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Pay-for-Performance: The National Security Personnel System

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Summary

The Department of Defense (DOD) is currently phasing in the first pay-for-performance system implemented in a large federal department. The system, known as the National Security Personnel System (NSPS), was initially intended to cover all DOD employees, but has since been modified to cover most DOD employees. The system has faced legal challenges from unions and employees who claim it is inconsistently applied and causes undeserved pay inequities. NSPS continues to face difficulties, including the elimination of plans to place 145,000 blue-collar workers in the system. NSPS, however, will be used as an example of both opportunities and challenges that agencies face when they create pay systems that more closely link employee performance to pay.

Like other performance-based pay systems, NSPS makes job performance a preeminent factor in determining employee pay. Under the NSPS structure, employee performance is more directly linked to pay than in the General Schedule, the pay scale that covers most civilian federal employees. A supervisor and an employee who use NSPS are to work together to create an annual appraisal plan that can accurately reflects an employee's performance. A supervisor then uses the appraisal later to evaluate an employee. At the end of each appraisal year, an employee is assigned pay shares based on performance that represent percentage increases in pay. Lower-performing employees may receive fewer pay shares or no pay shares. An employee must acquire at least a satisfactory performance rating to be eligible for any performance-based bonuses.

In fall 2008, DOD plans to place an additional 20,000 civilian employees in NSPS, bringing the system to a total enrollment of more than 200,000. Only the Department of Veterans Affairs has more employees covered by a performance-based pay system. On May 22, 2008, DOD and the Office of Personnel Management jointly published proposed regulations in the *Federal Register* to clarify the system's labor-management relations. In addition, the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181) required NSPS's annual pay raises and pay supplements to be more in line with those of federal employees in more traditional pay systems.

DOD originally proposed the creation of NSPS to make employees and supervisors more effective. Title XI of the National Defense Authorization Act for FY2004 granted DOD additional pay flexibilities to create a performance-based pay system for its more than 600,000 employees — which includes nearly 35% of the federal civilian personnel workforce worldwide. Originally scheduled for implementation in 2004, a variety of delays pushed the system's debut to October 2006.

This report reviews the creation of the NSPS, examines how NSPS operates, discusses litigation against it, and analyzes future options for lawmakers regarding it. It will be updated as necessary.

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Introduction

The Department of Defense (DOD) is currently phasing in a performance-based pay personnel system called the National Security Personnel System (NSPS).[1] NSPS is gradually replacing the General Schedule (GS), which serves as the federal government's main pay system and bases raises and promotions largely on an employee's length of service. In contrast, NSPS attempts to more directly link employee performance to pay increases. NSPS is "the first civilian alternate personnel system to be implemented on a broad basis, across an entire [e]xecutive [d]epartment," and DOD is "the largest department in the [f]ederal government."[2] As of December 2007, DOD employed nearly 670,000 civilian employees — about 35% of federal civilian executive branch personnel worldwide[3] — although not every DOD employee is currently eligible to enter NSPS. As of June 2008, 180,000 (or

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[1] The legislation that created NSPS is P.L. 108-136, The National Defense Authorization Act for Fiscal Year 2004.

[2] U.S. Office of Personnel Management, *Creating a Foundation for the 21st Century Federal Workforce: An Assessment of the Implementation of the Department of Defense National Security Personnel System* (Washington: May 2007), Appendix H, p. 149. Many government agencies currently operate pay-for-performance systems. For more information on such systems see CRS Report RL34529, *Pay for Performance: Linking Employee Pay to Performance Appraisal*, by Wendy Ginsberg. On June 18, the Office of Personnel Management published in the *Federal Register* a plan to experiment with performance-based pay at the Department of Veterans Affairs (VA). According to the *Federal Register*, the first performance-based bonuses at VA would be distributed in 2010. For more information, see U.S. Office of Personnel Management, "Proposed Personnel Demonstration Project; Performance-Based Pay Adjustments in the Department of Veterans Affairs," 73 *Federal Register* 34800, June 18, 2008.

[3] U.S. Office of Personnel Management, "FedScope: Federal Human Resources Data," available at [http://www.fedscope.opm.gov/], visited June 21, 2008. Data are from Dec. 2007. Although NSPS was originally designed to include all DOD employees, P.L. 110-181 removed "prevailing rate employees" from NSPS eligibility. Prevailing rate employees, as defined in 5 U.S.C. § 5342(a)(2), include, among others, "an individual employed in or under an agency in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement."

26.9%) of DOD's employees were covered by NSPS. In fall 2008, DOD expects to enter 20,000 additional employees into NSPS.[4]

Several public laws govern and limit NSPS's employee coverage. P.L. 108-136, for example, exempted some employees in specific laboratories from the system.[5] P.L. 110-181 cancelled plans to place 145,000 blue-collar workers in NSPS, and no employee with union representation has been placed in the pay system. Although there are limits to NSPS's coverage, the system continues to incorporate additional employees.

NSPS grew out of executive branch concerns that the GS system was incapable of creating a responsive and flexible national security workforce. In April 2003, DOD sent a proposal, entitled "The Defense Transformation for the 21st Century Act," to Congress.[6] The proposal recommended changing the statutory basis for much of DOD's civilian personnel system to create a "more flexible, mission-driven system of human resources management" that could "adequately address the 21st century national security environment."[7] Many provisions in the DOD proposal were ultimately included in Title XI of the National Defense Authorization Act for FY2004, P.L. 108-136 — including personnel flexibilities to create NSPS.[8] The act made some DOD personnel policies more flexible than those governed by Title 5 of the U.S. Code, which includes most of the provisions governing civilian employees. The flexibilities gave DOD and Office of Personnel Management (OPM) officials the opportunity to design a pay system that attempted to more closely link employee performance to pay. The new system was to help the department "develop a more flexible civilian personnel management system that would enhance [the department's] ability to execute [its] national security mission."[9] Subtitle A of Title

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[4] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, 110th Cong., 2nd sess., testimony of Bradley Bunn, program executive officer of the National Security Personnel System, July 22, 2008, available at [http://hsgac.senate.gov/public/_files/BunnTestimony072208.pdf], visited Aug. 12, 2008.

[5] Senator George Voinovich stated that these exemptions were made to preserve personnel flexibilities that had already been granted to these laboratories. See CRS Report RL31954, *DOD's National Security Personnel System: Statute, Regulations, and Implementation Plans*, by Barbara Schwemle, et al., p. 12.

[6] The text of the DOD proposal can be accessed at [http://www.oft.osd.mil/library/library_files/document_131_Dod%20Transformation%20Act%20.pdf], visited June 19, 2008.

[7] U.S. Department of Defense and Office of Personnel Management, "Department of Defense Human Resources Management and Labor Relations System; Final Rule," 70 *Federal Register* 66117.

[8] For a more complete history of NSPS, see CRS Report RL31954, *DOD's National Security Personnel System: Statute, Regulations, and Implementation Plans*, by Barbara Schwemle. The National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, modifies P.L. 108-136. Some of these changes will be discussed later in this report.

[9] U.S. Congress, House Committee on Armed Forces, Subcommittee on Readiness, *The* (continued...)

XI of the act authorizes the Secretary of Defense and the Director of OPM to establish a new human resources management (HRM) system for DOD's civilian employees, and to jointly prescribe regulations for the system.

On January 28, 2008, the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181) was enacted. The law requires the NSPS system to pay annual bonuses and supplements that are closer in value to those given GS employees. More specifically, the law requires NSPS employees with satisfactory ratings to receive at least 60% of the annual bonus given to GS employees, and ensures that all employees receive a pay supplement to keep pace with growing labor costs.[10] Additionally, on May 22, 2008, DOD and the Office of Personnel Management jointly published proposed rules in the *Federal Register* that clarify NSPS labor-management regulations.[11]

This report details NSPS operations and practices. It also examines the pay system's history and analyzes its utility.

National Security Personnel System History

Since 2006, DOD has been phasing in NSPS. The system has weathered several delays in its implementation, but currently covers 180,000 of DOD's civilian employees.

On June 2, 2003, during the 108th Congress and shortly after DOD proposed changes in personnel flexibilities for NSPS, Senator Susan Collins, then-chairman of the Senate Committee on Governmental Affairs, introduced S. 1166. The bill, entitled the National Security Personnel System Act, would have granted DOD additional pay flexibilities for its large civilian workforce. The bill was referred to the Senate Governmental Affairs Committee. On June 4, 2003, the committee conducted a hearing on the bill. Following the hearing, Senators George V.

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[9] (...continued)
National Security Personnel System — Is it Really Working?" oversight hearing, testimony of Michael Dominguez, principal undersecretary of defense for personnel and readiness, 110th Cong., 2nd sess., Mar. 6, 2007, available at [http://armedservices.house.gov/pdfs/Readiness030607/Dominguez_Testimony030607.pdf], visited June 23, 2004.

[10] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Improving Performance: A Review of Pay-For-Performance Systems in the Federal Government*, 110th Cong., 2nd sess., testimony of Bradley Bunn, program executive officer of the National Security Personnel System, July 22, 2008, available at [http://hsgac.senate.gov/public/_files/BunnTestimony072208.pdf], visited Aug. 12, 2008. GS employees receive locality pay, a pay supplement designed to close the salary gap between federal workers and private sector workers who have similar jobs. NSPS employees receive a similar pay supplement, but it is called a local market supplement (LMS).

[11] U.S. Department of Defense, "National Security Personnel System," proposed rule, 73 *Federal Register* 29882, May 22, 2008.

Voinovich and Thomas Carper asked then-Comptroller General David M. Walker to respond to several additional questions about DOD's ability to motivate and control its workforce. Walker's response, submitted on July 3, 2003, included the following comments:

> Based on our experience, while DOD's leadership has the intent and the ability to transform the department, the needed institutional infrastructure is not in place in a vast majority of DOD organizations.... In the absence of the right institutional infrastructure, granting additional human capital authorities will provide little advantage and could actually end up doing damage if the authorities are not implemented properly by the respective department or agency.[12]

The bill was reported by the Committee on Governmental Affairs on September 9, 2003, and was placed the Senate Legislative Calendar, but was not passed. Another bill that addressed DOD personnel, however, H.R. 1588, was concurrently moving through the legislative process. H.R. 1588 , the National Defense Authorization Act for Fiscal Year 2004, set definitions and provided guidelines for a new DOD personnel system. The Senate passed the bill, as amended, by voice vote on June 4, 2003. President George W. Bush signed the legislation on November 24, 2003, as P.L. 108-136 (117 Stat. 1392).[13]

P.L. 108-136, among other things, authorized the director of OPM to "establish, and from time to time adjust, a human resources management system for some or all of the organizational or functional units of the Department of Defense."[14] The law protected employees' collective bargaining rights, and required that the system be "fair, credible, and transparent" and provide "effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance."[15]

NSPS Implementation. The timetable for implementing NSPS has changed several times. Initially, DOD planned to publish details of the new system by April 2004, and cover 300,000 civilian DOD employees under the NSPS by October 1, 2004. In early February 2004, then-Secretary of Defense Donald Rumsfeld named then-Navy Secretary (and now-Deputy Secretary of Defense) Gordon England as the DOD official responsible for negotiating with labor organizations on the personnel reform effort.[16] On April 14, 2004, Navy Secretary England announced that

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[12] U.S. General Accounting Office, *Posthearing Questions Related to Proposed Department of Defense (DOD) Human Capital Reform*, GAO Report GAO-03-965R (Washington: July 3, 2003).

[13] S. 1050 was introduced by Senator John Warner and reported to the Senate (S.Rept. 108-46) by the Senate Committee on Armed Services on May 13, 2003. Earlier, on May 7 and 8, 2003, the Senate Armed Services Committee marked up the bill.

[14] 117 Stat. 1622.

[15] 117 Stat. 1623.

[16] The National Security Personnel System Program Executive Office was established in April 2004, and Secretary England announced on May 24, 2004, that Mary E. Lacey, a member of the Senior Executive Service, would serve as the program executive officer. (continued...)

implementation of the NSPS would be phased in over several years so that all eligible DOD employees would be covered by October 1, 2006.

England announced more specific implementation steps and a revised implementation timetable on December 15, 2004.[17] Civilian DOD employees converting to NSPS were to be grouped into three "spirals" or phases of implementation. Spirals are further separated into three distinct implementation segments. Spiral One was scheduled for implementation over 18 months beginning around July 2005 and covering some 60,000 employees.[18] On October 26, 2005, DOD announced further revised NSPS plans, and pushed back initial implementation of the system to calendar year 2006.[19] On January 17, 2006, DOD identified the 11,124 employees in Spiral 1.1, the first employees to enter NSPS.

NSPS began its phase-in of Spiral 1.1 in April 2006.[20] Spirals 1.1, 1.2, and 1.3 were completed in March 2007.[21] Spiral 2 began in October 2007, and was completed in April 2008, with more than 180,000 of roughly 670,000 DOD

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[16] (...continued)
Earlier, on Feb. 13, 2004, OPM Director James named George Nesterczuk as a senior advisor, and announced that he would serve as the lead OPM official on design of the NSPS.

[17] U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), *DOD Selects First Group for National Security Personnel System*, News Release No. 1286-04, Dec. 15, 2004. Available on the Internet at [http://www.cpms.osd.mil/nsps], visited Jan. 24, 2005. DOD stated that the reason for postponing implementation was to "provide technical corrections and adjustments to NSPS policies and procedures."

[18] Spiral 1.1 covered 9,900 employees in the Navy, Army, and Air Force. Many of these employees were involved in human resources within the military branches. An additional 1,200 employees were in management and threat reduction positions at DOD. Spiral 1.2 included 65,000 non-bargaining Army, Navy, Air Force, and other DOD employees. Spiral 1.2 included the Army Corps of Engineers, Office of the Secretary of the Army, Marine Corps, Fleet Forces Command, Air Combat Command, Air Force Materiel Command, and Air Force Space Command. Spiral 1.3 included 35,362 DOD employees, including more employees from the Office of the Secretary of the Army and Army Corps of Engineers. Additionally, employees in the Space and Naval Welfare Systems Command, U.S. Air Forces Europe and Headquarters, and U.S. Army Medical Command were included. Spiral 2 would incorporate an anticipated 72,333 additional employees into NSPS. Spiral 2.1 includes employees at the Headquarters Department of the Army, U.S. Army Medical Command, Commander Naval Installations Command, and U.S. Army training and Doctrine Command. For more information, see NSPS, "Spiral Implementation," available at [http://www.cpms.osd.mil/nsps/spiralimplementation.html], visited June 30, 2008.

[19] U.S. Department of Defense, "Department of Defense and Office of Personnel Management Announce New Human Resources System," press release, Oct. 26, 2005, available at [http://www.defenselink.mil/releases/release.aspx?releaseid=9000], visited June 18, 2008.

[20] National Security Personnel System, "May 2006 SOFC Captures Attitudes of NSPS Employees," available at [http://www.cpms.osd.mil/nsps/sofc.html], visited June 30, 2008.

[21] National Security Personnel System, "Spiral Implementation," available at [http://www.cpms.osd.mil/nsps/spiralimplementation.html], visited June 18, 2008.

employees placed in NSPS.[22] Additional employees are to be brought into the system as it continues its phase-in.

Concerns of Secrecy. At times during NSPS's development, some employees and their representative organizations have claimed that OPM and DOD had been reluctant to include them in their planning and roll out processes. In addition to exempting blue-collar employees from NSPS, P.L. 108-136 required the Secretary of Defense and the Director of OPM to provide DOD employees and their representatives "a written description of the proposed system" and "at least 30 calendar days (unless extraordinary circumstances require earlier action) to review and make recommendations with respect to the proposal." Some Members voiced concerns that employees and unions were not given this statutorily required access to the agencies' pay-for-performance plans.

A March 12, 2004, letter from Senator Daniel Akaka to Secretary of Defense Rumsfeld urged DOD and OPM to jointly publish all proposals on the NSPS in the *Federal Register* and not as internal regulations in order to promote "openness, transparency, public comment, and scrutiny of the details."[23]

Government Executive reported that Senator Edward Kennedy wrote to Secretary of Defense Donald Rumsfeld and OPM Director Kay Coles James on November 19, 2004, to voice opposition to DOD's refusal to share the details of the new personnel plans with union officials representing DOD employees in advance of the publication of regulations in the *Federal Register*. Reportedly, DOD believed that to share its intentions would "depart from the intent of the Administrative Procedure Act."[24] Kennedy, in a December 10, 2004, press release, also emphasized development of the new system "in the most transparent way possible." According to the Senator:

> Congress gave the Department of Defense the authority to make major personnel changes affecting 700,000 defense employees, but only with the understanding that those changes would be made in consultation with representatives of the employees. It's appalling that the Bush Administration is ignoring that understanding by stonewalling the representatives and refusing to let them review personnel changes before they are published.[25]

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[22] Ibid.

[23] Senator Daniel Akaka, Press Release, "Akaka Queries Agencies on Personnel System Changes," Mar. 23, 2004, available at [http://www.senate.gov/~akaka/releases/04/03/2004323842.html], visited June 19, 2008.

[24] David McGlinchey, "Legislator Says Withholding Pentagon Personnel Plans Violates Laws," *Government Executive*, Nov. 29, 2004, available at [http://www.govexec.com/dailyfed/1104/112904d1.htm], visited June 19, 2008; and David McGlinchey, "Back and Forth," *Government Executive*, Dec. 16, 2004, available at [http://www.govexec.com/dailyfed/1204/121604pb.htm], visited June 19, 2008.

[25] Senator Edward M. Kennedy, Press Release, "Senator Edward M. Kennedy Statement on Response By Bush Administration on Transparency in National Security Personnel Regulations," Dec. 10, 2004.

In a February 10, 2005, press release, Senator Joseph Lieberman expressed his deep disappointment with DOD's and OPM's refusal to publish the system's guidelines and include employees in its creation, stating, "The proposal imposes excessive limits on collective bargaining ... changes the appeals process to interfere with employees' rights to due process ... and ... contains unduly vague and untested pay and performance provisions."[26]

DOD Personnel System Proposal. DOD and OPM published proposed rules for NSPS in the *Federal Register* on February 14, 2005. In the November 1, 2005 final rules, which were also published in the *Federal Register*, DOD and OPM stated that the GS personnel system failed to allow the department to keep pace with the George W. Bush Administration's demands to "transform the way we think, the way we train, the way we exercise, and the way we fight."[27]

> At best, the current personnel system is based on 20th century assumptions about the nature of public service and cannot adequately address the 21st century national security environment. Although the current Federal personnel management system is based on important core principles, those principles are operationalized in an inflexible, one-size-fits-all system of defining work, hiring staff, managing people, assessing and rewarding performance, and advancing personnel. These inherent weaknesses make support of DoD's mission complex, costly, and ultimately risky. Currently, pay and the movement of personnel are pegged to outdated, narrowly defined work definitions; hiring processes are cumbersome; high performers and low performers are paid alike; and the labor system encourages a dispute-oriented, adversarial relationship between management and labor. These systemic inefficiencies detract from the potential effectiveness of the Total Force. A more flexible, mission-driven system of human resources management that retains those core principles will provide a more cohesive Total Force....
>
> The immense challenges facing DoD today require a civilian workforce transformation: Civilians are being asked to assume new and different responsibilities, take more risk, and be more innovative, agile, and accountable than ever before. It is critical that DoD supports the entire civilian workforce with modern systems — particularly a human resources management system and a labor relations system that support and protect their critical role in DoD's Total Force effectiveness. The enabling legislation provides the Department of Defense with the authority to meet this transformation challenge.[28]

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[26] Senator Joe Lieberman, "Lieberman Condemns Proposed DOD Personnel Rules," Press Release, Feb. 10, 2005.

[27] U.S. Department of Defense and Office of Personnel Management, "Department of Defense Human Resources Management and Labor Relations Systems; Final Rule," 70 *Federal Register* 66117.

[28] Ibid., 70 *Federal Register* 66118.

Description of the National Security Personnel System

To date, only white collar, non-bargaining DOD personnel have transitioned to NSPS.[29] Each employee in the NSPS system is assigned to a career group, a pay band, and a pay schedule. Instead of the 15-step GS system that serves as the pay structure for most federal employees, those who are in NSPS have pay bands that usually encompass a wider pay range than a single GS grade.[30] The wider pay bands are designed to give managers greater flexibility to hire promising employees at a higher rate of pay than they could under the GS scale, and to retain high-performing employees by increasing their pay at a faster pace than was possible under the GS scale. Pay bands, like GS grades, limit minimum and maximum pay rates. Unlike the GS scale's pay grades, pay bands do not have steps through which employees advance automatically with satisfactory job performance. Instead, in NSPS, funds formerly used to pay for within-grade, quality-step, and other increases in the general schedule are pooled and used to fund the pay increases determined at the end of the performance appraisal cycle.[31]

NSPS contains four career groups: Standard Career Group; Scientific & Engineering Career Group; Investigative & Protective Services Career Group; and Medical Career Group. According to DOD's NSPS website, "[c]areer groups are sets of occupations that involve similar types of work and have similar career and pay progression patterns. Career groups are based on mission or function, nature of the work, qualifications or competencies, promotion or pay progression patterns, and relevant labor market features."[32]

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[29] P.L. 110-181 removed blue-collar DOD employees from NSPS eligibility.

[30] The General Schedule contains 15 pay grades, with higher grade levels reserved for employees with higher salary levels. Higher pay grades are those with higher numbers. Within each pay grade are 10 steps through with employees climb based on satisfactory job performance. The FY2008 GS pay scale is available from the U.S. Office of Personnel Management at [http://www.opm.gov/oca/08tables/pdf/gs.pdf], visited July 7, 2008.

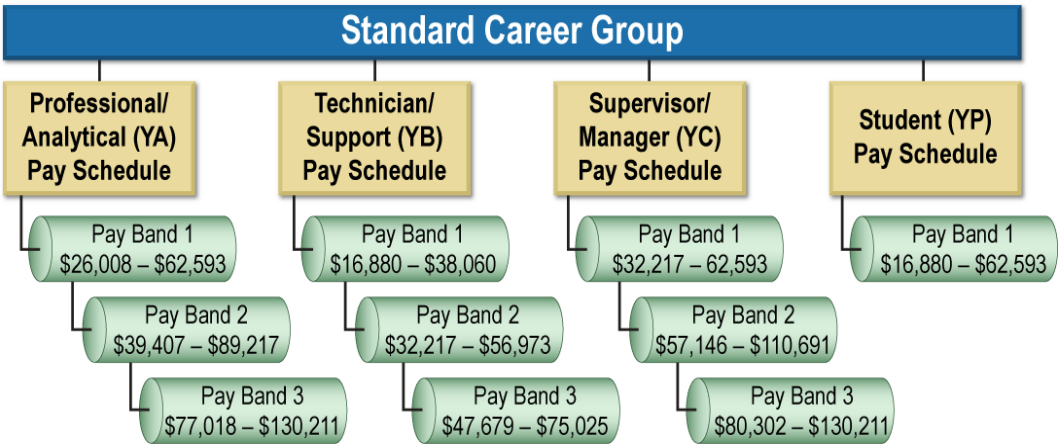
[31] Under the GS pay scale, within-grade increases (WGIs) are "received by federal employees after they have served a specified amount of time at a certain grade level and demonstrated at least an acceptable level of performance." These increases are provided for by Chapter 53 of Title 5 of the U.S. Code. Regulations for within-grade increase distributions are at 5 C.F.R. 531, Subpart D. Quality-step increases (QSIs) are "a one-step increase to base pay [that] can be granted to recognize employees in the general schedule who have received the highest available rating of record and meet agency criteria." They provide "faster than normal progression through the step rates of the general schedule." QSIs are provided for under 5 C.F.R. 531, Subpart E. See the *Federal Employees Almanac 2006* (Herndon, VA: Federal Employees News Digest, 2006), pp. 17, 23.

[32] National Security Personnel System, "Classification Architecture Fact Sheet," Nov. 2007, p. 1, available at [http://www.cpms.osd.mil/nsps/docs/FinalClassificationArchitecture Fact.pdf], visited June 18, 2008. The National Security Personnel System also publishes a list of all DOD occupations and their career group classification at

(continued...)

Finally, NSPS has four pay schedules: Professional/Analytical; Technician/Support; Supervisor/Manager; and Student. And there are between two and four pay bands within each pay schedule. Pay schedules divide employees into groups by the "types of work being performed, knowledge or skill level, and pay ranges."[33] Because of the nature of career groups, some groups have higher starting salaries and higher salary caps than others. A Professional/Analytical employee, for example, has a higher salary cap than a Technician/Support employee. Most pay schedules have three pay bands: Expert; Journey; and Entry/Development.[34] **Figure 1** uses the Standard Career Group to demonstrate how pay schedules and pay bands fit within career groups.

Figure 1. Standard Career Group's Pay Schedule and Pay Bands



Source: Department of Defense, "National Security Personnel System Worldwide Pay Table," available at [http://www.cpms.osd.mil/ASSETS/8E60EB0AAEE04E4D8AD58EFCACBD2984/StandardCG.PDF], visited September 5, 2008; NSPS, "Classification Architecture Fact Sheet," November 2007, available at [http://www.cpms.osd.mil/nsps/docs.22may08/finalclassification architecturefact.pdf], visited Sept. 5, 2008. Technical assistance for this figure was provided by Lisa Kaplan of CRS.

Performance Appraisal. Within 30 days of the start of a new performance-evaluation period — which runs from October 1 through September 30 of each year — each employee is to be issued a performance plan, which outlines his or her performance criteria and goals for the year.[35] The performance expectations in the

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[32] (...continued)
[http://www.cpms.osd.mil/nsps/docs/implementing_issuances/1920Classification.pdf], visited June 18, 2008.

[33] National Security Personnel System, "Classification Architecture Fact Sheet," p. 2, available at [http://www.cpms.osd.mil/nsps/docs/FinalClassificationArchitectureFact.pdf], visited Aug. 26, 2008.

[34] National Security Personnel System, "Frequently Asked Questions," available at [http://www.cpms.osd.mil/nsps/faqs.html], visited Mar. 26, 2008. See also the U.S. Department of Defense, "Compensation Architecture Pay Policy," p. 52, for a complete list of the NSPS pay bands and rate ranges.

[35] To be eligible for performance review, an employee must be employed for at least 90 days of the current performance appraisal period. For more information on employees who are
(continued...)

plan "shall support and align with the DoD mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance."[36] These goals can be generalized across the department, or they can be specific to an individual employee.[37] Performance elements can include knowledge of the department's standard operating procedures, specific goals or objectives, contributions to the department that are expected of the employee, and overall employee conduct and behavior.[38] An employee is required to meet with his or her supervisor at least one time during his or her performance-appraisal period prior to a final evaluation.[39] The interim evaluation is to "acknowledge achievements and suggest areas for improvement, and provide meaningful dialogue and exchange of concerns."[40] A supervisor is responsible for informing an employee which performance criteria are considered more important and may be weighted higher in his or her evaluation.[41] A supervisor should also communicate "measures of job objective accomplishment (quantitative, qualitative, timeliness)."[42] Performance expectations, or competencies, "should be reviewed regularly,"[43] and "[s]upervisors are encouraged to involve employees in the development of their job objectives and the identification of applicable contributing factors."[44] Supervisors are encouraged to engage in continued dialogue with employees throughout the performance appraisal period, and to update individual performance plans as necessary.[45]

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[35] (...continued)
covered by NSPS see U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.2.2, available at [http://www.cpms.osd.mil/nsps/docs/1940 Performancemanagement2008.pdf], visited June 16, 2008. The 30-day requirement may be extended up to 60 days without affecting employee pay, see SC1940.5.6.1, p. 8.

[36] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management,", SC1940.5.1, p. 6.

[37] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940 5.2.1.1, p. 6.

[38] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.5.2.1.2 - SC1940 5.2.1.5, pp. 6-7.

[39] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.5.4.1., p. 7.

[40] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.6.4.1., p. 11.

[41] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.5.7.1., p. 8.

[42] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.5.4.5. - SC1940.5.4.8., p. 7.

[43] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.5.5., p. 7.

[44] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.5.7, p. 8. Management has the final say on what is included in a performance evaluation.

[45] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.6.1. - SC1940.6.3.1, p. 10. DoD prefers face-to-face dialogue "for performance-
(continued...)

An employee has 24-hour online access to his or her performance plan through the Performance Appraisal Application (PAA) 2.0.[46] The application runs through computer programs that already exist on the Defense Civilian Personnel Data System (DCPDS). The online performance plan is available to both employees already in NSPS and those who will transition to NSPS. The DCPDS website also includes a conversion calculator for employees who are scheduled to transition from the GS to NSPS.[47]

At the end of the performance appraisal period, employees are encouraged to provide supervisors with a self assessment in each competency to "better inform the rater of performance and contribution."[48] Supervisors are to evaluate narratively each employee using the performance criteria, and then translate the narrative into a five-point numeric scale, with the lowest score of 1 and the highest of 5.[49] When evaluating individual criteria, supervisors may choose to include a "contributing factor" that reflects "the manner of performance important for the accomplishment of the job objective."[50] Contributing factors include technical proficiency, critical thinking, cooperation and teamwork, communication, customer focus, resource management, and leadership.[51] In general, no more than three contributing factors should be considered when evaluating a single criterion, and leadership should be considered when evaluating any supervisory element.[52] Each contributing factor may be used to increase or decrease a competency's numeric rating by one point. For example, if the employee demonstrated critical thinking when performing a competency, his or her score for that criterion could rise from 3 to 4. In contrast, if the employee failed to use critical thinking, he or she would receive no additional point, or a supervisor may decide to take a point away from his or her numeric

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[45] (...continued)
based issues."

[46] For more information on the PAA, see National Security Personnel System, "Performance Appraisal Application," available at [http://www.cpms.osd.mil/nsps/paa.html], visited June 18, 2008.

[47] National Security Personnel System, "GS to NSPS Conversion Calculator," available at [http://www.cpms.osd.mil/nsps/conversion/index.html], visited June 18, 2008.

[48] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.9.2., p. 14.

[49] Closeout assessments are also required when a supervisor leaves his or her position or if the employee leaves his or her position. For additional information see U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.6.5.-SC1940.6.5.4.3., pp. 11-12.

[50] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.5.7.5.

[51] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC19405.7.5.1.1. - SC1940.5.7.5.1.7., pp. 9-10.

[52] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.5.7.5.2., p. 10. A contributing factor may not be used to raise the rating score of a competency rated at 2 or lower.

assessment, dropping a score from 3 to 2.[53] Supervisors do not have to use whole numbers when assessing employees, but final ratings — the recommended rating of record — must be rounded to the nearest whole number.

Each numeric performance rating matches to a nominal one (**Table 1**).

Table 1. Numeric Performance Evaluation Rating of Record and Its Corresponding Nominal Descriptor

Numeric Rating of Record	Corresponding Nominal Rating
1	Unacceptable
2	Fair
3	Valued Performer
4	Exceeds Expectations
5	Role Model

Source: U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," available at [http://www.cpms.osd.mil/nsps/docs/1940Performancemanagement2008.pdf], visited June 16, 2008.

An employee must score at least a three — which is equal to a nominal rating of "valued performer" — to be eligible for performance-based pay increases.[54] If an employee scored a one on any individual objective, their overall rating is required to be a one.[55]

If an employee is performing below expectations at any time throughout the appraisal process, supervisors and management must determine "corrective action," which may include "remedial training, an improvement period, a reassignment, an oral or written warning, a letter of counseling, a written reprimand, and/or adverse actions."[56] As of June 10, 2008, NSPS corrective action may also include reduction in salary as well as retention of pay, so an employee may have his or her pay withheld

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[53] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.10.5., p. 17.

[54] National Security Personnel System, "Frequently Asked Questions," available at [http://www.cpms.osd.mil/nsps/faqs.html], visited Mar. 26, 2008. Basic pay increases are determined annually by the department. For more information see U.S. Department of Defense, SC1930 Subchapter 1930: Compensation Architecture Pay Policy, p. 5, available at [http://www.cpms.osd.mil/nsps/docs/implementing_issuances/1930Compensation.pdf], visited Mar. 28, 2008.

[55] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.10.3.3, pp. 17.

[56] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.8 - SC1940.8.3.2.7., pp. 12-13. An employee's salary may be reduced for unacceptable performance at any time during an evaluation, but employee salary may be reduced only one time in any 12-month period. See SC1940.8.4.3., p. 13.

and/or his or her salary decreased concurrently if his or her performance is deemed unsatisfactory.[57]

Within 10 days of receiving his or her performance evaluation, an employee may request a reconsideration of the rating by submitting "a written request for reconsideration to the pay pool manager." The request must include a copy of the rating and a statement clarifying which part of the rating is being challenged. A copy of the reconsideration request also may be given to the rating official and the human resources office.[58] Within 15 days of receiving the request, the pay pool manager is to render a written statement that explains his or her determination. If the employee remains unsatisfied, he or she may — within five days of receiving the pay pool manager's decision — submit a written request for final review with the Performance Review Authority (PRA),[59] which oversees all pay pools and ensures consistency in performance and evaluations across the agency. The PRA has 15 days to respond. Bargaining employees may also file a grievance under the agency's negotiated grievance process.[60]

In a January 1, 2008, *Government Executive.com* article, a DOD executive director said that supervisors and managers in the agency would need to spend 40 to 60 hours per employee per year on performance evaluations and ratings. These hours were to include at least four conversations with each employee annually.[61]

Linking Performance to Pay. The agency-wide performance-based pay pool is comprised of three funding sources:

- basic pay funds that ... were historically spent on within-grade increases, quality-step increases, and promotions between general schedule grade levels that no longer exist under NSPS;
- funds (if any) that remain available from the government-wide general pay[62] increase after the Secretary has exercised his authority

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[57] National Security Personnel System, "Significant Changes to Approved Implementing Issuances," available at [http://www.cpms.osd.mil/nsps/docs/FinalNSPSSigChangesInfoSheet.pdf], visited June 18, 2008.

[58] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.12.4.1., p. 22.

[59] A PRA "provides oversight of several pay pools, and addresses the consistency of performance management policies." See U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management,", SC1940.4.1, p 4.

[60] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.12.5., p 24.

[61] Brittany Ballenstedt, "FEATURES: Freedom to Manage," *Government Executive.com*, Jan.1, 2008, available at [http://www.governmentexecutive.com/features/0108-01/0108-01s1.htm], visited Mar. 31, 2008.

[62] Normally, a law is passed each year that increases the basic pay of civilian federal employees. The amount of the annual increase is supposed to be based on the percentage change in the Employment Cost Index, which "measures changes in private sector labor

(continued...)

to fund any Rate Range Adjustments[63] and/or Local Market Supplements[64]; and
- funds spent for performance-based cash awards.[65]

Within the larger pay pool are smaller pay pools for groups of employees "who share in the distribution of a common pay-for-performance fund."[66] Group pay pools are divided by organization structure, employee job function, location, and organization mission.[67]

In NSPS, each employee may be assigned a certain number of performance pay shares. Each pay share represents a monetary value that is a predetermined percentage of pay that will be used to calculate performance-based pay increases. The amount of pay shares allocated to each employee reflects his or her numerical performance rating: the higher an employee's numeric rating, the more shares he or she is allocated. Employees with a performance rating of 1 or 2 are assigned no performance shares. The pay pool panel,[68] which consists of DOD administrators and senior staff and assigns performance shares to employees, may award an employee with a rating of 3 either one or two shares; a rating of 4 can warrant three or four shares. An employee with a rating of 5 may receive either five or six performance shares. **Table 2** shows the performance shares allowed for each of the 5 possible ratings of record.

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[62] (...continued)
costs" and is maintained by the Bureau of Labor Statistics. *2006 Federal Employees Almanac*, p. 12.

[63] Rate Range Adjustments occur when the minimum and maximum pay levels for each pay range shifts.

[64] "Local market supplements (LMSs) are additional payments to employees in specified local market areas, occupations, specializations, or pay bands that are not adequate by world-wide pay band rate ranges. LMSs replace locality pay and special salary rates in NSPS. There are no special salary rates in NSPS." See U.S. Department of Defense, "National Security Personnel System: Local Market Supplement Fact Sheet," April 2006, available at [http://www.schriever.af.mil/shared/media/document/AFD-060913-022.pdf], visited Aug. 11, 2008.

[65] U.S. Department of Defense, "SC1930 Subchapter 1930: Compensation Architecture Pay Policy," SC1930.9.3 - SC1930.9.4.5., pp. 12-13. Funds for performance based cash awards are available only as pay bonuses and will not impact an employee's rate of basic pay.

[66] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," SC1940.11.1.1. p. 19.

[67] Ibid.

[68] The pay pool panel "is a board of management officials who are usually in positions of line authority or in senior staff positions with resource oversight for the organizations, groups, or categories fo employees comprising the pay pool membership." See "SC1940 Subchapter 1940: Performance Management," SC1940.4.3., p. 4.

Table 2. Performance Shares Available at Each Rating of Record

Rating of Record	Performance Share Available at Rating Level
1	No Shares
2	No Shares
3	1 - 2 Shares
4	3 - 4 Shares
5	5 - 6 Shares

Source: U.S. Department of Defense,"SC1940 Subchapter 1930: Compensation Architecture Pay Policy," SC1930-1, p. 9, available at [http://www.cpms.osd.mil/nsps/docs/implementing_ issuances/1930Compensation.pdf], visited June 18, 2008.

If a single performance share, for example, equaled 1% of an employee's pay, that employee's pay supplement could be calculated by multiplying his or her basic pay by the number of performance shares they have been assigned. An employee with 5 performance shares, therefore, would be entitled to a performance-based pay increase that was equal to 5% of his or her basic pay.[69] The pay pool manager ensures that the pay performance shares are distributed in a legal and consistent manner.[70] An employee who is at the maximum level of his or her pay band may receive his or her performance-based bonus as a one-time lump sum paid at the beginning of the following year. The lump sum does not count as basic pay, and is not included when calculating an employee's pension, life insurance, premium pay, or other retirement benefits.[71]

NSPS pay also includes a local market supplement (LMS), which functions much like locality pay or special rates on the GS scale. LMS is an "additional payment to employees in specified local market areas, occupations, specializations, or pay bands."[72] The supplements are used to attract certain employee expertise, bridge the difference in labor costs in the public or private sector, and provide additional pay to employees who work in a hazardous environment. LMSs are added to base salary, and, therefore, are included when calculating pension, life insurance, premium pay, and other retirement benefits. Employees must have been employed by the agency for at least 90 days and have a performance evaluation of 2 ("Fair") or

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[69] Ibid., pp. 14-16. The formula is as follows [EMPLOYEE PERFORMANCE PAYOUT = BASIC PAY x PERFORMANCE SHARES x PERFORMANCE SHARE VALUE]

[70] U.S. Department of Defense, "SC1940 Subchapter 1940: Performance Management," p. 4, available at [http://www.cpms.osd.mil/nsps/docs/implementing_issuances/ 1940PerformanceManagement.PDF], visited June 20, 2008.

[71] U.S. Department of Defense, "SC1930 Subchapter 1930: Compensation Architecture Pay Policy," SC1930.8.2.7.1., p. 11.

[72] National Security Personnel System, "Local Market Supplements Fact Sheet," available at [http://www.schriever.af.mil/shared/media/document/AFD-060913-022.pdf], visited June 20, 2008.

higher to be eligible for the LMS increase.[73] Unless the Secretary of Defense deems otherwise, the LMS is usually equal to annual locality pay increases, which are based on cost of labor differences between federal and non-federal employees within the same geographic area.

In addition to pay increases that are awarded based on annual performance evaluations, DOD employees may receive discretionary performance payouts that include Extraordinary Pay Increases (EPI) and Organization Achievement Recognitions (OAR). Only employees who have an annual performance evaluation of 5 are eligible for an EPI, which can be awarded as an increase in basic salary or as a one-time lump sum. OARs award members of a team, organization, or branch that advanced department goals. OARs may be awarded as an increase in basic pay or as a one-time lump sum. Employees must have a numeric performance evaluation of 3 or higher to be eligible for an OAR.[74]

The 110th Congress

Legislation. Hiring and retaining the most effective federal workforce remains an important goal for lawmakers in the 110th Congress. Several congressional committees have held hearings on federal pay-for-performance systems in general, and NSPS in particular. In addition, on January 28, 2008, the National Defense Authorization Act for Fiscal Year 2008, was enacted. The statute modified certain elements of NSPS, requiring DOD to award every NSPS employee who received a satisfactory rating at least 60% of the pay increase given to GS employees.[75] The law required NSPS to link "performance management and the agency's strategic plan;" provide "adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;" and create "[a] process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review."[76] The law also ensures employees' rights to bargain collectively and establish labor organizations.[77]

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[73] "SC1930 Subchapter 1930: Compensation Architecture Pay Policy," SC1930.8.1.2.2.1.2., p. 7.

[74] U.S. Department of Defense, "SC1930 Subchapter 1930: Compensation Architecture Pay Policy," p. 57.

[75] P.L. 110-181, sec. 1106. Prior to the enactment of P.L. 110-181, employees with satisfactory performance ratings in the NSPS may have received pay raises that were below those given to federal employee on the general schedule, which is "the federal government's main pay system that sets the pay rates for federal employees in most white-collar positions not at the senior executive or other senior levels." See *2006 Federal Employees Almanac*, p. 1.

[76] P.L. 110-181, sec. 1106.

[77] The previous labor-relations arrangement prompted litigation from federal employee unions that will be discussed later in this report.

Hearings. Committees in both congressional chambers continue to hold hearings on performance-based-pay systems, with a focus on NSPS. Some common themes throughout the hearings have been DOD employees' mistrust of the system and concerns over how much time the agency would need to fully implement NSPS. On March 6, 2007, the House Committee on Armed Services' Subcommittee on Readiness, held a hearing on DOD's NSPS pay, at which Members questioned whether NSPS was "working," and whether it was adjusting to the challenges it faced. Representatives from DOD stated that the system was effective.

> It is early in the journey as it will take years before the Department realizes all of the results NSPS was designed to produce, but we are already showing a powerful return on investment.
>
> We are seeing an unprecedented training effort focused on performance management for employees and supervisors who are seeing greater communication between supervisors and employees. People are talking about performance, results, and mission alignments. We are seeing increased flexibility and rewarding exceptional performance. Finally, we are seeing positive movement in behaviors and in organizational culture. These early returns are cause for optimism as we continue to deploy the system.[78]

At that hearing, John Gage, the national president of the American Federation of Government Employees, stated that NSPS was "unfair to employees," and it should be repealed because it violated workers rights to collectively bargain, as well as other protections normally provided to federal employees.[79]

NSPS's effects on the collective bargaining rights of employees was also considered at a House Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia hearing on March 8, 2007.[80] Kevin Simpson, the executive vice president and general counsel for the Partnership for Public Service, a nonprofit organization that seeks to create a more effective workforce, said that NSPS needed employee support if it were to succeed.

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[78] U.S. Congress. House Committee on Armed Forces, Subcommittee on Readiness, *The National Security Personnel System — Is it Really Working?*" oversight hearing, testimony of Michael Dominguez, principal deputy under secretary of defense for personnel and readiness, 110th Cong., 1st sess., March 6, 2007 (Washington: GPO, 2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37887.wais], visited June 16, 2008.

[79] Ibid., testimony of John Gage, national president of the American Federation of Government Employees, 110th Cong., 1st sess., March 6, 2007 (Washington: GPO, 2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37887.wais], visited June 16, 2008.

[80] U.S. Congress. House Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, *The Status of Federal Personnel Reform*, oversight hearing, 110th Cong., 1st sess., March 8, 2007 (GPO: Washington, 2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:36547.wais], visited June 16, 2008.

> [W]e believe that many (but not all) aspects of NSPS — if implemented with employee involvement and strong congressional oversight — have a potential to make a positive difference and to gain acceptance by the DOD workforce.[81]

At a February 12, 2008, congressional hearing before the House Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, Gage said that the NSPS and other merit-based systems were subjective, implemented inconsistently across the agency, and infused with bias. Employees with lower ratings in one office could receive a higher pay bonus than an employee with a higher rating in another, Gage said. Moreover, Gage said, the NSPS system permitted certain managers to determine what percentage of an employee's pay increase would be distributed as an increase in basic pay or as a one-time lump sum bonus.

> Obviously, the more compensation placed in bonuses as opposed to salary increases has profound implications for the employee's standard of living not only in subsequent years while he or she is still working, but also into retirement.[82]

At a February 29, 2008, hearing before the Senate Committee on Homeland Security and Governmental Affairs' Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, then-Comptroller General David M. Walker testified that NSPS could serve as an example for other agencies or departments as they transition to performance-based pay systems.

> Most important, we have noted in testimonies and reports that DOD and other federal agencies must ensure that they have the necessary institutional infrastructure in place before implementing major human capital reform efforts, such as NSPS. This institutional infrastructure includes, at a minimum, a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program goals, mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and the existence of a modern, effective, and credible performance management system that includes adequate safeguards to ensure a fair, effective, nondiscriminatory, and credible implementation of the new system.[83]

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[81] Kevin Simpson, executive vice president and general council of the Partnership for Public Service, Testimony before the House Committee on Oversight and Government Reform's Subcommittee on the Federal Workforce, The Postal Service, and the District of Columbia, oversight hearing on Federal Personnel Systems, 110th Cong., 2nd sess., Mar. 8, 2007, available at [http://federalworkforce.oversight.house.gov/documents/20070313110929-84384.pdf], visited Sept. 8, 2008.

[82] John Gage, National President of the American Federation of Government Employees, AFL-CIO, Testimony Before the House Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, *Robbing Mary to Pay Peter and Paul: The Administration's Pay-for-Performance System*, oversight hearing, 110th Cong., 2nd sess., Feb. 12, 2008, available at [http://federalworkforce.oversight.house.gov/documents/20080214121105.pdf], visited June 17, 2008.

[83] David M. Walker, former comptroller general of the United States, Testimony before the Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on (continued...)

At a July 22, 2008 hearing, Bradley Bunn, the program executive officer for NSPS said the pay system was successfully linking employee performance to department goals, but that there were difficulties with the system.

> NSPS is a significant change, particularly in the area of performance management, for employees and supervisors. It requires more time and energy than previous systems, and many of our employees are not yet completely comfortable with the system. Performance plans and assessments need improvement, as many are struggling with translating organizational goals into individual, results-oriented, and measurable job objectives. Employees have expressed concern over the pay pool process, and whether it produces fair results. It is clear, however, that employees have a better understanding of how their jobs relate to the mission and goals of the organization, and there is increased communication between employees and supervisors about performance.[84]

At the same hearing, AFGE President John Gage stated that many federal employees "express skepticism about their chances to excel in the workforce" under NSPS. Additionally, Gage stated that "subjectivity and bias pervades the NSPS system."[85]

Department of Defense Rulemaking. On May 22, 2008, the Department of Defense proposed new rules for NSPS in the *Federal Register*.[86] Some of the proposed new rules include removing references to a new labor-management system in existing NSPS regulations and deleting the prohibition on collective bargaining.[87] The proposed rules would flesh out some definitions of pay, and permit employees who were rated "unacceptable" to begin receiving pay increases after they improve their performance — even if the improvement occurs prior to the completion of a full

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[83] (...continued)
Oversight of Government Management, the Federal Workforce, and the District of Columbia, 110th Cong., 2nd sess., GAO Report, GAO-08-413T, p. 10, Feb. 29, 2008, available at [http://hsgac.senate.gov/public/_files/REVISEDGAO08413T.pdf], visited Sept. 8, 2008.

[84] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, 110th Cong., 2nd sess., testimony of Bradley Bunn, program executive officer of the National Security Personnel System, July 22, 2008, available at [http://hsgac.senate.gov/public/_files/BunnTestimony072208.pdf], visited Aug. 12, 2008.

[85] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, 110th Cong., 2nd sess., testimony of John Gage, program executive officer of the National Security Personnel System, July 22, 2008, available at [http://hsgac.senate.gov/public/_files/GageTestimony072208.pdf], visited Aug. 12, 2008.

[86] U.S. Department of Defense, "National Security Personnel System," 73 *Federal Register* 29882, May 22, 2008.

[87] Ibid., pp. 28885-29886.

performance appraisal cycle.[88] Comments on the proposed rules were accepted until June 23, 2008. DOD and OPM received more than 500 comments on the proposed regulations.[89]

Litigation. On November 7, 2005, a coalition of ten unions that represent DOD employees — including the American Federation of Government Employees (AFGE) — filed a lawsuit in federal district court challenging the DOD's final regulations for NSPS published in the *Federal Register*.[90] On February 27, 2006, the court enjoined the regulations, saying they failed to ensure collective bargaining rights; did not provide for independent, third-party review of labor relations decisions; and failed to provide a fair process for appealing adverse actions.[91] DOD originally stated that it would not appeal the decision, but the Department of Justice — on behalf of DOD and OPM — filed an appeal on April 17, 2006.

The United States Court of Appeals for the District of Columbia reversed the federal district court decision and upheld the DOD's regulations, saying the National Defense Authorization Act "grants DOD expansive authority to curtail collective bargaining through November 2009."[92] The decision also upheld all other regulations that were contested by the unions. On July 2, 2007, the coalition of unions requested a full court review of the appellate court decision. The courts denied the request on August 10, 2007. On August 29, AFGE filed an appeal with the U.S. Supreme Court to stop DOD implementation of NSPS. On September 5, 2007, the Court denied the motion for a stay, and DOD continued its implementation of NSPS.[93]

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[88] Ibid., p. 29889

[89] Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, 110th Cong., 2nd sess., testimony of John Gage, program executive officer of the National Security Personnel System, July 22, 2008, available at [http://hsgac.senate.gov/public/_files/GageTestimony072208.pdf], visited Aug. 12, 2008.

[90] U.S. Congress, House Committee on Armed Services, Subcommittee on Readiness, *The National Security Personnel System of the Department of Defense*, testimony by John Gage, national president of the AFGE, Mar. 6, 2007.

[91] *Am. Fed'n of Gov't Employees v. Rumsfeld*, 422 F. Supp. 2d 16 (D.D.C. 2006), available at [http://www.afge.org/Documents/2006_02_27RumsfeldDecision.pdf], visited Sept. 16, 2008. The passage of the National Defense Authorization Act for Fiscal Year 2008 on January 28, 2008 prompted AFGE to drop its lawsuit against DOD, saying the legislation "effectively corrected" NSPS's collective bargaining issues. For more information see American Federation of Government Employees, "Defense Authorization Bill Provides NSPS Fix, press release, Jan. 30, 2008, available at [http://www.afge.org/index.cfm?page=PressReleases&PressReleaseID=820], visited Sept. 16, 2008.

[92] *Am. Fed'n of Gov't Employees v. Gates*, 486 F.3d 1316 (D.C. Cir. 2007), available at [http://www.afge.org/Documents/Rehearing%20Response%20FINAL.pdf], visited Sept. 16, 2008.

[93] American Federal of Government Employees, "NSPS Background," available at [http://www.afge.org/Index.cfm?Page=NSPSBackground], visited Sept. 16, 2008.

NSPS Assessment. NSPS has been assessed by both the federal government and private entities. The *Federal Times* acquired performance evaluations of 102,239 civilian DOD employees in the NSPS system and analyzed pay outcomes. In one report, the *Federal Times* claimed NSPS was "living up to its promise of tying bigger raises and bonuses to better performance on the job."[94] The *Federal Times* stated that "all but 165 employees at [rating] [l]evels 1 through 5 receive total pay increases that were equal to or greater than the average 3.5 percent pay raise that General Schedule employees received." But many of these pay increases were distributed as one-time bonuses. Moreover, when the local market supplement is not included as a performance-based increase, 5,039 employees who were rated as valued performers (level 3) received a pay increase of less than 1 percent.[95] According to another *Federal Times* report that used the same data, "[w]hite employees received higher average performance ratings, salary increases and bonuses ... than employees of other races." In addition, civilian employees at DOD agencies were assigned overall higher performance ratings than civilian personnel in the Air Force, Navy, and Marine Corps. Finally, employees who received similar rating scores were, in some cases, given different pay increases.[96]

A 2007 OPM assessment of NSPS implementation concluded that DOD was successfully transitioning to the new system, but found continued measurement of the department's ability to retain key employees and hire quality workers was needed.[97] In October 2007, three Members of the Virginia congressional delegation — Representatives Tom Davis, Frank Wolf, and James Moran — sent Defense Secretary Robert Gates a letter condemning DOD's announcement that 110,000 NSPS employees with satisfactory performance ratings would receive pay increases that were equal to only half of the annual pay increase given to GS employees. "[T]hese employees ... reportedly were informed from the outset that for the first year in NSPS they would at least receive their base bay increase." The Members added:

> It would be difficult if not impossible to recruit or retain employees if they could not rely on their promised salaries. But an even more difficult task will be meeting the cost of replacing employees or increasing hiring efforts in general if employees do not have confidence in the personnel system.[98]

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[94] Stephen Losey, "Better performers net bigger payouts, NSPS numbers show," Federal Times, August 25, 2008, p. 6, available at [http://www.federaltimes.com/index.php?S=3692119], visited Aug. 26, 2008.

[95] Ibid.

[96] Stephen Losey, "Is DoD's New Pay System Fair?" Federal Times, Aug. 10, 2008, available at [http://www.federaltimes.com/index.php?S=3666513], visited Aug. 25, 2008.

[97] U.S. Office of Personnel Management, *Creating a Foundation for the 21st Century Federal Workforce: An Assessment of the Implementation of the Department of Defense National Security Personnel System*, May 2007.

[98] Brittany R. Ballenstedt, "Lawmakers urge Pentagon to hold off on new pay policy," Government Executive.com, October 16, 2007, available at [http://www.governmentexecutive.com/dailyfed/1007/101607b1.htm], visited June 18, 2008.

According to media reports, the average raise for employees covered by the NSPS in 2008 was 7.6% — more than double the average raise for employees on the GS pay scale (3.5% — 2.5% across the board, and a 1% increase in locality pay).[99] AFGE President John Gage told the *Federal Times* that he believed the high percentage pay increases will drop in the future because it will cost too much to continue. NSPS Program Executive Officer Mary Lacy responded by saying the pay system does not cost more to run because some employees get no pay increases, while others receive large ones.[100] In other media reports, unions criticized NSPS for its lack of transparency. Greg Junemann, president of the International Federation of Professional and Technical Engineers told *Government Executive* that, "Defense is intentionally misleading employees by simply releasing a [pay raise] number without releasing the data that supports their number. Congress should ask the DOD to release any and all data relating to their 7.6% payout."[101]

The Government Accountability Office released a report on NSPS in September 2008 stating that DOD had "taken some steps to implement internal safeguards to ensure that NSPS is fair, effective, and credible," but added "some safeguards could be improved."[102] Specifically, GAO cited nine "safeguards" currently in place that aim to improve NSPS operation, including linking "employee objectives and the agency's strategic goals and mission," and requiring "ongoing performance feedback between supervisors and employees."[103] GAO added that DOD could improve the implementation of some of the safeguards by having an uninvested third-party analysis performed on NSPS's pay determinations as well as requiring publication of department-wide rating results to increase the system's transparency. Additionally, the report recommended DOD give pay pool administrators and supervisors more guidance on rating employees "appropriately" and charged DOD with creating a plan to combat the increasingly negative perception employees have of NSPS.[104]

Bradley Bunn responded to GAO's recommendations on behalf of DOD saying "the [d]epartment does not concur with all the finding and recommendations in the ... report" but "[a]s we have implemented NSPS, we have heard many of the same concerns as your auditors and have attempted to differentiate between those that warrant prompt action, and those that reflect the uncertainty and skepticism that

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[99] Stephen Losey, "DOD hands out bigger raises," *FederalTimes.com*, Feb. 11, 2008, available at [http://www.federaltimes.com/index.php?S=3349297], visited June 18, 2008.

[100] Ibid..

[101] Brittany Ballenstedt, "Management Matters: Pay Potential," *Government Executive*, April 23, 2008, available at [http://governmentexecutive.com/dailyfed/0408/042308mm.htm], visited June 17, 2008.

[102] U.S. Government Accountability Office, *Human Capital: DOD Needs to Improve Implementation of and Address Employee Concerns about Its National Security Personnel System*, GAO Report GAO-08-773, Sept. 2008, p.3.

[103] Ibid., pp. 5-6.

[104] Ibid., p. 42,

typically accompany major changes."[105] Further, DOD disagreed with GAO's recommendation to require third-party analysis of pay pool decisions, saying that NSPS was "fair, equitable, and based on employee performance," and had clear grievance procedures in place for an employee who disagreed with his or her rating. DOD also disagreed with GAO's assertion that some rating scores may not have made "meaningful distinctions" among employees' performances.[106] GAO agreed that it should publish its agency-wide rating results, and said it would take steps to accomplish that goal.[107]

Concluding Observations

Members of Congress created NSPS and granted DOD pay flexibilities to run the performance-based system, and they may, therefore, choose to maintain close oversight of its implementation through the continuation of committee hearings. Members may remain interested in ensuring that DOD maintains a transparent and fair pay system that is trusted by administrators, supervisors, and employees. Members may also choose to continue to ensure that NSPS maintains transparency and appropriately trains both managers and employees who are covered by the system.

Unions have, historically, not favored pay-for-performance systems, and NSPS is no exception. Congress has forced DOD to collectively bargain with its employees, and brought NSPS under government-wide labor-relations rules. Members of Congress may continue to use NSPS as a model — evidencing both good and bad experiences — for other agencies that may transition to a performance-based pay system. NSPS has faced and solved many challenges in its attempt to attract and retain a high-quality workforce. Overall, NSPS may serve to demonstrate whether performance-based pay systems can work in certain large federal agencies.

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[105] Ibid., p. 69.

[106] Ibid., p. 72,

[107] Ibid.