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Docket ID: DoD-2022-OS-0117

Personnel Demonstration Project at the Army Futures Command Science and Technology Reinvention Laboratory (STRL)

Dear Ms. Saari:

These comments are submitted on behalf of the American Federation of Government Employees (AFGE), which represents over 700,000 federal and District of Columbia workers, including approximately 250,000 at the Department of Defense (DoD). They respond to the referenced docket number appearing at 87 *Fed. Reg.* 62801 (Oct. 17, 2022). We thank you for the extension of the comment period until November 30, 2022, for consideration of AFGE's views.

In summary, the proposed demonstration project at the Army Futures Command Science and Technology Reinvention Laboratory (STRL) provides conclusory rationale without supporting analysis, contains incoherent rationale, and in some cases exceeds statutory authority.

Throughout the notice, the sketchy boilerplate rationale is provided that the ostensible intent of enhancing managerial flexibilities is "to attract, motivate, train, and retain a top-performing science, technology, and modernization workforce. Unfortunately no behavioral science or management studies are cited to support this boilerplate. And in fact, there is recent research from behavioral scientists that goes in the opposite direction on what actually motivates innovative and creative output from people, and it is not performance management systems along the lines cited in the notice.

There is ample literature counter to the standard human resources (HR) consulting firm propaganda periodically published by reputable papers such as the Washington Post and the Harvard Business Review that profiles opinion pieces by social psychiatrists on what kind of "leadership" framework gets the best out of motivating people and improving their performance. Low on these lists as vehicles for motivating people and improving performance are so-called performance measurement systems, which are designed more to facilitate building a case for firing a person or taking punitive disciplinary actions against a person rather than serving as motivational frameworks used by the most effective leaders use to instill performance.



Pay banding systems are designed by lawyers and HR oriented persons who focus too much on “measurement” rather than “motivation” and “leadership.” Yes, they will give lip service to “coaching” or the more sinister sounding “performance counseling” for the workforce. A collaborative coaching style of leadership works better at motivating people to do their very best, which is all that should appropriately be asked of a person, than formalized “measurement” systems which can serve as a demotivating factor, as well as inducing selfish kinds of behaviors contrary to team-building.

In the modern workplace, enlightened managers and leaders want to motivate people to work together collaboratively and excel beyond what they imagined they could do, rather than pitting them against each other in a social Darwinian kind of system that these demonstration projects will foster. Measuring and docking individuals in a performance measurement system every time they make a mistake, or evaluating them based on a “bell curve,” is the best way of destroying morale and reducing productivity, enthusiasm, creativity and collaboration. It creates a zero sum, non-collaborative environment. The theory of these systems is that only under their pay banding framework will they be able to “attract and retain the best and brightest workers.” That is unproven by behavioral scientists. There are a lot of unused talent and abilities in our country that we do not fully harness because we write off people through performance measurement rather than lead them into excellence and achievement. This is a link to power point briefing by a Canadian consultant that nicely captures these points with some references: <http://cannexus.ca/wp-content/uploads/2014/04/Lets-Abolish-Performance-Appraisal-MarchFifteen1.pdf>

Every demonstration project generated since the "pilot" demonstration projects that laid the seeds for the discredited National Security Personnel System have been discriminatory, administratively burdensome, and counter-productive to their stated goals. Per-capita costs increased disproportionately favoring certain groups over others. A RAND review of the Acquisition Demonstration (Acq Demo) program found that “[f]emale and nonwhite employees in Acq Demo experienced fewer promotions, and less rapid salary growth than their counterparts in the GS system.” The virtues of the current system are rarely acknowledged. A Government Accountability Office (GAO) report confirmed that the federal pay system does a far better job of avoiding pay discrimination by gender than private sector pay systems that allow for broad discretion in pay-setting and pay adjustments. The GAO study (<https://www.gao.gov/assets/720/711014.pdf>) found that the gender pay gap in the federal government was \$.07 on the dollar as of 2017; similar studies of private sector gender pay gaps that adjusted for occupation and education show a gap 61% higher than the federal government’s gap: \$.18 on the dollar as of 2018 vs. \$.07. To take this out of the realm of pennies on the dollar: on average, for every \$35,000 earned by males, women in the private sector are paid \$28,700 and in the federal sector are paid \$32,550. Of course, these are broad averages and should not exist at all. But the differential in pay equity between the federal pay system and private sector discretionary pay systems is stark. This relative advantage in the area of pay equity is not the only systemic virtue of the current federal GS pay system. Its structure is designed to create a good balance among several factors: market sensitivity, career mobility, internal equity, flexibility and recognition of excellence. All of these are attributes of a functional pay system if the system receives adequate funding. However, budget politics, “bureaucrat bashing,” and lack of understanding of the statistical processes used to measure the federal-non-federal market pay gap combine to deprive a very fair system of the funds it needs to operate at an optimal level. There is no problem with the GS system that adequate funding does not solve.

There are four reasons why this *Federal Register* notice exceeds the statutory authority afforded to DoD.

First, the scope of the career fields this project applies to goes far beyond the purview of scientific and technical career fields into other administrative and professional areas.

Second, AFGE is currently participating in a Defense Business Board talent management study that is in response to directive report language from the FY 2022 National Defense Authorization Act, directed in the National Defense Authorization Act for Fiscal Year 2022.<sup>1 2</sup> Accordingly, the STRL demonstration project announced through this *Federal Register* notice is premature and should not even be considered until the Congressionally-required study is completed and acted upon by the Deputy Secretary of Defense and Congress.

Third, the FY2022 NDAA repealed the two year probationary period currently in effect within DoD, effective December 2022. The Under Secretary of Defense has not yet complied with FY 2020 statutory direction to provide to Congress a report that was completed by RAND that was coordinated with this union that includes examples of discriminatory and abusive mis-uses of the expanded probationary period, particularly against persons with disabilities, contrary to the letter and intent of the Americans with Disabilities Act.<sup>3</sup> The whole point of a probationary period is to allow management an initial

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<sup>1</sup> S. Rep. 117-39 to Accompany S 2792, National Defense Authorization Act fir Fiscal Year 2022 (Sep. 22, 2021) at p. 168.

<sup>2</sup> Department of Defense civilian workforce career developmental programs

The committee notes that skill gaps in hiring, development, and retention of personnel in Science, Technology, Engineering, Mathematics, and Manufacturing (STEMM), Cyber, Artificial Intelligence, acquisition workforce, financial management and other critical functional areas required by the National Defense Strategy (NDS) persist, even after numerous legislative initiatives that provided greater flexibility in setting the terms and conditions of employment. Each military department has created its own separate career program brands for the same kinds of skills, often with their own separate developmental paths and certification and training requirements that create a cumbersome application process and may at times impede consideration of otherwise qualified candidates for civilian jobs. The committee believes that this fragmented approach does not meet the needs of the Department. Accordingly, the committee directs the Secretary of Defense to provide a report to the Committees on Armed Services of the Senate and the House of Representatives not later than January 1, 2022, on its plan to streamline civilian personnel management across the Department of Defense (DOD) with the goal of further developing the skills the Department needs to meet the priorities of the NDS while maintaining an apolitical civilian workforce. The plan should at least address the following elements:

- (1) Emphasis on competitive hiring using objective assessments of qualifications in lieu of rigid tools for classification;
- (2) Promoting innovative management of the Federal workforce;
- (3) Using data analytics to establish a systematic process to ensure the current and future DOD workforce is aligned with the current and future mission of the Department;
- (4) Use of subject matter expert hiring panels to limit rigid assessments of qualifications;
- (5) Recognition of alternative developmental paths to establish qualifications required for positions;
- (6) Emphasis on diversity and inclusion;
- (7) Increasing use of standing registers of qualified applicants to fill open positions;
- (8) Emphasis on active recruitment methods through visits to high schools, trade schools, colleges, universities, job fairs, and community groups rather than passive recruitment through job postings; and
- (9) Utilizing standardized and uniform Government-wide job classification.

<sup>3</sup> “Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall – (1) conduct an independent review on the probationary periods applicable to Department of Defense employees under section 1599e of title 10 United States Code, and (2) submit a report on such review to the Committees on Armed Services and Oversight and Reform of the House of Representatives and the Committees on Armed Services and Homeland Security and Governmental Affairs of the Senate. (b) The review and report under subsection (a) shall cover the period beginning on the date of the enactment of such section 1599e and ending on December 31, 2018, and include the following: (1) An assessment and identification of the demographics of each Department of Defense employee who, during such period, was on a probationary period and who was removed from the civil service, subject to any

evaluation period during which an unsatisfactory employee can be terminated without cause and with minimal due process. To suggest that an extended probationary period is necessary to retain a quality workforce is both specious and an insult to the DoD workforce. The idea that Department management needs an extended probationary period is a reflection of a management philosophy that does not recognize the high costs of turnover that for-profit businesses need to take into account. Enlightened businesses that properly value human capital and the effect of turnover on the bottom line focus more on performing highly selective merit-based hiring from diverse sources and seek to retain such employees once they hire them because the costs of turnover can affect share value. The Department's business model seems to go in the opposite direction of emphasizing non-competitive hiring to expedite the hiring process and – because turnover costs apparently do not matter as much within DoD – then seeking an extended probationary period to remedy errors from careless hiring. One cannot extol the virtues of human capital planning and at the same time follow such practices. The Department's rationale for extending probation appears to be based on businesses with a less skilled workforce where turnover is much higher compared to more professional organizations. There is no justification for such a blatantly anti-civilian workforce provision which rewards management lapses and is contrary to progressive management practices for leading, motivating, recruiting and retaining a quality workforce. It is counterproductive to suggest that a highly qualified job candidate would seek to work for the Department of Defense with an expanded period when they have options to work in other federal agencies with a one-year probationary period, or for private sector employers who are motivated to reduce turnover costs and have a commitment to retaining employees. Federal employees are not enlisted like the military for extended terms of enlistment but are free to leave their jobs at any time they want. So the idea that an expanded probationary period would be an inducement for someone to work at a reinvention laboratory is absurd and incoherent, demonstrating a lack of analysis on the part of persons offering up such conclusory boilerplate rationale.

The fourth reason the STRL demonstration project exceeds the Department's statutory authority is its provision that would expand the use of direct hiring while the Under Secretary of Defense has defied Congress by submitting a statutorily non-compliant response to section 1109 of the FY 2020 NDAA. In the final analysis, use of direct hire authority, while too often authorized by law, is effectively inconsistent with merit system principles for promoting transparent, fair, and open competition. True merit-based hiring is not achievable when the STRL demonstration project permits restriction of consideration of candidates in very broad ways through direct hire processes. Despite claims to the contrary, direct hire is often a closed, virtually non-competitive program that promotes the hiring of friends and acquaintances, and allows use of other than merit based considerations in selecting employees and even candidates for consideration. Most disturbingly, direct hire allows hiring officials to restrict consideration of applicant pools to whomever they prefer. It is a quick and dirty way to quickly hire without a thorough and robust examination process, the very hallmark of a merit-based civil service system.<sup>4</sup>

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disciplinary action (up to and including removal), or who filed a claim or appeal with the Office of Special Counsel or the Equal Employment Opportunity Commission. (2) A statistical assessment of the distribution patterns with respect to any removal from the civil service during such period of, or any disciplinary action (up to and including a removal) taken during such period against, any Department employee while the employee was on a probationary period. (3) An analysis of the best practices and abuses of discretion by supervisors and managers of the Department with respect to the probationary periods. (4) An assessment of the utility of the probationary period prescribed by such section 1599e on the successful recruitment, retention, and professional development of civilian employees of the Department, including any recommendation for regulatory or statutory changes the Secretary determines to be appropriate.”

Finally, the statement that the current “system” in title 5 governing most aspects of civil service hiring and pay “does not quickly or easily respond to new ways of designing work and changes in the work itself” (87 *Fed. Reg.* 62803) is a conclusory statement not at all supported by a careful review of title 5 authorities that presently exist. Indeed, the Defense Business Board in a study recently posted on their website stated the following: “Title 5 may be unduly maligned with respect to talent management. Despite several generalizations made as part of our interviews, we did not identify a specific portion of Title 5 that inhibits DoD from achieving any of its hiring or talent management goals. *In fact, strict adherence to these laws may help, not hurt, the ability of DoD to fulfill its future needs.*”<sup>5</sup> (Emphasis added.)

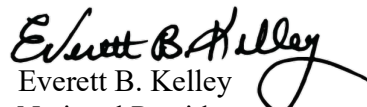
Accordingly, proceeding with the STRL demonstration project at this time is arbitrary and capricious, and the recent *Federal Register* notice should be withdrawn.

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<sup>4</sup> As the Merit Systems Protection Board (MSPB) study on use of one direct hire authority noted, “... OPM’s cited guidance specifically states that agencies should determine which candidates meet the level of proficiency needed to perform the work [under direct hire] and make selections in an order that approximates the receipt of applications, rather than trying to determine the relative degree of qualifications applicants have.” Direct-Hire Authority Under 5 U.S.C. § 3304: Usage and Outcomes.” February 2021.

<sup>5</sup> Defense Business Board, “Strengthening DoD Civilian Talent Management” (DBB FY22-03), May 12, 2022

Sincerely,

  
Everett B. Kelley  
National President