

AFGE

American Federation of Government Employees, AFL-CIO

DOD'S CONCEPTUAL DESTRUCTION OF COLLECTIVE BARGAINING

BACKGROUND ANALYSIS of 2/6/04 DOD Paper "NSPS Pre-Collaboration Labor Relations Systems Options"

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On February 6, 2004, the Department of Defense published a list of 'concepts' which, according to them, should govern any DOD labor relations under the National Security Personnel System. The NSPS is a DOD-specific personnel system, to be jointly developed by the Secretary of Defense and the Director of the Office of Personnel Management, not bound by the details of many of the basic civil service laws.

The key concept in DOD's paper, reiterated in several different ways, is that there would be no collective bargaining at all.

Existing collective bargaining agreements would remain in place, on paper, until their expiration. However, nothing in those agreements would be binding on management, and management could unilaterally issue regulations superseding provisions of those contracts.

As contracts expire, they would not be renewed or renegotiated.

There would be a mock collective bargaining process in some circumstances. Management would notify the union of planned changes, and then 60 days later management would implement those changes. During the 60 day period management would, at most, consult with the union over these issues.

There would be no jointly controlled grievance procedure, culminating in decisions by independent third-parties.

The system of non-bargaining would be administered by a management controlled board.

The concepts announced by DOD on February 6 do not meet the standard set by the new law. They do not seek to change the a labor relations system to allow it to better address the unique role that the DOD civilian workforce plays in supporting the Department's national security mission, they instead constitute a wholesale repudiation of collective bargaining; they do not allow for a collaborative issue-based approach to labor-management relations; they do not provide for independent third party review of decisions; and they do not ensure that employees may bargain collectively, participating through unions of their own choosing in decisions which affect them. All of these are criteria established by law to govern any labor relations program under the National Security Personnel System.

The concepts were presented long after the January 23, 2004, deadline for DOD and the Office of Personnel Management to have presented concrete proposals for improving the DOD labor relations system and, moreover, OPM was actually barred from participating in developing the concepts.

A more detailed, point-by-point, analysis follows.

Pre-Collaboration Labor Relations Options
Under the NSPS

On February 6, DOD sent us what they called its concepts for building a labor relations system for DOD civilian employees. Here is an analysis of those concepts.

1. Labor Relations Administration

The outline proposes creation of a Defense Labor Relations Board (DLRB) to make final published decisions as the independent third party. The DLRB would operate "with independence and autonomy within the Department." 5-7 members would sit, with "some members nominated by the unions." DLRB would also adjudicate employee appeals in the NSPS appeals process.

The proposal does not say how the DLRB members would be appointed, but one can assume that they would all be appointed by the Secretary. No matter how much "independence and autonomy" DOD promises, a body appointed entirely by the Employer is not a neutral third party, for either labor relations or employee appeals.

It is uncertain what is meant by the idea that some members of the DLRB would be "nominated" by the unions. Perhaps the unions would be allowed to submit some suggestions from which the Secretary would select. This would not be a jointly selected panel.

2. Employee Rights

The outline proposes that bargaining unit employees would not be required to join the union. Unions could establish fee-for-service arrangements for nonmember bargaining unit employees who are provided individual representation. Fees would be determined by the unions.

This would be something less than an agency shop, in which all employees must either join the union as regular members, or if they chose not to join, pay an agency fee to the union that is essentially equivalent to Union dues. Under the outline, only those nonmember employees who wanted individual assistance would have to pay a fee. Normally, this would leave the 'free-rider problem,' i.e., the fact that employees benefit from a union-negotiated contract even though they do not financially or otherwise support the union. Under the DOD plan, however, there will be no union contracts, so this problem is less important.

3. Bargaining Units

Bargaining unit coverage determinations would be based on a standard that the unit provides for collective bargaining AND efficient and effective administration of DOD and its components. Units may be described in terms of command structure, geographic location, or component. DLRB would make determinations on bargaining unit status and oversee unit determination election processes, using the most efficient method available for the ballot process. When elections are required for new or existing units, more than 50% of the potential or existing bargaining unit members (the employees eligible to vote) must participate in a vote. To be elected as exclusive representative, the union must receive over 50% or actual bargaining unit votes cast. An outside third party could participate in

decisions on a case-by-case basis on sensitive or significant cases and if invited to participate by the DLRB.

The proposed standard for bargaining units differs from the current standard, perhaps because no bargaining would occur regardless of the definition of bargaining units. The FLRA standard is that there be a clear and identifiable community of interest among the unit employees and that it promotes effective dealings with and efficiency of the operations of the agency. The requirement that more than 50% of the potential or existing employees participate in representation elections would make it next to impossible for unions to gain recognition. The American system for more than 200 years has left citizens free to decide whether or not to participate in elections, and the decisions of those who vote are binding on the entire effected body. If DOD's proposed standard were applied to general elections, no one would be able to govern at the national level, in any state, or in practically any local jurisdiction. This proposed idea is intended to prevent unions from gaining recognition. The participation of any other body (FLRA) in representation matters, at the option of the DLRB is superfluous. It goes without saying that the body charged with conducting representation elections could seek advice or assistance from anyone it chose.

The outline expands the list of employees who are excluded from bargaining units. Among those added would be employees who supervise military members (though not necessarily civilians), work leaders, clerical workers in human resource offices, employees performing intelligence or counter-intelligence, investigative, and security work that "impacts or affects in a significant way DOD physical, personnel, and information security," attorneys, employees on time limited appointments of 2 years or less, and professional employees and those requiring certifications (unless a majority of the employees vote to be included).

This would remove a substantial number of employees that we have historically been able to represent. It would shrink the scope of coverage far beyond that of the private sector and beyond state and local government systems. We currently represent work leaders, clerical human resources employees, attorneys, and temporary employees or those with term appointments of less than 2 years. The proposal concerning security workers goes beyond the current standard, which removes these workers from unit coverage if their work "directly affects national security." The proposal would remove far more workers from the unit than the current standard does. Similarly, the proposal would remove more employees than the current definition of "professional employee" does. For example, skilled craft workers such as electricians or boiler plant operators often need to be "certified." DOD could exclude positions from bargaining units simply because the positions require "certifications."

We note, however, that since the DOD plan does not allow bargaining on behalf of any employees, the question of inclusions and exclusions from bargaining units is not as important as it would be under a genuine labor-management relations system.

4. Union Dues

The outline retains current procedures for dues allotment and collection, with a few changes. Unit employees may cancel dues at any time after one year has passed since dues withholding began. Management may not be held financially responsible for any

administrative errors related to dues withholding. Disputes between the union and union members concerning dues are not included in any agency complaint procedure.

The current system allows employees to cancel their dues withholding only once per year. If the employee misses that date, dues withholding continues until the next year. The change will allow employees to quit the union at any time after one year of membership. It will create uncertainty and additional administrative work for the union. It allows management to escape any liability for its own malfeasance or misfeasance regarding union dues. Numerous court decisions have documented management errors in withholding and forwarding employee dues in a timely manner and have held management responsible to make the union whole. DOD seeks to avoid this responsibility by simply declaring itself innocent.

5. Duty to Bargain

The entire concept of collective bargaining is changed in the outline. It is reduced only to an obligation to "consult." There is no requirement to make any effort to reach agreement. There is no impasse resolution process. Thus, wherever the terms "bargain" or "bargaining" appear in the outline, they should be understood only to mean "consult" and "consultation."

Consultation would be required over management-initiated changes in conditions of employment that have a "significant" impact on the unit. NSPS regulation will set what that means. The Department would still notify the union of any changes that are not "significant," though no consultation would be required.

Unions would be able to initiate consultation over any matters that "significantly" affect working conditions, and are not already covered by existing policies or national level consultation.

This outline makes a mockery of the term "collective bargaining." For more than 100 years collective bargaining has been understood as an obligation on the part of employers and unions to negotiate with the intent of reaching agreement. If the parties are unable to reach agreement on their own, they may use the assistance of mediators. After that if agreement still cannot be reached, in the private sector each side is free to try to force acquiescence with its demands through a strike or lockout. Since strikes are illegal in the Federal Sector, for more than 30 years binding resolution by a neutral independent body has served as a substitute. Here DOD evades Congress's requirement that its new personnel system provide for collective bargaining by simply making that term mean what it wants, not how it is understood everywhere else. The suggestion that this would satisfy the law's requirements is condescending and insulting. This blatant power grab would make Al Capone blush.

As weak as the requirement only to consult is, DOD would dilute it further by determining on its own those subjects over which consultation is required. Whenever the Department tired of discussing a particular issue with the union, it could just change the rules and take that issue off the table. The provision for union-initiated consultation similarly allows management to evade this responsibility by issuing a new policy.

There is no impasse resolution process in this proposal because there is not even a pretense that collective bargaining is supposed to culminate in a contract that the parties agree to follow. In fact, under DOD's definition of collective bargaining, there is no such thing as a contract.

6. Scope of Bargaining

Existing and new DOD-wide and Component-wide regulations, policies, and other similar issuances will supersede any conflicting provisions of collective bargaining agreements and past practices.

Management would retain all the rights contained in Section 7106 of Chapter 71. In addition, management would have the exclusive right to determine cash awards and incentives, determine performance ratings and payouts, set pay, determine pay and allowances and differentials, offer voluntary early retirement or buy-outs, and make Fair Labor Standards Act determinations. The exercise of any management rights is only subject to consultation.

As will be shown below, existing collective bargaining agreements may continue only until their expiration date, and cannot be extended or renegotiated. But, DOD would be able to void any contract provision or past practice that it did not like by simply issuing a new policy to the contrary. This would be contrary to hundreds of years of contract law in the United States.

The management rights clause in Chapter 71 is already among the strongest and most restrictive provisions in any labor relations scheme. DOD proposes to expand it further to retain for itself the power to make decisions in pay matters that are currently subject to negotiation. The current management rights clause requires management to negotiate over the procedures to be used in implementing those rights and over any adverse effects on employees from the exercise of those rights. DOD would eliminate such obligations, substituting only a call for consultation. Unions would be unable to try to mitigate the effects on employees and management would be able to run rampant on its workers.

7. Bargaining Process at the Level of Recognition

So-called bargaining would be accomplished through a form of consultation with exclusive representatives on any matter on which DOD management unilaterally decides there is a "duty to bargain," and over which the union has requested to bargain. It would require the parties to have a meaningful exchange of views in an attempt to reach agreement on the resulting policy document that would be issued.

In the event of an emergency or for national security reasons, management would be able to implement and consult afterwards.

In all cases the consultation process would last no more than 60 calendar days. If no agreement is reached after that, management may implement the proposed changes. A copy of the resulting policy would be given to the union, along with the reason for final action.

Unions would be able to seek review of procedural complaints with the DLRB. However, no *status quo ante* remedies may be granted.

In a gambit straight out of Alice in Wonderland, DOD proposes collective bargaining with neither bargaining nor collective bargaining agreements. The outline eliminates the ability to negotiate contracts that are binding and enforceable on both parties. Instead, the employer and the union would consult on what policies the employer would issue, but only if management wishes. The Agency would be free merely to go through the motions of consultation for 60 days and then do whatever it wanted with no recourse for the union.

AFGE is not opposed to delaying bargaining until after implementation when there is a real emergency. However, the DOD outline contains a hole big enough for an Abrams tank since it is free to consider any minor event to concern "national security."

The DLRB would be able to review union charges that the Agency failed to comply with even the limited obligations in the consultation process. However, the only action the Board could take if it determined a violation took place is to tell the Department not to do it again. The cynicism of this proposal is overwhelming.

8. Bargaining Process above the Level of Recognition (National Level Bargaining)

This would replace both the current national consultation process and local bargaining on an issue. National level consultation can occur at the DOD level concerning DOD policy changes or at the Component level on component level policy changes not covered at the DOD level. The process to be used is the same as that for local level consultation.

Here again, the Department or Component would be able to have superficial discussions with the union at the national level for 60 days before taking whatever action it wished. Local managers who would have to implement whatever policies are issued are removed completely from the process. While the union would be free to designate local-level representatives to participate, the process is an empty gesture since management retains the power to do whatever it wishes.

9. Union Rights

The current provisions of Chapter 71 regarding union representation during "formal discussions" with employees would be retained, with several modifications. Management must only invite the union to attend meetings with employees when it is known in advance that there will be a discussion of changes in general working conditions. Any matter concerning an employee complaint will not be considered a "formal discussion" which requires management to invite the union to attend. Employees may invite the union if they wish. Witness preparation or interviews will not be considered formal discussions. No portion of the EEO process will be considered a formal discussion.

The current provisions of Chapter 71 require that management invite the union to be represented in any formal discussion with bargaining unit employees. The provision recognizes the union's obligation to protect the institutional interests of the bargaining unit and to see that management neither takes advantage of an employee or group of employees, nor makes any "side deals" with them that are contrary to the working conditions that apply generally. The outline blatantly attempts to escape the current law and case decisions that found certain management actions violated employees' rights. In the past, management may have initiated a meeting for one purpose and it eventually became a formal discussion. Case decisions held that at that moment, management was required to invite the union to participate. The current law includes discussions of any employee complaint as a "formal discussion." So, when an employee would want to discuss a complaint, the union would be entitled to participate to look after the bargaining unit employees' mutual interests. Case decisions held that witness preparation and interviews and meetings held concerning EEO complaints were all "formal discussions." DOD would simply write its own regulations to eliminate these employee protections.

The right of employees to have union representation during investigatory interviews (the so-called *Weingarten* right) would continue with several modifications. Management would be able to limit the amount of time it would have to wait for a union to provide a representative. This determination would be based on such matters as the geographic location of the closest steward, security, health, safety, and the integrity of the interview process. Unions would not have the right to be present during investigations by the Department's various criminal and security investigative arms or its Inspector General.

Once more, DOD would severely debilitate an important employee protection. The Department would determine for itself who would be the union's representative by choosing the closest steward, regardless of that individual's skills or qualifications or the union's determination of who could best handle that case. The Department also seeks to overturn a decision by the United States Supreme Court that held that any component of the Agency that would interview an employee in an investigation that could result in that employee's being subject to discipline, including criminal investigative organizations or the Inspector General, must afford the employee the right to union representation. Again, DOD arrogantly seeks to rewrite any decision it does not like.

The Freedom of Information Act procedures will be used for union requests for information.

For 70 years it has been recognized that unions are entitled to information maintained by management when it is necessary to support collective bargaining. A large body of case law has developed in both the private sector and the federal sector regarding what information is required and the conditions for providing it. The outline would substitute the provisions of the Freedom of Information Act for these labor relations-specific provisions. The FOIA is intended to provide information to the general public about the actions of the government. Only that information that is in the public interest is required to be divulged. Information that is maintained by the Agency regarding employee discipline, or other working conditions in a particular workplace may not rise to that level of interest to the general public, but is of vital concern to the union seeking to represent employees. This proposal is a thinly-veiled attempt to curtail the information DOD would have to provide to the union.

The union would have the right not to represent any bargaining unit member who is not a member of the union, if that employee does not pay the required fee. If a fee is received, the union must fairly and competently represent the member.

As discussed above, this would apply only to individual cases and not to representing the unit as a whole. As discussed, below, the outline eliminates provisions for a negotiated grievance procedure, so employees would be free to use their own representatives in the DOD complaint process. As such, the outline is no different from the current situation in which unions are free to decline to represent nonmembers in statutory appeals. However, the outline would increase the standard of union representation that must be provided over what has existed for 70 years.

10. Official Time

Official time would be available only for specified uses and only when approved in advance by the appropriate supervisor. Official time could be used for consultation, preparation time for consultation, presentation of labor disputes, management-initiated meetings, and for any other situations as requested by the union and approved by management "at its sole and exclusive discretion."

For more than 40 years the Federal sector labor relations program has allowed union officials to perform representational duties on official time, or time paid for by the government, in recognition of the union's obligation to represent union members and nonmembers alike, and the inability to impose representational fees on nonmembers. The system provided that the parties would determine the uses of official time and the procedures for obtaining it through negotiations. The outline would reserve these decisions "solely and exclusively" to the employer. The result will be a weaker union, unable to properly represent the interests for the bargaining unit.

11. All Inclusive Complaints Review

The outline would consolidate all employee complaints currently filed under negotiated grievance procedures, administrative grievance procedures, and the statutory MSPB appeals process into a new NSPS appeals system. DOD would write the rules for how these appeals would be administered. As discussed above, the DLRB would adjudicate employee appeals.

DOD substitutes a management-dominated complaint review process for processes that had been negotiated by the parties. Instead of final decisions being issued by neutral, independent reviewers, the final decision will be issued by the management-controlled DLRB. The outline would recognize the imperial power of DOD over its employees.

Local union and management complaints that previously had been the subject of negotiated grievance procedures or unfair labor practice charges would be appealable only to the DLRB . Complaints would have to be filed within 15 days of the event or the date the charging party became aware of the event.

The outline does not explain how the complaint process would work. However, the proposal gives the union no rights that would need enforcement and any decisions would be rendered by the management-dominated DLRB. It provides only a pretense of fairness and due process.

Alleged violations of the local application of agency policy are reviewable by the appropriate management official as determined by the Component or by an appropriate union official in the case of a management initiated complaint. The complaint process lasts no more than 30 days, including time to file the complaint and make decisions. Decisions are final and binding unless mediation is invoked by either party. DLRB may do a limited substantive review of the original complaint decision.

Instead of final decisions by neutral parties such as arbitrators or FLRA administrative law judges, management will make interim decisions on union complaints and the union will make interim decisions on management complaints. This is akin to the interim responses to grievances prior to arbitration. They are not "decisions" as that term is understood. DOD proposes that if the union complains that management violated its own policies, management can simply respond, "No," and that will be the final word. The role of mediation and the "limited" review by DLRB are not made clear in the outline. However, the management-controlled DLRB is still not a credible adjudicator.

Currently unfair labor practice charges must be filed within 6 months of the date of the alleged violation. Here the entire complaint and adjudication process is limited to 30 days. The result will be rushed, arbitrary decisions that do not protect the interests of employees represented by the union.

National level union or management complaints alleging procedural violations of the labor relations system are appealable to the DLRB. Complaints would have to be filed within 15 days of the event or the date the charging party became aware of the event.

This severely limits the time to file such allegations from the current 6 months for filing ULP charges. However the outline provides such limited rights and protections to the union that the complaint process for enforcing those rights is practically irrelevant.

12. Miscellaneous Issues

Term collective bargaining agreements in effect at the time NSPS is implemented will remain in effect until they expire or their current rollover expires. However, in any conflict between existing or subsequently issued NSPS, DOD, or component regulations or other laws or government-wide regulations, the contract will be superseded. Once NSPS is implemented, no term collective bargaining agreements may be renewed, rolled-over or negotiated. Provisions in expired term collective bargaining agreements may continue until they are replaced by policy or regulation issued at any level subject to the consultation process.

For more than 100 years labor and management negotiated agreements to set working conditions that were binding and enforceable by the parties. The outline would eliminate that entirely. Existing contracts would have a date-certain on which they would expire and no longer govern the parties. Currently, a contract that is in effect takes precedence over Agency regulations that are issued during its term. The outline reverses this long-standing principle. All management needs to do to evade any provision of a contract during the time it is still in force is issue a new policy to the contrary at the DOD or component level.

The new NSPS labor relations system will not employ any provisions of 5 USC Chapter 71.

Congress allowed DOD to modify the provisions of Chapter 71 to meet its special national security needs. DOD chose to interpret that as a license to throw out the entire labor relations system, regardless of its effects on national security. There is not even a pretense that scrapping Chapter 71 is necessary. The outline proposes doing it just because DOD thinks it can.

It will be a violation of the NSPS labor relations regulations for employees or unions to call or participate in a strike, work stoppage or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with agency operations. It will be a violation for a union to condone any such activity by failing to take action to prevent or stop it.

This is the only provision of the current federal sector labor relations system that was continued intact in the outline. We are not surprised.