Dismantling the Civil Service

Introduction

Since September 11, 2001, the Bush Administration has taken every opportunity available to advocate for a profound erosion of civil service protections and collective bargaining rights for federal employees. First, the Bush Administration reluctantly agreed that the terrorist attacks necessitated federalizing airport security functions, but they also insisted that the legislation not allow security screeners the rights and protections normally provided to federal employees. Consistent with this position, then Under Secretary of TSA Admiral James Loy issued a decision on January 8, 2003 which denied the right to collective bargaining to all airport security screeners. AFGE subsequently filed suit in federal district court to protest this action, but the courts have to date upheld the Bush Administration. (See Issue Paper entitled "Transportation Security Administration" for more detail.)

In 2002, the Bush Administration reluctantly agreed with Senator Joseph Lieberman that the creation of a Department of Homeland Security (DHS) was necessary. However, the Bush Administration insisted on a *quid pro quo* for that acquiescence; specifically, that federal employees who were transferred into the new department would not be guaranteed the collective bargaining rights they had enjoyed since President Kennedy was in office. In addition, the Bush Administration insisted that the legislation which was eventually signed into law exempt the DHS from compliance with major chapters of Title 5 of the U.S. Code, including pay, classification, performance management, disciplinary actions and appeal rights, as well as collective bargaining rights. AFGE filed a lawsuit challenging the Department's final regulations. On August 12, 2005, Federal District Court Judge Rosemary Collyer ruled that major portions of the DHS regulations were illegal, and enjoined the labor relations system. On June 27, 2006, the Court of Appeals upheld her decision.

In 2003, then Secretary of Defense Donald Rumsfeld insisted that the Defense Authorization bill include similar provisions which attacked the civil service protections and collective bargaining rights of 700,000 Department of Defense civilian employees. Despite months of debate over serious objections raised by AFGE and Representatives and Senators from both parties, the Department was granted the ability to write regulations creating a new personnel system. The regulations eliminated many civil service protections and some collective bargaining rights from DoD civilians. In November 2005, AFGE and its union coalition partners filed a lawsuit to enjoin implementation of the labor relations and appeals sections of DoD's final National Security Personnel System regulations. On February 27, 2006, Federal District Court Judge Emmett G. Sullivan ruled illegal several key labor-management components of the new system, including collective bargaining and independent third-party review of labor-management disputes. The case is currently on appeal.

Department of Homeland Security

On November 25, 2002, President Bush signed into law H.R. 5005, the bill creating the Department of Homeland Security (DHS). This law has combined 22 federal agencies and 170,000 employees, over 30,000 of whom are represented by AFGE. Most of these employees had been working for the Immigration and Naturalization Service (INS) as Border Patrol Agents, Immigration Inspectors, Special Agents, and Detention and Deportation Officers. AFGE-represented employees from the Coast Guard, the Federal Emergency Management Agency, the Animal and Plant Health Inspection Service (formerly under the Department of Agriculture), the Federal Protective Service, the Chemical, Biological, Radiological and Nuclear Response Assets division of the Department of Health and Human Services, and the Plum Island Animal Disease Center were also brought into DHS.

Collective Bargaining Rights

One of the most contentious issues in the Congressional debate on the creation of the DHS related to the authority of the President to deny collective bargaining rights to employees, subdivisions and agencies engaged in national security work. President Bush used this authority early in 2002 to prevent employees of the U.S. Attorneys' offices from organizing. Both because of this action and fears that the President would abuse this power by excluding all unions from the DHS, AFGE spearheaded an effort in Congress to limit this authority. Despite achieving success in making collective bargaining rights a central issue in the debate, the Republican takeover of the Senate in the 2002 election effectively eliminated hopes of any significant change in the President's authority in this area. How President Bush chooses to exercise the power to exclude unions from all or part of the Department has been clearly indicated in his December 2005 Executive Order eliminating collective bargaining rights for all employees of the Office of Investigation in Immigration and Customs Enforcement (ICE).

Personnel Flexibility Provisions

An equally contentious issue during the debate on homeland security in 2002 concerned the supposed need for additional personnel flexibilities in connection with managing employees of the DHS. Section 841 of the Act authorizes the establishment of a new Human Resource Management System and provides the Administration with the ability to modify Title 5 of the United States Code in each of the following areas: pay, classification, performance management, disciplinary actions, appeals, and labor-management relations.

The new law created a process to allow employee collaboration in the development of the new system, but left the Secretary of DHS with the final

authority to impose changes over objections from unions or other employee representatives. In 2003, AFGE and representatives from the Office of Personnel Management (OPM) and DHS spent nine months exploring options and debating proposals to address pay, classification, performance management, disciplinary actions, appeals and labor-management relations. This was followed by a statutory "meet and confer" process over the regulations DHS proposed. DHS published its final regulations on February 1, 2005. AFGE and others sued to block implementation, and in August 2005, Federal Judge Rosemary Collyer ruled that major portions of the DHS regulations, including those involving collective bargaining, were an illegal violation of the terms set forth in the Homeland Security Act. That decision was upheld by the Court of Appeals, and the labor relations system remains enjoined.

Collective Bargaining

The DHS personnel regulations transfer responsibility for adjudicating collective bargaining disputes from the Federal Labor Relations Authority (FLRA) and the Federal Service Impasses Panel (FSIP) to an internal DHS Labor Relations Board, whose members are hand-picked by the DHS Secretary with no Senate confirmation. These members are removable only by the Secretary. Meaningful collective bargaining must have independent review and resolution of disputes. The final regulations do not provide for that and, therefore, do not provide for collective bargaining as required by the Homeland Security Act.

In addition, under the DHS personnel regulations, the scope of bargaining is so limited that unions will no longer be permitted to bargain over any issues that are even remotely related to operational matters, even though they often profoundly affect these employees who possess a great deal of knowledge about them. In addition, the final DHS personnel regulations reduce DHS' obligation to collectively bargain over the already narrowed scope of negotiable matters by making department-wide regulations non-negotiable. Collective bargaining is currently precluded only over government-wide regulations and agency regulations for which a "compelling need" exists. The final DHS personnel regulations would allow management to void existing collective bargaining agreements, and render matters non-negotiable, simply by issuing any department-wide regulation. The result is that employees will be deprived of their voice in most workplace decisions.

Employee Appeal Rights

The Homeland Security Act gave the Secretary and OPM Director authority to modify the appeals procedures of Title 5, but only in order "to further the fair, efficient and expeditious resolution of matters involving the employees of the Department." Instead, the final regulations greatly restrict due process by limiting the current authority of the Merit Systems Protection Board (MSPB), arbitrators and adjudicating officials to modify agency-imposed penalties in DHS cases to

situations where the penalty is "wholly without justification," a new standard for DHS employees that will rarely, if ever, be met.

Pay System

The DHS personnel regulations provide very little detail about the new pay system for DHS employees, and leave broad discretion in every area. This raises the real possibility that the salaries of some employees will unfairly lag behind those of other employees in the Federal Government, making it extremely difficult to attract and retain high-quality employees.

AFGE strongly believes that all DHS employees under the new pay system must have at a minimum the guarantee of comparability with employees under the current General Schedule pay system. Without such a guarantee, once the new system is implemented and experienced employees start heading for the exit doors, it will be impossible to replace their expertise. The employees of the DHS will quietly, one by one, leave to pursue careers in other agencies that will treat them with the dignity and fairness that they deserve. The real losers in this ill-advised experiment will be American citizens who are looking to their government for protection.

Conclusion

Congress should restore to DHS employees the important rights and protections eliminated by the new personnel regulations promulgated by the Department. In particular, they should restore due process and collective bargaining rights to DHS employees. In addition, they should ensure that the new pay system to be developed by the Department will not reduce overall pay levels for employees compared to those under the General Schedule in other federal agencies.

It would be a grave mistake to view the new DHS personnel system regulations simply as an arcane set of rules governing such mundane issues as pay rates, civil service protections and collective bargaining rights for employees. To do so greatly diminishes the import of these changes on the readiness of the nation to prevent another terrorist attack or respond to natural disasters like Hurricane Katrina. Unlike most federal agencies, the core mission of DHS is the safety of the American public, and the fundamental changes to the personnel system for DHS workers must be viewed through that prism.

Without a doubt, dedicated and experienced personnel are America's most invaluable resource in the war on terror. No technology can replace their perseverance, expertise, and ingenuity. Keeping these employees motivated to remain in the service of our country is not simply a matter of fairness to them, but is also absolutely essential to the protection of our nation against the threat of terrorism and the consequences of natural disasters. To the extent that the new

DHS personnel system fails to achieve that goal, it must be modified by Congress in the interest of homeland security.

Department of Defense: National Security Personnel System (NSPS)

Background

On February 14, 2005, the Department of Defense (DoD) published draft regulations to create the National Security Personnel System (NSPS). These sweeping regulations would replace current provisions of Title 5, U.S. Code, affecting pay, classification, personnel management, employee appeal rights, and collective bargaining for 700,000 civilian employees in the Department. DoD's authority to create an alternative personnel system -- within certain parameters -- was granted under the FY 2004 National Defense Authorization Act (Public Law 108-136).

The law required the NSPS to be established jointly with unions through a "meet and confer" process. It also required union participation in any further planning or development of the system. In order to ensure that the meet and confer process did not bog down, the 36 unions representing employees in DoD formed a joint United Department of Defense Workers Coalition (UDWC). Unfortunately, despite months of meetings, DoD failed to take the process seriously, and for all practical purposes, ignored UDWC proposals. DoD made clear they simply want unlimited authority with no effective outside review. To that end, DoD's NSPS regulations, published in final form on November 1, 2005, are unilateral, arbitrary and go well beyond the original intent of the law. On November 7, 2005, ten federal employee unions jointly filed suit against the regulations, and on February 27, 2006, Judge Emmett G. Sullivan released his decision, ruling illegal several key labor-management components of the new personnel system and enjoining the agency from implementation. The case is on appeal.

Collective Bargaining Rights

Public Law 108-136 called for a new labor relations system ostensibly for DoD to engage in national level bargaining with unions, rather than negotiate the same issues at each local installation. In addition, the law addressed the need to retain an independent third party to resolve labor-management issues. AFGE strongly supported these principles.

DoD's NSPS legislative proposal, passed by the House, waived Chapter 71, the federal labor-management relations section of Title 5, U.S. Code. However, as explained by Senator Susan Collins (R-ME) on November 11, 2003, the final conference report stripped DoD's authority to waive Chapter 71 from the NSPS legislation. Instead, DoD was only authorized to make two specific modifications

to Chapter 71: to provide for national level bargaining and *independent* third party review of labor relations decisions.

Contrary to the statute, the NSPS regulations allow DoD to waive Chapter 71 in its entirety. Specifically, the regulations go beyond the concept of national level bargaining, and instead dramatically scale back the scope of collective bargaining over matters that go to the very heart of employee issues, including overtime, shift rotation, flexitime and compressed work schedules, safety and health programs, and deployment away from the regular worksite. These and many other issues have been negotiated successfully for years by employee representatives with Department management officials. The result of that bargaining has been the creation of smooth systems which both ensure that the work gets done and that employees are able to enjoy safe workplaces and properly balance their work lives with their responsibilities to their families. In addition, the regulations eliminate the statutory right to collective bargaining by providing the Secretary unlimited power to remove ANY subject from bargaining by unilateral "issuance."

Further, the regulations replace the current independent, statutorily-created Federal Labor Relations Authority and the Federal Service Impasses Panel with an internal board whose members are selected solely by the Secretary. The board's composition ensures that it will lack impartiality and thus undermine the credibility of the new collective bargaining system among employees. This internal board is not independent, as required by the statute.

Employee Appeal Rights

Under Title 5, federal employees have the right to appeal an agency's adverse actions to the independent MSPB. The NSPS statute mandated that DoD protect due process rights and ensure that any new adverse action procedures be "fair" to employees. The statute authorized DoD to create a "streamlined" procedure for employee appeals.

The NSPS regulations do not streamline the process, but actually add steps to the process. Under Title 5, arbitrator decisions in discipline cases are subject to immediate judicial review. However, the NSPS regulations subject arbitrator decisions, as well as MSPB Administrative Judge (AJ) decisions (in cases where employees do not elect arbitration), to two layers of administrative review. The first review is by DoD itself and allows the Department the unilateral right to overturn the decision of the independent AJ or arbitrator before the case can even be appealed to the full MSPB. Instead, decisions will become essentially advisory subject to DoD review and then may be reviewed by the MSPB, thus reducing the rule and power of arbitrators and AJs. This is entirely insupportable and contrary to Congressional intent. Since DoD wins close to 90% of its current MSPB cases, there is simply no justification for eliminating a fair adjudicative process for employee appeals. This change will dramatically increase the MSPB workload, delay results, and cause inefficiency in the system.

Further, the NSPS regulations prohibit an AJ or arbitrator from mitigating DoD's penalty unless it is "totally unwarranted." This new standard, never before used, is clearly designed to prevent DoD from ever having a disciplinary action mitigated, no matter the circumstances.

Pay and Classification

The regulations provide insufficient detail to evaluate the Department's plan to replace the General Schedule and the Federal Wage System with pay-for-performance. Nevertheless, the Department has begun implementation of the new pay system for some employees. Until the regulations are clearer or the experience of the first "spirals" of employees in the new system is evaluated, it will be impossible for the Congress to determine whether the new system will include necessary safeguards such as transparency, accountability, and fairness, and will minimize politicization and abuse. In addition, AFGE strongly believes that this new system should not undercut federal wage levels, which are still behind those in the private sector.

Conclusion

The National Security Personnel System, envisioned by DoD regulations, is contrary to the statute. The regulations are unfair to employees, and if implemented, they will undermine the contribution to mission that DoD civilians have demonstrated so ably over the years. Congress should rewrite the statute so that this multitude of problems can be corrected.

Where AFGE Stands On These Issues

AFGE's support of collective bargaining rights and civil service protections for federal employees has never wavered. Without these rights and protections, it will be impossible for the government to attract and retain quality employees, and our democracy as well as our national security will suffer. AFGE urges all elected officials to repeal the provisions of the Homeland Security Act and the National Security Personnel System of the FY 2004 Defense Authorization Act that facilitate the removal of these rights and protections. America will not be safer if the guardians of our liberty are treated like second-class citizens, and the corruption that will be inevitable under government personnel systems that give relatively unchecked authority to political appointees and the managers they supervise will be profound.