AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Eric Bunn Sr.
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February 8, 2022

The Honorable Adam Smith
Chairman
House Armed Services Committee
2216 Rayburn House Office Building
Washington, DC 20515

The Honorable Jack Reed
Chairman
Senate Armed Services Committee
Russell Senate Building, Room 228
Washington DC 20510

The Honorable Mike Rogers
Ranking Member
House Armed Services Committee
2216 Rayburn House Office Building
Washington, DC 20515

The Honorable James Inhofe
Ranking Member
Senate Armed Services Committee
Russell Senate Building, Room 228
Washington DC 20510

Dear Chairman Smith, Chairman Reed, Ranking Member Rogers, and Ranking Member Inhofe:

On behalf of the American Federation of Government Employees, AFL-CIO (AFGE) which represents over 700,000 federal and District of Columbia employees who serve the American people in 70 different agencies, including approximately 300,000 in the Department of Defense (DoD), we appreciate your support of a strong national defense and your recognition of the importance of a professional, apolitical civil service supporting our uniformed servicemen and women. As you and the Armed Services Committees begin work on the National Defense Authorization Act for Fiscal Year 2023 (NDAA FY 2023), we write to urge your support on the following issues which we will be submitting to Armed Services Members as Member Requests in accordance with each Members' prescribed formats.

The following issues are our top priorities for matters within the jurisdiction of the Armed Services Committees:

1. **Please address the following three concerns with respect to implementing Planning, Programming, Budgeting and Execution System (PPBES) reforms that may be under consideration by the Commission established in the Fiscal Year 2022 NDAA:**

    - Revive strategic planning, programming and budgeting data analytics for transparency over contract services fully burdened costs without interfering with year of execution commercial acquisitions by reviving the Enterprise Contractor Manpower Reporting Application.
    - Ensure near-, mid- and long-term strategic readiness includes data analytics for identifying DoD civilian contributions to readiness.
    - Ensure program and budget reviews challenge, compete, and prioritize contract services requirements instead of the default practice of cutting the DoD civilian workforce.

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AFGE's National President has separately addressed this issue in two detailed letters addressed to the Department of Defense and copied to the Armed Services Committees dated January 21, 2022, and January 31, 2022.

2. **Please repeal the remaining arbitrary personnel caps on headquarters functions in sections 143, 194, 7014, 8014 and 9014 of title 10.** These personnel caps mask true overhead costs by creating incentives for shell games involving creating field operating agencies that are really part of the headquarters or shifting "closely associated with inherently governmental" functions and "critical functions" to contractors. The HASC documented this problem with the Office of the Under Secretary of Defense (USD) for Policy in the Fiscal Year 2022 NDAA where staffing reductions could not practically be mitigated because the operations of these arbitrary caps would simply result in hiring more contractors to fill the gap. The GAO recently documented a similar problem: As missions grew, only 22 percent of the USD (Intelligence and Security) were civilian employees, with the remainder comprised of 78 percent "non-permanent personnel – consisting of contractors, joint duty assignees, military/reservists, and liaison officers or detailees" resulting in a loss of accountability. See, GAO 21-295, "DEFENSE INTELLIGENCE AND SECURITY: DoD Needs to Establish Oversight Expectations and to Develop Tools That Enhance Accountability (May 2021).

3. **Continue the public-private competition moratorium established in the Fiscal Year 2010 NDAA.** Despite previous Congressional direction, DoD is not prepared to conduct viable A-76 competitions. In fact, the disruptive impact of A-76 competitions on the care provided to wounded warriors being treated at the former Walter Reed Army Medical Center in February 2007 led to multiple investigations, resignations of senior officials, hearings and legislation by Congress prohibiting the conduct of A-76 competitions, initially at military medical treatment facilities, and the Department of Defense, as currently reflected in Fiscal Year 2010 NDAA section 325, and later extended to the entire federal government through annual appropriations restrictions. Section 325 of the FY 2010 NDAA made congressional findings on the flaws of public-private competitions as devised by OMB Circular A-76 and implemented within DoD. Key areas of concern included repeated GAO and DOD Inspector General findings that "savings" were overstated, largely due to double-counting of om-house overhead, requirements growth after the competitions, and failure to account for the substantial investment costs when military departments, like the Army and Marine Corps retained military end strength performing the competed functions for realignment to operational requirements, necessitating reprogramming to fund civilian hires or contractors to replace the military. The competitions were disruptive to missions and morale, often taking two years or longer. There was insufficient transparency over services contracts through contractor inventories and budget submissions, and no enforcement mechanisms in place to ensure contractors did not take on inherently governmental and other high risk or unlawful types of contract. To date, the flaws have not been addressed as exemplified by services contract management remaining on GAO's list of high risk issues in the case of DoD.

4. **Include language strengthening implementation of section 815 of the Fiscal Year 2022 NDAA depending on the Department's implementation of those provisions to enforce**

compliance with existing statutory restrictions on converting civilian positions to contract performance and to ensure the Department is complying with statutory requirements to consider civilian employees for performance of "closely associated with inherently governmental" and "critical functions." The Department's compliance with various statutory prohibitions on privatizing federal employee jobs and requirements to mitigate risks of contractor performance of "closely associated with inherently governmental" and "critical functions" by giving "special consideration" to federal employee performance of such functions, whether as new requirements or currently performed by contractors, has been inconsistent at best and generally non-complaint, as documented in numerous GAO reviews. Most recently, these problems were the basis for continuing to include DoD service contracts on GAO's high-risk list in GAO 21-267R, "SERVICE ACQUISITIONS: DoD's Report to Congress Identifies Steps Taken to Improve Management But Does Not Address Some Key Planning Issues" (Feb. 22, 2021). AFGE's National President's letter to the Deputy Secretary of Defense of January 21, 2022 documented our concerns with the Department's failures to document these requirements in an updated DoD instruction 1100.22 pertaining to Total Force Management; its failure to conduct contractor inventory reviews, as was formerly done in the Obama Administration, to ensure the fiscal year 2023 contract services budget submission has mitigated risks from over-reliance on contractor performance of "closely associated with inherently governmental" functions; and the practice of cutting civilian structure that then gets shifted to contractors who continue to be insulated from having their requirements prioritized and competed in the Department's program and budget reviews. Accordingly, we will be working with Committee staff and Members to ensure the Department's plans for implementing section 815 of the Fiscal Year 2022 NDAA are reasonably calculated to ensure the fiduciary and National Security interests of the government are not compromised through high risk or unlawful contracting of functions that should be performed by federal employees.

5. **Continue the prohibition on another round of Base Realignment and Closure Commissions (BRACs).** Another BRAC round would undermine DoD's efforts to rebuild its readiness and result in excessive unprogrammed investment costs in a politically divisive process with adverse economic impact and community dislocations. DoD has undergone five BRAC rounds from 1988 to 2005. The Cost of Base Realignment Actions (COBRA) model used by DoD has typically underestimated upfront investment costs and overstated savings (see GAO 13-149). This occurred because: There was an 86% increase in military construction costs in the last BRAC round caused by requirements "that were added or identified after implementation began." DoD failed to fully identify the information technology requirements for many recommendations. There was no methodology for accurately tracking recommendations associated with requirements for military personnel. GAO found that stated objectives of consolidating training so that the military services could train jointly failed to occur in two thirds of the realignments for this purpose (see GAO-16-45).

6. **Include language in the NDAA markup encouraging the Department to hire civilian backfills when converting military medical structure to operational requirements in Military Medical Treatment Facilities.** In the 2017 NDAA, Congress directed the

department to reorganize the Defense Health Program and provided authority to convert military medical structures to civilian performance. To that end, Congress repealed requirements that military department surgeon generals certify to Congress about the impact on readiness and quality of care before privatizing any military medical structure. The Department initially misused this authority with plans to downsize both military and civilian structures in military medical treatment facilities. For any function that did not involve a military occupational specialty that was deployable into combat zones, the administration planned to shift care into already oversaturated local TRICARE markets. The effects of these actions have degraded the quality and level of health care provided to military beneficiaries and their families because the local markets, as Congress and the GAO found, lack the capacity to provide this care. These local health care network capacity problems were exacerbated further by the COVID-19 pandemic. Recognizing these concerns, the Armed Services Committees and Defense Appropriators slowed down the Defense Health Reorganization with various reporting requirements and GAO reviews. However, neither the Congress, nor Department have sufficiently considered a course of action that would have significantly mitigated the risks of this reorganization, that is, making a reasonable effort to backfill planned realignments of military medical structure with civilian employees.

7. **Include language in the NDAA markup to encourage Commissaries to address food insecurity among military families by ending variable pricing and establishing specific pilot programs to provide free produce to eligible military families.** The commissary benefit is a crucial non-pay benefit for the military and their family members, particularly in remote and overseas locations. As a result of recent variable pricing "reforms" developed by the Boston Consulting Group, sales have dropped by nearly 25% and coupon redemption has been reduced by more than half from 113 million in 2012 to 53 million in 2017. SNAP usage has dropped by 947,000 down to 550,000. There is broad coalition support for preserving the commissary benefit led by the American Logistics Association. Accordingly, we recommend that Congress:

   - Establish pilot programs for providing free produce to military families affected by food insecurity through the Commissaries.
   - Require Commissaries to stop profiting like private businesses through variable pricing and return to the low-cost model that provided a clear benefit to military families.

8. **Include language in NDAA markup to improve sustainment planning for major weapon system acquisitions by re-establishing the manpower estimate report process prior to milestone B and C decisions on the appropriate mix between Active Component and Reserve Component military, civilian employee, host nation and contract support for operating, training, and maintaining major weapon systems.** The Fiscal Year 2017 NDAA repealed the requirement in 10 U.S.C. Section 2434 for cost estimate reports on the military, civilian, and contract support employee mix needed to operate, train, and sustain major weapon systems prior to milestone B and C decisions. This proposal would reinstate the manpower estimate reporting requirement for major weapon system acquisitions that formerly was in section 2434 of title 10. The manpower estimate report would improve strategic workforce planning requirements on the mix of active and reserve military, civilian workforce, host nation support and contractors needed to operate, train and sustain major

weapon system acquisitions. Deferring this planning until after deployment of a system may adversely affect sustainment costs, readiness, and create incentives for over-reliance on contractor sustainment of major weapon systems. This flawed repeal effort had been opposed by the Manpower and Personnel Integration community, known as MANPRINT, the Force Management communities within the Pentagon, and the HASC, but was successfully promoted by the acquisition community and the SASC. This action reflected a further erosion of USD P&R total force management responsibilities for strategic manpower planning that accelerated during the Trump Administration. The long-range strategic effects of this statutory change cause the deferral of manpower decisions until after a system is deployed and operational risks and sustainment costs have escalated.

- This encourages more performance-based logistics arrangements at the root of the F-35 sustainment cost problem where the government has had problems in gaining access to technical data from contractors in a timely way resulting in escalating sustainment costs and reduced flying hours and readiness of approximately 30 percent in flying hours.
- Another example concerns the Army STRYKER infantry carrier vehicle which initially could not deploy without contractor logistics support, prompting the Vice Chief of Staff of the Army to have to belatedly establish processes to in-source the capability to military and civilian performance.

9. **Please include language in NDAA markup terminating authority for alternative compensation frameworks by repealing authority for the Acquisition Demo project which has been documented as discriminatory to women and minorities.** A RAND review of AcqDemo in 2016 documented that “[f]emale and non-white employees in AcqDemo experienced fewer promotions and less rapid salary growth than their counterparts in the GS system. RAND further noted that its survey of participants reflected concerns with a lack of transparency over how ratings are calculated and translated to pay, how the pay pool process works, and how pay pool results are shared. Only about 40 percent of respondents to RAND’s survey perceived a link between their contributions and their rating and compensation. Finally, RAND documented a perception from many survey interviews and write-in responses that AcqDemo was overly bureaucratic, administratively burdensome and interfered with mission performance.

10. **Please include language in the NDAA markup prohibiting the misuse of term or temporary hiring authorities for enduring functions.** The Department has mis-used term and temporary hiring authorities for “enduring functions,” a practice we commented on at length in a May 5, 2021 letter. According to a GAO analysis of DOD data, during fiscal years 2016 through 2019: "approximately 35 percent of DOD term and temporary personnel were converted to permanent civilian positions within the federal government [after DoD had] increased term personnel by 40 percent." See GAO 20-532: "DEFENSE WORKFORCE: DOD Needs to Assess Its Use of Term and Temporary Appointments" (Aug 2020). A particularly egregious example of the abusive use of successive term appointments is exemplified by the practices used at the Defense Language Institute-Foreign Language Center at Monterey, CA., where highly trained foreign language faculty are discarded as if trash whenever an increased requirement occurs in a different language skill, notwithstanding that funding for foreign language training was recently identified by Senate Appropriators as

an area of special Congressional interest and enhanced funding. This use of term appointments is completely contradictory to any concept of treating employees as if they valuable human capital with skills that have an enduring value.

We are actively working with the Committees of jurisdiction on the following top priority issues to gain their support for consideration of these issues in this year's NDAA:

Please include in the NDAA markup H.R. 903, "The Rights for the TSA Workforce Act of 2021," as reported in the House Homeland Security Committee.

1. The Transportation Security Administration (TSA) workforce is among our first line defenses in the Homeland Security mission and recruitment and retention of a quality workforce is greatly enhanced by affording this workforce the same title 5 collective bargaining rights afforded to the rest of the federal government and most of the workforce in the Department of Defense. This is a bi-partisan bill that reflects TSA input. H.R. 903 honors TSOs' dedication to America's aviation security by:

    - Statutorily repealing the TSA Administrator's authority to maintain a separate and unequal personnel system that applies only to the TSO workforce;
    - Ending the current TSA personnel directives that have allowed TSA to be the judge and jury, with no neutral third-party review, in workforce disciplinary matters and providing statutory access to the Merit Systems Protection Board;
    - Requiring TSA to follow the labor-management employee relations statutes that provide workplace rights and protections to most federal employees under Title 5 of the U.S. Code; and
    - Putting TSOs on the General Schedule pay scale with regular step increases, under which most federal employees' pay is determined. While it takes 18 years to advance to the top step in the GS system, it takes **<u>30 years to advance through a TSA pay band</u>**.

2. **Please include in the NDAA markup H.R. 962 and S. 1888 "The Law Enforcement Equity Act."** Federal personnel who are primarily involved in law enforcement currently exist within a two-tier system that provides enhanced pay and benefits to some agencies but not to others. Congress must amend title 5 of the United States Code to provide all federal law enforcement professionals with equal access to the enhanced pay and benefits currently only available to certain agencies such as the FBI, the Border Patrol, and the Drug Enforcement Administration. Under present law and regulation, the definition of a "law enforcement officer" (LEO) does not include positions such as officers of the Federal Protective Service (FPS) and police officers from the Department of Defense (DOD), Veterans Affairs (VA), and the U.S. Mint – even though their duties, responsibilities, training, and physical demands are generally similar to officers who are considered LEOs. Despite the similarities, these law enforcement professionals have lower rates of pay and are not eligible for full retirement benefits until years after their LEO peers at other agencies. The law enforcement agencies with lower pay and benefits are greatly disadvantaged when recruiting and retaining professional officers and have far lower employee morale.

3. **Please include in the NDAA markup H.R. 2499 and S. 1116, "The Federal Firefighters Fairness Act."** AFGE represents federal firefighters at DoD, VA, and other agencies across the country. Too many firefighters are suffering and dying from cancer and other chronic diseases in the United States every year. Firefighters are frequently exposed to smoke, asbestos, particulate matter, and various toxic chemicals, all of which can cause cancer. Most federal firefighters are located at military facilities. These federal firefighters have specialized training to respond to emergencies involving aircraft, ships, and munitions. Federal firefighters at the Department of Veterans Affairs serve civilians and veterans including chronically ill and bedridden patients. Federal firefighters provide emergency medical services, crash rescue services, and hazardous material containment, as well as fighting fires. This bill creates a presumption under the Federal Employees Compensation program that certain forms of cancer and other chronic diseases among firefighters are the result of workplace exposure, making the victims eligible for monetary and medical benefits. AFGE urges Congress to pass this legislation without further delay.

4. **Please include in the NDAA markup S. 3423, "Chance to Compete Act of 2022." Additionally, please improve the hiring process by opposing non-competitive hiring and excepted service appointments.** Competitive service appointments are the key to a strong professional apolitical federal workforce that is free of personal or political patronage. Over the years, our highly trained apolitical competitive civil service – representing the best workers the country can produce – has helped the nation to overcome the Great Depression, put astronauts on the moon, and won the Cold War. But recent decades have witnessed an alarming erosion of the competitive civil service, as the Department of Defense and other agencies have increasingly sought to bypass competitive hiring procedures in favor of less rigorous methods. These methods have in some cases led to less qualified hiring and the recruitment of friends and political allies instead of the best candidates available to serve our country.[1] The Department too often tailors its jobs to individuals rather than competencies with redundant career programs in each military department and defense component for the same set of skills. These separate career programs create artificial barriers to promotion by imposing distinct certification and training requirements and do not sufficiently use Office of Personnel Management (OPM) granted flexibilities to substitute experience for training. The Department's emphasis on non-competitive hiring practices tends to reduce the pool of candidates. Requiring employees or external candidates to continuously check USAJOBS on a daily basis and hunt for job announcements is a transaction-heavy, burdensome process that tends to discourage candidates unless someone on the inside or management tells them about the job posting. Reinvigorating the competitive service, rather than continuing to dismantle it, is the solution to addressing the skills gaps the federal government and Department of Defense are facing because of their failure to use the objective assessment tools and flexibilities. Competitive service hiring processes, properly administered, will generate larger pools of qualified and diverse candidates than are produced with the expansion of

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[1] We understand that the preponderance of "certifications" for positions in the competitive service are based on job candidates' "self-assessments" in lieu of use of objective assessments. This has discredited the competitive service with some hiring managers who then push for expansions of the "excepted service" or for more "direct hire" authority to hire people they know. Accordingly, we support Senator Sinema's "Chance to Compete Act of 2022" (S. 3423).

excepted service and direct hiring, both of which exist to bypass normal competitive hiring channels.

5. **Please include report language in the NDAA markup requesting an Administrative Conference of United States review of the efficiency, effectiveness, and fairness from a due process perspective of DoD security clearance determinations, as well as a Federally Funded Research and Development Center (FFRDC) demographic survey on whether security clearance adjudications within DoD and other federal agencies have been applied in a discriminatory manner against protected Civil Rights categories and in favor of certain hate groups.** The Senate version of the FY 2021 and FY 2022 NDAA bill included language ("Exclusivity, Consistency and Transparency in Security Clearance Procedures, and Right to Appeal") which purported to establish transparent appeal procedures for adverse security clearance determinations. The Senate language was struck in conference in FY 2021 and not included in the final conferee agreement in the FY 2022 NDAA. The Senate language had several defects, including:

    - Lack of clarity on whether the appeal procedures could be applied to positions not requiring security clearances but merely requiring access to sensitive information;
    - No clear provision for judicial review of appeals;
    - A provision allowing an agency head to waive the procedures;
    - Summaries of testimony were permissible in lieu of verbatim transcripts.

    AFGE lost a federal court appeal involving a Defense Finance and Accounting Service (DFAS) employee whose job did not require access to classified information (only sensitive information and who was fired from their job after incurring credit problems arising from health issues while the person had inadequate insurance coverage. The dismissal was based on the application of the procedures for determining access to classified material. *See*, Kaplan *v. Conyers,* 733 F.3d 1148 (Fed. Cir. 2013) (*en banc*), cert. denied sub nom. *Northover v. Archuleta,* 134 S. Ct. 1759 (2014). Accordingly, AFGE requests directive report language in either the House or Senate version of the NDAA to obtain independent reviews of the security clearance adjudication and appeals process by the Administrative Conference of United States and a Federally Funded Research and Development Center Survey of Security Classification Procedures.

6. **Please consider the adverse effects of limited access to technical data in the organic industrial base and limits to governmental access to "certified cost and pricing data" under the Truth in Negotiations Act (TINA) resulting from recent expansions of "commercial items and services" definitions through the NDAA in sole source procurements that have contributed to escalating sustainment costs and cybersecurity risks for DoD weapon systems.** We believe these raise antitrust and competition issues that should be considered by the Judiciary Committee, and Defense Production Act issues that should be considered by the Banking and Commerce Committees before further incentivizing these expansions of so-called "commercial" acquisitions through the NDAA process.

7. **Please support H.R. 3086 and S. 1561, the "Locality Pay Equity Act of 2021,"** that would codify the directive report language from the prior two National Defense Authorization Acts

that directed Office of Personnel Management to adjust wage grade localities consistent with longstanding Federal Pay Advisory Council recommendations. Within the federal workforce, hourly and salaried workers are paid using different pay- setting systems. Hourly workers fall under the Federal Wage System (FWS) while salaried workers fall under the General Schedule (GS) pay system. Both systems allow for workers' compensation to be adjusted based on their work location to account for differences in regional economic conditions. However, current law does not require the boundaries used to set locality pay for hourly and salaried workers to align. Consequently, at some federal facilities, GS employees are included in more generous locality pay areas while FWS employees are not, despite working in the same location. This system is unfair. At these federal facilities where these disparities exist, salaried GS and hourly FWS employees live and work in the same areas and are similarly affected by the cost of living in the area, but the GS employees receive greater relative compensation than the FWS employees. As repeatedly stated in this directive report language from last year's Conferees for two, "since 2010, the Federal Prevailing Rate Advisory Committee (FPRAC) has voted three times to recommend that the Office of Personnel Management (OPM) align Federal Wage System (FWS) wage areas with General Schedule locality pay areas across the country."

For additional information or questions, please contact John Anderson, (703) 943-9438, john.anderson@afge.org. and contact Jacque Simon, (202) 639-4010 on the wage grade locality pay equity issue.

Sincerely,

Julie N. Tippens
Legislative Director

Cc: HASC
SASC