16 March 2005

To: Program Executive Office
National Security Personnel System, Attn Bradley B Bunn
1400 Key Blvd, Suite B-200
Arlington, VA 22209-5144

From: Linda Veenstra, J.D.
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Subject: Comments on Proposed NSPS Regulations – RIN 3206-AK76/0790-AH82, "National Security Personnel System", 70FR7552

1. I am submitting this request and comments in my capacity as an effected civil service employee only and completely independent of any of my official duties.

2. I request an extension of the review and comment periods for me, all civil service employees and the public. Request for additional review time of at least another 30 days is based upon the following factors:

a. The proposed rule is very important and effects the rights of most current civil service employees in critical areas of job classification, pay, adverse actions, appeal rights. This is a major overhaul that the DOD should provide more time to review and comment, especially since many of us put our civil service duties first and therefore have limited time to review the proposed rule.

b. The proposed rule is very complex and lengthy. As an attorney with over 10 years of experience, I am much better suited to understand and unravel the proposed rule; however I am not a labor lawyer and thousands of other civil service employees effected by this proposed rule, I have difficulties following the numerous references to other provisions, statutes and regulations for waivers, exceptions, modifications, etc., which are all vital to understanding this proposed rule. See for example, §9901.104 with references to 10 chapters of 5 United States code and uncited related regulations that the DOD can waive or modify. Neither I, nor I suspect most lay persons less familiar with regulatory interpretation, had enough time to adequately review this rule. With almost 23 pages of 3-column Federal Register text for the Supplement, and 15 pages for the actual proposed rule, at least 30 additional review days are needed for fair and reasonable public and effected employee review and comment. Many other Federal agencies provide much longer timeframes for review of complex regulations, such as EPA with complex environmental regulations.

c. Supplementary Information provided was not an accurate reflection of all aspects of the actual text of the proposed rule, so cannot be relied upon to justify a relatively short review time. Vital pieces of the proposal could only be gleaned from a very close reading of the propose rule vice the Supplemental Information or any other website information. For example, The Adverse Actions part of the Supplementary Information does not mention that excepted employees are not covered by Subpart G; only the actual text at §9901.704(c)(5) excepts coverage of employees excepted from the competitive service; however many other sections of the proposed rule apply to excepted service employees. Therefore, the Supplemental

Information was helpful in explaining decision-making processes, but not in providing important details regarding the proposed rule.

d. In the proposed rule title and numerous other places, national security is invoked as a reason for the change. However, no actual tie to national security is provided and no timing requirement, merely general fiscal responsibility. Therefore additional review time would not impact the alleged national security purposes.

2. I reserve the right to submit additional comments if my request for additional review time is granted. Meanwhile the following comments are submitted for consideration and written response.

3. Subpart A-General Provisions

a. §9901.101 (a) incorrectly states that the proposed rule contains "regulation." Instead the proposed rule contains broad grants of discretion to the Secretary of Defense (hereinafter DOD) to develop "implementing issuances" that will contain the actual rights and processes of importance. Therefore, this paragraph should instead state that this part contains the framework for future development of regulations. Without the details filled in on critical issues by actual regulations, notice of the proposed rule is without substance, and therefore, comment on the non-existent provisions is impossible. This subpart should specify that after DOD approval of the framework, DOD will provide the actual regulations in the form of "implementing issuances" for future public review and comment for DOD consideration prior to finalization.

b. §9901.101(b) lists guiding principals, many of which will not be met by the rest of the proposed rules. "Put mission first" is listed first, and indicates that DOD is viewing the civil service as part of the "total force." I am a Navy Reserve Officer who was active duty for over five years, and I know that for Sailors and Soldiers, putting the mission first is a given; but current civil service employees did not sign up for an employment system similar to active duty military service and its sacrifices and benefits. The civil service system should instead continue to be more closely aligned with private sector (other than for pay- see below) rather than active duty systems. Use instead the phrase "support the mission." Related is the deployability provisions. It is unclear whether any assistance with funding related expenses of voluntary or involuntary moves will be provided, in contrast to military moves due to PCS which are normally paid by DOD. Do not draft current civil service employees into the proposed system by obscure references to national security and mission. Instead I request the proposed rule be changes to grandfather current civil service employees into the current system; I have relied upon and invested in the current system and do not agree with the proposed rule that discounts or negates those expectations.

c. §9901.101(b) Another factor, keeping talented persons employed in DOD, will be severely hindered by the proposed rule. The uncertainties embedded in the proposed system are detractors. These uncertainties are due to several provisions of the proposed rule, including the increase in possible abuses from increased manager discretion in ratings a pay; broad discretion of DOD to change coverage and provisions (e.g. via implementing issuances) at any time and without further employee input; and reduced employee protections via reviews and appeals. The pay for federal civil service jobs is not the main attraction for talented people; the benefits and predictability are; unfortunately many experienced employees, including me, will consider other employment options if major revisions to the proposed rule are not forthcoming.

d. §9901.101(b) Rewarding high performance through increased pay of some sort is mentioned as key in this subpart and elsewhere. This key requirement will not be met by the proposed rule due to no guarantee of funding for many pay for performance categories, improper consideration of attitudes as performance, the promotion of the "good-ol-boy system and discrimination, and the improper limits on pay for performance decisions.

e. §9901.103 Definitions

(1) Implementing issuances – need public input and review prior to finalization.

(2) Mandatory removal offense (MROs)– this is one example in which the proposed rule provides such broad general authority to DOD that there is no meaningful notice or understanding. DOD has the "sole, exclusive, and unreviewable discretion" to come up with the list of MROs later, without employee input. This is unfair and does not meet due process requirements. Instead, either provide a list of those offenses here, or provide notice and public review of the MROs developed later.

(3) Performance – remove reference to attitude from professional demeanor. The current definition will spawn a horde of yes-men so that they will not be chastised for attitude. Only through open and honest discussion and consideration of new ideas will promote efficient and innovative means to meet the mission. Focusing instead on accomplishments and value-added in a variety of methods is necessary, rather than attitude. Measuring attitude and putting employees on notice of what attitude is required will be difficult. Delete it.

4. §9901.105 proposes DOD coordinate with OPM before promulgation of some implementing issuances, but no public or employee review of those important regulations. Add at least 60 day public and civil service employee review before finalization of all implementing issuances. Same comment for §9901.106 because unions do not represent all effected employees.

5. §9901.107(a)(2) states that great deference must be given to DOD due to "the critical national security mission." Explain how the civil service pay, promotion, adverse action and related system is related to national security. If actual positions held by civil service employees are the reason for the national security connection, then consider whether military members should have those positions. At least apply the proposed rules only to those civil service positions that are Government in Nature; otherwise it is inconsistent to say the civil service employees present a national security concern when a contractor can take over the position, do the same work, and cause no national security concern. Instead, DOD seems to be instituting a means to reduce pay and rights for civil service employees hoping to ride on the tide of patriotism by citing an unexplained national security basis. Instead, civil service employees should be given adequate employment protections.

6. §9901.201(a) states that the proposed rule is based on the merit principle "that equal pay should be provided for equal work of equal value…." Abolishing standard step increases and providing unbridled discretion in supervisor's allocation of performance pay actually jeopardizes equal pay. Recent studies show that women and especially minority women receive substantially less pay for the same work. The Institute for Women's Policy Research published "Women's Economic Status in the States: Wide Disparities by Race, Ethnicity, and Religion (available on website www.iwpr.org) that resulted in the following findings:

-"The economic status of women is critical to the success and growth of every state and the entire country." (page 4)

-"even in areas where there have been significant advances in women's status, there is still ample room for improvement. For example, at the rate of progress achieved between 1989 and 2002, women would not achieve wage parity for more than 50 years." (page 4)

- "… research by the U.S. General Accounting Office (2003) shows that for the period from 1983 to 200, approximately 45 percent of the wage gap between men and women could not be explained by the combined effect of differences in human capital, industry and occupation, unionization, and work hours. Both this finding and evidence from case studies and litigation suggest that sex discrimination continues to play a role in holding down women's earnings." (page 10)

-"…even when women work in higher paid occupations, such as managerial positions, they earn substantially less than men." (page 14)

-"Government employment especially benefits women, as it tends to provide employment opportunities, pa and benefits that are more similar to those of men than is the case in private industry…. Large proportions of all women managers and professionals, especially among women of color work in the public sector." (page 18)

- "Businesses should regularly evaluate their wage and promotion practices to ensure that men and women of all races and ethnicities are fairly compensated for their work." (page 31)

In 2002, women were paid approximately 78 cents for every dollar men are paid – 22 cent difference for every dollar. This is not a fair and equitable payment scheme. Therefore, do not change to a system for pay more like the private sector because the private sector breeds unwarranted discrimination in pay rather than equal pay for equal performance. Not only women are the big losers, but also the DOD due to increased cost of defending claims of unreasonable pay awarded based on discrimination due to gender or ethnicity. If the pay system is changed, DOD should have periodic review and revision to ensure equal pay for women.

7. §9901.201(a) additional pay for good performance is only made if the funds are available; therefore the system is flawed and good performers will not normally get the additional pay they deserve, resulting in a migration of highly skilled and experienced workers out of DOD.

8. Minimum provisions are not provided for employee coverage in §9901.202(a)(5). Similarly §9901.211(a) DOD's later classifying of positions in implementing issuances does not provide regulations in the proposed rule that can be reviewed and evaluated. These are examples of provisions that should be fleshed out. Provide details on these and similar provisions presented through the proposed rules for later public review for a reasonable period.

9. §9901.231(b) No meaningful provisions are presented for review and comment on the Transitional Provisions because those important provisions will be developed later in implementing issuances. Such later development constitutes rulemaking without proper procedures.

10. §9901.313 Revise subparagraph (a). Fiscal year 2004 is already over for the Army; change to when proposed rule is implemented plus 5 years. This should be mandatory, so delete "to the maximum extent practicable". In subparagraph (B). delete "to the maximum extent practicable"; provide calculations in the proposed rules for out years, or provide subsequent employee input. Apply these provisions not to the employees in the aggregate, but ensure each employee's pay is not reduced simply because of the conversion to the NSPS.

11. §9901.333 The cost of the Local market supplement when it needs annual review and revision is substantial. Ensure this is included in the cost of implementing the proposed rule. The uncertainty of receipt of this pay causes serious problems fore retention of good employees.

12. §9901.342(d)(4) Do not limit pay for good performance to the pay band maximum; if bad performance can result in loss of band and other pay, make similar increases available for good performers.

13. §9901.401(b) Delete civility and respect provision as not pertaining to performance and too discretionary for measurement.

14. §9901.607 Basing retention on only the latest rating is very unfair. Instead, take into consideration length of years of service, veterans preference and average rating.

15. §9901.609 Provide 120 days vice 60 for RIF notices so that employees have time to adjust and can make other employment plans.

16. §9901.712 and §9901.714. Make the notice to the employee mandatory, rather than giving the notice "only after the secretary's review and approval." Make MRO reviewable.

17. §9901.714 and §9901.715 Change so that only criminal offenses that are related to the employees job performance are considered as MROs. DOD has no business taking employment action for other offenses that have no connection to employment or national security, but that distinction is not currently in the proposed rule. Also, change to exclude offenses classified as misdemeanors.

18. §9901.715(g) Give the employee here and similar provisions elsewhere more time to obtain and provide medical documentation; use 30 days at a minimum.

19. Subpart H sends appeals to MSPB but severely limits the actual review so that it affords insubstantial protection. The appellant has a heavy burden of proof. This is not a fair system, and will promote the good-ol-boy system at the expense of innovation and efficiencies in DOD.

20. §9901.807(h) Expand the standard to provide more protection for employees; use not only what management did know but also what they should have known, or what a reasonable manager should have known. Otherwise, often the manager will be the one testifying about what was known, and employee is put in the unenviable position of contesting that. Instead, managers should be encouraged to seek out and find reasonably available information to base decisions on and held accountable.

21. §9901.807(i)(6) The "Wholly without cause" standard for penalty review and adjustment is nearly an impossible standard to meet and basically negates this process as viable for employees. Revise to a standard more protective of the individual employee.

22. §9901.808(d) This is completely contrary to the notion of double jeopardy. Revise so that the DOD cannot bring another adverse action against the employee based on facts and prior adverse action that have been resolved at MSPB or finding of no MRO.

23. If appeals have to go to MSPB, more staffing and speedy resolution is required to protect due process rights.

24. §9901.806 Do not allow only the DOD to force the employee into binding arbitration. Arbitration should be an employee-driven option.