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Before the

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
FEDERAL WORKFORCE, POSTAL SERVICE AND DISTRICT OF COLUMBIA SUBCOMMITTEE
U.S. HOUSE OF REPRESENTATIVES

The Honorable Danny K. Davis, Chairman
The Honorable Kenny Marchant, Ranking Member

Concerning

Cost and Impact on Morale, Minorities and Labor – Management Relations of Design, Implementation and Training Related to New Personnel Systems, at the Department of Defense, Homeland Security, Transportation Security Agency, Internal Revenue Service, and Government Accountability Office

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Good afternoon my name is Joseph Swerdzewski, Managing Partner of JSA Consulting, a veteran owned, small business actively involved in assisting both unions and agencies in the transition to the Department of Defense (DOD) National Security Personnel System (NSPS) through providing training, consulting services and publications. For approximately the past 2 years we have been assisting unions and management to better understand how NSPS will affect labor relations and particularly collective bargaining rights of employees. We have also assisted agencies with the implementation of NSPS for non bargaining unit employees through training and consulting on the NSPS performance management, classification, and compensation systems.

Thank you Chairman Davis and Ranking Member Marchant for holding this hearing and providing me with an opportunity to present information about the costs associated with the design, implementation and training related to NSPS and its impact on employee morale, minorities and labor-management relations.

NSPS represents a revolutionary change in how federal employees are hired, promoted, disciplined and compensated. In its draft form it also significantly changes how labor relations currently operates under Title 5. There are significant and valid reasons for human resource reform. The Title 5 personnel system has not kept current with the needs of the federal government and its work force. Many of its practices and procedures have become cumbersome and restrictive in allowing federal agencies to quickly acquire new employees. Qualified employees are not eligible for promotion because of antiquated requirements such as time in grade. Discipline for performance based reasons has become a complex procedural thicket which must be surmounted to achieve a desired result. Compensation is governed by a rigid system that is not labor market sensitive, does not allow for recognition of truly outstanding performance nor necessarily provide incentive to employees. Collective bargaining under Title 5 can result in dragged out negotiations which don't meet the needs of either union or management.

Understanding that there is a need to reform the current personnel system Congress provided wide latitude to the Secretary of Defense and the Director of the Office of Personnel Management (OPM) to fashion a new personnel system for DOD employees. However, Congress was mindful of the role of federal unions in representing the interests of federal employees in the workplace. The Congress placed a requirement on DOD that any NSPS system implemented provide for collective bargaining. This requirement has been the subject of litigation between DOD and employee unions. As you are aware the NSPS labor relations system is currently been enjoined from being implemented by a federal court judge in Washington DC. This injunction is currently being reviewed by the District of Columbia Circuit.

The outcome of this litigation before the DC Circuit at this time is uncertain. A case before the DC Circuit concerning the implementation of a new personnel system for the Department of Homeland Security (DHS) resulted in a decision by a three member panel of the DC Circuit that the labor relations system proposed by DHS violated the rights of federal unions to engage in collective bargaining. The Court found that the system did not provide for the collective bargaining that Congress mandated be a part of the new human

resources system at DHS. Since issuance of the decision, DHS has decided not to challenge the ruling of the DC Circuit. Recently DHS announced it would not be implementing pay for performance in conjunction with its new performance management system but would instead implement pay for performance at a later date.

The DHS labor relations regulations which were the subject of the litigation are almost identical to the NSPS regulations on labor relations. In fact the judge issuing the injunction in the NSPS case used the decision of the judge issuing the injunction against DHS as persuasive authority for his decision.

The NSPS litigation has lead to a bifurcation of the implementation of NSPS in DOD. DOD has begun implementing NSPS in various waves for non bargaining unit employees over the course of the last year. However, at this time it is uncertain whether, when or how NSPS will be implemented for bargaining unit employees.

The entire design of NSPS appears to have been premised on there being no collective bargaining over any aspects of the new personnel rules. It was based on immediately terminating existing collective bargaining agreements containing provisions found by DOD to be inconsistent with the new NSPS personnel rules and unilaterally implementing the new rules with little or no bargaining. For DOD this could be seen as a practical approach to implementing the new system for approximately 800,000 employees all at one time. This approach avoided negotiations with approximately 1800 individual bargaining units and the delays inherent in those negotiations. It also avoided having to wait until current agreements expired. While this is the approach DOD chose there are other approaches which could have resulted in achieving this same goal such as using the authority DOD was given in the NSPS Statute to bargain at the national level and avoid all local negotiations.

Should the DC Circuit Panel, which is currently deliberating over the future of the NSPS labor relations system rule in a similar manner to the Panel which heard the DHS case, DOD will have a significant decision to make with great cost implications and significant operational impacts. There are a number of options from which DOD may chose, all with cost implications. DOD may decide to revamp its current NSPS regulations to align them with current management rights enjoyed by agencies under Title 5. The current NSPS regulations create in some cases greater bargaining rights because DOD waived certain statutory requirements which were non negotiable, in favor of developing new DOD regulatory requirements which under Title 5 may be negotiable. This option will entail considerable expense and delay as a result of the need to develop a new design for the system and then completing the collaboration requirements required under the NSPS statute.

As another option DOD could decide to use its recently issued NSPS regulations with no changes and instead of developing a new labor relations system follow current Title 5 bargaining rules. This could lead to a significant amount of bargaining over the implementation of the rules and challenges to the rules through statutory appeal processes. The bargaining and challenges can lead to significant expense.

A third option would be for DOD to rework the NSPS labor relations system to meet the dictates of the decision. Once again this will take time and expense.

DOD is facing the provision in the NSPS Statute that sunsets in 2009 its authority to create its own labor relations system. This places a real question of the efficacy of spending the resources to implement NSPS for bargaining unit employees when in a year's time or slightly more union's will be able to bargain individually over changes to the NSPS system.

On the other hand DOD may be successful in the litigation before the DC Circuit and win a ruling overturning the District Court decision. While this would be a tremendous victory for DOD it is also not without its costs. Prior to implementation of NSPS the labor relations regulatory requirements of the draft NSPS labor relations system will have to be met. This will take time and expense. Depending on the time required once again DOD will be pushing up again the sunset provisions of the NSPS Statute. However, it would have the advantage of having the regulation implemented without bargaining. Should the NSPS labor relations system sunset, as discussed above, unions would have a right to negotiate. The implementation and then shortly thereafter subsequent changing of the system could lead to confusion and discord between labor and management.

Aside from the significant legal implications of the forthcoming decision on the NSPS labor relations system, having a bifurcated personnel system could be disruptive to the workforce. At this time some employees are covered by NSPS and some are not. There are definite advantages and disadvantages to both systems. Many employees may believe the current Title 5 system is superior to NSPS and avoid seeking positions covered by NSPS. The guarantee of a Congressionally set annual pay adjustment and Federal-wide locality pay adjustments may appeal to employees more than a DOD managed pay for performance system especially until it can be proven to employees that pay for performance works.

One of the advantages of NSPS is allowing for easier movement of employees to positions of greater responsibility through the use of reassignments within pay bands rather than the use of merit promotion. However with a bifurcated system with some employees in pay bands and the majority of employees not in pay bands this ease of movement by reassignment in a pay band will be lost. Employees working side by side with different NSPS status could have significantly different opportunities for promotion or increase in responsibilities and subsequent significant differences in pay.

DOD has chosen to begin implementation of NSPS without a clear picture of what the future holds for bargaining unit employees. A bifurcated personnel system could lead to long term costs in terms of administration of two separate personnel systems and on the morale of employees. Employees will be watching how the two systems compare which will place a greater burden on managers to explain and support what may be very different outcomes for employees under the two systems.

One of the most significant innovations under NSPS is the pay for performance system. Under NSPS employees are to be rewarded based on achieving results linked to an organization's goals. The new pay for performance system is based on creation of three new systems: a new system for classification of positions which eliminates the General Schedule and replaces it with pay schedules and pay bands; a new DOD-wide performance management system which bases performance on linking employee achievements with organizational goals and a compensation system which replaces the statutory Title 5 system in which compensation is set by Congress and replaces it with a system where compensation is set by the Secretary of Defense. All three of these systems have a profound effect on employees.

The new classification system provides greater flexibility to managers in compensating employees and does away with the cumbersome and somewhat byzantine and formulaic nature of Title 5 classification. Pay bands provide greater latitude for pay setting and therefore greater opportunity for both attracting and retaining employees. The new performance management system is to be used DOD wide removing the differences and potential inconsistencies between the various performance systems in use in DOD. It assesses an employee's performance on what is achieved and not just what an employee does in accordance with the employees' job description. These are significant strengths of the new system.

In the eyes of many employees the best performance system is either the last one they had or the next one they are going to have – it is never the one they are under now. Every new performance management system goes through a period of evolution as the supervisors and employees under the system gain a better understanding of how it works and what needs to be done to make the system work effectively. A system intending to cover approximately 800,000 employees will be under considerable scrutiny. A one size fits all system places considerable strain on both the supervisors and the employees as they struggle with what is required of them under the system. Making a common system for that many employees is a daunting task. Undoubtedly there will need to be reassessments and adjustments of the system as it is implemented throughout DOD.

To be effective under the new performance management system requires a new understanding of how performance management works and how to measure employee performance. This requires a clear understanding by supervisors of how to create job objectives tied to their organization goals that meet the SMART objective criteria required by DOD. It will take some time for supervisors and employees to understand how to be effective at performance management.

Under the DOD implementation strategy the pay for performance system is tied immediately to performance. There is no time allowed for the kinks and aberrations inherent in any new performance management system to be worked out before the system is applied to employees. As mentioned above DHS has decided to implement its new performance system first and then later link it to pay.

The new performance management system will have significant growing pains as do all new performance management systems. However unlike other systems this system has significant immediate impact on employees. Under NSPS an employee's performance rating will have direct effect on an employee's retention in case of a RIF and it will be determinative of an employee's pay raise and bonus.

In many ways the new performance management system is a more difficult system for supervisors to use than many predecessor systems. It should be given the time to mature before such significant demands are placed on it credibility. A particular area of concern, often expressed by both employees and supervisors, is the numerous levels of review of an employee's recommended performance rating by not just the second level supervisor but also the pay pool panel and finally the pay pool manager who makes the final decision on an employee's performance. The pay pool manager, in many cases, may be far removed organizationally and even geographically from many employees in the pay pool. Employees and supervisors wonder at how the pay pool manager is going to make such decisions fairly and how the supervisor is going to explain the decision if it is contrary to his/her recommendation. While these concerns with training and experience can be overcome it may be preferable for employees to gain this experience before subjecting them to the effects of the system.

I appreciate the opportunity to testify on this important issue and hope these remarks will be of use to the committee as they review the introduction of new human resources systems in the federal government.