March 5, 2005

RE: Department of Defense (DoD) National Security Personnel System (NSPS), 5 CFR Part 9901, proposed rule appearing in the Federal Register 2/14/2005 at page 7552. Agencies: Department of Defense and Office of Personnel Management. Docket Number: NSPS-2005-001. The Regulatory Information Number is 3206-AK76
Comments:

Subpart A

1. Section 9901.106: In (a)(2)(ii), the Secretary has the sole and exclusive discretion to determine the number of employee representatives to be engaged in the collaboration process. In (a)(3)(i), the Secretary specifies the time frame for employee representatives to comment on implementing issuances. In (a)(3)(ii), the Secretary determines to what extent it is necessary for employee representatives to engage in discussion or comment. This allows management to control the collaborative process. Management is supposed to be seeking employee input in this process. However, these limits tilted toward one party, do not allow for true employee input. In Section 9901.106(a)(3)(6), the Secretary can "determine the content of implementing issuances" and "make them effective at any time." It seems this could occur regardless of employee or public input. This is a major concern since numerous issues in the proposed NSPS are left vague and unspecified, deferred to "implementing issuances." Several examples of these situations include: premium pay (Section 9901.361), classification of career groups (Section 9901.211), specifics of the pay system (Section 9901.311), the method by which employees can challenge ratings of record–their only recourse in a system where so much rests on the rating of record (Section 9901.409(g)); the methodology of how DoD will set starting rates of pay (Section 9901.351), the multi-level rating system that will be used to rate performance (Section 9901.409(a), the establishment of probationary periods (Section 9901.512) and others. There is no demonstration that national security depends on the ability of the Secretary to develop all these policies unilaterally. In 9901.107(b), it seems that DoD implementing issuances can be used to modify portions of the U.S. Code. Issuances should not be used to supersede statute.

Subpart B

2. Section 9901.201 states that the NSPS meets the principles that "equal pay should be provided for work of equal value" and that "appropriate incentives and recognition should be provided for excellence in performance." However, Subpart B does not meet these principles.

Subpart C

3. In Section 9901.322, DoD management has the "sole and exclusive discretion" to set and adjust pay band rate ranges. There is no requirement that the pay be consistent with that of other agencies, or other employers in the same area; these are merely things the department "may consider." This does not ensure fairness or accountability, nor does it ensure DoD's competitiveness as an employer. Section 9901.342(a)(2) allows a rating official to suddenly change an employee's rating of record: the rating that determines performance pay increases. Under Section 9901.409(b), this is only supposed to happen in the event of a "substantial and sustained change in the employee's performance." However, "substantial and sustained" is not defined. Furthermore, Section 9901.409(g) states that the rating can only be challenged "through a reconsideration procedure as provided in DoD implementing issuances. This procedure will be the sole and exclusive method for all employees to challenge a rating of record." This whole process is open to abuse by management. The employee's only recourse would be through an as yet undefined process defined exclusively by management. This is a decrease, not an increase, in accountability.

Subpart D

4. Subpart D, Section 9901.401(b) states that the performance management system will include a "fair, credible, and transparent employee performance appraisal system" and "means for ensuring employee involvement" and "ensuring ongoing performance feedback and dialogue" and "safeguards to ensure that the management of the system is fair and equitable and based on employee performance." Subpart D does not meet these goals. Section 9901.406(e) states that supervisors will "involve employees, insofar as practicable," in the development of performance expectations, and "final decisions . . . are within the sole and exclusive discretion of management." This is not fair or credible, does not ensure dialogue, and does not provide any safeguards to the employee. Section 9901.409(a) states that the multi-level rating system will be "described in the DoD implementing issuances." This is not transparent, does not ensure dialogue,

and does not provide safeguards. Section 9901.409(g) states that a rating of record may only be challenged through a process yet to be described in DoD implementing issuances. This is not credible or transparent, does not ensure employee involvement, does not ensure ongoing dialogue, and does not provide a safeguard.

Subpart F

5. Workforce Shaping page 7564. Under the proposed RIF guidelines, the department could lose the skills of good workers and highly experienced employees whose breadth of knowledge might well be important for our defense. The entirety of work experience including length of service, variety of job skills, and overall performance during a reasonable time frame must be considered more carefully than appears is allowed by these regulations. Also, if the other portions of the NSPS are expected to result in a better performing workforce, then those who have worked for several years under this system with overall good job performance should be the workers who are retained.

Subpart G

6. Section 9901.712 (also Section 9901.808): The Secretary has the "sole, exclusive, and unreviewable discretion" to identify mandatory removal offenses and to mitigate their penalties. 9901.712(d) indicates the department can also remove employees for additional offenses. Essentially, it appears that the department can remove employees for any offense of its choosing. This offers no protection to employees, or to the public they serve, against abuses of power. In Section 9901.714(b), the department cannot remove an employee based on evidence that cannot be disclosed to the employee, the employee's representatives, or physician. This protection is essential and ought to be retained in the final NSPS. In Section 9901.715(b), the employee is not afforded the right to a formal hearing with examination of witnesses. The employee should have such a right.

Subpart H

7. In Section 9901.807(c)(1), the department has the "sole, exclusive, and unreviewable discretion" to determine whether an employee's return to the workplace is "impracticable" or "unduly disruptive." This determination ought to be reviewable by the AJ and MSPB. Section 9901.807(d)(3) prevents a reversal of departmental action based on the way a performance expectation is expressed. In the event of misleading, misstated, impossible, unfair or unachievable expectations, the action should be reversible. Section 9901.807(k)(6) is unjust. It states that the department's determination regarding penalties will be "given great deference" and cannot be modified unless it is "wholly without justification." In other words, if a penalty is wrong and quite substantially without justification, it cannot be mitigated while the slightest piece of justification exists. This also places the burden of proof on the employee, where it does not belong. The department ought to have the burden of proof not only on whether an adverse action is justified, but what that adverse action should be. Because codes of conduct and discipline already allow management wide latitude in imposing penalties, sometimes ranging from a mild reprimand to removal for the same offense, the department ought not to be allowed to sustain the harshest penalty where the mildest penalty is appropriate and proportionate. Section 9901.807(k)(8)(iii) allows the department to reverse AJ decisions. If management has acted erroneously or unjustly, it ought not to have to power to exempt itself from consequences. Section 9901.808(d) allows the department, if it fails to show an MRO has occurred, to keep using the same evidence to try to sustain a lesser penalty. This appears to give the department unlimited opportunities to keep throwing charges at an employee to see what sticks. Aside from being unfair, this is also a waste of public money because there is no incentive for the department to make its best case and pick a proportionate penalty at the outset. Rather, it encourages managers to pick the severest penalties, whether justified or not, and to keep refiling charges if the original charges do not succeed.

Subpart I

8. Subpart I should be removed in its entirety. The provisions of 5 USC 7101 through 7135 are sufficient. Under that code, management already has clearly defined rights exceeding those afforded managers in the private sector. Management already has the right to take swift action for reasons of national security. The provisions of Subpart I do not make the department more flexible, nor do they advance its mission.

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