

United DoD Workers Coalition

National Security Personnel System

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

Int'l Guard Union of America

Int'l Assn. of Fire Fighters

Hawaii Council of Defense
Commissary Unions

Laborers' Int'l Union of
North America

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.
United American Nurses

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

(List in-formation)

In 2003, under the guise of national security, Congress granted the Department of Defense (DoD) the authority to establish a new human resources system and to modify certain labor relations provisions under what was called the National Security Personnel System (NSPS).

When then-Defense Secretary Rumsfeld appeared before Congress, he stressed the need for flexibilities in order to defend our nation against the new threats of terrorism. Yet, when draft regulations were finally issued on February 14, 2005, the agency put forward a plan that scarcely resembled the one brought to Congress.

The law required DoD officials to engage in meaningful discussions with the unions concerning the development of NSPS. Moreover, Congress mandated that NSPS be created jointly with employee representatives through a “meet and confer” process before any changes to existing personnel and labor relations policies could be implemented. In light of this, shortly after the law was created, 36 labor organizations came together to form a coalition called the United Department of Defense Workers Coalition (UDWC). The UDWC went to work not only to defend federal employee rights but to work with DoD to find real solutions to real problems.

In April of 2005, the UDWC sat down with DoD to begin the meet and confer process. The unions representing the federal civilian workforce made a good-faith effort to address the needs of DoD and revise the current personnel system. Rather than trying to collaborate with the UDWC, the agency chose to ignore virtually all of the proposals offered by the unions. DoD insisted that the authority granted to them by Congress allowed them to use national security as a pretense to do whatever the agency wanted. This approach was encouraged by the Office of Personnel Management (OPM). Then-OPM Director Kay Cole James stated in a letter to Secretary Rumsfeld that we “...strongly support the objective of assuring DoD’s discretion to act without being burdened by collective bargaining obligations...”

DoD published its final regulations on November 1, 2005. Remarkably, despite nearly 58,000 comments from the public and federal workers and a 30-day meet and confer period, DoD only deviated slightly from the originally proposed regulations. The end product was a set of regulations that lacked in specificity and thus resulted in an unbalanced set of employment directives that were neither objective nor fair for federal employees.

On November 7, 2005, 10 member unions of the UDWC filed suit against the DoD in the United States District Court for the District of Columbia, challenging the new NSPS regulations as exceeding congressional intent and being contrary to law (*AFGE, et al. v. Rumsfeld*).

On February 27, 2006, Judge Emmett G. Sullivan issued a decision on the case. He determined that several key components of NSPS, including those concerning collective bargaining and third-party review of labor-management disputes, were “legally deficient.” Sullivan’s ruling was consistent with an earlier ruling by Judge Rosemary Collyer in a similar lawsuit that challenged the personnel changes attempted by the Department of Homeland Security (DHS). The DHS decision was later unanimously affirmed by a court of appeals decision.

On April 18, 2006, DoD appealed Judge Sullivan’s decision. The case was argued in December of 2006 and a decision was issued on May 18, 2007. In a bitterly divided 2-1 decision, the U.S. Court of Appeals for the District of Columbia Circuit reversed the U.S. District Court. The Court of Appeals determined that the language in the National Defense Authorization Act of 2004 gave the Secretary of Defense the authority to “curtail collective bargaining” until the law sunsets in November 2009. This “temporary, experimental period” authorized DoD to set up a labor relations system essentially unfettered by any collective bargaining requirements.

On July 2, 2007, Defense unions filed a Petition for Rehearing *En Banc*. On August 10, 2007 the U.S. Court of Appeals for the District of Columbia Circuit decided not to rehear the case. On September 17, 2007, the D.C. Circuit Court issued their mandate on this case. Once the Court issued the mandate, DoD became able to implement NSPS in full for both bargaining unit and non-bargaining unit employees. The agency has indicated through a release that they plan to hold off on implementation for bargaining unit employees at this time, presumably until Congress finalizes changes to the personnel system in the fiscal year 2008 Defense Authorization bill. It should be noted that the American Federation of Government Employees will pursue an appeal to the Supreme Court.

Mismanagement

The Comptroller General of the United States, David Walker, and the staff at the Government Accounting Office (GAO) has analyzed the development of NSPS. In published reports and testimony before Congress, Mr. Walker has criticized the manner in which DoD has failed to effectively manage the design and implementation of NSPS.

The following are observations noted by the GAO:

- The process used to advance major initiatives is critical to a successful transformation. DoD faces a significant challenge in implementing NSPS. The inclusion of employees and their representatives must be meaningful, not just pro forma.
- By including employee representatives in the process, DoD can improve policies and procedures, increase acceptance within the workforce, and minimize potential adverse effect on morale. Unfortunately, the final regulations do not identify a process for the continuing involvement of employees and other key stakeholders.

On July 16, 2007 GAO released a report supporting Defense unions’ contention that DoD has been underestimating the cost of implementing NSPS. According to the report, GAO found that DoD’s November 2005 estimate that it will cost \$158 million to implement NSPS “does not include the full cost that the department expects to incur as a result of implementing the new system.”

Not included in the estimate for implementing NSPS from 2005 to 2008 are many of the direct costs associated with implementing the personnel system, such as the full salary costs of all the civilian and military that directly support NSPS activities department wide. The estimate also excluded indirect costs of implementing NSPS, such as general administrative services, general research and technical support, rent, and other operating expenses.

The report also concluded that the total amount of funds the department spent on NSPS during fiscal years 2005 and 2006 cannot be determined because DoD has not established an effective oversight mechanism to ensure that all these costs are fully captured. Because of this extreme mismanagement, we will never know how much DoD spent trying to implement NSPS, although the total amount likely runs into the billions of dollars.

DoD's missteps in implementing NSPS have also caused another significant problem. Delays caused by the agency overstepping their authority have brought us close to the labor-management relations sunset date, as prescribed by Congress. The agency was given until November of 2009 to implement the labor-management relations sections of NSPS, after which, the agency would revert back to current labor law unless the program is reauthorized. It seems a gross waste of DoD resources to spend billions developing a personnel system that is likely to be scrapped in a matter of months. Doing so would also be a huge disruption and source of confusion to department employees.

Congressional Action

For nearly three full years, DoD has misused the authority granted by Congress to design and implement a contemporary human resources management system. As the record reflects, the Department has not allowed meaningful involvement by employee representatives and there is serious question as to whether the Department's sweeping interpretation of their new-found authorities are consistent with Congressional intent.

There is also great uncertainty as to whether DoD can control, or even keep track of, the costs associated with implementing NSPS. GAO's recent report demonstrates that DoD drastically misrepresented the true cost of NSPS to Congress, and accounting practices have been so poor, it will be impossible for DoD to ever determine how much they have spent on the program.

In this regard, the 600,000 plus members that are represented by the 36 member United DoD Workers Coalition, is requesting that Congress take the following actions:

- **Defund NSPS through the Fiscal Year 2008 (FY08) Defense Appropriations Conference Report:** With our country in the midst of a global war against terrorism, this is hardly the time to spend billions of dollars to institute another one of former Secretary Rumsfeld's ill-conceived reforms; much less one that has demonstrated that it will demoralize the federal workforce and take much needed resources away from our men and women in uniform as they defend our country.

In light of the aforementioned conclusions, the Congress should not provide funding for the implementation of this misguided endeavor any longer. NSPS, in its current form, denies basic due process and is fundamentally anti-worker. Moreover, the program has proved to be a huge waste of taxpayers' dollars. DoD has failed to track spending on the program, and the agency has little chance of implementing much of their system before the sunset date, making investment in the system wasteful.

The UDWC applauds the House of Representatives for unanimously accepting the bipartisan Inslee/Walter Jones/Van Hollen NSPS defunding amendment. While the Senate version does not include the defunding language, the UDWC is urging DoD Appropriators to include it as a part of the final FY08 DoD Appropriations Conference Report.

- **Repeal NSPS through the FY08 Defense Authorization Bill:** The House passed FY08 Authorization measure (H.R. 1585) included a sweeping repeal of much of NSPS, while leaving in place the Department's ability to move forward with pay for performance. While the UDWC is leery of pay for performance, the coalition is nonetheless pleased that the House bill restores all of the civil servant, veterans preference, appeals rights and collective bargaining protections for the DoD workforce. In addition, the language will ensure that the DoD will have to bargain impact and implementation of any pay banding system with unionized DoD workers, ensuring that a fair and balanced pay system is put in place. The UDWC supports the House language in its entirety.

In addition to all of the House language, the UDWC also supports inclusion of Senate passed language included in their version of the FY08 Defense Authorization bill (S. 1548) that will repeal all of NSPS, including pay for performance, for wage-grade Civilian workers at DoD. There is also language in both the House and Senate bills that exempts DoD labs from NSPS and the UDWC supports that as well.

The UDWC asks that Congressional Authorizers to the FY08 Defense Authorization Conference Report include all of the House passed NSPS repeal language, as well as the Senate passed language calling for a full repeal of NSPS for Wage Grade workers.