subsection (a) shall include the following:

“(1) With respect to the five-year period covered by the plan, an identification of the major lines of effort, milestones, and specific goals of the Secretary over such period relating to the improvement of depot infrastructure and a description of how such goals support the goals outlined in section 359(b)(1)(B) of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116-92; 133 Stat. 1324; 10 U.S.C. 2476 note).

“(2) The estimated costs of necessary depot infrastructure improvements and a description of how such costs would be addressed by the Department of Defense budget request submitted during the same year as the plan and the applicable future-years defense program.

“(3) Information regarding the plan of the Secretary to initiate such environmental and engineering studies as may be necessary to carry out planned depot infrastructure improvements.

“(4) Detailed information regarding how depot infrastructure improvement projects will be paced and sequenced to ensure continuous operations.

“(c) Incorporation of Results-oriented Management Practices. --Each plan under subsection (a) shall incorporate the leading results-oriented management practices identified in the report of the Comptroller General of the United States titled ‘Actions Needed to Improve Poor Conditions of Facilities and Equipment that Affect Maintenance Timeliness and Efficiency’ (GAO-19-242), or any successor report, including--

- “(1) analytically based goals.
- “(2) results-oriented metrics.
- “(3) the identification of required resources, risks, and stakeholders; and
- “(4) regular reporting on progress to decision makers.”.

v SEC. 374. MODIFICATION TO MINIMUM CAPITAL INVESTMENT FOR CERTAIN DEPOTS.

(a) Modification. --Section 2476 of title 10, United States Code, is amended--

(1) in subsection (a)--

(A) by striking “Each fiscal year” and inserting “(1) Each fiscal year”.

(B) by striking “six” and inserting “eight”; and

(C) by inserting after paragraph (1), as designated by subparagraph (A), the following new paragraph:

“(2) Of the amount required to be invested in the capital budgets of the covered depots of a military department under paragraph (1) for each fiscal year--

“(A) 75 percent shall be used for the modernization or improvement of the efficiency of depot facilities, equipment, work environment, or processes in direct support of depot operations and

“(B) 25 percent shall be used for the sustainment, restoration, and modernization (as such terms are defined in the Department of Defense Financial Management Regulation 7000.14-R, or successor regulation) of existing facilities or infrastructure.”.

(2) in subsection (b), by striking “, but does not include funds spent for sustainment of existing facilities, infrastructure, or equipment”.

(3) by redesignating subsections (c) through (e) as subsections

(d) through (f).

(4) by inserting after subsection (b) the following new subsection:

“(c) Compliance With Certain Requirements Relating to Personnel and Total Force Management. --In identifying amounts to invest pursuant to the requirement under subsection (a)(1), the Secretary of a military department shall comply with all applicable requirements of sections 129 and 129a of this title.”; and (5) in subsection (e)(2), as redesignated by paragraph (3), by adding at the end the following new subparagraph:

“(F) A table enumerating, for the period covered by the report, the amounts invested to meet the requirement under subsection (a)(1), disaggregated by funding source and whether the amount is allocated pursuant to subparagraph (A) or subparagraph (B) of subsection (a)(2).” (b) Technical and Conforming Amendments. -- (1) In general. --Such section is further amended in subsections (d) and (e), as redesignated by subsection (a)(3), by striking “subsection (a)” and inserting “subsection (a)(1)” each place it appears. (2) Additional technical and conforming amendments. --Section 2861(b) of title 10, United States Code, is amended-- (A) by striking “subsection (e) of section 2476” and inserting “subsection (f) of section 2476”; and (B) by striking “subsection (a) of such section” and inserting “subsection (a)(1) of such section”. (c) Applicability. --The amendments made by this section shall apply with respect to fiscal years beginning on or after October 1, 2023.

vi SEC. 375. CONTINUATION OF REQUIREMENT FOR BIENNIAL REPORT ON CORE DEPOT-LEVEL MAINTENANCE AND REPAIR.

(a) In General. --Section 1080(a) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 1000; 10 U.S.C. 111 note) does not apply to the report required to be submitted to Congress under section 2464(d) of title 10, United States Code.

(b) Conforming Repeal. --Section 1061(c) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 130 Stat. 2401; 10 U.S.C. 111 note) is amended by striking paragraph (45).

vii SEC. 376. CONTINUATION OF REQUIREMENT FOR ANNUAL REPORT ON FUNDS EXPENDED FOR PERFORMANCE OF DEPOT-LEVEL MAINTENANCE AND REPAIR WORKLOADS.

(a) In General. --Section 1080(a) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 1000; 10 U.S.C. 111 note) does not apply to the report required to be submitted to Congress under section 2466(d) of title 10, United States Code.

(b) Conforming Repeal. --Section 1061(c) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328; 130 Stat. 2401; 10 U.S.C. 111 note) is amended by striking paragraph (46).

viii SEC. 377. CLARIFICATION OF CALCULATION FOR CERTAIN WORKLOAD CARRYOVER OF DEPARTMENT OF THE ARMY.

For purposes of calculating the amount of workload carryover with respect to the depots and arsenals of the Department of the Army, the Secretary of Defense shall authorize the Secretary of the Army to use a calculation for such carryover that applies a material end of period exclusion. This clarification from HASC resulted from Army, DoD Comptroller and Defense Appropriator cuts to the Army in response to how a 2019 GAO report recommending standardizing the calculation of depot carryover had been misapplied by appropriators and DoD comptroller to penalize Army depot workforce funding: “Each year, billions of dollars of work is ordered from maintenance depots that cannot be completed by the end of the fiscal year. The Department of Defense (DOD) refers to this funded but unfinished work as carryover. For fiscal years 2007 through 2018, the Navy, Marine Corps, and Air Force depots averaged less than 6 months of annual carryover worth \$1.0 billion, \$0.2 billion, and \$1.9 billion, respectively. The Army depots averaged 10 months of annual carryover worth \$4.3 billion. Reasons for unplanned carryover include issues with parts management, scope of work, and changing customer requirements.” GAO-19-452: DoD Depot Maintenance: DoD Should Adopt a Metric That Provides Quality Information on Funded Unfinished Work (Jul. 26, 2019).

ix SEC. 803. DATA REQUIREMENTS FOR COMMERCIAL PRODUCTS FOR MAJOR WEAPON SYSTEMS.

(a) Amendments Relating to Subsystems of Major Weapons Systems. --Section 3455(b) of title 10, United States Code is amended--

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B);

(2) by inserting “(1)” before “A subsystem of a major weapon system”; and

(3) by adding at the end, the following new paragraph:

“(2)(A) For a subsystem proposed as commercial (as defined in section 103(1) of title 41) and that has not been previously determined commercial in accordance with section 3703(d) of this title, the offeror shall--

“(i) identify the comparable commercial product the offeror sells to the general public or nongovernmental entities that serves as the basis for the ‘of a type’ assertion.

“(ii) submit to the contracting officer a comparison necessary to serve as the basis of the ‘of a type’ assertion of the physical characteristics and functionality between the subsystem and the comparable commercial product identified under clause (i); and

“(iii) provide to the contracting officer the National Stock Number for both the comparable commercial product identified under clause (i), if one is assigned, and the subsystem, if one is assigned.

“(B) If the offeror does not sell a comparable commercial product to the general public or nongovernmental entities for purposes other than governmental purposes that can serve as the basis for an ‘of a type’ assertion with respect to the subsystem--

“(i) the offeror shall--

“(I) notify the contracting officer in writing that it does not so sell such a comparable commercial product; and

“(II) provide to the contracting officer a comparison necessary to serve as the basis of the ‘of a type’ assertion of the physical characteristics and functionality between the subsystem and the most comparable commercial product in the commercial marketplace, to the extent reasonably known by the offeror; and

“(ii) subparagraph (A) shall not apply with respect to the offeror for such subsystem.”.

(b) Amendment Relating to Components and Spare Parts. --Section 3455(c)(2) of such title is amended to read as follows:

“(2)(A) For a component or spare part proposed as commercial (as defined in section 103(1) of title 41) and that has not previously been determined commercial in accordance with section 3703(d) of this title, the offeror shall--

“(i) identify the comparable commercial product the offeror sells to the general public or nongovernmental entities that serves as the basis for the ‘of a type’ assertion.

“(ii) submit to the contracting officer a comparison necessary to serve as the basis of the ‘of a type’ assertion of the physical characteristics and functionality between the component or spare part and the comparable commercial product identified under clause (i); and

“(iii) provide to the contracting officer the National Stock Number for both the comparable commercial product identified under clause (i), if one is assigned, and the component or spare part, if one is assigned.

“(B) If the offeror does not sell a comparable commercial product to the general public or nongovernmental entities for purposes other than governmental purposes that can serve as the basis for an ‘of a type’ assertion with respect to the component or spare part--

“(i) the offeror shall--

“(I) notify the contracting officer in writing that it does not so sell such a comparable commercial product; and

“(II) provide to the contracting officer a comparison necessary to serve as the basis of the ‘of a type’ assertion of the physical characteristics and functionality between the component or spare part and the most comparable commercial product in the commercial marketplace, to the extent reasonably known by the offeror; and

“(ii) subparagraph (A) shall not apply with respect to the offeror for such component or spare part.”.

(c) Amendments Relating to Information Submitted. --Section 3455(d) of such title is amended--

(1) in the subsection heading, by inserting after “Submitted” the following: “for Procurements That Are Not Covered by the Exceptions in Section 3703(a)(1) of This Title”.

(2) in paragraph (1)--

(A) in the matter preceding subparagraph (A), by striking “the contracting officer shall require the offeror to submit--” and inserting “the offeror shall, in accordance with paragraph (4), submit to the contracting officer or provide the contracting officer access to--”.

(B) in subparagraph (A)--(i) by inserting “a representative sample, as determined by the contracting officer, of the” before “prices paid”; and (ii) by inserting “, and the terms and conditions of such sales” after “Government and commercial customers”.

(C) in subparagraph (B), by striking “information on--” and all that follows and inserting the following: “a representative sample, as determined by the contracting officer, of the prices paid for the same or similar commercial products sold under different terms and conditions, and the terms and conditions of such sales; and”; and

(D) in subparagraph (C)--(i) by inserting “only” before “if the contracting officer”; and (ii) by inserting after “reasonableness of price” the following: “because either the comparable commercial products provided by the offeror are not a valid basis for a price analysis or the contracting officer determines the proposed price is not reasonable after evaluating sales data, and the contracting officer receives the approval described in paragraph (5)”; and (3) by adding at the end, the following new paragraphs: “(4)(A) An offeror may redact data information submitted or made available under subparagraph (A) or (B) of paragraph (1) with respect to sales of an item acquired under this section only to the extent necessary to remove information individually identifying government customers, commercial customers purchasing such item for governmental purposes, and commercial customers purchasing such item for commercial, mixed, or unknown purposes.

“(B) Before an offeror may exercise the authority under subparagraph (A) with respect to a customer, the offeror shall certify in writing to the contracting officer whether the customer is a government customer, a commercial customer purchasing the item for governmental purpose, or a commercial customer purchasing the item for a commercial, mixed, or unknown purpose.

“(5) A contracting officer may not require an offeror to submit or make available information under paragraph (1)(C) without approval from a level above the contracting officer.

“(6) Nothing in this subsection shall relieve an offeror of other obligations under any other law or regulation to disclose and support the actual rationale of the offeror for the price proposed by the offeror to the Government for any good or service.”.

(d) Applicability. --Section 3455 of such title is amended by adding at the end the following new subsection:

“(g) Applicability. --

“(1) In general. --Subsections (b) and (c) shall apply only with respect to subsystems described in subsection (b) and components or spare parts described in subsection (c), respectively, that the Department of Defense acquires through--

“(A) a prime contract.

“(B) a modification to a prime contract; or

“(C) a subcontract described in paragraph (2).

“(2) Subcontract described. --A subcontract described in this paragraph is a subcontract through which the Department of Defense acquires a subsystem or component, or spare part proposed as commercial (as defined in section 103(1) of title 41) under this section and that has not previously been determined commercial in accordance with section 3703(d).”.

^x SEC. 806. LIFE CYCLE MANAGEMENT AND PRODUCT SUPPORT.

(a) In General. --Section 4324(b) of title 10, United States Code, is amended--

(1) by redesignating paragraphs (1), (2), (3), (4), (5), (6), (7), and (8) as subparagraphs (A), (B), (C), (D), (E), (F), (G), and (J), respectively.

(2) by designating the matter preceding subparagraph (A), as so redesignated, as paragraph (1).

(3) in paragraph (1), as so designated--

(A) in the matter preceding subparagraph (A), as so redesignated--

(i) by inserting "In general. --" before "Before granting"; and

(ii) by inserting "for which the milestone decision authority has received views from appropriate materiel, logistics, or fleet representatives" after "approved life cycle sustainment plan".

(B) by amending subparagraph (G), as so redesignated, to read as follows:

"(G) an intellectual property management plan for product support, including requirements for technical data, software, and modular open system approaches (as defined in section 4401 of this title);";

(C) by inserting after subparagraph (G), as so redesignated, the following new subparagraphs:

"(H) an estimate of the number of personnel needed to operate and maintain the covered system, including military personnel, Federal employees, contractors, and host nation support personnel (as applicable);

"(I) a description of opportunities for foreign military sales; and"; and

(4) by adding at the end of paragraph (1), as so designated, the following new paragraph:

"(2) Subsequent phases. --Before granting Milestone C approval (or the equivalent) for the covered system, the milestone decision authority shall ensure that the life cycle sustainment plan required by paragraph (1) for such covered system has been updated to include views received by the milestone decision authority from appropriate materiel, logistics, or fleet representatives.".

(b) Milestone C Approval Defined. --Section 4324(d) of title 10, United States Code, is amended--

(1) by redesignating paragraph (7) as paragraph (8); and

(2) by inserting after paragraph (6) the following new paragraph:

"(7) Milestone c approval. --The term 'Milestone C approval' has the meaning given that term in section 4172(e)(8) of this title." See also: Joint Confere Report Language explaining *Sec. 806 - Life cycle management and product support*. The House bill contained a provision (sec. 804) that would amend section 4324 of title 10, United States Code, to require the milestone decision authority to ensure the life cycle sustainment plan is approved by the product support manager, program manager, program executive officer, and an appropriate materiel, logistics, or fleet representative. The Senate amendment contained no similar provision. The agreement includes the House provision with a modifying amendment. We note that traditionally program sustainment costs have not been adequately integrated into the up-front acquisition planning process, though there is data and analysis to demonstrate that focusing on sustainment early in the acquisition process can achieve significant programmatic cost savings. The Government Accountability Office (GAO) has reported extensively on programs that experience sustainment cost growth, such as shipbuilding programs and the F-35 program and made recommendations on how programs can be operated and maintained affordably while meeting sustainment requirements. GAO has noted the importance of establishing connections between life-cycle costs, reliability requirements, and manpower estimates, as well as emphasized the importance of developing a business case analysis that addresses tradeoffs and the associated implications to help programs assess the costs, benefits, and risks of key acquisition decisions. We further note the Department of Defense (DOD) has issued a new policy on product support management (DOD Instruction 5000.91), which states, "[T]he DOD will conduct comprehensive product support and sustainment planning for defense systems across the program's life cycle." We therefore direct the Secretary of Defense to present a briefing to the Committees on Armed Services of the Senate and the House of Representatives, not later than March 1, 2023, on demonstrated or anticipated improvements resulting from implementation of the Department's policy for optimizing product support planning and execution, including its ability to enable competition for life cycle product support, retain core logistics capability through organic depot maintenance, and make total force management risk assessments.

DEFENSE RESALE ISSUES: Commissaries, Exchanges and Transient Lodging

Issue

The Administration and the Congress have recognized DeCA's vital role in combatting food insecurity, providing a hedge against food inflation, and addressing the financial stress of many military families, retirees, and veterans. The DoD and the Congress have provided additional funding to allow the commissary agency to largely discontinue the practice of raising prices to offset commissary operating costs. This non-pay benefit is vital to ensuring retention (at a time when DOD recruiting is under stress) of quality military personnel, thereby contributing force readiness. The Administration and Congress should continue this support.

Background/Analysis

1. The commissary benefit is a crucial non-pay benefit for the military and their family members, particularly in remote and overseas locations. Congress and the DoD have recognized the vital role that commissaries have in addressing chronic problems with financial distress and food insecurity. Commissaries demonstrated their worth during the COVID-19 pandemic and continued to ensure that food flowed to military families especially in remote and overseas areas. There is broad coalition support for preserving the commissary benefit among the military family advocacy groups.
2. The SecDef, in response to inflationary pressures invested \$250 M more for commissaries above the Administration's plan in 2022. And Congress authorized and appropriated the same amount in the FY2023 NDAA and FY2023 Defense Appropriation. The Department of Defense also moved in the direction of reducing its reliance on variable pricing as part of its effort to leverage DeCA to address food insecurity. Recent Congressional efforts to address the food insecurity problem with a Basic Needs Allowance have been found to be less effective than DeCA because of DeCA's direct mission to provide food security for the force and, providing a vital hedge against persistently high food prices, and the minimal levels of military with food insecurity issues qualifying for the Basic Needs Allowance. It is anticipated that the so-called "Freedom Caucus" in the House will generate amendments to reverse course by cutting the nominal appropriation funding DeCA and turn it into a for-profit business less responsive to the growing food insecurity problem among lower enlisted military families. The Senate and the Administration will need to apply some common sense to this issue and not reverse course and continue to invest in DeCA.
3. Congress continues to press for privatization Navy and Air Force transient lodging based on the Army's privatization of transient lodging. A provision calling for outright privatization of the Air Force, Navy and Marine Corps lodging was rejected but there are continued calls to review of this program aimed at privatizing the lodges. The House version of the FY2023 NDAA was rejected by the Joint Conferees based on GAO reviews and a Congressional Budget Office finding that privatizing the Navy and Air Force lodging would add \$5B to the deficit.¹ Lodging is a vital part of the Defense

mission, providing needed accommodations during emergencies such as the Afghan refugee resettlement and COVID-19. Moreover, the DoD has conducted a thorough review of the lodging programs and has concluded that in-house operations are more economical and are more responsive to the Defense mission. The Army privatization Model has failed to deliver on its promise of modernizing facilities and has resulted in major increase in temporary lodging expenses for military personnel.

Congressional Action

- Establish pilot programs for providing free produce to military families affected by food insecurity through the Commissaries.
- Support efforts to discontinue price hikes to offset commissary operating costs.
- Resist proposals to cut DeCA appropriations or impose frameworks that DeCA extract profits from sales to military families afflicted with food insecurity problems.
- Discontinue any efforts to outsource DoD lodging. Mandate insourcing Army transient lodging.
- Ensure the effects of inflation are adequately addressed for Department's MWR programs.

ⁱ The Congressional Budget Office scored this provision as “increasing direct spending by more than \$5 billion in the ten-year period beginning in 2022,” stating “CBO considers military lodging run by private entities to be a governmental activity that uses a private- sector financial intermediary to serve as an instrument of the federal government. In CBO’s view, investments by those entities to improve the lodging facilities be treated as governmental expenditures because most of the income for the project would be paid from appropriated funds such as per diem payments to service members. Because those investments would not be contingent on the availability of appropriated funds at the time they are made, CBO classifies them as direct spending. Using information [from the GAO] on the reported costs to improve privatized Army lodging, CBO estimates that enacting section 2814 would increase direct spending by more than \$5 billion ...” See H. Rpt 117-397, Part 2, pp. 5-6; see also, *Page 412*: “JOINT EXPLANATORY STATEMENT TO ACCOMPANY THE JAMES M. INHOFE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2023”--*Privatization of Navy and Air Force transient housing*. The House bill contained a provision (sec. 2814) that would require the Navy and Air Force, 11 years after this provision becomes law, to privatize their transient housing, prevent government direct loans, government guarantees, or government equity from being used to accomplish this privatization, and would require consultation with the Army, which has already completed the privatization process. The Senate amendment contained no similar provision. The agreement does not include this provision. We note that Chapter 169 of title 10, United States Code provides authority to the Secretaries concerned to privatize lodging facilities. The Secretary of the Army implemented the Privatization of Army Lodging in 2009 and has indicated cost avoidance of \$605.8 million since inception and \$85.2 million annually with better quality of facilities and higher customer satisfaction. However, according to the Government Accountability Office’s (GAO) report published on June 9, 2021, titled “Military Lodging: DOD Should Provide Congress with More Information on Army’s Privatization and Better Guidance to the Military Services” (GAO-21-214), found that the Army may be overstating its cost avoidance due to the methodology it uses to calculate said cost avoidance leaving in question if the reported financial benefits of privatization have actually been achieved. Therefore, we direct the Secretary of the Navy and the Secretary of the Air Force to provide a briefing to the congressional defense committees by not later than December 1, 2023, as to the anticipated steady state cost avoidance that could be anticipated if a lodging privatization effort were adopted, any barriers to implementing, and any impact to traveling servicemembers. The methodology to calculate any cost avoidance should take into account GAO’s concerns over the Army’s existing process and address how and if the cost avoidance metrics are impacted.”

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DEPARTMENT OF DEFENSE CHILD CARE ISSUES

Issue: AFGE represents Non-Appropriated Fund (NAF) workforce providing childcare services to military families (and civilian employees on a space available basis) in Child Development Centers located on military installations. There is a nationwide shortage of childcare workers primarily because of their health and safety working conditions exacerbated during the pandemic and low levels of compensation. The provision of quality childcare is important to recruitment and retention of both military and civilian employees in competitive labor markets where employers in highly compensated professions have Cadillac level childcare that is unaffordable to most Americans, while the absence of adequate childcare harmed economic growth by limiting the ability of families with children to have both parents working.

Background/Analysis:

1. The legislative history of the Military Child Care Act of 1989 included suggestions that reliance on non-appropriated funds limited Child Development Centers' ability to attract and retain quality personnel and to make necessary repairs and upgrades to facilities and equipment. To improve affordability Congress authorized the use of appropriated funds to subsidize family home day care providers. The Act also mandated training and credential requirements for employees. Throughout this paper an excellent Congressional Research Service analysis of the evolution of DoD's childcare program capabilities, which became absolutely necessary when the draft ended with the advent of the All-Volunteer Military and subsequent imperative to open up opportunities for more people to serve (including women) in order to meet end strength requirements is the source for most of the descriptions of this program in DoD.ⁱ
2. The 2015 Military Compensation and Retirement Modernization Commission recommended
 - a. Establishing standardized reporting of childcare wait times.
 - b. Exempting childcare personnel from future departmental hiring freezes and furloughs.
 - c. Supported DoD efforts to streamline Child Development Center position descriptions and background checks.
3. Secretary of Defense Ashton Carter's "Force of the Future" reforms extended hours of operation of Child Development Centers from a minimum of 12 to 14 hours a day to ensure hours of operation were consistent with servicemembers work hours at various installations. The FY2018 NDAA required the Child Development Centers to consider the "demands and circumstances" of the active and reserve component patrons of Child Development Centers.
4. The FY2018 NDAA provided direct hire authorities and required a review of the GS pay grades for DoD childcare to ensure "the Department is offering a fair and competitive wage" for these positions.

5. DoD currently has a mix of Child Development Centers on government-owned facilities on installations and subsidized and regulated private care in Family Care Facilities. Family Care Facilities afford military spouses the opportunity to own and operate a business while caring for their own children, and free up space at the Child Development Centers. Family Care Facilities present continuity of care problems if an FCC operator becomes ill or is moves in a permanent change of station. Also there are oversight concerns regarding quality of care and safety issues in FCC facilities. While Child Development centers are more expensive for DoD to operate, they are more preferable to service members in terms of stability, convenience, continuity of care and oversight.
6. Child Development Center wait list management is a major concern on large bases and high-demand areas. DoD's current target for how long a family is on a wait list is 90 days. In 2014, DoD estimated average wait times of three to nine months. Some family advocacy groups have advocated for higher wait list priority for certain active service members over DoD civilian employees. In the FY2020 NDAA Congress requires DoD to take remedial actions to "Reduce the waiting lists for childcare at military installations to ensure that members of the Armed Forces have meaningful access to childcare during tours of duty." Since February 1, 2020, wait list management prioritizes access for military families over DoD civilians with military priorities encompassing Priority 1A, 1B, 1C, 1D and civilian employees Priority 2.
7. In FY2020 NDAA Congress authorized an additional \$158M in MILCON funding for DoD to carry out construction projects for Child Development Centers on military installations.
8. FY2023 NDAA chartered still another round of studies on compensation for childcare, but nothing more proactive to address the current capacity shortfalls that impede military and civilian workforce recruitment and retention, creating substantial skills gaps and readiness shortfalls in DoD.
9. During the pandemic, there were health and safety issues in Child Development Centers associated with exposures to unvaccinated patrons in some installations, such as San Diego, California.
10. Nationwide, there is a shortage of childcare workers exemplified by the following press accounts:
 - a. "Why You Can't Find Child Care: 100,000 Workers Are Missing/Where did they go? To better-paying jobs stocking shelves, cleaning offices, or doing anything that pays more than \$15 an hour. See Dana Goldstein, "The New York Times," (Oct. 13, 2022).
 - b. "Childcare industry struggles with shortage of workers: 'This is unheard of' 'We're not paying what Chick-fil-A pays,' a day care director said, by Ben Gittieson and Karen Travers, ABC News (Oct. 20, 2022).
 - c. Meanwhile, if one looks at the Covington and Burling benefits for its lawyers: "**Childcare.** We offer emergency back-up care to all lawyers in the New

York, San Francisco, and Washington offices, providing in-home or center-based emergency back-up care for children as well as adults.”

11. NAF workers are not protected from privatization in public-private competitions.
12. Section 2463 of title 10 requires “special consideration” for federal government employee functions of “critical functions.” It can be argued that to compete for quality and skilled military and civilian workforce in current labor market, DoD must view childcare as a critical function and invest in the MILCON and DoD civilian workforce to meet its human capital needs. A NAF workforce is not competitive and converting the NAF childcare workforce to appropriated fund will afford greater job security and compensation.

Congressional Action

- No more studies. It is time to stem the readiness shortfalls arising from reduced accessions and retention problems for military by increasing CDC capacity.
- CDC capacity can be increased through increased MILCON and improving the compensation and job security of the workforce
 - By converting the NAF workforce to AF
 - By insourcing this “critical function”
 - By increasing CDC positions to reduce wait times for military
 - By increasing CDC positions to provide more space for civilian employees

ⁱ CRS Report (R45288), Kristy N. Kamarck, “Military Child Development Program: Background and Issues,” (Updated March 19, 2020). This very comprehensive report should be reviewed as it describes in detail some of the constituencies supportive and opposed to viewing military childcare as a core capability of the Department of Defense, and the rationale for their positions. It also describes in much more detail than this paper the incremental evolution of this programs capabilities in response to various oversight issues ranging from concerns about safety and health, training and quality.

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

1. 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 material. See, e.g., to classified *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (en banc), cert. denied sub nom. *Northover v. Archuleta*, 134 S. Ct. 1759 (2014).
2. The Senate version of the FY 2022 NDAA bill included language (“Exclusivity, Consistency and Transparency in Security Clearance Procedures, and Right to Appeal”) co-sponsored by Sen. Warner (D-VA) and Sen. Collins (R-ME). 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. Neither provision made it into the final NDAA, and while well-intentioned, included the following defects:
 - a. Lack of clarity on whether the appeal procedures could be applied to positions not requiring security clearances but merely requiring access to sensitive information.
 - b. No clear provision for judicial review of appeals.
 - c. A provision allowing an agency head to waive the procedures.
 - d. Summaries of testimony were permissible in lieu of verbatim transcripts.
3. The over-classification of documents is a risk to National Security by exposing too many persons to classified information intermingled with over-classified documents who do not have a need to know this information.
4. The over-classification of documents can also impede mission performance and incur unnecessary costs.

Congressional Action

Request following directive report language in either House or Senate version of NDAA after obtaining appropriate waiver of jurisdiction from the Intelligence Committees with jurisdiction 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.

RATIONALE FOR OPPOSING ANOTHER ROUND OF BASE REALIGNMENT AND CLOSURES (BRAC)

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

1. Section 2703 of H.R. 7776, "the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023" prohibits another round of BRAC.
2. DoD has undergone five BRAC rounds from 1988 to 2005.
3. 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:
 - a) 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."
 - b) DoD failed to fully identify the information technology requirements for many recommendations.
 - c) There was no methodology for accurately tracking recommendations associated with requirements for military personnel.
 - d) 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).
4. 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 Action

- Do not authorize another BRAC round or alternative to BRAC. Carry forward section 2703, "Prohibition on conducting additional base realignment and closure (BRAC) round."
- Eliminate loophole in section 2702 permitting privatization and clarify process for employee and union input.