

Minority Views

Civil Service and National Security Personnel Improvement Act (H.R. 1836)

Over the past century, Congress has developed a comprehensive set of laws to prevent the patronage system that ruled the federal government during the first 100 years of the country's existence. Until the Civil Service Act of 1883, federal jobs were often awarded through the spoils system. Civil service jobs went to supporters of elected officials and loyal party members, which often led to incompetence and corruption.

With the passage of H.R. 1836, this Committee has embarked on the path of reversing many of the legislative reforms of the past century. The bill strips away fundamental rights from almost 700,000 civilian employees at the Department of Defense (DoD) – approximately one-third of all federal civilian employees. The bill also opens the door for the rest of the federal workforce to have their rights taken away as well.

We agree that DoD needs certain flexibilities to allow it operate more effectively and more efficiently. We want the strongest possible national defense and are willing to give DoD the tools it needs to modernize its workforce. However, H.R. 1836 goes well beyond those flexibilities by giving DoD a blanket waiver from large parts of the civil service laws.

In two hearings before the Committee, DoD witnesses provided virtually no details about how it would exercise these flexibilities and no rationale for why statutory protections of employee rights should be waived. Often, the only rationale DoD provided for such waivers was that the Department of Homeland Security received the same waivers last year. However, the creation of the Homeland Security Department was a unique situation involving the combination of more than 20 different agencies from different parts of the federal government. Congress reasoned that the new Secretary of Homeland Security needed flexibilities to quickly organize the different components and functions. The Homeland Security Department was an experiment, not a precedent.

The bill approved by the Committee on a party-line vote is an improvement over the proposal initially submitted by DoD. On balance, however, H.R. 1836 still gives far too little direction to DoD without providing any meaningful safeguards to employees.

Our views on specific provisions in H.R. 1836 and the Committee's process for considering the bill are set forth below.

I. EXPEDITED CONSIDERATION OF BILL

Members of the Committee on both sides of the aisle argued that a bill of this magnitude deserves careful and thoughtful consideration by Congress. However, DoD did not send its personnel proposal to Congress until April 10, 2003, and the bill was not introduced until April 29, 2003.

Prior to marking up the bill, the Committee held only one subcommittee hearing and one full committee hearing – both in the eight days prior to the markup. Eight days was not enough time to consider a bill that will affect one-third of federal civilian employees and will likely become the de facto personnel system for the entire federal government. At the subcommittee hearing, Chairwoman Jo Ann Davis stated: “We’re doing this so quickly and so fast that I can’t say I’m very comfortable. I’m not anxious to run forward and vote for something when I just don’t know what it’s going to do to 700,000 people. . . . I think we’re all concerned with the sweeping power that would be given.”

DoD also failed to consult with interested parties about its legislative proposal. DoD never formally consulted with unions representing DoD employees during the development of the proposal. We also were not briefed on the proposal until after it was submitted to Congress.

Finally, we believe this bill is premature because the personnel provisions of the Homeland Security Act – the precedent for many of the changes sought by DoD – have not been implemented. Congress should wait until the Department of Homeland Security has implemented its new personnel system, before deciding that this novel approach should be extended to other agencies.

II. PERSONNEL PROVISIONS

We believe that H.R. 1836 provides a blank check to DoD to create a new personnel system for its almost 700,000 civilian employees without providing any details about what it would do. DoD has stated only that the new personnel system would be based on: (1) existing demonstration projects within the Department; and (2) DoD’s civilian human resources strategic plan.

Existing DoD demonstration projects cover approximately 30,000 employees, many of whom are scientists and engineers, at research labs. It is an open question as to whether these limited demonstration projects can be extrapolated to a more diverse workforce that is over 20 times larger than the demonstration projects. At a minimum, more research is needed before DoD is granted such broad pay and hiring flexibilities.

DoD’s reliance on its human resources strategic plan is also problematic. In a report issued in March 2003 GAO found DoD’s strategic plan to be wholly inadequate:

The human capital strategic plans GAO reviewed for the most part lacked key elements found in fully developed plans. Most of the civilian human capital goals, objectives, and initiatives were not explicitly aligned with the overarching missions of the organizations. Consequently, DoD and the components cannot be sure that strategic goals are properly focused on mission achievement. Also, none of the plans contained results-oriented performance measures to assess the impact of their civilian human capital initiatives (*i.e.*, programs, policies, and processes). Thus, DoD and the

components cannot gauge the extent to which their human capital initiatives contribute to achieving their organizations' mission. Finally, the plans did not contain data on the skills and competencies needed to successfully accomplish future missions; therefore, DoD and the components risk not being able to put the right people, in the right place, and at the right time, which can result in diminished accomplishments of the overall defense mission. . . . Moreover, the civilian strategic plans did not address how the civilian workforce will be integrated with their military counterparts or sourcing initiatives.¹

At the Civil Service Subcommittee hearing, Comptroller General David Walker underscored these points, testifying that he had "serious concerns" about the proposal and that the Pentagon needs to improve its management systems to demonstrate that adequate safeguards would be in place to minimize the chance of abuse. Mr. Walker testified: "Unfortunately, based on GAO's past work, most existing federal performance appraisal systems, including a vast majority of DOD's system, are not currently designed to support a meaningful performance-based pay system."

Despite GAO's criticisms of DoD's human resources strategic plan – and DoD's failure to adequately address these criticisms – H.R. 1836 essentially allows the Department to implement a new personnel system modeled after the strategic plan.

Of equal concern is DoD's inability to justify the need for these sweeping flexibilities. At the subcommittee hearing, Undersecretary of Defense David Chu testified that the new personnel system would make DoD into a more "agile" force but was unable to explain how the current personnel system had in any way hindered DoD's efforts to wage war in Iraq.

Based on pre-markup negotiations and amendments passed during the markup, several changes were made to the initial proposal submitted by DoD in April. Some of these changes improved the bill. Most significantly, the number of waivable chapters under Title 5 of the U.S. Code was scaled back from 12 provisions in the original DoD proposal to the six chapters that were waived in the homeland security bill. A provision exempting the DoD personnel regulations from notice and comment requirements was dropped. A provision allowing the Defense Secretary to invoke national security and trump the Office of Personnel Management was modified to require that the national security exception be the President's decision. And standards were added to the bill to require that a performance-based pay system incorporate elements of accountability and transparency.

Nevertheless, efforts by minority members to improve the bill during the markup were rejected on party-line votes. Minority amendments were defeated that would have: required DoD to submit a legislative proposal detailing its new personnel system prior to any authorities being granted; limited any new flexibilities only to DoD managers; and

¹ General Accounting Office, *DOD Actions Needed to Strengthen Civilian Human Capital Strategic Planning and Integration with Military Personnel and Sourcing Decisions* (Mar. 2003) (GAO-03-475).

required DoD to receive an unqualified audit opinion before it could exercise any authorities.

III. LACK OF PROTECTION FOR EMPLOYEE RIGHTS

In its proposal, DoD sought a complete waiver from four chapters of the Title 5 of U.S. Code that protect fundamental rights of federal employees.

DoD sought waivers from Chapters 43, 75, and 77, which relate to due process and appeal rights. These chapters set forth basic employee protections, such as the right to have advance notice of suspension or removal, the right to respond in writing, the right to be represented by an attorney, and the right to a written decision explaining the action. In addition, these chapters set forth a procedure for employees to challenge personnel actions to the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC) and receive backpay for wrongful termination actions.

DoD also sought a waiver from Chapter 71, which relates to employee collective bargaining rights. Chapter 71 protects the rights of employees to join unions, requires that agencies and unions bargain in good faith, and prohibits discrimination based on union membership.

Even as DoD argued for a complete waiver from these chapters of Title 5, DoD witnesses continued to maintain that they were not revoking the rights contained in these chapters. Deputy Defense Secretary Paul Wolfowitz explained:

[W]e are not talking about stripping all of those basic protections of civil service. In fact, we are very much keeping the basic prohibitions on prohibitive personnel practices. We are keeping appeals process in place. We are simply making it easier to hire people that ought to be hired, easier to reward people that ought to be rewarded.

When Mr. Wolfowitz was asked about employee protections against race and sex discrimination, he explained: “We are certainly not trying to change anything in the way that people are protected against that kind of discrimination.”

Notwithstanding DoD’s reassurances, the Department’s new ability to waive Chapters 43, 75, and 77 effectively precludes employees from having a statutory remedy to redress employment discrimination or wrongful termination actions. DoD has not stated what due process and appeals provisions will be adopted in place of the current system. The amendment offered by Rep. McHugh that was adopted by the Committee is an improvement upon DoD’s initial proposal but still gives the Department too much discretion to determine what kind of due process and appeal rights will be given to their employees.

Two amendments by Rep. Norton to strengthen the due process and appeals provisions were defeated on party-line votes. However, the Committee did adopt an amendment by Rep. Norton to prohibit any DoD employee from serving on the new employee appeals panel, thus ensuring the panel's independence. Rep. Norton's amendment also required that the Department consult with EEOC in designing its personnel regulations.

With regard to collective bargaining rights, DoD was unable to justify its request for a complete waiver from Chapter 71. In only one area – the ability of DoD to bargain with unions at the national level, instead of the local level – was the Department able to identify a potential problem that needed to be addressed. Under Secretary of Defense David Chu explained: “[T]here’s no proposal here for anyone to lose his or her collective bargaining rights. . . . The proposal is designed to facilitate bargaining at the national level. That is the proposal.” Mr. Wolfowitz stated: “I read [the bill] as consolidating collective bargaining at the national level. Collective bargaining will still be very much a part of the process.”

On the issue of national-level bargaining, we are sympathetic to DoD's arguments and are willing to give DoD the requested flexibility. However, there was great skepticism about DoD waiving all collective bargaining obligations. No explanation was given for the need to waive the obligations in 5 U.S.C. §7116 that DoD not “encourage or discourage membership in any labor organization by discrimination in connection with hiring” and that DoD “negotiate in good faith with a labor organization.”

Notwithstanding DoD's statement that it welcomes national-level bargaining, H.R. 1836 provides no guarantees that DoD will engage in collective bargaining at all. The bill requires only that the Department engage in “collaboration” with unions in the development of the new personnel system. If the Defense Secretary decides to implement any part of the proposal over the objections of labor organizations, the bill gives the Secretary the discretion to do so after notifying Congress.

In those instances in which DoD chooses to engage in collective bargaining, the bill specifically removes the current requirement that any agency-union impasse be mediated by the Federal Services Impasse Panel, whose members are all appointed by the President. Without any impasse resolution procedure – and without any legal duty to bargain in good faith – the Defense Department could always bargain to impasse and then unilaterally impose its will on employees.

Rep. Lynch offered two amendments that would have restored Chapter 71 and several key collective bargaining rights. Both amendments were defeated on party-line votes.

IV. OTHER BILL PROVISIONS

A. SEC Provisions

The Securities and Exchange Commission (SEC) has sought flexibilities to hire accountants, economists, and compliance examiners to improve oversight of U.S. corporations. We support this flexibility but contend that these flexibilities should be temporary to meet current hiring needs caused by the passage of the Sarbanes-Oxley Act. An amendment by Rep. Kanjorski to sunset these flexibilities at the end of FY 2008 was defeated.

B. NASA Provisions

The National Aeronautics and Space Administration (NASA) also sought a variety of workforce flexibilities relating to greater pay and hiring authority. We believe, however, that it is premature to expand NASA's authorities at this time. An outside board headed by Admiral Harold Gehman is currently investigating the Columbia space shuttle accident and has indicated that it is examining whether workforce issues played a role in the accident. Until the board issues its report, Congress should not grant far-reaching waivers to NASA.

On the merits of NASA's request, we are most concerned about NASA's request to remove the current restriction that demonstration projects be limited to no more than 5,000 employees. This provision would allow NASA to exempt the entire agency from most federal civil service laws. We also are concerned about a provision in the bill that would allow employee exchanges between NASA and outside contractors. This provision could give contractors undue influence over NASA's operations and might create potential conflict of interest problems by allowing private sector detailees to NASA to review contract proposals from their competitors.

The NASA provisions of H.R. 1836 were improved during the markup. The Committee accepted an amendment by Rep. Jo Ann Davis to require NASA to consider employee input into any workforce flexibilities employed by the agency. The Committee also accepted an amendment by Rep. Kucinich to prohibit NASA supervisors from receiving more than 15% of the relocation, retention, and recruitment bonuses authorized under the bill.

C. Hatch Act Provision

The manager's substitute amendment contained a provision relating to the Hatch Act that was never discussed with us prior to the Committee markup. This provision is intended to help one person, Alan White, who is currently being prosecuted by the Office of Special Counsel (OSC) for an alleged Hatch Act violation. The provision would prevent OSC from prosecuting Mr. White, while also prohibiting OSC from publicly discussing the case.

We believe this is a private relief measure that has no place in this legislation. The provision also has implications beyond Mr. White by creating a loophole for federal employees to avoid Hatch Act prosecution. Moreover, the provision imposes a "gag order" on OSC that will prevent the OSC from disclosing information about its cases to

the media and public. According to OSC, disclosure of enforcement actions and accomplishments is important to deter violations and ensure accountability.

On May 13, 2003, Elaine Kaplan, the head of OSC, sent a letter to the chairman and ranking minority member of the House Armed Services Committee about this provision of H.R. 1836. In this letter, Ms. Kaplan states the provision “would significantly undermine OSC’s ability to effectively enforce compliance with the Hatch Act.” A copy of this letter is attached to these views.

D. Other Provisions

During the markup, the Committee accepted other amendments offered by minority members:

- An amendment by Reps. Bell and Lantos was passed giving federal employees called up for duty in the military reserves the difference between their reserves salary and their civilian salary.
- An amendment by Rep. Van Hollen was passed prohibiting agencies from charging fees to employees for setting up flexible spending accounts.
- An amendment by Rep. Ruppertsberger was passed requiring agencies to conduct annual employee surveys.
- An amendment by Rep. Danny Davis was passed relating to numerical targets for outsourcing.

In addition, an amendment by Rep. Van Hollen was defeated which would have provided all federal civilian employees with the same pay increases as the military.

V. CONCLUSION

Although we support giving DoD the tools it needs to modernize its workforce, we cannot support H.R. 1836 in its current form. As reported by the Committee, the bill is a blank check to DoD to develop a new personnel system for its almost 700,000 civilian employees, without providing any meaningful safeguards for those employees.