UNIVERSITY OF BALTIMORE SCHOOL OF LAW
CTIEFER@ubalt.edu Tel: (301) 951-4239

Hearing on Status of Federal Personnel Reform

TESTIMONY BEFORE
SUBCOMMITTEE ON FEDERAL WORKFORCE,
POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA
HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

by Professor Charles Tiefer

NEW PERSONNEL SYSTEMS HAVE IMPOSED UNACCEPTABLE COSTS AND IMPACTS AT DOD, DHS, AND OTHER AGENCIES

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Thank you for the opportunity to testify on the subject of the federal personnel reform at the Departments of Defense (DoD), Homeland Security (DHS), and elsewhere. There is no more vital and controversial subject. Only this Subcommittee can tackle it as it needs to be tackled – government-wide, across the board, taking a broad view of the developments, costs and impacts.

I am Professor of Law at the University of Baltimore Law School since 1995, and the author of a number of pertinent law review and journal studies, and book sections, on federal personnel and related procurement policy, besides testifying in 2003 (Senate) and 2006 (House) about earlier stages of the new personnel systems.[1]

[1] These include sections about personnel in CHARLES TIEFER & WILLIAM A. SHOOK, GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (Carolina Academic Press 2d edition

I. Executive Summary

From the start of this Administration's drive to replace the civil service General Schedule with pay-banding at supervisors' loose discretion, there were cautionary expert voices. Studies of pay-for-performance warned that it did not tend to yield such positive results. A 2003 Kennedy School review concluded that the "conditions" for ""[p]ay for performance" to be effective "are often not met in the public sector, in part because of the complexity of the typical government product . . . ."

The concerns increased from 2003 on as the Administration withheld the resources needed for this change to have much chance of success. Concerns mounted further as the Administration introduced radical elements, notably an effort to suppress labor representation and appeal rights, supposedly for security flexibility. For a concrete example, the failure of FEMA under this Administration to deal with the aftermath of Hurricane Katrina reflects that the agenda of changing to the MaxHR personnel system had nothing to do with the effective disaster management that is FEMA's mission.

NSPS

In DoD, at NSPS, the Administration has set up a complex schedule. If the appellate panel (with Judge Kavanaugh on it – formerly associate White House counsel to President Bush) that heard the *Chertoff* case in December, rules in the Administration's favor, that schedule would leave it open to implement the most radical elements in NSPS, including suppression of labor representation. Also, the pay-banding could extend to all 650,000 of DoD's civilian employees. NSPS's implementation is summed up by how the factors already being used for rating employees not only included "how well they accomplished agreed-upon job objectives, [but] also . . . factors such as cooperation, communication and leadership." As one female Navy employee said, who found these like rating whether she was "personable" enough, "'Perhaps I am being cynical, but it would seem to me this aspect was added to the system in order to allow more subjectivity to the evaluation process.'"

DHS and Other Agencies

At DHS, the paybanding of HCOP (MaxHR) is only scheduled for a pilot program. But, if the Administration decides to expand the pilot, DHS in 2009 could still seek to shift all its employees from the GS to pay banding. This would set back DHS, distracting it from proper focus on integrating all its different units into one department.

Besides comment about GAO, IRS, and SES, it is noted here that the Director of National Intelligence (DNI) seeks a payband system for the whole intelligence community (IC). This may raise important legislative and oversight issues for this Subcommittee, like whether vital rights will be saved in cross-agency personnel systems.

2004 & Supp. 2006). In 1984-1995 I was Solicitor and General Counsel (Acting) of the U.S. House of Representatives, and participated in numerous oversight investigations of federal personnel and procurement policy. I testified in 2006 before a House Homeland Security subcommittee and in 2003 before a Senate Government Operations subcommittee.

II. Overview of Costs and Impacts Generally

For this testimony, I have reviewed a number of scholarly and survey studies, and journalistic accounts of new personnel systems. Some of the most relevant ones are cited in footnotes below, including some notably high-quality journalistic reports.

Starting in 2001, and particularly after obtaining new legislation in 2002-2003, the Administration showed ideological enthusiasm for setting up new personnel systems in government departments and agencies. The new and extreme ideology was first laid out in a Heritage Foundation study, and in proposed government-wide legislation (in 2001, the Freedom to Manage Act, and in 2005, the similar "Working for America" Act) – both of which notably pitched their ideology on a government wide basis rather than that the ideology related to some special national security reason.[2]

From the start, there were cautionary expert voices against putting too much confidence in the central step of replacing the civil service General Schedule with pay-banding at supervisors' loose discretion. This throws away the time-tested bedrock that the diverse units of the government have in common: all its units, to the extent relevant, were hitherto under the same government-wide personnel system, the "General Schedule" (GS) for the civil service.[3]

Studies of public-sector pay-for-performance warned that it did not tend to yield such positive results. These included the extensive work of Professor Jason Shaw spanning the public and private sectors.[4]

A comprehensive review of the literature was done in 2003 at the Kennedy School of Government at Harvard by two leading professors.[5] The Kennedy School review concluded that the "conditions" for ""[p]ay for performance" to be effective "are often not met in the public sector, in part because of the complexity of the typical government product . . . . the increasing role of . . . cross-agency collaboration, and the social comparisons and internal motivational dynamics of . . . public employees in particular."[6] And, the motivational dynamics depend heavily, not upon a pure piecework-minded interest in wages, but upon precisely the "public service motivation" as to which the Kennedy School review said "the reduction of intrinsic motivation through performance-based pay will be a correspondingly bigger problem."[7]

Second, the concerns increased from 2003 on as the Administration withheld the resources for this change to have much chance of success. The Administration launched pay-for-performance with inadequacy as to the needed elements: resources for pay

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[2] Taking Charge of Federal Personnel, Heritage Foundation Backgrounder, No. 1404, Jan. 10, 2001, at http://www.heritage.org/Research/GovernmentReform/BG1404.cfm.

[3] A good review of how the General Schedule works is in Major John P. Stimson, *Unscrambling Federal Merit Protection*, 150 Mil. L. Rev. 165 (1995).

[4] Jason Shaw is a professor of management at the University of Kentucky. He is quoted about the relevance of his studies to this Administration's current initiatives in Shawn Zeller, *Performance Pay Perils*, GovExec.com, Feb. 15, 2004.

[5] Iris Bohnet & Susan C. Eaton, *Does Performance Pay Perform? Conditions for Success in the Public Sector*, in John D. Donahue and Joseph S. Nye Jr., eds., *For the People: Can We Fix Public Service?* (2003). Another large-scale report is National Academy of Public Administration & Center for Human Resources Management, *Broadband Pay Experience in the Public Sector: 15 Organizational Case Studies* (August 2003), at http://www.ourpublicservice.org/usr_doc/Broadband_Pay_in_the_Public_Sector_-_15_Case_Studies.pdf

[6] *Id.* at 250.

[7] *Id.* at 246.

increases and for training in the new system; and, a period to carefully develop performance criteria, and to work them out between managers and employees so as to damp down the employees' very natural concerns about the dangers of arbitrary and even punitive or discriminatory pay changes.

Third, the concerns mounted further as the Administration introduced radical elements, notably an unheralded effort to suppress rights supposedly for security flexibility – rights such as labor representation in collective bargaining, independent parties (such as neutral arbitrators) in labor-management dispute resolution, and appeal rights to protect against discrimination, whistleblower penalties, and other losses of rights.

What makes these elements so radical, namely, the established nature of the rights such as of labor representation, warrants elaboration.[8] Although the principal unions of federal employees emerged in 1917-1938, the contemporary framework of federal-sector labor management relations did not take its legally developed shape until Executive Order 10988 in 1962. Statutory codification occurred in Title VII of the 1978 Civil Service Reform Act. The Clinton Administration tried a relatively successful partnership effort, which the Bush administration largely ended in 2001.

There was nothing to foreshadow the Administration's radical effort, in the first instances at DoD and DHS, to severely undermine the role of such longstanding labor representation. Academic commentators have found little credibility in the newly-manufactured Administration claim that it was justified for security reasons.[9]

Moreover, this and other radical elements produced delays of the new personnel systems as the courts wrestled over many aspects, sometimes throwing out some flatly illegal parts, and as the Administration changed or postponed various aspects. These various delays mean the new personnel systems have become an even more long-lasting source of uncertainty and morale damage than imagined.

The central problem remains the Administration's inability to create the extensive, practical, and credible systems for measuring, in large and diverse departments with complex public-oriented (not simpler profit-oriented) missions, the "performances" on which pay would be based. Robert M. Tobias, with whom I could not agree more on this point, recently moderated a panel about the problems of performance management in which he laid out that:

> "If we don't know what performance is, it is impossible to have a pay-for-performance system that is transparent, that is credible. It will indeed be perceived as arbitrary . . . . <u>Very few agencies with whom I'm familiar have done the hard work of defining what performance means in the context of their organization.</u> They haven't decided whether they can actually do outcome goals. . . . And I suggest, if agencies have not done that hard work, there's very little chance of retaining the best, stimulating those in the middle to perform at a higher level, and/or identifying the non-performers and dealing with them. What is performance? That is the fundamental, unanswered question . . . . and it is [a]

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[8] For the background through 2004, see Marick F. Masters, *Federal-Sector Unions: Current Status and Future Directions*, 25 J. Lab. Res. 55 (2004).

[9] Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. Pa J. Lab. & Emp. L. 283 (2006), and sources cited in notes 115, 120.

question that has to be addressed and satisfactorily answered before we even begin to think about a pay for performance system."[10]

Let us put the lack of meaningful performance measures in concrete terms. Just around the time in 2005 when the Administration's drive for new personnel systems faltered, a great test occurred of the key department for that drive. The department was DHS; the great test was Hurricane Katrina. Whereas hitherto FEMA performed impressively in disaster management, with experienced personnel performing ably under the time-tested GS system, FEMA as part of DHS performed abysmally under the Bush Administration, directed by enthusiasts for the new personnel system, HCOP (then MaxHR). The failure of FEMA under this Administration to deal with the aftermath of Hurricane Katrina reflects that the agenda of changing personnel systems was a distracting political agenda, which undermined the effective disaster management that is the mission of FEMA's hitherto capable civil servants.

One wants to ask: what is going to be the pay-for-performance measure in post-Katrina efforts, that will take the place of the public service mission orientation that characterized FEMA before this Administration? Suppose FEMA employees went to New Orleans for post-Katrina efforts: should their pay go up based on how much they hold back on federal expenditures? One hopes not. Should their pay go up based on how little they hold back on federal expenditures? One hopes not. Neither simple measure is good. Their mission is too important and complex to go by simple quantitative pay-for-performance measures of counting how much or how little they spend. The motivation for FEMA employees was better before the Administration took control. And considering the abysmal failure of the political figures at DHS and FEMA, surely the need is not to destroy the civil service's capacity to function by taking away any rights it has to perform its mission in the face of such poor political leadership. So, it was at this time that the support plummeted in the public and Congress for the drive to remake the personnel system, in DHS among other agencies, according to the prescription of this Administration.

III. NSPS at DoD

The Rise of NSPS

Pay-for-performance in the federal sector actually started with DoD – specifically, with a demonstration program at a Navy facility in China Lake, California, in 1980. Other demonstration programs followed, including in recent years, up to 45,000 DoD employees mostly in DoD's R&D laboratories.[11] In 2003 came a time when the Administration expanded its security-emphasizing political themes to embrace the need for DoD to get into Iraq for the supposed stockpiles there of weapons of mass destruction. Against a background of intensified national urgency over this alleged imminent security menace, the Administration obtained the authority in the National Defense Authorization Act for FY 2004, to extend a new personnel system in DoD beyond such demonstration projects, to embrace Secretary Rumsfeld's whole department.[12]

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[10] Robert M. Tobias, Moderator, Panel 3, in The Practice of Merit: A Symposium, at http://www.mspb.gov/studies/rpt_02-06-07_proceeding/panel%203.htm.

[11] Trudy Walsh, *Performance Anxiety*, Government Leader, Jan. 13, 2006.

[12] 5 U.S.C. sec. 9902(a).

It must be emphasized that this occurred when public confidence was at a peak – from which it has had a dizzying decline – that the political leadership of DoD, such as Secretary Rumsfeld, Deputy Secretary Wolfowitz, and Undersecretary Feith – knew best how to run and use the department. There was a direct correlation between two views of the Department hierarchy: (1) that the way to handle logistics in Iraq, a subject I have extensively studied, was by sole source contracting to Halliburton rather than relying on career DoD civilian or military personnel or competition among suppliers; and, (2) and that the department's civilian employees should have their personnel rights substantially reduced and that they should be subjected to potent subjective pay control. Either way, the idea was not to depend any more upon the public spirit of the civil service, but on a much more top-down, hierarchical, politically controlled approach.

DoD promulgated final regulations in November, 2005.[13] In early 2006, federal employee unions successfully challenged major portions of the regulations, particularly those failing to ensure collective bargaining; those providing inadequate independent third party review of labor relations decisions; and those providing an inadequate process for appealing adverse actions.[14] Rather than simply letting go of these problems, notably those seeking to suppress labor representation, the Administration appealed, even though that meant the Administration was itself deferring, if not partly disabling, the rest of the new personnel system – notably, pay-banding.

The appeal was argued this past December. The possibility exists that the Administration will receive something it can call a victory in that appeal. Judge Sullivan's decision was straightforward and persuasive. But, the appellate panel includes Judge Brett M. Kavanaugh, who was a deputy for Ken Starr, the Whitewater counsel who pursued President Clinton, and then served this Administration as an associate White House counsel, next door, so to speak, to President Bush himself. As my book noted when Kavanaugh was nominated, he is "pretty clearly the opposite of an independent judge who would dispassionately and disinterestedly weigh arguments for and against the Bush White House."[15]

Status of NSPS Implementation

During the pendency of the litigation, the status of NSPS implementation has been as follows. Following the ruling by Judge Sullivan against NSPS, DoD officials made a complex deferral.[16] They reduced by 81 percent the first group of employees to be covered by the pay plan, just to 11,000. A second group – the number was later put at 66,000[17] -- would not transition to the performance-based system until October 2006 and January 2007, and these would not see their performance pay raises until January 2008. Then, the revised schedule delayed moving the third group into NSPS until 2007, and the rest of its 650,000 employees even later, so that the whole department would not be paid under the system until January 2009.

The implicit significance of this plan was two-fold. First, the Administration adhered to its desire to couple to its new pay system its effort, knocked down by Judge Sullivan, to suppress labor representation. The limited first group of employees were all

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[13] 70 Fed. Reg. 66116 (Nov. 1, 2005).

[14] *AFGE v. Rumsfeld*, 422 F. Supp. 16 (D.D.C. 2006)(Sullivan, J.).

[15] Charles Tiefer, *Veering Right* 72-73 (2004).

[16] Tim Kauffman & Mollie Ziegler, *DoD Scales Back Pay Reform*, Army Times, Jan. 23, 2006.

[17] M. Z Hemingway, *he Battle Over Civil Service Reform, Fed. Times Almanac 2007*, at 8.

nonunion ones, so that the ruling did not squarely affect how NSPS applied to them. The House voted in July 2006 to withhold funding to carry out parts of NSPS deemed illegal by Judge Sullivan,[18] but that provision does not appear to have been enacted. An appellate ruling by Judge Brett M. Kavanaugh might allow a resumption of the drive to implement the radical provisions suppressing unions, independent third-party review of disputes, and appeal rights. Second, the deferral gave the Administration some time to wrestle with, or at least paper over, the increasingly evident problems of pay-banding, particularly as to developing criteria and conducting training.

Problems With NSPS Implementation

As the NSPS moved toward implementation, both studies and journalistic accounts reflected its problems. The GAO commented about several shortcomings in NSPS:[19]

> GAO Comments on Problems with NSPS
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> The Department of Defense (DoD) has designed its own new human resources management system, called the National Security Personnel System (NSPS). Government Accountability Office (GAO) Comptroller General David Walker last week testified . . . GAO also has several areas of concern. First, DoD has considerable work ahead to define the "important details"—such as measures of performance. Second, the regulations do not require the use of core competencies that can help provide consistency. Third, although the regulations do provide for continuing collaboration with employee representatives, they do not identify a process for the continuing involvement of individual employees in the implementation of NSPS.

An account just a few months ago, "Transition to Pay for Performance Makes Some Anxious,"[20] discussed the practical details of the implementation of the pay-banding system. Notably, the pay-banding system not only could adversely affect an employee's current pay, but even a relatively short period of involvement in the system could very adversely affect an employee's lifetime pension.[21] Small wonder that pay-

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[18] Aimee Curl, *House Tightens Grip on Appropriation for NSPS*, Fed. Times, Aug.7, 2006.

[19] FederalDaily, Nov. 22, 2005 (emphasis added). Comptroller General Walker 's testimony is at www.gao.gov/new.items/d06227t.pdf.

[20] Stephen Barr, *Transition to Pay for Performance Makes Some Anxious*, Oct. 31, 2006, at D4.

[21] In the private sector, defined contribution plans (typically 401(k)'s) make pensions determined by the contributions during the employee's whole tenure, so a reduction or cut-off of raises in the final couple of years has no special significance. In the federal sector, the pensions are determined by a formula applied to the "high-3" – the average of the three highest paid years of consecutive service. Typically, these are the final years.

Thus, an employee whose final three years came during the start of pay-banding, and who then got minimal raises, who suffer more than just three years of those pay raises, but the reduction of her "high-3" and hence of her whole pension. Such an employee would see her pension reduced for the rest of her life by the impact of that pay-banding.

banding can produce great anxiety among the senior employees, often those with the most extensive and varied experience.

In several respects, the pay system was poorly received. For one thing, although the small amount of money needed for its small-scale initiation was indeed made available, managers worried whether larger amounts of money needed for the larger-scale later pay raises would be. For another, the factors for rating employees not only included "how well they accomplished agreed-upon job objectives, [but] also . . . factors such as cooperation, communication and leadership."[22] Individual reactions shed light on the reception to these pay systems. As one female Navy employee told a reporter, "'Perhaps I am being cynical, but it would seem to me this aspect was added to the system in order to allow more subjectivity to the evaluation process.'"[23]

When Army Times published an Administration defense of NSPS, it received disagreeing responses from employees: one wrote a published letter that she "has worked for the Defense Department for more than 34 years. This system is age-biased."[24] Another wrote that "[i]n my 25 years of federal civil service . . . performance is not considered as much as personal favoritism in giving out rewards."[25]

Moreover, whatever personnel resources DoD has devoted to rolling out and maintaining NSPS have come at a serious cost. DoD faces an acute shortage of civilian employees in many key areas, as a generation comes to retirement and is not being replaced adequately by new hires and promotions. This is a "crisis" that Comptroller General Walker has testified about extensively.

This shortfall is visible in an area I am particularly familiar with, namely, in the acquisition, or procurement, workforce. DoD should be devoting all the personnel resources it can to training, retaining, promoting, and recruiting its acquisition workforce. Otherwise, it faces a recurrence of the procurement scandals of Iraq, namely, inadequate acquisition oversight leading to overdependence on self-interested vendors like Halliburton, and to the untrained, abusive private employees involved in a third of the incidents at Abu Ghraib. But, the personnel resources for training, retaining, promoting, and recruiting are being spent instead on pushing NSPS. The result: scandals of procurement waste and abuse now, and the prospect these will continue in the future.

IV. DHS and TSA

DHS

The new DHS personnel system was launched by the 2002 statute creating DHS. Initial regulations were issued in 2004. The system was to be called "MaxHR." Key elements were rejected by a district court decision in 2005 by Judge Collyer,[26] and by a unanimous appellate court decision in 2006.[27] More recently, the system shifted to a new plan, called "Human Capital Operational Plan," known as "HCOP" (so, at this interim

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[22] Mollie Ziegler, *DoD Pay Reform Begins: Starting Small, Pentagon Sets Off on Rocky Road*, Fed. Times, May 8, 2006, at 1.

[23] *Id.* The employee added that she was worried that the extra factors would "penalize employees who aren't as articulate or personable." It could be, although it is not entirely clear, that she meant that penalizing those who are not "personable" in this context opens a window for sex discrimination.

[24] Letter, Fed. Times, Oct. 2, 2006, at 20 (signed letter).

[25] *Id.* (unsigned letter).

[26] *NTEU v. Chertoff*, 385 F.Supp.2d 1 (D.D.C. 2005); 394 F.Supp.2d 1237 (D.D.C. 2005).

[27] *NTEU v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006).

moment, it will be called "HCOP (MaxHR)"). This will set up a pilot project in 2008 focused just on the department's (relatively few) employees who work in intelligence.

If the Administration decides to expand the pilot, DHS in 2009 could still seek its old goal of shifting all its employees from the GS to pay banding.[28] The Administration would face an interesting situation in the extreme situation that the D.C. Circuit reverses Judge Sullivan's decision about NSPS and the Administration decided to unroll all of NSPS, including its radical provisions for suppressing labor representation. That problem is that for all their practical similarities, the DOD and DHS personnel systems spring from different statutes, and so an appellate decision unleashing NSPS at DoD would not in any way unleash the personnel system at DHS. So, the limit on what this Administration could do at DHS is presumably defined in terms of expanding the pilot project on pay banding from intelligence employees to a larger group.

I testified in detail at a Homeland Security Subcommittee hearing last May about the special reasons DHS's new personnel system was a problem for that department., and will summarize here. DHS faces a central daunting challenge of "integrating" itself – pulling itself together from many units – in just a few years. DHS is the largest department to come together since the Department of Defense in the late 1940s, and it consists of almost a dozen principal units of different natures originating in many different departments. Recent developments have made increasingly clear how seriously it sets DHS back in this goal of integrating itself, to saddle DHS also with the problem of creating a wholly new personnel system, based on pay-for-performance, from scratch.

The studies, surveys, and journalistic accounts reviewed for this testimony show that DHS's personnel system has recently shown many problematic aspects which mean that implementing a new personnel system has been, and will be, particularly setting back the task of integrating DHS. First, the new personnel system throws away one of the aspects that all the diverse precursor units of DHS have in common: all those units, to the extent relevant, were hitherto under the same government-wide personnel system, the "General Schedule" (GS) for the civil service. By continuing on with the new personnel system, DHS throws away that one unifying constant, and obliges its employees to set off on a bewildering and insecure personnel policy venture.

Second, the new personnel system tries to launch pay-for-performance in a situation missing many of the elements needed to have any chance for even minimal success, like a period of mission stability to carefully develop performance criteria, and to work them out between managers and employees so as to damp down the employees' very natural concerns about the dangers of arbitrary and even punitive pay changes.

And, the new personnel system draws away precisely those resources – the vital but limited attention and funding that DHS managers can devote to personnel matters – that DHS desperately needs to use, not to redo the existing pay system, which is not a particular priority, but to fill serious shortfalls in training and hiring, which should have the highest priority.

[28] Stephen Barr, *A Symbolic Setback to Linking Pay With Performance*, Wash. Post, Feb. 26, 2007, at D1.

TSA

Surveys both of DHS, and of TSA, have shown that the effort to create a new personnel system has been accompanied by very high levels of employee dissatisfaction. The 2006 survey at DHS turned up the following:[29]

> The Homeland Security Department . . . . ranked last on the Office of Personnel Management's 2006 Federal Human Capital Survey for job satisfaction and results-oriented performance, second to last for leadership and knowledge management, and fourth to last for talent management. The results are similar to those in a survey OPM conducted in 2004.

The TSA's own employee survey turned up similar results as described in a story in FederalDaily:[30]

TSA Screeners Show Discontent

. . . more than 17,000 TSA screeners returned 2004 TSA Organizational Assessment Survey forms. POGO said the results showed that of screeners who returned their forms:

- 76 percent disagree that "Creativity and innovation are rewarded" at TSA.
- 80 percent disagree that "Risk-taking is encouraged without fear of punishment for mistakes" at TSA.
- 73 percent disagree that "Disciplinary actions are applied fairly to employees."
- 68 percent disagree that "Managers provide an environment that supports employee involvement, contributions, and teamwork."
- **82 percent disagree that "High performing employees are promoted."**
- **86 percent disagree that "Pay raises depend on how well employees perform their jobs."**
- 60 percent rate TSA as "below average" or "one of the worst" organizations compared to other organizations.

Extensive attention has also gone recently to the provision in the original charter of the TSA that left to the Administration's discretion whether to allow collective bargaining for the TSA screeners. The Administration has refused to do so. Now, as part of legislation to implement the 9/11 Commission's proposals, the issue has returned.[31]

One need only look at the figures just quoted about the low morale at TSA, and the almost universal skepticism among employees that pay and promotion depend on merit, to see how important it is that the screeners have the same labor representation rights long enjoyed by other federal personnel in security such as those involved in

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[29] Wade-Hahn Chan, *OPM Survey Finds Employees Enjoy Work, But Dislike Their Bosses*, FCW.COM, Feb. 12 2007, at http://www.fcw.com/article97635-02-12-07-Print.

[30] FederalDaily, Jan. 24, 2006. (Emphasis added.)

[31] Stephen Barr, *Union Proposal for Airport Screeners Stalls at the Gate*, Wash. Post, March 6, 2007, at D4.

immigration, customs, and federal prisons. As to these latter types, I have personal experience meeting with, and talking to, the labor representatives of these employees, such as the representatives of the federal prison guards. It is a vital part of their esprit de corps, if you will, that such guards organize, and strengthen what might be called their "unit cohesion" with their brothers and sisters by the right to join a labor organization. I cannot understand why not to let TSA employees raise their morale by similarly organizing together.

V. Other Agencies: Intelligence Community (IC), IRS, GAO and Other Agencies

Intelligence Community (IC)[32]

In September 2006, the Director of National Intelligence (DNI), John Negroponte, set in motion a pay-banding system for the 16 agencies under his supervision – the "intelligence community" or IC -- which amount to about 50,000 civilians. There are a number of uncertainties about this IC plan. It seems that this plan will keep that pay-banding system moving forward for intelligence organizations under the DNI's umbrella that are part of DoD and DHS, even if the departmental pay-banding systems for DoD and DHS are deferred or abandoned. Also, DNI admits that to take off of the GS the intelligence components from other departments, like State, Energy, and Treasury, that have not had statutory authority to do so, will require what DNI calls "gap-filling legislative authority." Presumably DNI would try to get such authority slipped through on the annual intelligence authorization.

It can only be hoped that as DNI tries to do this, the experience of this Subcommittee with personnel systems of the past will be brought to bear. It is by no means clear that DNI can avoid the problems that have beset DoD and DHS – problems that this Subcommittee is studying. One hopes that the intelligence committees will not be lulled by the DNI with the notion that Congress has no role than to pass so-called "gap-filling legislative authority."

Let us take a particular example, the best known around: "performance" about pre-Iraq invasion intelligence. The analysts at the State Department, which has an intelligence unit not under the NSPS or HCOP (MaxHR) laws, had the confidence to disagree with what the White House and DoD wanted, and to dispute the supposed evidence that Iraq had stockpiles of weapons of mass destruction. Under existing personnel law, they were out of reach for the White House and DoD to punish for their heresy. In contrast, the DoD made sure that its analysis stuck to the official story about those stockpiles. If the DNI gets too much authority, the next time around, the analysts at State would be whipped into line about the bogus weapons stockpiles – no pay raises, and nowhere else to turn, for anyone heretical enough to dispute the official story.

Moreover, the issue is also: which version of personnel reform will become the IC's? Already it is seen that NSPS and HCOP(MaxHR) could go in different directions, especially if the appellate panel ruled the Administration's way on NSPS after a different panel unanimously ruled against the Administration about HCOP (MaxHR). The

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[32] Karen Rutzick, *Intelligence Agencies to Follow Defense in Personnel Reform*, GovExec.com, Oct. 19, 2006.

Administration will no doubt seek a version that gives the IC the lowest common denominator of employee rights, arguing that many of the IC employees currently work for DoD in agencies such as the National Security Agency. However, the lowest common denominator is not necessarily the best. Since this is an instance where the Administration must affirmatively seek new enacted authority, the Congress should put its rubber stamp away and see that the new authority is the best, not the lowest common denominator.

IRS

The IRS started its new personnel system well before the Bush Administration push. Basically, its effort dates back to the 1998 IRS reorganizational legislation. It had a very major goal in terms of changing the orientation of the agency's employees, away from a relatively exclusive focus on revenue-raising, towards more attention to "customer (taxpayer) satisfaction." Thereafter, the new personnel system was basically launched in 2001 as a system of paybanding for managers.[33] It emphasizes concrete, measurable standards.[34] By late 2005, the IRS had about 8,000 managers under a pay-for-performance system.[35]

It is difficult to generalize from the IRS system to others, for the personnel system changes in few other agencies result from the distinctive circumstances that led to a decision by Congress to reorient the IRS's mission in a specific new direction.[36]

GAO

This is not an occasion when a focus can be given to the GAO's new personnel system. Some public reports show the early results. A few months ago, the new pay-for-performance system at GAO received adverse comment, because of negative evaluations: "25-year GAO veterans feel insulted and unappreciated by a ranking system that implies that half of the analysis in his cohort are performing below a satisfactory level despite receiving good performance evaluations."[37] This past January, the discontent had apparently reached the point where GAO employees were attempting to unionize.[38]

SES

There is a pay for performance system for the Senior Executive Service (SES). It received major criticism after the release of a survey by the Senior Executive Association in late 2006.[39] The survey "revealed that 15 percent of respondents with the highest possible rankings at their agencies in 2005 had received no increase in salary in 2006, and respondents felt 'de facto quotas' were being enforced."[40] The SES is under much tighter Administration control than GS–level employees, and the SES's official voices are

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[33] The background is laid out in General Accounting Office, *Performance Management Systems: IRS's Systems for Frontline Employees and Managers Align with Strategic Goals, but Improvements Can Be Made* (July 2002).

[34] Denise Kersten Wills, *I'm OK, You're Outstanding*, GovExec.com, July 1, 2006.

[35] Trudy Walsh, *Performance Anxiety*, Government Leader, Jan. 13, 2006.

[36] The IRS system was commented upon insightfully by the Colleen Kelley, President of NTEU, at hearings of this Subcommittee last September. Since this is the same Subcommittee there is no need for this testimony to recapitulate that testimony.

[37] Florence Olsen, *"Ticked Off" About Pay at GAO*, Federal Computer Week, May 15, 2006.

[38] Karen Rutzick, *GAO Employees Move Toward Vote on Union Representation*, GovExec.com, Jan. 23, 2007.

[39] Senior Executives Association, *Lost in Translation: Survey of the Senior Executive Service Pay and Performance Management System* (2006).

[40] *Leadership Changes Could Deter Pay-for-Performance Rollout*, Fed. Hum. Res. Week, Nov. 20, 2006.

generally reluctant to speak out forcefully against the Administration. So, the quiet message of this survey is important. It means that even for a group that is literally middle management itself, and so, in theory, a natural group for pay-for-performance, the way the new personnel system is being approached, imposes unacceptable costs and adverse impacts.