

United DoD Workers Coalition

Nat'l Assn. of Aeronautical
Examiners

Nat'l Air Traffic Controllers Assn.

Professional Airways Systems
Specialists

Antilles Consolidated Education
Assn.

Int'l Brotherhood of Boilermakers

Assn. of Civilian Technicians

Communications Workers of
America

Federal Education Assn./NEA

Int'l Brotherhood of Electrical
Workers

Nat'l Federation of Federal
Employees

Fairchild Federal Employees Union

American Federation of Gov.
Employees

Nat'l Assn. of Gov. Employees

Nat'l Assn. of Gov. Inspectors

Int'l Guard Union of America

Int'l Assn. of Fire Fighters

Hawaii Council of Commissary
Dept. of Defense Unions

Laborers Int'l Union

Int'l Assn. of Machinists and
Aerospace Workers

Nat'l Marine Engineers Beneficial
Assn.

Int'l Organization of Masters,
Mates & Pilots

Metal Trades Dept., AFL-CIO

American Nurses Assn.

Int'l Union of Operating Engineers

Int'l Union of Painters and Allied
Trades

United Assn. of Journeymen and
Apprentices of the Plumbing &
Pipe Fitting Industry of the U.S.
and Canada

United Power Trades Org.

Int'l Federation of Professional and
Technical Engineers

Retail, Wholesale, and
Department Store Union

Seafarers Int'l Union

Service Employees Int'l Union

Sport Air Traffic Controllers

American Federation of State,
County and Municipal Employees

American Federation of Teachers

Int'l Brotherhood of Teamsters

Int'l Assn. of Tool Craftsman

Contrasting Plans For The Department Of Defense: Labor's Proposals for Positive Change versus Management's Unlawful Return to the 19th Century

A Paper By The United DoD Workers Coalition

June 15, 2005



Introduction

Labor's Authorized Proposals for Reform Met by the "Administration's Rigid Position" Demanding Unlimited Power and Unlawful Elimination of Rights

In the spring of 2005, during a month of meeting and conferring with the Department of Defense and the Office of Personnel Management over the Administration's proposed National Security Personnel System regulation, the United Department of Defense Workers Coalition presented proposals to accomplish all of the reforms that Congress authorized in 2003, as well as the goal that DoD publicly professed to pursue in seeking new legislative authority-increased flexibility, speed and efficiency, with preservation of legal rights and fairness.

The Coalition's comprehensive proposals for change included provisions for (1) a personnel system providing new appointing authority, pay banding, market-based pay, pay linked to performance, and new force reduction procedures; (2) a fair, expedited employee appeals process; and (3) a labor relations system including national level and multi-unit bargaining; expedited bargaining with specific time limits; consolidated and expedited resolution of negotiation impasses and legal disputes by independent arbitrators, with immediate judicial review; expanded interpretation of DoD's statutory authority to act immediately and unilaterally to meet an urgent unforeseen need, with postponement of negotiation until after the emergency; and new interpretation of the law governing employees' inclusion in collective bargaining units.

In response to its proposals, the Coalition encountered what DoD Chief Spokesperson Charles Abell called the "Administration's rigid position"-an unlawful demand for return to the 19th century. The Administration's unlawful position insisted on (a) total elimination of the statutory right to collective bargaining, by creation of both unlimited Secretarial power to preclude negotiation by regulation and unlimited management right to act unilaterally; (b) establishment of a biased labor board to control what little negotiation the Secretary may choose to allow; (c) delay and restriction of independent review in employee discipline cases; and (d) other measures that overstep DoD's statutory mandate, overreach for power, and belie management's claim that its proposed changes seek only flexibility, speed and efficiency.

The Three Major Reforms Congress Authorized In November 2003

In the National Defense Authorization Act for Fiscal Year 2004, P. L. 108-136, enacted November 24, 2003, Congress authorized three major reforms. First, Congress granted the Secretary authority to establish a personnel system providing pay linked to performance evaluation; new methods of assigning, promoting, and determining qualifications of employees; and new methods of reducing and reorganizing the workforce. 5 U.S.C. § 9902(b)(6) and (k).

Second, Congress authorized the Secretary to create, without "waiver of any provision of law," a new employee appeals process providing fair treatment and the protections of due process, and preserving the authority of arbitrators, the Merit Systems Protection Board, and the judiciary to review and correct unsupported or otherwise unlawful agency decisions in major employee discipline cases. § 9902(h)(1), (5), (6) and (7); § 7121(f).

Third, Congress granted the Secretary express and specific authority to establish a labor relations system making two changes to the collective bargaining procedures provided in chapter 71 of title 5. First, Congress authorized the Secretary to bargain above the level of bargaining unit recognition. § 9902(m)(5). This is commonly called national-level bargaining. Second, Congress authorized new independent third party review to resolve labor-management disputes. § 9902(m)(6). In enacting these two specific provisions directly inconsistent with chapter 71, Congress expressly rejected the Secretary's request for authority to waive all provisions of the chapter. § 9902(b)(3)(D) and (d)(2). In addition to preserving DoD's chapter 71 collective bargaining obligations, Congress expressly required that DoD's personnel system "ensure that employees may . . . bargain collectively . . . subject to . . . limitation on negotiability established pursuant to law." § 9902(b)(4) (emphasis added).

Speaking on the Senate floor November 12, 2003, Senator Lieberman, a member of the Conference Committee, confirmed that the new law "overrides chapter 71 only where" the new law

The Secretary may use this provision to expedite the review of decisions, but not to alter the statutory rights, duties, and protections established in chapter 71 or to compromise the right of parties to obtain fair and impartial review.

— Senator
Joseph Lieberman

Let me put some myths to rest. Here is what the National Security Personnel System will not do, contrary to what you may have read:

It will not end collective bargaining. To the contrary, the right of defense employees to bargain collectively would be continued. What it would do is bring collective bargaining to the national level so that the Department could negotiate with national unions instead of dealing with more than 1,300 different union locals — a process that is grossly inefficient.

— *Secretary of Defense
Donald H. Rumsfeld*

"and chapter 71 are directly inconsistent with each other" and "that the Secretary of Defense has no authority" to depart from chapter 71 in any other area:

[I]n the area of collective bargaining, the conference agreement included the provision of S. 1166 stating that the Secretary of Defense has no authority to waive chapter 71 of civil service law, which governs labor-management relations. . . . However, the conferees also agreed to a new provision authorizing the Secretary . . . to establish a "labor relations system" for . . . the Department's civilian workforce. As the conference report makes chapter 71 non-waivable, this new provision overrides chapter 71 only where the new provision and chapter 71 are directly inconsistent with each other.

The new provision . . . does not conflict with the statutory rights duties, and protections of employees, agencies, and labor organizations set forth in chapter 71, including . . . the duty to bargain in good faith . . . and others and such rights, duties, and protections will remain fully applicable at the department. The conference agreement provides . . . "for independent third party review of decisions." . . . The Secretary may use this provision to expedite the review of decisions, but not to alter the statutory rights, duties, and protections established in chapter 71 or to compromise the right of parties to obtain fair and impartial review.

The new provisions for national-level bargaining and independent third party review responded to the only need that the Department had identified in congressional hearings— expedition of collective bargaining. In his prepared testimony of June 4, 2003, before the Senate Committee on Governmental Affairs, Secretary of Defense Donald H. Rumsfeld said:

Let me put some myths to rest. Here is what the National Security Personnel System will not do, contrary to what you may have read:

- It will not end collective bargaining. To the contrary, the right of defense employees to bargain collectively would be continued. What it would do is bring collective bargaining to the national level so that the Department could negotiate with national unions instead of dealing with more than 1,300 different union locals — a process that is grossly inefficient. [p. 4.]

Senators Collins, Voinovich and Levin noted, however, that-contrary to the Secretary's testimony-the legislation sought by the Department (which had passed the House) would allow the Department to eliminate collective bargaining, because it would authorize the Secretary to waive all of chapter 71 of title 5. These Senators pointed out that the bill passed by the Senate Committee, S. 1166, prohibited waiver of chapter 71. They asked Under Secretary of Defense David C. Chu, who accompanied Secretary Rumsfeld, to justify the Department's request for authority to waive the entire chapter. In response, Under Secretary Chu said that the Department did not intend to use all of the authority it sought, but wanted to expedite bargaining:

Senator Levin. Dr. Chu, . . . the Department needs authority to bargain with unions at the national level because it is impractical . . . to continue bargaining with 1,400 separate bargaining units[; b]ut you are going way beyond that, because you . . . seek to authorize the total waiver of Chapter 71 of Title 5. . . . Does the Department intend to modify provisions, if you were given this authority, regarding unfair labor practices and the duty to bargain in good faith, for instance?

* * *

Mr. Chu. We don't have such an intent, sir.

* * *

Senator Levin. . . . Why do you need the authority to waive the requirements of Chapter 71 in their entirety given your immediate statement that you have no intent to exercise that waiver?

Mr. Chu. Because you have to get the bargaining to come to a conclusion, sir. Our experience is, many bargaining efforts don't come to a conclusion. I would cite an Air Force installation which is still bargaining since 1990 over [an] issue. . . . The bargaining process needs to have a conclusion for it.

Senator Levin. We agree obviously on that. But is the waiver of those other protections in Chapter 71 necessary to get bargaining to a conclusion?

Mr. Chu. We think so, sir.

* * *

Chairman Collins. . . . Dr. Chu, before I call on

[W]e put within the bill a deadline for how long disputes can be before any one component of the FLRA and we put a 180-day limit so that issues would come to conclusion. They would not hang on for years and years, as occasionally cases do now. So I think there are other ways to ensure that bargaining comes to a conclusion than having the authority to waive the entire chapter governing collective bargaining.

— Senator Susan Collins

Senator Voinovich, I would point out . . . that we put within the bill a deadline for how long disputes can be before any one component of the FLRA and we put a 180-day limit so that issues would come to conclusion. They would not hang on for years and years, as occasionally cases do now. So I think there are other ways to ensure that bargaining comes to a conclusion than having the authority to waive the entire chapter governing collective bargaining.

* * *

Senator Voinovich. [Y]our request for authority to bargain collectively at the national level . . . seems to make a great deal of sense. But at the same time you want this extraordinary new power, you seek to opt out of Chapter 71. Our bill would provide that you would remain in Chapter 71, as explained by our Chairman. . . . [I]f you get this broad authority to bargain collectively, . . . why not preserve the other labor-management rights under Chapter 71?

Mr. Chu. . . . In terms of Chapter 71, . . . we would like . . . to move to national bargaining as opposed to local bargaining. It is too slow, too cumbersome, doesn't get to a consistent result for the Department in a timely fashion. [pp. 27-29.]

The House-Senate conference followed this hearing. The Senate conferees took to the conference S. 1166, with its provision precluding waiver of chapter 71. During the conference, the House receded. As Senator Lieberman noted in his remarks on the Senate floor November 12, 2003, "the conference agreement included the provision of S. 1166 stating that the Secretary of Defense has no authority to waive chapter 71." See 5 U.S.C. § 9902(d)(2) (listing chapter 71 among "nonwaivable provisions"). The conference agreement provided that the Department may "not waive, modify, or otherwise affect" chapter 71 except "to the extent . . . otherwise specified in" title 5. §§ 9902(b)(3)(D) and (d). The conferees then specified two modifications to chapter 71 "[n]otwithstanding [the listing of chapter 71 in] section 9902(d)(2)." § 9902(m)(1). The first, as noted, was national-level bargaining, which the Department had requested. § 9902(m)(5). The second, a substitute for S. 1166's time limits on the FLRA, authorized new "independent third party review of decisions." § 9902(m)(6).

UNION COALITION PROPOSALS FOR REFORM

A Plan for the 21st Century--not the 19th Century

During the spring 2005 meetings with DoD and OPM, the United Department of Defense Workers Coalition presented specific proposals, in appropriate regulatory language and format, to accomplish the three major reforms that Congress authorized in 2003.¹ Many of the Coalition's proposals embraced concepts and provisions desired by management.

PAY AND PERSONNEL MANAGEMENT SYSTEMS

The Unions have proposed a reform plan which offers constructive change in these key areas:

- (1) Pay-banding structure
- (2) Across the board pay increases equivalent to military pay increases in accordance with the NSPS Statute
- (3) Pay-for-performance, with safeguards to prevent erosion in overall funding, allow independent review of payouts, and protect employees from inequities and abuse.
- (4) Market-based pay, with safeguards to ensure validity and protect employees from inequities and abuse
- (5) Reduction in force procedures that blend performance and years of service as retention criteria, while protecting veterans preference
- (6) Streamlined hiring authorities

Like management's proposals, the Coalition's personnel system proposals included new authority to appoint employees without competitive examination, pay banding, pay for performance, market-based pay, and reduction-in-force procedures using performance rating as a retention criterion. The Coalition suggested several procedures and safeguards to facilitate fair implementation of the system, including publication of career groups, vesting in OPM of final authority to make classification decisions, provision of reasonable advance notice of and reasons for new appointing authority, maximum feasible use of objective criteria in performance evaluation, advance written notice of performance require-

¹ The full texts of the Coalition's proposals are available at www.uniteddodworkerscoalition.org.

To the maximum extent practicable, the rates of compensation for civilian employees at the Department of Defense shall be adjusted at the same rate, and in the same proportion, as are rates of compensation for members of the uniformed services.

—5 U.S.C. § 9902(e)(3)

ments, formal opportunity to improve unsatisfactory performance, evaluation of performance separately from assessment of conduct and handling of misconduct solely through the disciplinary system (not the performance evaluation system), protection of veterans' preference during force reduction by avoiding (where possible) creation of competitive groups consisting solely of veterans, reasonable advance notice of retention group determinations, and consideration of veterans' preference and tenure and length of service before performance rating when determining retention standing.

Regarding pay and pay-for-performance, the Coalition proposed that the minimum and maximum rates in a band range be adjusted by the same percentage, to promote stability and avoid abuse. The Coalition proposed that annual increases, local market supplements and performance payouts be paid in the first full pay period in January of each year. The Coalition proposed that the rating of record for employees who perform activities during duty time that are not subject to DoD's assignment of work, such as EEO counselors, union representatives, and others, be their last rating of record, the modal rating for employees in the same pay pool, or, when applicable, the current rating of record, whichever is highest. For employees who have neither a current rating of record nor a presumptive rating of record, UDWC proposed that DoD presume a rating of record above "unacceptable" for the purpose of determining eligibility for an annual pay increase and local market supplement. UDWC proposed that all career groups, bands and occupations be reviewed at least annually to determine if a local market supplement is warranted.

To encourage meaningful communication throughout the appraisal period and prevent discrepancies between a supervisor's rating of an employee and the determination ultimately made by the pay pool manager, UDWC proposed that the "pay and pay administration system, including the pay pool process, . . . be fair, transparent, and credible" so that "[p]erformance ratings and payouts should not come as surprises to employees." The Coalition proposed that ratings be based on an employee's performance during the entire appraisal period, and that rating officials not be permitted to substitute another rating for the rating of record.

The unions proposed that the following language regarding civilian and military pay parity found in 5 U.S.C. § 9902(e)(3) be included in the regulations along with §§ (4) and (5), which currently are included:

To the maximum extent practicable, the rates of compensation for civilian employees at the Department of Defense shall be adjusted at the same rate, and in the same proportion, as are rates of compensation for members of the uniformed services.

UDWC proposed that funding for non-management employees' pay pools be at least at the same level as funding for management pay pools; that supervisors and managers be in separate pay pools from non-management employees; that pay pools be funded at least at the level that would have been available for the employees if they had not been converted to NSPS; and that funds not be taken from one pay pool to pay higher performance payouts to employees in another pay pool. The Coalition also proposed that other performance payments, such as team awards or EPs, not come from performance pay pool funds and that to prevent abuse and inequity, there be a fixed number (not a discretionary range) of shares for each rating. UDWC proposed that the maximum 10 percent pay reduction include any annual increase, local market supplement, or other pay increases that are withheld from the employee but given to employees who are similarly situated and rated above unacceptable.

To ensure that no employee is left to stagnate because of a lack of supervisory diligence, the Coalition proposed that employees in developmental positions be given equivalent access to training and assignments needed to progress timely to the full performance pay band. UDWC proposed that employees who are promoted, receive a pay increase of at least 6 percent over their current pay. For employees whose temporary promotions end or who fail to successfully complete their supervisory probation periods, UDWC proposed return to a rate of pay not less than what they would have received had they not been promoted. UDWC also proposed that when employees are converted to NSPS, those who have served some part of their waiting period for their next WIGI or career ladder promotion receive a pay increase upon conversion equal to the prorated amount they already have earned. The Coalition also proposed that premium pay not be less than it would have been had employees not been converted to the new personnel system.

APPEALS PROCESS

The Unions have proposed a reform plan which offers constructive change in these key areas:

- (1) A single standard of proof
- (2) Speedier and more efficient processes
- (3) Preserve immediate judicial review of arbitration decisions
- (4) Full authority of AJs, arbitrators and MSPB to determine adequacy of proof and mitigate penalties

The Coalition's suggested appeals process embraced management's proposal for a single standard of proof in adverse actions based on unsatisfactory performance or misconduct. To increase speed and efficiency, the Coalition also accepted management's proposals for time limits on decision making and use of summary judgment procedures where facts are not in dispute.

To provide due process and additional expedition, promote decision accuracy, and preserve the statutory authority of arbitrators and the Merit Systems Protection Board, the Coalition proposed several additional provisions: advance notice of and reasonable time to reply to charges; fair consideration of an employee's reply; a right to representation at all stages; preservation of immediate judicial review of arbitrator decisions; and full authority of administrative judges, arbitrators, and the MSPB to determine adequacy of proof and mitigate overly-harsh penalties based on consideration of aggravating and mitigating circumstances, such as prior record and length of employment.

LABOR RELATIONS SYSTEM

The Unions have proposed a reform plan that offers constructive change in these key areas:

1. National-level bargaining;
2. Speed the process for bargaining and dispute resolution;
3. Allow management to implement and conduct bargaining post implementation in certain sensitive situations;
4. A "one-stop," independent dispute resolution process

Under the Coalition's proposal, the Secretary would have authority to set time limits for completion of proceedings for the resolution, by independent arbitrators, of negotiation impasses and legal disputes.

The Coalition's labor relations system proposals embraced national-level and multi-unit bargaining, as proposed by management, and embraced, as well, management's proposal for expedited bargaining with specific time limits. Consistent with congressional intent to "allow for a collaborative issue-based approach to labor management relations," 5 U.S.C. § 9902(m)(2), the Coalition suggested that national-level bargaining be interest-based bargaining.

The Coalition also proposed consolidated and expedited resolution of negotiation impasses and legal disputes by independent arbitrators, followed by immediate judicial resolution of any contested legal issues. Under the Coalition's proposal, the Secretary would have authority to set time limits for completion of the proceedings. Use of arbitrators would avoid the Federal Service Impasses Panel, with its backlog and delays. Arbitrators simultaneously would decide both bargaining impasses and all bargaining-related legal issues, expediting final resolution. This would be a major improvement over the current system, in which (a) negotiability must be determined by the Federal Labor Relations Authority before FSIP impasse resolution can begin, and (b) information request disputes and other unfair labor practice charges must be addressed in FLRA proceedings separate from negotiability appeals. The Coalition proposed, in agreement with management, that Congress further expedite final resolution by providing for immediate appellate judicial review of the initial decision of legal disputes—thus eliminating appeal to the FLRA, with its crowded docket.

In addition to proposing consolidated and expedited resolution of bargaining impasses and disputes, the Coalition proposed an expanded interpretation of management's chapter 71 right to act unilaterally in emergencies. 5 U.S.C. § 7106(a)(2)(D). Under the Coalition's proposal, emergencies would include all "exigencies requiring action reasonably necessary to carry out the Department's national security mission before collective bargaining concerning the action can be completed." Bargaining concerning these exigencies would be required only "when circumstances reasonably allow," and during the exigencies management would be allowed to "take action contrary to the provisions of a collective bargaining agreement to the extent reasonably necessary to carry out the Department's national security mission." Any agreement or remedy stemming from post-exigency bargain-

ing or proceedings would apply only prospectively if the exigency was unforeseen. Even where management foresaw the exigency but failed to act timely in accordance with employee rights, a post-exigency agreement or remedy could not be retroactive if retroactive effect would "unduly disrupt Department operations reasonably necessary to carry out the Department's national security mission."

The Coalition also presented a proposal implementing Congress's recognition of "the unique role that the Department's civilian workforce plays in supporting the Department's national security mission," 5 U.S.C. § 9902(m)(1), and Congress's express determination that DoD's labor relations system must "ensure that employees may organize, bargain collectively, . . . and participate through labor organizations . . . in decisions which affect them, subject to . . . any exclusion from coverage . . . established pursuant to law." § 9902(b)(4) (emphasis added). In enacting these provisions, Congress determined that Department employees' performance of national security work is not a reason to exclude them from collective bargaining. The Coalition proposed an interpretation of 5 U.S.C. § 7112(b)(6) consistent with this determination. Under the Coalition's proposal, exclusion from coverage would not be based on "security clearance; access to or use of classified information, equipment, technology, or facilities; or assignment to implement a prescribed security procedure or policy." An employee would be excluded from collective bargaining, however, "if the majority of the employee's duties require independent judgment to recommend, determine, or implement national security policy."

In accordance with Congress's preservation of all chapter 71 provisions not directly inconsistent with national-level bargaining and new independent third-party review of labor disputes, the Coalition proposed that determination of working conditions under the new personnel system be subject to chapter 71 collective bargaining, and that arbitrator decisions in employee discipline cases be subject to immediate judicial review under 5 U.S.C. § 7121(f).

MANAGEMENT'S PROPOSALS

Violation of Law, Contradiction of Congressional Testimony, Return to the 19th Century

Management's response to the Coalition's proposals was to assert-in direct contradiction to the Department's congressional testimony-the "Administration's rigid position" demanding total elimination of the statutory right to collective bargaining. Contrary to the law Congress passed, and in violation of the Constitution's separation of powers, agency representatives asserted Secretarial authority to waive every provision of chapter 71. See § 9901.104(f) of the proposed regulation.²

Agency representatives insisted that the Secretary have unlimited authority to determine what if any bargaining will be allowed; that management's nonnegotiable rights include an unlimited right to take whatever action may be necessary to carry out the Department's mission; and that any negotiations that the Secretary may choose to allow be supervised not by an independent third party, but by an internal labor board handpicked by the Secretary.

To this unlawful demand that labor-management relations return to the 19th century, management added unlawful demands for delay and restriction of independent adjudication of employee discipline. Belying the Department's claim to desire fair but more expeditious resolution of discipline cases, management insisted that judicial review of arbitrators' decisions be delayed by new layers of administrative review, that the Secretary have power to overturn the decisions of arbitrators and administrative judges, and that the authority of independent reviewers to remedy Department errors and mitigate penalties be sharply restricted.

² The proposed regulation appears in the Federal Register at 70 FR 7552 (February 14, 2005). In addition to eliminating the statutory right to collective bargaining, the proposed regulation seeks to evade the statutory requirement that DoD and OPM provide unions "a written description of the proposed [personnel] system" and "meet and confer" with unions in an "attempt to reach agreement." 5 U.S.C. § 9902(f)(1)(A)(i) and (B)(ii). Apparently following the advice of former OPM Director Kay Cole James in her May 9, 2004, letter to Secretary Rumsfeld, the proposed regulation leaves many aspects of the personnel system undescribed and asserts that additional provisions may be created by "implementing issuance," without complying with the "meet and confer" process (or chapter 71 national consultation and collective bargaining rights). See § 9901.106 of the proposed regulation.

TOTAL ELIMINATION OF THE STATUTORY RIGHT TO COLLECTIVE BARGAINING —BY ISSUANCE

In § 9901.917(d)(1), the proposed regulation totally eliminates the statutory right to collective bargaining by prohibiting bargaining on any matter that the Secretary of Defense chooses to prescribe by regulation, policy, or other issuance. There is no limit to the subjects that the Secretary by unilateral decree may wipe from the bargaining table. Under the proposed regulation, all bargaining is solely at the sufferance of the Secretary, who may eliminate any and all bargaining by the stroke of a pen. DoD and OPM representatives insisted that this section not be changed because this total elimination of the statutory right to collective bargaining is "the Administration's rigid position."

TOTAL ELIMINATION OF THE RIGHT TO BARGAIN—BY UNLIMITED MANAGEMENT RIGHT

In § 9901.910(a)(2), the proposed regulation provides unlimited management authority "to take whatever . . . actions may be necessary to carry out the Department's mission." Agency representatives said this provision is their emergency clause, but its text is not qualified by either of the two criteria that define a genuine emergency warranting suspension of labor rights—that the need to act be urgent and unforeseen. The proposed regulation provides management power to do whatever it wants whenever it wants, with no obligation to bargain over procedures, consequences, or anything else. This new management right is another provision that totally eliminates the statutory right to collective bargaining. Management can invoke it to bar bargaining of a particular subject if the Secretary mistakenly fails to eliminate bargaining of that subject by regulation, policy, or issuance.

Agency representatives said orally that they do not intend "whatever actions" to mean "whatever actions," but they did not say that they will rewrite the phrase or state any qualification of it in an authoritative publication.

The proposed regulation eviscerates bargaining of appropriate arrangements to, among other things, mitigate employee hardships and reduce the health and safety risks of dangerous work assignments.

INCREASE IN SPECIFIED MANAGEMENT RIGHTS AND EVISCERATION OF PROCEDURE AND ARRANGEMENTS BARGAINING

Even if "whatever actions" is narrowly interpreted and the Secretary publishes no "issuances" that restrict bargaining, other provisions of the proposed management rights regulation restrict bargaining to about 25 percent of the subjects that are negotiable under chapter 71. This must be viewed in the context of the very limited scope of bargaining provided by chapter 71, itself. Section 7106(a) of chapter 71 exempts many "management rights" from bargaining and precludes bargaining or compliance with any collective bargaining agreement in an "emergency." From the already limited chapter 71 scope of bargaining, several draconian, one-sided, and unfair provisions of the proposed regulation remove additional subjects.

Contradicting the Department's professed desire for management flexibility, § 9901.910(a)(2) prohibits management from negotiating any of the "permissive" subjects of bargaining that currently are negotiable at the election of the agency under § 7106(b)(1).

Section 9901.910(b) of the proposed regulation prohibits negotiation of procedures with respect to over twenty specified management rights, including the catch-all right to take "whatever actions may be necessary." This contrasts with § 7106(b)(2) of chapter 71, which allows negotiation of procedures by which management will exercise any management right. While chapter 71 allows collective bargaining agreements providing, for example, that volunteers deemed qualified by management be chosen in situations where a single head of household cannot accept a lengthy detail far from home, the proposed regulation bans all such contract terms. Section 9901.910(b) allows negotiation of procedures only with respect to layoffs, discipline, and hiring-and, moreover, only to the extent that these actions do not overlap the management rights as to which no procedures are negotiable. See § 9901.910(f). Further, if layoffs, discipline, and hiring are deemed to be "actions" that "may be necessary," or if the Secretary by issuance prescribes procedures for these actions, no procedures at all are negotiable and the rights provided by § 7106(a)(2) of chapter 71 are entirely wiped out. The proposed regulation also grants management authority to violate even procedures (other than those for layoffs, discipline, or hiring) that the agency establishes unilaterally. § 9901.910(i).

Section 7106(b)(3) of chapter 71 allows negotiation of appropriate arrangements for employees adversely affected by exercise of management rights, in order to, among other things, mitigate employee hardships and reduce the health and safety risks of dangerous work assignments. Arrangements, for example, can include training over new technology, so that employees may work effectively and safely. The proposed regulation, however, eviscerates bargaining of appropriate arrangements. Under § 9901.910(e)(2), arrangements with respect to "routine assignment to specific duties, shifts, or work on a regular or overtime basis" are totally banned; and under § 9901.910(g), any negotiated arrangement can be totally negated by unilateral management action. The latter subsection gives management "sole, exclusive, and unreviewable discretion" both to take any action without "delay" and to determine whether an arrangement will be "retroactively applied" or "binding on subsequent acts." In other words, management may act without regard to a negotiated arrangement, then determine unilaterally both whether the arrangement will be applied retroactively to the action taken and whether the arrangement will apply to any future agency action. Under § 9901.910(g), the right to negotiate arrangements is illusory; there is no right to demand implementation of any negotiated arrangement. A negotiated arrangement is implemented only if management-in exercise of "sole, exclusive, and unreviewable discretion"-chooses to implement it.

LABOR BOARD HAND-PICKED BY THE SECRETARY

The proposed regulation, in § 9901.907(a)(1), creates an internal DoD labor board hand-picked by the Secretary of Defense. This makes a mockery of the statutory requirement that new review of labor-management disputes be an independent third party. § 9902(m)(6). DoD recently sought to disguise this by saying that labor organizations would be allowed to recommend two of the board's three members; but upon questioning, the agencies admitted that the Secretary would not have to appoint anyone recommended by labor and, instead, would have unrestricted authority to name all three board members. Under management's proposal, labor's right to recommend is no greater than that of any person who has a pen, paper, envelope, postage stamp, and the Secretary's mailing address. Indeed, labor's right is less than that of others because unions are allowed to make recommendations only for two positions, while everyone else may write a letter recommending individuals for each of the three positions.

DELAY AND RESTRICTION OF INDEPENDENT REVIEW IN DISCIPLINE CASES

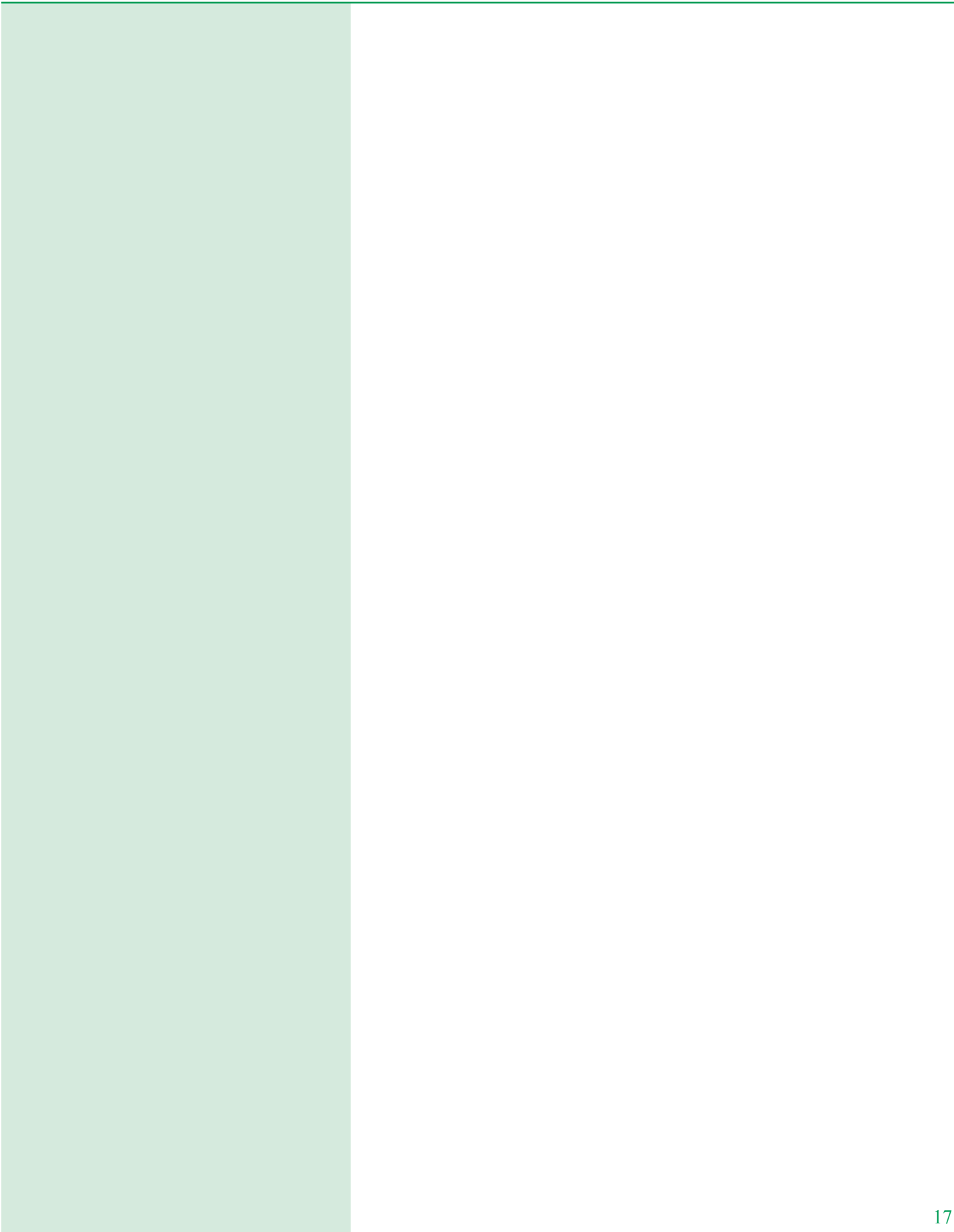
In direct contradiction of the Department's professed desire to expedite employee discipline cases-and in violation of 5 U.S.C. §§ 7121(f) and 9902(h)(7)-the proposed regulation, in § 9901.923(a), injects two new intermediate layers of review of arbitrator decisions that currently are reviewed immediately by an appellate court. The two new layers of review delay rather than expedite resolution of discipline cases.

These extra layers of review also unfairly skew the process, unlawfully restricting arbitrators' authority under 5 U.S.C. § 7121, rather than preserve employees' right to impartial independent adjudication. The first layer allows DoD to overrule the arbitrator. § 9901.807(k)(8)(iii)(A). Then, during the second layer of review, the authority of the reviewer to overrule DoD is restricted. §§ 9901.807(c)(1) (allowing DoD to disregard order for interim relief), 9901.807(d) (barring remedies for errors in charge notices and performance requirements), 9901.807(k)(6) (requiring "great deference" to DoD's choice of penalty and imposition of "the maximum justifiable penalty"); 9901.808(b) (prohibiting penalty mitigation in DoD-designated "mandatory removal" cases).

Under the proposed regulation, the same restrictions apply where an employee appeals to the MSPB instead of electing arbitration. These restrictions violate the MSPB's statutory authority to "order such corrective action as the Board considers appropriate" in cases where discipline has been imposed improperly. 5 U.S.C. § 9902(h).

CONCLUSION

In response to the Coalition's comprehensive proposals for positive change, management has demanded unlawful elimination of rights and regression to the 19th century. DoD should change course, and comply with the law.



AMERICAN FEDERATION OF
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