



# LEGCON ISSUE PAPERS

## AFGE 2021 Issue Papers

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## Federal Pay

### Introduction

Wages and salaries paid to federal employees are governed by statute. Two pay systems cover the vast majority of federal employees. Hourly workers in the skilled trades are paid under the Federal Wage System. Salaried workers in professional, administrative, and technical occupations are paid under the General Schedule's Locality Pay System. Both pay systems are based on the principle of local labor market comparability. Successive Congresses and administrations have failed to adhere to this principle, causing federal wages and salaries to fall far below the standards set in the private sector and state and local governments. As such, federal employees are underpaid relative to their non-federal counterparts and have experienced a decline in living standards over the past decade.

The purchasing power of federal salaries has declined by **4.9%** since 2011.

<b>YEAR</b>	<b>FEDERAL PAY RAISE</b>	<b>INFLATION</b>
2011	0	3.6%
2012	0	1.7%
2013	0	1.5%
2014	1.0%	1.7%
2015	1.0%	0
2016	1.0%	0.3%
2017	1.6%	2.0%
2018	1.8%	2.8%
2019	1.9%	2.3%
2020	3.1%	1.4%
2021	1.0%	n/a
<b>Total</b>	<b>12.4%</b>	<b>17.3%</b>

It is clear from the above that even in the midst of low inflation, federal salaries are in need of adjustment, not only in order to bring living standards of federal employees at least back to pre-recession levels, but also to assist in the recruitment and retention of a high-quality federal workforce.

### White Collar Pay

The Federal Pay Comparability Act (FEPCA) provides the basis for the operation of the pay system that covers most salaried federal employees. The law defines market comparability as 5% below salaries paid in the private sector and state and local government for jobs that are performed by federal employees. Recognizing that labor markets vary by region, FEPCA created distinct pay localities among urban areas with large concentrations of General Schedule, or salaried, federal employees.

Under FEPCA, annual pay adjustments are supposed to include two components. The first is a nationwide, across-the-board adjustment based on the Bureau of Labor Statistics' (BLS) Employment Cost Index (ECI), a broad measure of changes in pay in the private sector and state and local government. The second is the locality adjustment. Locality adjustments are based on the size of gaps between federal salaries and those paid to workers in the private sector and state and local government who perform the same jobs as federal employees. Pay gaps are calculated using the Bureau of Labor Statistics' (BLS) Occupational Employment Statistics data.

For 2021, the nationwide adjustment ECI-based adjustment should have been 2.5% (full ECI of 3.0% minus 0.5 percentage points). Locality payments should have closed remaining gaps to the law's definition of comparability, 5% below market. The law originally envisioned gradual closure of gaps until 2002 when full comparability payments would be made. However, remaining pay gaps still average around 23%. In spite of an initial proposal by the administration to freeze federal pay for 2020, an executive order providing a 1.0% across-the-board increase for 2020 was issued in August, which froze locality pay at 2020 levels.

For 2022, AFGE urges the Congress to provide a 3.2% federal salary adjustment, as described in the bill introduced by Rep. Gerry Connolly (D-Va.), chairman of the House Subcommittee on Government Operations, and Sen. Brian Schatz (D-Hawaii), the Federal Adjustment of Income Rates or FAIR Act. This bill bases its proposed increase to reflect the Federal Employees Pay Comparability Act's half-point reduction in the relevant ECI (September 2019 to September 2020 of 2.7%) plus an additional 1% to be distributed among the localities. While modest relative to the size of the pay gap between federal and non-federal salaries, this amount would begin to restore purchasing power and living standards for federal workers and would go a long way in demonstrating respect for the value of the work and dedication of the federal workforce. It would also facilitate recruitment and retention of the next generation of federal employees which is so important to the proper functioning of federal agencies.

### **Blue-Collar Pay**

Federal blue-collar workers' pay is governed by a statutory "prevailing rate" system that purports to match federal wages with those paid to workers in skilled trades occupations in the private sector. That system has never been permitted to function as intended. Instead, annual adjustments have been capped at the average adjustment provided to white collar federal employees under the General Schedule (GS). Prevailing rates are defined in the law as fully equal to market rates paid in the private sector, unlike "comparability" in the white-collar system, which is defined as 95% of market rates.

While the white-collar system uses BLS data to determine non-federal rates and thus the gap between federal and non-federal pay, the blue-collar system relies on surveys conducted by local teams comprised of representatives from the union and from management from the agency with the largest numbers of blue-collar employees in the local wage area. These local survey teams are prohibited from using any data from local building trades' unions' scales. The data are used to create wage schedules that describe local prevailing rates.

For the past two decades, Congress has added language to appropriations bills that guarantee that blue-collar federal employees receive the same annual adjustments as their white-collar coworkers. Although the boundaries of local wage areas are different from General Schedule, the language grants the same annual pay adjustment to all salaried and hourly workers within a given white-collar locality.

This policy of equal annual pay adjustments solves just one inequity between the two systems. The GS locality boundaries are drawn according to commuting rates, which is the proper way to define local labor markets. The FWS locality or wage area boundaries were drawn mostly in the 1950s, reflecting the location of large military installations that employed the majority of federal hourly workers at that time.

Today, some GS localities include several FWS wage areas. Thus, while everyone in a given GS locality receives the same annual raise, hourly workers in a given GS locality may receive vastly different base wages. For example, the salaried workers at the Tobyhanna Army Depot in Monroe County, Penn., are paid according to salaries in the New York City locality because, according to Census data on commuting, Monroe County is part of the overall New York City labor market. Yet the hourly workers there are considered to be in a different local labor market. Hourly and salaried workers at Tobyhanna who work side-by-side in the same place for the same employer and who travel the same roads to get to and from work are treated as though they are in different locations.

We strongly support the provision of a \$15 per hour minimum wage for all federal employees. There are more than 6,000 hourly federal workers and 16,000 salaried federal workers whose pay is currently below \$15 per hour. It is important that President Biden's executive order instructing agencies to develop plans to implement the \$15 per hour minimum for federal workers and federal contractors apply equally to those paid on an hourly and salaried basis.

### **Efforts to “Reform” the Federal Pay Systems**

Over the past several years, there has been a concerted effort to disparage and discredit the locality pay system for General Schedule employees. It has been derided as inflexible, antiquated, and inadequate for purposes of recruiting and retaining a talented federal workforce. The pay gap calculations based on BLS data have been ridiculed as “guesstimates” despite the fact that they are based on sound and objective statistical methods. These arguments are window-dressing for a much more malign agenda. Advocates of replacing the GS locality system with a so-called pay-for-performance system actually propose to reallocate federal payroll dollars.

The outlines for a new system that have received backing from the Trump administration and supporting organizations like the Heritage Foundation, the Cato Institute, and the government contractor Booz Allen Hamilton. They propose paying higher salaries to those at the top of the current scale and lower salaries to those in the middle and bottom. This reallocation would occur through a formal system that considered both market data by occupation and individual performance. Although reallocation of payroll is not explicit, it is implicit in the notion that absent substantial increases in resources for federal payroll, in order for some salaries to rise substantially, others would have to fall. The Trump administration used the Federal Salary

Council and the Pay Agent to advance such a plan; its reports attempted to justify lowering pay for those at the bottom of the scale in order to raise pay for those at the top.

The National Security Personnel System (NSPS), a short-lived experiment in “performance pay” in the Department of Defense under then-Secretary Rumsfeld, provides ample evidence of some of the pitfalls of such a plan. Indeed, Congress repealed authority for this system a mere three years after its inception because the discretion given to managers over pay adjustments produced larger raises for white males in the Pentagon and much lower raises for everyone else in the Department. It was found to be profoundly discriminatory in outcome with no measurable improvement in productivity or performance. Morale and trust in the integrity of the system both plummeted.

Another Trump administration strategy that has support from contractors posing as “good government” groups to justify refusal to adjust salaries is the argument that salary comparisons that compare only salaries are inadequate and that the cost and provision of non-salary benefits should be included in salary comparisons. This approach would penalize federal employees for the fact that their employer provides subsidized health insurance and retirement benefits unlike some of the largest private employers in the U.S. The fact that roughly half of American workers receive no retirement benefit from their employer<sup>1</sup> should not be grounds for denying federal employees pay adjustments that allow them to keep up with the cost of living.

The virtues of the current system are rarely acknowledged. A December 2020 study by the Government Accountability Office (GAO) confirmed that the federal pay system does a far better job of avoiding pay discrimination by gender than private-sector pay systems that allow 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 7 cents on the dollar as of 2017; similar studies of private-sector gender pay gaps that also adjust for occupation and education show the gap at 61% higher than the federal government’s gap: 18 cents on the dollar as of 2018 vs. 7 cents. 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 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.

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<sup>1</sup> <http://www.pensionrights.org/publications/statistic/how-many-american-workers-participate-workplace-retirement-plans>



**What AFGE is Asking Congress to Do:**

1. Provide a 3.2% pay adjustment for 2022. This adjustment is an amount that reflects pay adjustments in both the private sector and state and local government.
2. Resist the calls to reduce the pay and benefits of the middle- and working-class federal employees who are in the middle and lower grades of the General Schedule by reallocating their pay toward those in the top grades. No matter how strong the denials are that “reform” means reallocation to the top, what matters is the incidence, distribution, and fairness of the system’s mechanisms for pay adjustments. Any system that rewards those at the top by providing less to those at the bottom and middle of the pay distribution should be strongly opposed, no matter how compelling the obfuscating rhetoric of modernization might sound.

## Federal Retirement

### INTRODUCTION

Since 2011, federal workers have contributed more than \$195 billion to deficit reduction, including an unprecedented three-year pay freeze, a mandatory increase in employee pension contributions of 2.3% of salary for employees hired in 2013, and an additional 3.6% of salary increase in pension contributions by employees hired after 2013. This amount does not include the hardship that resulted from delayed paychecks, threats to credit ratings, and general disruption to the lives of federal employees and their families caused by the government shutdowns in 2013 and 2018-2019.

Increased mandatory pension contributions for federal employees hired after 2013 makes it all but impossible for many to take full advantage of matching funds for their Thrift Savings Plan (401(k) equivalent) accounts, resulting in a serious shortfall in their retirement income security, and a substantial lowering of their standard of living.

<b>FEDERAL WORKERS CONTRIBUTED OVER \$246 BILLION TOWARD DEFICIT REDUCTION</b>	
<b><i>3-year pay freeze (2011, 2012, 2013)</i></b>	<b><i>\$98 billion</i></b>
<b><i>2012 UI extension which increased retirement contributions for 2013 hires to 3.1%</i></b>	<b><i>\$15 billion</i></b>
<b><i>2013 lost salaries of 750,000 employees furloughed because of sequestration</i></b>	<b><i>\$1 billion</i></b>
<b><i>2013 Murray-Ryan increased retirement contributions for post-2013 hires to 4.4%</i></b>	<b><i>\$6 billion</i></b>
<b><i>2014 pay raise of only 1%; lower than baseline of 1.8%</i></b>	<b><i>\$18 billion</i></b>
<b><i>2015 pay raise of only 1%; lower than baseline of 1.9%</i></b>	<b><i>\$21 billion</i></b>
<b><i>2016 pay raise of only 1.3%; lower than baseline of 1.8%</i></b>	<b><i>\$23 billion</i></b>
<b><i>2018 pay raise of 1.9%</i></b>	<b><i>\$13 billion</i></b>
<b><i>Total</i></b>	<b><i>\$195 billion</i></b>

## **AUSTERITY BUDGET POLITICS HAS CAUSED SEVERE HARM TO FEDERAL EMPLOYEES**

AFGE rejects the notion that there should be a trade-off between funding the agency programs to which federal employees have devoted their lives, and their own livelihoods. None of this would have occurred were it not for the perverted logic of austerity budget politics. The Budget Control Act of 2011 was a grave mistake, and the spending cuts it has imposed year after year have been ruinous for federal employees, and for the government services on which all Americans depend. Spending cuts hurt not only the middle class, the poor and the vulnerable, and they also hurt military readiness, medical research, enforcement of clean air and water rules, access to housing and education, transportation systems and infrastructure, and homeland security.

### **Background**

At the end of 2013, the then House and Senate Budget Committee negotiated over a budget that would repeal sequestration for two years in order to restore most agencies' funding levels above sequestration levels. Their primary differences were on which offsets should be used to pay for the two-year repeal of sequestration. Eventually, they agreed that one offset would be a \$6 billion hit to federal employee retirement, which was achieved by increasing mandatory pension contributions/salary reductions for employees hired after 2013 to 4.4% of salary.

Using federal retirement to facilitate budget deals must not happen again. It was entirely unjustified and unjustifiable in 2013 and 2014 and the ongoing salary reductions first imposed during those years should be repealed. The \$195 billion forfeited by the middle- and working-class Americans who make up the federal workforce has been an unconscionable tax increase on just one small group of Americans. In wake of the recent tax cuts granted to wealthy individuals and corporations, AFGE urges lawmakers not to repeat the mistakes of the past and require federal employees to make up for revenue losses from those whose ability to pay far exceeds the modestly paid federal workforce.

It is important to view all proposals to cut federal retirement in the proper context. The federal retirement systems play no role whatsoever in the creation of the deficit, and reducing benefits to federal workers has made no positive effect on the budget or the economy. These proposals have no justification other than to scapegoat federal employees and retirees for an economic crisis they had no part in creating. No other group of middle-class Americans has contributed to deficit reduction the way federal employees have. Now that the deficit will balloon as a result of tax cuts to corporations and wealthy individuals, it is even more unconscionable to reduce the pensions of working-class federal employees as a means of deficit reduction. AFGE will continue to oppose any additional efforts to undermine the statutory retirement promises on which federal employees rely.

There have been repeated efforts to increase federal employee retirement contributions so that employees pay fully half of the cost of the FERS defined benefit amounts to a reduction in salary of 6.2% for those hired before 2013. These proposed cuts have been justified on the absolutely false argument that private sector workers with defined benefit pensions pay this amount of salary for similar benefits. According to the Bureau of Labor Statistics, 96% of private sector and

state and local government employees with defined benefit pensions pay nothing for this element of their compensation. That is, 96% of American workers who receive a defined benefit from their employer are not required to make any “contribution” from their salaries for this benefit.

Also, the additional 6.2% of salary that the administration would require from federal employees derives from a fundamental misunderstanding of the difference between private and public sector finance. Because federal pension assets are invested exclusively in Treasury bonds, they have a lower rate of return than private-sector pension assets that can be invested in both public and private equities. Because of this investment restriction (that AFGE strongly supports), the cost of providing/saving for a dollar of retirement income to a federal worker is higher than that for a private-sector worker. The federal government needs to save more to provide the same benefits to its employees than a private-sector employer. Federal employees should not be forced to pay this differential either.

**Congressional Action Needed:**

- Support legislation that repeals the draconian increases in employee contributions to retirement for those hired after 2012.
- Support the First Responder Fair RETIRE Act, which allows federal law enforcement officers injured on the job to retain their 6c retirement benefits.
- Oppose all additional efforts to reduce or eliminate defined benefit pensions for new or current employees.
- Oppose efforts to enact legislation that would allow the government to force employees to forfeit their earned pensions under any circumstances apart from those currently in law.

## Federal Employees Health Benefits Program

The Federal Employees Health Benefits Program (FEHBP), which covers more than eight million federal employees, retirees, and their dependents, is the nation's largest employer-sponsored health insurance program. FEHBP is also a target of those who would force federal employees to forfeit their earned benefits to finance deficit reduction. The attacks on FEHBP are likely to continue in Congress this year as any part of a focus on deficit reduction by conservative members. AFGE strongly opposes dismantling either FEHBP or Medicare, including by replacing the current premium-sharing financing formula with vouchers.

### Issue and Background - Maintain Quality and Control Escalating Employee Cost Sharing

At present the FEHBP is a cost-sharing program. On average, the government contributes approximately 70% of the premium cost for most employees, although this number can vary considerably depending on the plan chosen by a covered employee and their family. (This formula is 72% of the weighted average premium; in practice, this has meant an average contribution of 70%.)

In order to lower the overall costs of the program, the Office of Personnel Management (OPM), the federal agency administering the FEHBP, has been promoting employee enrollment into lower premium plans, e.g., the new Blue Cross/Blue Shield Blue Focus plan. While this plan and other lower premium plans may appeal to those seeking to pay lower upfront costs, they offer inferior benefits, and out-of-pocket costs to employees can be quite high, especially if an employee and his/her family experience high overall health care costs in a given year.

It is vital to federal employees that the government's current premium sharing formula for the FEHBP be maintained, and that the share of cost attributable to employee paid premiums be kept as low as possible, consistent with plans that offer comprehensive benefits. That is, FEHBP must continue to be financed with the government paying a percentage of premiums, not a flat rate or cash voucher.

The largest FEHBP plans contract with OPM on a fixed price re-determinable basis with retrospective price redetermination. This means that even as the insurance companies receive only a fixed amount per contract year per "covered participant," they are allowed to track their costs internally until the end of the year. The following year, they can claim these costs and recoup any amount they say exceeded their projections from the previous year. They are guaranteed a minimum, fixed profit each year regardless of their performance or the amount of claims they pay. The cost "estimates" on which they base their premium demands are a combination of what they report as the prior year experience plus projections for the coming year plus their minimum guaranteed profit. Clearly, there is no ability for federal employees to alter the "high cost" of these plans. It is in the FEHBP's insurance companies' interests to keep costs and profits high and benefits low.

AFGE will continue to monitor OPM's administration of the FEHBP and urges all members to actively engage with their congressional representatives to ensure that any attempts to scale back the government's FEHBP share of premiums is defeated.

## Issue and Background - Turning FEHBP into a Voucher System

In 2019, the House Republican Study Committee (RSC), a caucus of Republican members of Congress, recommended changing FEHBP into a “premium support system.” This is a euphemism for vouchers. The RSC suggests that because the government covers a set percentage of an employee’s health premium, FEHBP participants have an incentive to choose higher-priced health plans.

“The government would offer a standard federal contribution towards the purchase of health insurance and employees would be responsible for paying the rest,” the RSC plan said. “This option would encourage employees to purchase plans with the appropriate amount of coverage that fits their needs.”

What this means is that they propose turning FEHBP into a defined-contribution or voucher system. Premium support or voucher plans provide a fixed subsidy that is adjusted by an amount unrelated to changes in premiums. One proposal would adjust the voucher by the growth in Gross Domestic Product (GDP).

The voucher plan would change FEHBP by having the government provide a fixed amount of cash each year that employees could use to buy insurance on their own, instead of paying a percentage of average premiums charged by the insurance companies coordinated by the Office of Personnel Management, as is currently the case. Under the existing statutory system, if premiums go up by 10%, the government’s contribution goes up by around 10%. The FEHBP financing formula requires the government to pay 72% of the weighted average premium, but no more than 75% of any given plan’s premium. With a vouchered plan, the government’s “defined contribution” or voucher would not rise in step with premium increases and thus, every year, employees would have to pay a larger percentage of the cost of their insurance. AFGE expects congressional Republicans to “rediscover” deficit spending as an inherent evil, much as they did during the Obama administration, and push for controls on health care costs, including the FEHBP. We will carefully guard against using federal employee or retirees as scapegoats for these types of cuts.

Between 2012 and 2019, FEHBP premiums increased by about 4.0% per year. For 2020, federal employees and retirees saw an average increase in their FEHBP premiums of 5.6%. This was the largest increase since the 2018 plan year, when premiums for employees jumped 6.1%. For 2021, the average enrollee premium increase is 4.9%.

Meanwhile, the government’s share of the premium increase for 2021 is only 3.6%, meaning that once again more of the cost of health care insurance is falling on employees rather than agencies. Combining the employee increase of 4.9% with the pay raise of 1%, means that the employee premium increase percentage will be almost five times as large as the pay raise. For retirees who are entitled to the 2021 1.3% COLA, the health insurance premium increase will be a little less than four times the COLA increase.

Fortunately, employees/retirees who choose to enroll in the Federal Employees Dental or Vision plans plan saw their premiums remain essentially flat.

During the past four FEHBP premium setting years (2018, 2019, 2020 and 2021), the government's contribution has been less than the increase in the employee contribution. (In 2018, the government contribution increased only about half as much as the increase in the employee contribution. In 2019, the government's increased contribution was 20% less than the employee's increased contribution. In 2020, the government's contribution was 40% less than the increase in the employee contribution. Now in 2021, it is about 33% less than the employee contribution.) If a voucher proposal was in effect, the government's "contribution" or voucher would have gone up by GDP + 1%. During periods of slow growth, the voucher program would not cover premium increases; for example, GDP in 2015 was estimated to have grown by 2%. Adding an additional percentage point to that, the voucher would have risen by 3%, not enough to cover the 4.1% average rise in premiums over the last five years. This amounts to additional cost shifting to employees.

### **Issue and Background - Scaling Back FEHBP for Retirees**

Scaling back FEHBP for retirees is based on a Heritage Foundation proposal, which has Republican support, that shifts more federal retiree health care costs away from FEHBP. Heritage proposes that all federal retirees be required to purchase Medicare Part B insurance even if they already have better FEHBP coverage and can neither afford nor want to pay two insurance premiums instead of one. Mandatory Medicare Part B coverage would be useless to veterans who use the FEHBP in combination with Department of Veterans Affairs (VA) care to cover their costs. Heritage includes in its proposal a loss of all health insurance for retirees who refuse to pay two premiums.

AFGE strongly opposes all efforts to replace FEHBP with a voucher or "premium support" structure for health insurance. The current program already does a poor job providing affordable care to federal employees and their families, with a financing formula that allows gradual cost-shifting from the government to employees each year. Voucherizing the system would only exacerbate this problem, leading to ever-lower living standards for federal employees and retirees as the cost of health insurance continues to outpace increases in wages and salaries.

### **Congressional Action Needed to Address FEHBP Issues**

- During the past 10 years, including the three year pay freeze, federal pay rose by just 14.3% (0% for 2011-2013, 1% for 2014 and 2015, 1.3% in 2016, 2.1% in 2017, 1.9% in 2018, 1.9% in 2019, 3.1% in 2020, and 1% in 2021). But in that same nine-year period, federal employees' premiums are approximately 40% higher in dollar terms in 2021 than they were in 2012. The cost to employees of participating in FEHBP continues to rise by more than either the general rate of inflation or the rate of growth of their ability to pay (i.e., COLA growth for retirees or pay adjustment rates). FEHBP's funding structure should be maintained in its current form. All attempts to convert the formula into a voucher or "premium support system" should be rejected.

## Government-Wide Sourcing Issues

### Issue

The Office of Management and Budget (OMB) and agencies have not addressed specific problems with public-private competitions pursuant to OMB Circular A-76 that prompted a congressional moratorium on use of A-76. The moratorium was first imposed as a result of a scandal at the Walter Reed Army Hospital, when wounded warriors were provided inadequate care resulting from staffing shortages caused by A-76. Numerous GAO and DoD Inspector General audits found that A-76 competitions had substantial unprogrammed investment costs and over-stated savings, even after the establishment of a “Most Efficient Organization.” Additionally, there is a virtual absence of contractor inventories, contract services budgets, and adequate review processes to ensure that inappropriate contracts, and contracts involving inherently governmental functions are not awarded.

Many government service contracts have been found to involve “personal services,” which are unlawful under existing statutory authority for most agencies. OMB has also allowed continuing abuses to persist with contracts that are characterized as involving services that are “closely associated with inherently governmental functions.” OMB has even allowed such contracts to be classified as “commercial” in nature, a characterization criticized by both Congress and the Commission on War Time Contracting. These concerns were embodied in congressional findings with direction to OMB to revise the inherently governmental guidelines. To date, neither OMB nor any agencies have fully addressed these findings.

Sourcing of work among civil service employees, contractors, and other labor sources is affected by pro-contractor procurement policies, anti-civil service hiring limitations, and the absence of planning to encourage a strong career civil service. Also contributing to a pro-outsourcing agenda are weaknesses in agency budget development and execution and the lack of adequate compliance mechanisms with existing sourcing laws, including the current A-76 moratorium.

As a result of pro-contractor policies, Congress and the Trump administration pushed for outsourcing many medical functions at the Department of Veterans Affairs, such as critical compensation and pension examinations. This was done despite the superior quality and lower cost of having the exams performed by VA’s own clinicians. As a result, the VA has had to reperform many improperly or hastily conducted contractor provided exams, which are incentivized by contract to be performed as quickly as possible.

In a related vein, despite knowing exactly how many civil servants are employed at any given federal agency, the Government Accountability Office (GAO) continues to criticize agencies -- especially the Department of Defense -- for not even having an adequate inventory of its service contracts, let alone any idea of how many people are employed on these contracts. (GAO-17-17, DOD Inventory of Contracted Services: Timely Decisions and Further Actions Needed to Address Long-Standing Issues.)

### Background/Analysis



Sourcing of work among the federal government's civil service workforce and contractors or other sources of labor is affected by:

1. Procurement policies devised to promote contracting-out of so-called "commercial" functions – very loosely defined and without regard to sufficient oversight over costs.
2. Hiring restrictions (such as Full Time Equivalent personnel caps imposed by OMB) and limitations on insourcing disconnected from human capital planning and agency workload requirements or cost considerations.
3. The way agencies develop, defend, and execute their budgets for the civil service workforce as opposed to contractors, who are not subject to any personnel ceilings (including inventories of contractor performed work). The focus is on fully executing agency budgets and wasting resources in the fourth quarter of each fiscal year by focusing on awarding contracts to fully obligate agency funds. Once contracts are awarded, there is little concern about the cost of performance, and various "acquisition reforms" have focused on weakening oversight and audit capabilities – leaving agencies defenseless to contractors. The civilian workforce is used as an offset or billpayer for under execution of an agency's budget or to fund new requirements not fully funded by OMB or Congress. Insourcing is discouraged even when allowed by statute. Vacant civil service positions are not automatically filled but often cut during this process. Contractor inventories exclude so-called "commercial item" contracts and are otherwise curtailed and sabotaged.
4. The absence of oversight mechanisms to ensure an agency complies the A-76 moratorium and other legal limitations on contracting-out.

**Congressional Action:**

- Continue the OMB A-76 moratorium and mandate enforcement mechanisms for all statutory sourcing limitations;
- Eliminate FTE caps on civilian hiring, allow insourcing; and promote better human capital planning informed by workload and costs;
- Improve agency budgets to highlight contractor workforce costs informed by comprehensive contractor inventories.

## **Official Time is Essential to Federal Government Efficiency and Productivity**

### **Protect the use of Official Time Within the Federal Government**

Official time is a legal term that describes time spent by federal employees who volunteer to be union representatives and who are engaged in representational duties required by the Civil Service Reform Act of 1978. According to that law, the amount of official time granted by a federal agency to volunteer union representatives is subject to collective bargaining and should be granted in amounts that are “reasonable, necessary, and in the public interest.” (5 U.S. Code § 7131).

Official time is a longstanding, necessary tool that gives federal agencies and their employees the means to expeditiously and effectively utilize employee input to address mission-related challenges, as well as bring closure to conflicts that arise in all workplaces.

### **Bipartisan Congressional Coalitions Have Supported the Use of Official Time for Decades**

The Civil Service Reform Act of 1978 required federal employee unions to represent all federal employees in a bargaining unit, even employees who choose not to pay union dues, and therefore, gave unions the right to bargain over amounts of official time. Over the years, repeated legislative attempts to eliminate official time have been defeated with strong bipartisan support. During the 116<sup>th</sup> Congress, no official time legislation came to the floor for a vote in the House or Senate.

In 2018, the administration issued an executive order to eliminate federal employees’ right to bargain over this aspect of union representation. The executive order prohibited official time for negotiated grievances on behalf of employees represented by a labor organization and prohibited official time for the purpose of representing employees in negotiated grievances. The executive order also set an arbitrary limit on the number of hours of official time that agencies could grant union representatives. Congress soundly rejected the executive order with statements of bipartisan opposition.

On August 29, 2018, a federal judge ruled that the executive order was in violation of current law; however, the administration successfully appealed this decision to the U.S. Court of Appeals for the D.C. Circuit, which ruled that the District Court did not have jurisdiction to rule on the lawsuit. Thus, the executive order was in effect until 2021, when a new administration revoked the anti-official time order in an effort to restore federal employees’ collective bargaining and representation rights.

### **Official Time Legislative Background**

On April 29, 2015, Rep. Jody Hice (R-Ga.) offered an amendment to the Military Construction-Veterans Affairs Appropriations bill to eliminate official time for all Department of Veterans Affairs (VA) employee union representatives. The House of Representatives soundly rejected the

amendment by a vote of 190-232, with all Democrats and 49 Republicans voting against the elimination of official time within VA.

Official time gives federal employees the ability to provide input to improve workplace policies and procedures, as well as protection if they are discriminated against or treated unfairly. Prohibition on the use of official time eliminates basic, much-needed protections for America's public servants—federal workers who support our military, make sure the Social Security checks are sent out on time, ensure a safe food supply, enforce clean water and clean air laws, and care for wounded veterans.

### **How Official Time Works**

In the federal government union membership is optional – it is a choice. Employees join the union and pay dues only if they choose to do so. By law, federal employee unions are required to provide services to all employees in units that have elected union representation, even for those who choose not to join the union and pay dues. Federal employee unions are forbidden from collecting any fair-share payments or fees from non-members for the services the union must provide.

In exchange for the legal obligation to provide services to those who pay as well as those who choose not to pay, the Civil Service Reform Act of 1978 allowed federal employee unions to bargain with agencies over official time. Under this law, federal employees who volunteer as union representatives are permitted to use official time to engage in negotiations and perform representational duties while on duty status.

#### Legally Permitted Representational Activities are Limited to:

- Creating fair promotion procedures that require that selections be based on merit, so as to allow employees to advance their careers,
- Setting procedures that protect employees from on-the-job hazards, such as those arising from working with dangerous chemicals and munitions,
- Enforcing protections from unlawful discrimination in employment,
- Participating in improvement of work processes,
- Providing workers with a voice in determining their working conditions.

The law provides that the amount of time that may be used is limited to that which the labor organization and the agency agree is reasonable, necessary, and in the public interest. The law states that, “(a)ny activities performed by an employee relating to the internal business of the labor organization must be performed while in a non-duty status.”

Activities that may **not** be conducted on official time include:

- Solicitation of membership.
- Internal union meetings.
- Elections of officers.

To ensure its continued reasonable and judicious use, all federal agencies track basic information on official time, and submit it annually to the Office of Personnel Management (OPM), which then compiles a governmentwide report on the amount of official time used by agencies. In March 2017, OPM reported that the number of official time hours used per bargaining unit employee increased from 2.81 hours in FY 2012 to 2.88 hours in FY 2014, and that official time costs represented 1/10 of 1% of the total of federal employees' salaries and benefits for FY 2014.

### **Official Time Makes the Government More Efficient and More Effective**

Through official time, union representatives are able to work with federal managers to use their time, talent, and resources to make our government even better. Improvements in quality, productivity, and efficiency across the government would not be possible without the reasonable and sound use of official time.

Private industry has known for years that a healthy and effective relationship between labor and management improves operational efficiency and is often the key to survival in a competitive market. The same is true in the federal government. No effort to improve or sustain improvements in governmental performance will be successful if labor and management maintain an adversarial relationship. In an era of tight budgets, it is essential for management and labor to develop a stable and productive working relationship.

Union representatives and managers have used official time to transform the labor-management relationship from an adversarial stand-off into a robust alliance. If workers and managers are communicating effectively, workplace problems that would otherwise escalate into costly litigation can be dealt with promptly and more informally.

### **Official Time Produces Cost Savings from Reduced Administrative Expenses**

Union representatives use official time for joint labor-management activities that address operational, mission-enabling issues in agencies. Official time is used for activities such as joint design of training for employees on work-related subjects and the introduction of new programs and work methods initiated by the agency or by the union, or both.

Union officials use official time for routine problem-solving of emergent and chronic workplace issues. For example, union representatives use official time when they participate in agency health and safety programs operated under the Occupational Safety and Health Administration (OSHA). Such programs emphasize the importance of effective safety and health management systems in the prevention and control of workplace injuries and illnesses.

Official time is also used by union representatives participating in programs such as LEAN Six

Sigma, labor-management collaborative efforts which focus on improving quality of products as well as procedural efficiencies. For instance, union representatives have participated on official time by working with the Department of Defense to complete a department-wide performance management and recognition system and accelerate and improve hiring practices within the department.

### **Conclusion**

Congress must protect federal employees' official time rights and oppose any attempts to eliminate the use of official time within the federal government. AFGE strongly opposes any legislative effort to erode, restrict, or eliminate the ability of elected union representatives to use official time to represent both dues and non-dues paying federal employees.

## Congress Must Protect Federal Employees' Right to Choose Payroll Deduction of Union Dues

### Federal Employee Payroll Deduction of Union Dues

Federal employees in bargaining units choose whether to join the union and pay dues. Federal employee unions do not collect fair share fees. **Federal employees only pay dues if they choose to join the union.** It is both the right and choice of federal employees who have chosen to join the union to elect to have their dues deducted through the automatic payroll system. The deduction of union dues is no different from the current list of automatic payroll deductions available to federal employees that range from health insurance premiums to contributions to charitable organizations.

Federal agencies throughout the country operate under an open shop collective bargaining arrangement, established first by executive order under President Kennedy in 1962, reaffirmed by executive order under President Nixon in 1969, and finally established by statute in the 1978 Civil Service Reform Act. Under the law, if a labor union is elected by the non-supervisory employees of a federal agency, then the union is legally obligated to represent *all* the employees in that bargaining unit, whether they join the union or not. ***The employees in that bargaining unit are under no obligation to join the union, nor are they under any obligation to pay for that representation or pay any other fee to the union.*** When federal employees choose to join the union, they sign a form called an “1187” which establishes their union membership and sets up the payroll dues deduction. When federal employees choose to pay union dues, they utilize this process, one that was established by the agencies to facilitate deductions for many purposes, not just collecting union dues.

### Legislative Background

During the 114<sup>th</sup> Congress, Rep. Tom Price (R-Ga) introduced H.R. 4661, the “Federal Employees Rights Act,” which proposed elimination of automatic payroll deduction of federal union dues. During the 113<sup>th</sup> Congress, legislation was introduced to amend current law by making it illegal for federal agencies to allow federal employees who are union members to pay their dues through automatic payroll deduction. This legislation was introduced by Rep. Mark Meadows (R-N.C.), H.R. 4792, and Sen. Tim Scott (R-S.C.), S. 2436. In 2013, Senator Scott also offered a Senate floor amendment to eliminate payroll deduction of union dues. This amendment was rejected, 43 to 56.

In the 115<sup>th</sup> Congress, Rep. Todd Rokita (R-Ind.) introduced H.R. 3257, the “Promote Accountability and Government Efficiency Act.” If enacted, this legislation would have made all new federal employees “at will,” would have eliminated employee due process rights, and potentially prohibited all federal agencies from allowing voluntary payroll union dues deduction. AFGE strongly opposed this legislation. No legislation to eliminate payroll deduction of union dues advanced during the 116<sup>th</sup> Congress.

Opposition to payroll deduction of union dues is rooted in the false premise that elimination of payroll deduction would produce cost savings to the government. Since payroll deductions are

done electronically, it costs the government virtually nothing to deduct union dues. The federal government currently provides payroll deductions for the following:

- Combined Federal Campaign (Charities)
- Federal, state, and local taxes
- Federal Retirement System annuity funding
- Thrift Savings Plan (TSP) contributions and TSP loan repayments
- Federal Employees Health Benefits (FEHBP) premiums
- Supplemental private dental, vision, and long-term care insurance (these are not financed at all by the government, just facilitated through payroll deductions for premiums)
- Court-ordered wage garnishment for alimony and child support, bankruptcy, and commercial garnishment
- Flexible spending accounts for payment of health costs not covered by insurance
- Collection of debts owed to the United States
- Professional Association dues
- Personnel account Allotments (savings accounts)
- IRS Paper Levies
- Military Service Deposits

If it is wrong to provide employees with electronic payroll deductions for dues, then it is just as wrong to provide the service for these other worthy goals.

### **Conclusion**

AFGE strongly opposes any efforts in the House or Senate to eliminate the ability of federal employees to choose to have their union dues deducted from their paychecks. Any legislation that aims to eliminate payroll deduction of union dues is a blatant political attack on federal employees' wages, benefits, collective bargaining rights, and jobs. Such attacks are designed to silence the collective voice of federal employees who carry out the work of federal agencies and programs on behalf of the American people. Congress must protect federal employees' right to join a union and have their dues automatically deducted.

## Office of Personnel Management

### Background

The Office of Personnel Management (OPM) is an independent federal agency within the Executive Branch that provides agencies with broad human resources policy and services. Most important, OPM has responsibility for enforcing the policies that uphold the government's merit-based personnel system and provides merit-system oversight to federal agencies.

OPM also develops federal employee pay and benefit policy, and it administers health care, retirement, and survivor benefits for nearly nine million current and retired federal workers and their dependents.

OPM serves an important role in ensuring efficient government operations, enabling the federal government to properly serve the American people, protecting merit system personnel principles, and ensuring a high-quality, apolitical, professional workforce.

### AFGE's Requests to Congress and the Administration:

1. OPM should be transitioned from a fee-for-service entity back to an agency funded through direct appropriations (rather than the current indirect appropriations model) to ensure efficient and effective operations and comprehensive services to agencies. This restoration of OPM to its original funding structure should occur as soon as possible.

The fee-for-service model imposed on OPM in the 1990s has been a failed experiment. This model has required agencies to expend their own funding for OPM services and/or go to contractors for services that should be provided by OPM consistent with statutory intent. Restoring direct appropriations for all of OPM's statutory functions will minimize costs for the government overall and reduce reliance on costly and unaccountable contractors.

2. In order to strengthen the merit system from efforts to corrupt or otherwise politicize federal workforce policies, OPM must be recognized as the primary, if not sole, human capital resource entity for the federal government. The lack of policy consistency across the federal government threatens the merit system, and it is facilitated in part by the gradual outsourcing of OPM's core statutory functions.

Only a strong and independent OPM can ensure that each agency follows government-wide rules, policies, and administration directives. To fulfill this role, OPM's own staffing levels must be increased. Efforts to strip away or contract out OPM's functions undermines the ability of the agency to fulfill its purpose as the principal agency responsibility for overall management of the civil service and are a dangerous substitute for full staffing of OPM.



3. OPM information technology (IT) systems need investment so that extensive paper processing can be eliminated where possible. This is especially true for retirement claims. The lack of investment in OPM's IT capacity has left the agency with severely outdated and inadequate systems. Direct appropriations are needed to update OPM's IT infrastructure.
4. OPM needs to address its own challenges with regard to diversity within and among its own workforce both in Washington, D.C., and Pennsylvania.
5. The OPM guidance on implementation of Executive Order 14003 must be issued as soon as possible. Many agencies are refusing to comply with this executive order absent OPM guidance.
6. OPM must issue updated safety guidance for COVID-19.
7. The OPM director's statutory authority must be better and more fully utilized by the agency rather than delegating it to other agencies.

With regard to administrative services, OPM has delegated authority over its own facility to GSA. The previous administration moved OPM work processes to the GSA IT network. GSA's control over the OPM building alone costs an additional \$4.2 million annually, plus a potential \$10.2 million in termination fees for existing operations and maintenance contracts, according to an OPM Inspector General report dated Aug. 5, 2020. These actions must be reversed and remedied.

## **Department of Defense (DoD): Keeping Our Nation Safe and Secure**

AFGE is proud to represent 270,000 civilian employees in the Department of Defense (DoD), whose experience and dedication ensures reliable and cost-efficient support of our nation's warfighters. Our members perform a wide range of civilian functions, from maintaining weapons to overseeing contractors to guarding installations. The Pentagon's own data prove that of the department's three workforces—military, civilian, and contractor—the civilian workforce is the least costly and the most efficient, is nevertheless targeted for the largest cuts. AFGE is honored to represent civilian employees on a wide range of issues, both on Capitol Hill and within the department.

### **RESTORING SENIORITY AND VETERANS PREFERENCE AS PRIMARY RETENTION CRITERIA DURING REDUCTIONS IN FORCE AND PROHIBITING FORCED DISTRIBUTION PERFORMANCE EVALUATIONS**

#### **Issue**

Subjective performance evaluations displaced the more objective criteria of seniority and veterans' preference in the order of retention during Reductions in Force in a statutory change enacted in section 1597(f) of Title 10, U.S. Code, enacted in section 1101 of the National

Defense Authorization Act for FY 2016 (P. L. 114-92) (2016 NDAA). Performance evaluations are being implemented with forced distributions mandating “average” ratings for employees irrespective of their actual performance. Section 3502 in Title 5 currently provides the following order of retention in RIFs across the entire federal government: (1) seniority; (2) veterans preference; and (3) performance. 1597(f) of Title 10, U.S. Code, enacted in section 1101 of the National Defense Authorization Act for FY 2016 (P. L. 114-92) (2016 NDAA) provides a different order of retention for DoD. The Trump administration issued Executive Order 13839, and the Office of Personnel Management issued a proposed rule on Dec. 17, 2020, that would change the order of retention across the federation government by displacing seniority and veterans’ preference with easily manipulated subjective “performance” measures.

### **Background/Analysis**

Until 2016, the reduction in force provisions codified in section 3502 of Title 5, U.S. Code, established seniority as primary, followed by veterans’ preference, as the required order of retention during reductions in force.

In 2016, everything changed. Objective measurements of work experience (seniority and rating systems based on standards without “bell curve” ratings) and the acknowledged value of military service (veterans’ preference) were replaced with the subjective and easily manipulated criteria of “performance.” DoD components have started to implement the “New Beginnings” performance evaluation system with mandates that most employees obtain “average” ratings, misleadingly claiming this practice is consistent with evaluating an individual employee based on an objective standard when in fact it does the very opposite.

A key foundation to retaining an apolitical civil service and adhering to merit principles has been to ground retention on an employee’s proven commitment to public service, reflected both by their service as a veteran in the armed forces and the seniority of their continued employment with the federal government.

The senior military leadership of the department has testified in the past few years during Readiness depot maintenance hearings before the Armed Services Committees on the importance to readiness of retaining an experienced workforce. Losing experienced employees directly impacted workload backlogs, which had a direct impact on training and readiness of warfighting capabilities supported by these civilians. (See., e.g., HASC on Feb 7, 2017, and SASC on Feb. 8, 2018).

Respected business journals such as the “Harvard Business Review” have reported on how many performance management appraisal review systems are being abandoned by the private sector because of their expense, subjectivity, misdirection of performance measures to “activities” rather than “outcomes,” “the need for better collaboration”; “the need to attract and retain talent;” “the need to develop people faster;” and “the changing nature of work.” (See, e.g., David Rock and Beth Jones, “Why More and More Companies are Ditching Performance Ratings,” Harvard Business Review (Sep. 8, 2015).

### **Congressional Action**

1. Add a new provision prohibiting the use of appropriated funds to implement any reductions in force that fail to comply with the current order of retention of section 3502 of Title 5.
2. Repeal section 1597(f) and replace with clarification that order of retention in RIFs must follow (1) seniority; (2) veterans preference; and (3) performance. Clarify that “forced distributions” prohibited by Title 5 includes “bell curves” and similar examples.

## **RETAINING THE MORATORIUM ON PUBLIC-PRIVATE COMPETITIONS PURSUANT TO OMB CIRCULAR A-76**

### **Issue**

Despite previous Congressional direction, DoD is not prepared to conduct viable A-76 competitions. In fact, the disruptive impacts 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 typically reflected in the Financial Services appropriation for the entire government. (Note: a collateral effect from the impasse over the partial government shutdown temporarily delayed continuation of the governmentwide appropriation language.)

### **Background/Analysis**

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. These flaws included:

1. The double counting of in-house overhead costs as documented by the DoD IG in D-20090-034 (Dec. 15, 2008);
2. Failure to develop policies that ensured that in-house workforces that had won A-76 competitions were not required to re-compete under A-76 competitions a second time;
3. The reporting of cost savings were repeatedly found by the GAO and DOD IG to be unreliable and over-stated for a variety of reasons, including:
  - a. Cost growth after a competition was completed because the so-called most efficient organization and performance work statements that were competed often understated the real requirement.

- b. Military buy-back costs documented by GAO (GAO-03-214); A-76 competitions required a military department either to reduce its end strength or reprogram the funds to Operations and Maintenance appropriations in order to complete the competition.
4. As a result of these flaws, DoD was required to develop comprehensive contractor inventories, improve its service contract budgets, and to have in place enforcement tools to prevent the contracting of inherently governmental functions; to ensure that personal service contracts were not being inappropriately used; and to reduce reliance on, or improve the management over high risk “closely associated with inherently governmental” contracts.

These flaws have not been addressed and the conditions laid out in Section 325 have not been complied with (based on required GAO reviews and the lack of required DoD certifications of actions taken). In fact, June 28, 2011, is the last time DoD specifically reported out to Congress on its plans to address specifically section 325 of the FY 2010 NDAA problems.<sup>2</sup>

### Congressional Action

- Continue the public-private competition moratorium until such time as the flaws in A-76 are corrected and contractor inventories complete.
- Congress, through its oversight over the department, require the department to address the requirements of section 325 of the FY 2010 NDAA in full, followed up by a GAO review.

### **PRESERVING THE DOD COMMISSARY NON-PAY BENEFIT SAVINGS (WHICH ARE PARTICULARLY IMPORTANT IN REMOTE AND OVERSEAS AREAS) AND ITS WORKFORCE (THAT INCLUDES VETERANS AND MILITARY SPOUSES AND FAMILY MEMBERS)**

#### Issue

DoD has placed the important commissary benefit at risk. The DoD has programmed substantial reductions premised on “assumed efficiencies” from prior and on-going Defense Resale Reform initiatives, at the same time that sales have dropped by nearly 25%, from \$6 billion to \$4.7 billion, and with an apparent near-term goal of reducing the needed \$1.26 billion annual subsidy

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<sup>2</sup> Additionally, the department notified Congress on Nov. 26, 2019 that it would be transitioning from the Enterprise Contractor Manpower Reporting Application to the System for Award Management (SAMS), and that it would provide a summary of FY 2020 data by the end of the third quarter of FY 2021. The DoD notification did not explain that SAMS excludes most services contracts and does not address the analytical review requirements of section 2330a of Title 10, as the statute requiring SAMS across non-DoD agencies had a much narrower scope than the DoD statute.

long acknowledged as crucial to preserving this benefit in an ill-considered conversion to a non-appropriated fund workforce.

### **Background/Analysis**

The commissary benefit is a crucial non-pay benefit for the military and their family members, particularly in remote and overseas locations. During the implementation of recent “reforms” from 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. All this has occurred during a period when DeCA has lacked a permanent director for two years and a Defense Resale “Reform” Task Force has apparently been making plans for an eventual conversion to non-appropriated fund (NAF). The FY 2021 NDAA prohibits consolidation of DeCA with the military exchanges until the Armed Services Committees of the House and Senate receive and “accept” a report. DoD must coordinate the report with the Army, Navy and Air Force by April 1, 2021 and get it to Congress by June 1. (The Military Departments had expressed concerns with the merger recommendations previously and the Navy had even non-concurred). This new business case analysis report must address:

- Baselines for savings from cost of goods sold
- Costs of new information technology
- Cost of headquarters relocations
- Recommendations by GAO in their prior report on consolidation.

### **Congressional Action**

- Ensure DoD does not preemptively restructure DeCA, consolidate DeCA and the exchanges, or convert the DeCA workforce to non-appropriated fund prior to congressional receipt and acceptance of GAO review.
- Ensure DoD does not convert the DeCA workforce to non-appropriated fund.

## **PRESERVING THE PROVISION OF QUALITY HEALTH CARE TO MILITARY MEMBERS, THEIR FAMILIES, AND RETIREES IN MILITARY MEDICAL TREATMENT FACILITIES BY PREVENTING DOWNSIZING, PRIVATIZATION AND CLOSURE**

### **Issue**

The department is downsizing military medical treatment facilities by shifting beneficiaries to TRICARE for any functions performed by military structure that does not deploy into combat zones on the specious grounds that this will improve readiness. This forces civilian nurses to

work outside the specialties in which they have been trained and licensed, increasing risks to the quality of care provided to military beneficiaries.

### **Background/Analysis**

In the 2017 NDAA, Congress directed the department to reorganize the Defense Health Program and provided authority to convert military medical structure to civilian performance by repealing requirements for military department surgeon generals to certify to Congress about impacts on readiness and quality of care before any such conversion or privatization could take place. The Trump administration misused this authority with plans to downsize military and civilian structure in military medical treatment facilities by shifting care to local oversaturated TRICARE markets for any function that did not involve a military occupational specialty that was deployable into combat zones, claiming these actions were intended to improve readiness.

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 were found by Congress and the GAO to lack the capacity to provide this care. These local health care network capacity problems were exacerbated further by the COVID-19 pandemic.

AFGE lobbied Congress during the course of the FY 2021 NDAA to consider inclusion of H.R. 2581, “Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act of 2019,” sponsored by Rep. Schakowsky (and others), and the corresponding S. 1357 sponsored by Sen. Warren (and others) in the NDAA for FY 2021. The concept of requiring the department to develop and report a proposed quality of care standard to Congress, which must be approved by Congress, before further action can be taken to downsize or reorganize military medical treatment facilities was included in Section 716, “Modifications to implementation plan for restructure or realignment of military medical treatment facilities,” of the FY 2021 NDAA. Section 715 bars downsizing military medical structure until the department reports to Congress its rationale for determining what medical structure is related to readiness. Additionally, Section 722 of the FY 2021 NDAA requires the department develop a “COVID-19 global war on pandemics” plan. And finally, Section 757 of the FY 2021 NDAA requires a study on force mix options and service models to enhance readiness of the medical force of the Armed Forces.” The Defense portion of the omnibus appropriations bill for FY 2021 includes direction for a GAO review of the military medical treatment reorganization and similarly puts a pause of reorganization efforts until GAO findings addressed in a report to Congress.

### **Congressional Action**

- Revive requirement for military department surgeon generals to certify to Congress about impacts on readiness and beneficiary quality of care before any military medical treatment functions can be downsized and privatized.

**IMPROVING THE CIVILIAN HIRING PROCESS BY ESTABLISHING AN OBJECTIVE EXAMINATION PROCESS WITH AFFIRMATIVE ACTION FOR DIVERSITY IN COHORT HIRING WITH STANDING LISTS; OPPOSE EXPANDED RELIANCE ON DIRECT HIRE AUTHORITIES**

## Issue

Section 1109 of the FY 2020 NDAA consolidates and sunsets until Sept. 30, 2025, various direct hire authorities established on a piecemeal basis over the course of several NDAs into a single provision. Section 1109 also requires the Secretary of Defense, in coordination with OPM, to provide for an independent study to identify steps that could be taken to improve the competitive hiring process consistent with ensuring a merit-based civil service and diverse workforce in DoD and the federal government. The study is required to consider the feasibility and desirability of using “cohort hiring” or hiring “talent pools” instead of conducting all hiring on a “position-by-position basis.” The study is to proceed in “consultation with all stakeholders, public sector unions, hiring managers, career agency and Office of Personnel Management personnel specialists, and after a survey of public sector employees and job applicants.”

## Background/Analysis

AFGE’s position, in general, has been to oppose direct hiring, and waiver of the 180-day waiting period for hiring retired military into civil service positions, because these exceptions to full and fair open competition for jobs have both been used to circumvent internal competition for jobs, weaken diversity, and are incompatible with merit-based hiring in a fully open and competitive process that does not exclude otherwise qualified candidates from consideration. Sometimes, in the past, AFGE has supported, purely on an exception basis, direct hire for depots but has seen these authorities later illegitimately expanded to cover areas such as installation support services in public works offices.

Direct hire authorities work “well” for a hiring manager when one knows specifically whom one wants to hire for a job by cutting off competition and shortening the length of a hiring process. But they completely undermine recruiting the best qualified candidate from a diverse pool of qualified candidates and largely perpetuate a “closed system” of hiring in the federal government, where getting hired means “knowing someone on the inside.”

The Merit Systems Protection Board recently suggested in November 2019 that agencies can hire better, not just faster and cheaper, by bringing subject matters experts into the hiring process and “ensuring that the advertised qualifications of a job posting more accurately line up to the competencies needed to be successful.” Direct hire authorities are typically justified as a means of streamlining the lengthy hiring process to fill positions that would otherwise be filled with other labor sources (contractors or military). However, direct hire is a band-aid that fails to deal with the root causes of hiring delays and largely circumvents other congressional objectives such as veterans preference, hiring military spouses, allowing for internal competition for jobs and diversity of the workforce.

There are four root causes to hiring delays, none of which is addressed by direct hire authorities:

1. Budgetary uncertainty arising from hiring freezes, sequestration, furloughs, and arbitrary caps on the size of the civilian workforce reflected in Full-Time Equivalent projections in the budget or the number of authorized positions on an organization’s

manning documents. Virtually every management layer of the DoD can create impediments to hiring by requiring organizations to seek their approval prior to initiating a hiring action with the human resources departments.

2. Restrictions on the use of “overhires” for civilian positions even when a workload requirement exists and funding is available to a local manager to initiate hiring for that position. These restrictions create incentives for managers to use available funding for civilian employment to hire contractors instead, even for inherently governmental functions that by law, cannot be contracted out. The GAO recently found that the depots in the organic industrial base sometimes commence hiring at 80% of their authorizations on a position by position level waiting for vacancies to occur, rather than a more proactive approach of hiring at some percentage above 100% of one’s authorizations to account for hiring lag.
3. Downsizing and centralization of human resources offices, in the name of “efficiency,” which severs the relationship between hiring managers and the human resource “recruiters” who have been asked to do more with less.
4. The processing of security clearances is an entirely separate process from the hiring process, which nonetheless will impact the time it takes to fill many positions, whether or not direct hire authority is used.

### **Congressional Action**

- Oppose adding additional direct hire authorities pending the completion and coordination of study mandated by section 1109.

## **REPEAL AUTHORITY FOR ACQDEMO AND OPPOSE SIMILAR SO-CALLED PERFORMANCE MANAGEMENT SYSTEMS SIMILAR TO THE FORMER NATIONAL SECURITY PERSONNEL SYSTEM (NSPS)**

### **Issue**

The AcqDemo is infected with the same problems that occurred under NSPS, described below. Recommendations from the section 809 Panel to make its authority permanent and expand it to the entire acquisition workforce are flawed and should be opposed.

### **Background/Analysis**

A recent RAND review of the AcqDemo identified the following problems:

1. It is not clear whether the AcDemo flexibility has been used appropriately, as starting salaries for AcqDemo participants were about \$13,000 higher than starting salaries for “comparable” GS employees in DoD.



2. As occurred in NSPS and similar pay-banding structures, “female and non-white employees in AcqDemo experienced fewer promotions and less rapid salary growth than their counterparts in the GS system.”
3. Only about 40% of respondents to the RAND survey perceived a link between their contribution and compensation, a figure that “is lower than comparable survey statistics from other demonstration projects.”
4. Subject matter expert interviews and survey write-in responses opined that AcqDemo was overly bureaucratic and administratively burdensome – taking time away from actual mission performance: appraisal writing, feedback sessions, and pay pool administration, in particular, were perceived to be time-consuming and inefficient.

Additionally, the claim by AcqDemo proponents that it “links employees pay and awards to their contribution to mission outcomes rather than longevity” is unsupported. In fact, our local at APG supports AcqDemo precisely because it provided greater salary increases overall than the GS system for every employee and had good grievance outcomes, largely because of the failure of management to do all the bookkeeping required on a timely basis with respect to setting objectives and counseling, which would seem to run counter to the argument of its proponents in management and the 809 Panel that describe it as rewarding and recognizing excellent performers.

### **Congressional Action**

- Oppose expansion of AcqDemo and consider repealing authority for AcqDemo.

## **EXPANSION OF COMMERCIAL ITEMS DEFINITIONS THAT ENCOURAGE SOLE SOURCE PROCUREMENTS WITH REDUCED ACCESS TO TECHNICAL DATA RIGHTS, ORGANIC INDUSTRIAL BASE SUPPORT AND GOVERNMENT COMMAND AND CONTROL OF WEAPON SYSTEMS**

### **Issue**

In FY 2018 and 2019 NDAs, the definitions of commercial items were expanded very broadly in ways that could easily mischaracterize many weapon systems and components as commercial and thereby inappropriately shift sustainment workload from the organic industrial base to the private sector. Military leaders could lose command and control, and depots could lose the ability to perform maintenance efficiently and effectively on new weapon systems. Government access to tech data rights, cost and pricing data could be diminished and the ability of the government to insource contract logistics support could also be imperiled.

### **Background/Analysis**

The following definitional changes are of concern:

- Changing the standard for designating the level of modifications to an item that would be required to deem an item as military unique. Many weapons and components that are only suited for military purposes could be modified to no longer be compatible with their civilian origins and yet would no longer be considered military unique.
- Changing the standard from multiple state “and” local governments to multiple state “or” local governments “or” foreign governments. This greatly expands the list of military unique items that could be considered commercial even though they have never been sold in the commercial marketplace.
- A single determination for an item to become a commercial item stands as the final determination for that item for all purposes throughout the lifetime of that item for all acquisition actions unless the Secretary of Defense determines otherwise in writing.

A joint hearing between the House Armed Services Committee (HASC) Readiness and Tactical Land and Air Forces Subcommittees on Nov. 11, 2019, focused on sustainment problems with the F-35 fighter jet, which is DoD’s costliest weapons system with acquisition costs expected to exceed \$406 billion and sustainment costs estimated at more than \$1 trillion over its 60-year life cycle. According to an April 2019 GAO-19-321 audit, “F-35 Aircraft Sustainment: DoD Needs to Address Substantial Supply Chain Challenges,” the F-35 aircraft performance is “falling short of warfighter requirements - that is, aircraft cannot perform as many missions or fly as often as required ... due largely to F-35 spare parts shortages and difficulty in managing and moving parts around the world.” For example, F-35 aircraft were unable to fly nearly 30% of the May-November 2018 time period due to spare parts shortages and a repair backlog of about 4,300 F-35 parts. Certain sets of F-35 parts are acquired years ahead of time to support aircraft on deployments, but the parts do not fully match the military services’ needs because the F-35 aircraft have been modified over time. For example, 44% of purchased parts were incompatible with aircraft the Marine Corps took on a recent deployment. The GAO, the DOD IG and some in Congress during this hearing acknowledged that these problems are rooted in the government’s lack of access to intellectual property.

However, these same members of Congress do not seem to recognize that the goal post has been moved even further with additional impediments to the government obtaining access to intellectual property in response to Section 809 panel and Section 813 panel recommendations that were recently enacted by Congress. For instance, a change made in Section 865 of the FY 2019 NDAA is currently being implemented in departmental rulemaking to remove an exception for major weapon systems to the presumption, for purposes of validating restrictions on technical data, that commercial items were developed exclusively at private expense. Currently, the general presumption of private expense at DFARS 227.7103-13(c)(2)(i) is subject to an exception in subparagraph (c)(2)(ii) for certain major weapon systems and certain subsystems and components. The rulemaking deleted the exception, making the presumption apply to all commercial items. Contracting officers now will presume development at private expense “whether or not a contractor or subcontractor submits a justification in response to a contractor’s asserted restriction on rights in technical data. See 84 FR 43513 (Sept. 13, 2019).

The majority industry members of the Section 813 Panel are recommending that Congress rewrite federal acquisition law to allow for greater negotiation between government and industry on intellectual property developed with governmental funding. According to the minority members of that panel (from the government) this will “further remove any risk from the contractor and to transfer that risk to the government” by allowing “a contractor, through negotiation, to transfer all R&D risk to the government, accept billions of dollars in government funding, and retain all intellectual property rights without providing any intellectual property rights to the government.”

The GAO itself, depending on who is leading the audit and when they did the audit, have sometimes supported industry’s position on IP and sometimes supported the notion that the government needs greater access to IP. See, e.g., GAO-06-839, *Weapon Acquisition: DoD Should Strengthen Policies for Assessing Technical Data Needs to Support Weapon Systems* (July 2006); versus GAO-17-664, *Military Acquisitions: DoD? Is Taking Steps to Address Challenges Faced by Certain Companies* (July 2017).

Some of the members of Congress who expressed great concerns with these issues during the Nov. 11 hearing seem to have backed away in response to industry assurances that they are negotiating in good faith with the government to give the government access to all technical data “consistent with contractual arrangements,” which were established when the government decided to shift all sustainment responsibility to the contractor in a performance based logistics contract.

### **Congressional Action**

- Ask for additional GAO, DoD IG and FFRDC studies of the issue on the impact of recent acquisition reforms to sustainment and readiness costs, focusing on access to IP and “right to repair” issues in depot and operational environments for the military departments.
- Scale back the commercial items application to foreign military sales.
- Repeal section 865 of the FY2019 NDAA that changes the presumptions for weapon systems against governmental access to IP.

## **UNLAWFUL DIRECT CONVERSIONS TO CONTRACT AND IMPROVING COMPLIANCE WITH SOURCING STATUTES**

### **Issue**

Statutory prohibitions against unlawful service contracting are often not complied with because of ignorance of the rules, disregard of the rules, lack of penalties for non-compliance, or the absence of incentives encouraging enforcement. Some progress was made with directive report language (pp.12-13) of the House Appropriations Committee for Defense FY 2020 that provided that “appropriated funds should not be used to fund service contracts that have not complied with the planning, programming, budgeting and total force management requirements of 10 U.S.C.

Sections 2329 and 2330a.” Additionally, clarity was provided in section 817 of the FY 2020 NDAA of USD (Comptroller) and Director, Cost Analysis Program Evaluation responsibilities for the programming and budgeting of contract services, which hitherto had been mis-assigned solely to Service Requirements Review Boards under the oversight of the USD (Acquisition and Sustainment).

### **Background/Analysis**

DoD ignored FY 2015 NDAA conference report language that directed DoD to adopt a checklist used by the Army to improve consistent compliance with sourcing statutes for all contracted services, including: the statutory definitions of inherently governmental; closely associated with inherently governmental; the statutory and regulatory definition of personal services and the various statutory exceptions; the statutory restrictions on contracting firefighters and security guards; the statutory restrictions on contracting for publicity; the statutory definitions and requirements for the contracting of critical functions; and the statutory prohibitions against contracting functions except through public-private competitions and the existence of the moratorium against public-private competitions.

The GAO (GAO-16-46) found that the Army’s use of this checklist resulted in considerably more consistent and accurate identification of “closely associated with inherently governmental” functions than other Defense components, reporting nearly 80% of the \$9.7 billion it obligated for the kinds of contracting activities where such contracts would likely be found. By contrast, because they did not use the checklist, Navy, Air Force, and other Defense components identified only a small fraction of what should have been identified. The checklist requires senior leader certification of all service contract requirements as part of the procurement package processed by contracting officers and is further reviewed after a contract is awarded as part of the post-award administration and service requirements validation.

A compromise statutory provision enacted in section 852 of the FY 2018 NDAA was watered down to require “standard guidelines” for implementing the Title 10 “total force management” statutory requirements. Accordingly, the vagueness of current statutory language makes it possible for the Army to stop performing this requirement and there is no evidence that the checklist has been adopted throughout DoD given the continuing examples of inappropriate conversions to contract that continue to surface. (Currently, AFARS 5107.503(e)(ii) permits alternatives to the checklist and seems to limit consideration only to inherently governmental functions and not the full range of prohibited contracts covered in the checklist.) The checklist improves compliance because it promulgates in a single “user-friendly” document on an updated basis the applicable statutory requirements -- without modification or amendment within the department. It is far less burdensome to comply with than requiring numerous government officials to individually and periodically do legal research on every applicable statute.

The absence of penalties on the part of contractors and government decision makers when they deliberately or negligently fail to comply with these statutory limitations, and the absence of whistleblower private rights of action under the False Claims Act for contractor non-compliance, results in complete indifference to the risks born by the government. As a result, these laws are flouted without consequence.

## Congressional Action

- Within the Armed Services Committees, clarify prior statutory direction so that DoD-wide implementation of the checklist takes place without delay and that the Army not degrade this requirement's rigor and proven effectiveness. Within Defense Appropriation Subcommittees, carry forward directive report language and augment with corresponding statutory provision prohibiting contracts that violate above statutes and require use of Army checklist.
- Within the Government Oversight and Reform Committee, pursue adding whistleblower private right of action against contractors for non-compliance under the False Claims Act, with a computed statutory penalty.

## FIXING THE DAMAGE DONE TO THE SCOPE OF THE CONTRACTOR INVENTORY STATUTE IN THE FISCAL YEAR 2017 NDAA

### Issue

DoD incurs waste and promotes inefficiencies because Section 812 of the FY 2017 NDAA reduced the scope of the contractor inventory by excluding 56% of service contracts by (1) limiting the contractor inventory to four “service acquisition portfolio groups;” (2) excluding service contracts below \$3 million (the majority of contract actions for services task orders fall below \$3 million); and (3) limiting the inventory to “staff augmentation contracts” (defined as “personal services contracts”). Section 819 of the FY 2019 NDAA would have repaired all these problems based on the House Chairman’s mark, but in conference the SASC majority would only agree to expanding the contractor inventory to also cover “closely associated with inherently governmental” contracts, a move that could potentially increase the inventory by 25%. (However, the GAO documented that all but the Army have underreported “closely associated with inherently governmental” contracts, so an increase by 25% is optimistic.) Finally, the department notified Congress on Nov. 26, 2019 that it would be transitioning from the Enterprise Contractor Manpower Reporting Application to the System for Award Management (SAMS), and that it would provide a summary of FY 2020 data by the end of the third quarter of FY 2021. The DoD notification did not explain that SAMS excludes most service contracts because of its exclusions and does not address the analytical review requirements of section 2330a of Title 10, as the statute requiring SAMS across non-DoD agencies had a much narrower scope than the DoD statute.

### Background/Analysis

The USD (Acquisition and Sustainment) conceded in a February 25, 2018 contractor inventory report to Congress that the FY 2017 changes had reduced the inventory to approximately 25% or just under \$42 billion of the department’s total \$160 billion plus spend for contracted services. An October 2019 information paper prepared by the Office of the USD (Acquisition and Sustainment) misleadingly claimed that the department’s purported “implementation” of the Enterprise Contractor Manpower Reporting Application (ECMRA) modeled on a prior

successful Army initiative was unsuccessful and only had a 20% reporting compliance rate, and that therefore the Department of Defense was allegedly going to fully meet the requirements of section 2330a of Title 10 through the OMB-developed SAMS used by the rest of the government under statutory authority requiring far less coverage and analysis than currently required for DoD.

An October 2016 GAO report (GAO 17-17) amply documents the vacillations, delays and malicious implementation by USD A&S and USD P&R of “ECMRA.” The 20% compliance figure cited in their paper was foreordained by their prolonged efforts to reverse Obama-era decisions. Additionally, the 2012 Army testimony before the Senate HSGA contracting subcommittee documents the successful Army ECMRA contractor inventory initiative never implemented by OSD. The lack of a viable contractor inventory is one of the conditions underlying the continuation of the public-private competition moratorium.

Prior Army and departmental testimony, as well as several GAO and DoD IG reviews, had established the importance of the contractor inventory in determining the direct labor hours and associated costs (direct and overhead) for service contracts and for improved total force management planning. SAMS does not address this nor does the underlying statutory requirement for SAMS, which is far narrower in scope than the section 2330a requirement in Title 10.

This testimony and these audits also established that the contractor inventory was important not just for identifying the size of the contractor labor component of the total force of military, civilian and contract, but who “the customer” was (the financial accounting systems and Federal Procurement Data System-Next Generation were not designed to identify the requiring activity who was the ultimate governmental customer for contract services, but instead identified the funding source in the case of the accounting system and the contracting activity in the case of FPDS-NG). Additionally, SAMS does not address this nor does the underlying statutory requirement for SAMS, which is far narrower in scope than the section 2330a requirement in Title 10.

The lack of a comprehensive and viable contractor inventory may very well hinder efforts to improve contract services planning and budgeting. Indeed, it will be difficult to validate projections of contract spending without a credible baseline for comparison of past expenditures by requiring activity and funding source. For instance, it is only through contractor inventories that the Army was able to ascertain that over 90% of the funding source for its headquarters’ contracts resided in mission areas budgeted for outside the headquarters accounts, making any future directed congressional efforts to cut contract costs an easily evaded shell game. Again, SAMS does not address this nor does the underlying statutory requirement for SAMS, which is far narrower in scope than the section 2330a requirement in Title 10.

When implemented in the manner of the Army, industry reporting burdens were reduced and accuracy increased through accommodation of industry reporting with a bulk loader for spreadsheets and use of a centralized help desk and data management capability. None of these features exists when implemented through a standard clause, resulting in less comprehensive and accurate inventories and complaints from industry on reporting burdens largely avoided by the

Army's original method for doing the inventory. Again, SAMS does use a standard clause for reporting because very little is actually reported in comparison to what was collected by the Army in response to the broader requirements in section 2330a of Title 10.

Governmentwide, under authority of 48 CFR 52.204-14, unlike the Army inventory, "non-labor costs" are not collected, a major defect earlier noted by CBO, and the scope is limited to exclude fixed price contracts in excess of \$2.5 million and collects cost-reimbursement contracts above the simplified acquisition threshold of \$150,000. This makes SAMS, according to the CBO, virtually useless.

### **Congressional Action**

- Repeal the \$3M threshold limitation.
- Repeal the limitation to just four service portfolio groups.
- Amend the scope to include all contract services, or alternatively add to the staff augmentation (personal services) and closely associated with inherently governmental categories, critical functions and any function performed by military or civilian force structure in the past 10 years.
- Consider expanding the DoD statutory framework governmentwide in lieu of the current requirement being implemented through OFPP and FAR clause for SAMS to improve accuracy, completeness, and reduce reporting burdens.
- Reject DoD efforts to rescope or repeal section 2330a of Title 10.
- Ensure that services characterized as commercial items that correspond to the scope of reporting are included.

### **RATIONALE FOR OPPOSING ANOTHER ROUND OF BASE REALIGNMENT AND CLOSURES (BRAC) AND FOR CLARIFYING LIMITED AUTHORITY FOR BRAC WHEN SELF-NOMINATED BY STATE GOVERNOR ENACTED LAST YEAR**

#### **Issue**

Another BRAC round would undermine the DoD's efforts to rebuild its readiness and result in excessive unprogrammed investment costs in a politically divisive process with adverse economic impacts and dislocations on communities.

#### **Background/Analysis**

- Section 2702 of the FY 2021 NDAA prohibits another round of BRAC.
- 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.
- The 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.)
- Section 2702 of the FY 2019 NDAA provided authority for DoD to realign or close certain military installations when self-nominated by a state governor, subject to the Secretary of Defense, and reporting that savings will exceed the costs of implementation by the end of the fifth fiscal year after completion of the realignment. However, this provision contains a loophole that could allow activities on a base being closed to be privatized, defeating the ostensible purpose of becoming more efficient. Additionally, section 2702 did not include a process ensuring meaningful input from affected employees and the labor unions representing them.

### **Congressional Action**

- Do not authorize another BRAC round or alternative to BRAC. Carry forward section 2703 of the FY 2020 NDAA.
- Eliminate loophole in section 2702 permitting privatization and clarify process for employee and union input.

### **RESTORING GOVERNMENT ACCOUNTABILITY BY IMPROVING THE REGULATION FOR PERSONAL SERVICE CONTRACTS AND OTHER SCHEMES THAT WEAKEN NORMAL EMPLOYER-EMPLOYEE DUTIES AND LIABILITIES REQUIRED BY TITLE 5 UNITED STATES CODE**

#### **Issue**

Existing exceptions to the prohibition against personal service contracts have been poorly regulated and procurement officials have expanded their use of “other transaction authorities” when procuring services that should be performed by federal government employees to ensure appropriate accountability and transparency over governmental operations to the public.



## Background/Analysis

The Section 809 Panel on “Streamlining and Codifying Acquisitions Regulations” has recommended ending the distinction between federal employees and contractors through elimination of the general prohibition against “personal services” contracts, thereby blurring the distinctions between federal government employees who take an oath of office from private contractors who are subject to completely different motivations based on advancing private interests to seek a profit.

- The confusion and unintended consequences posed by eliminating the distinction between contractors and employees include the Federal Tort Claims Act, Freedom of Information Act, Procurement Integrity Act, civil rights enforcement concerns, Military Extraterritorial Jurisdiction Act concerns, and tax liability confusions.
- Some congressional staff see great promise in the Air Force’s so-called Kellerun Agile Methods for developing software code in a “blended workforce” of military and contractors because they believe this blending together of different workforce shortens the length of the requirement and acquisition processes, particularly when developing software.
- DoD has relied on exceptions authorizing personal service contracts to perform “inherently governmental” functions, the most egregious example documented in the Fay Report provided to Congress on the Abu Ghraib scandal. The Abu Ghraib scandal provides a case study on how the use of personal service contracts actually interfered with military unit integrity, command and control, mission performance, training requirements, and sufficient background checks. These unfortunate outcomes all resulted from the quest for streamlined procurement of personnel with reduced and insufficient oversight on what they were doing. In essence, these statutory exceptions for personal services were a delegation from Congress to the private sector to perform functions that never should have been delegated in so loose a manner in a democratic republic.
- The theory of the Section 809 panel is that “self-regulation” is sufficient, as exemplified by FAR Subpart 3.11, which requires contractors to identify and prevent personal conflicts of interest of their employees performing acquisition functions “closely associated with inherently governmental” functions. The problem with this is that the criteria and definition of “closely associated with inherently governmental functions” and similar statutory categories is highly dependent on particular facts and circumstances and not broadly understood. A GAO report (GAO-16-46) found that, “Further, components may be inaccurately reporting on the extent to which contractors were providing services that are closely associated with inherently governmental functions, a key review objective to ensure that DOD has proper oversight in place. In fiscal year 2013, the Army reported that nearly 80% of the \$9.7 billion it obligated for these types of services included closely associated inherently governmental functions. In contrast, the Navy and other DoD agencies reported about 13% of the \$10.7 billion obligated for similar contracted services included such functions.”

- Decision makers and contractors are not held accountable for the mission failures and wasteful expense that might occur as a result of their actions to ignore the limitations related to using contractors to perform inherently governmental functions, closely associated with inherently governmental functions, critical functions, or the misuse of existing authorities for personal services in Section 129b(d) or 1091 of Title 10.

### **Congressional Action**

- Reject Section 809 Panel recommendations, and any departmental recommendations based on the 809 Panel’s recommendations, to blur the distinction between contractors and federal employees.
- Direct a GAO review examining the use of existing authorities for personal services in Sections 129b and 1091 of Title 10, public-private talent exchanges, and Kellerun Agile Methods, and whether abuses provide a basis for curtailing or repealing these statutory exceptions allowing for personal service contracts.
- Establish a False Claims Act private right of action for contractor liability related to prohibitive or regulated forms of contracts and establish an Anti-Deficiency Act violation applicable to governmental decision makers for such contracts.

## **ENSURING STATUTORY DIRECTION TO PLAN, PROGRAM AND BUDGET CONTRACT SERVICES OVER THE FUTURE YEAR DEFENSE PROGRAM IS ACTUALLY IMPLEMENTED**

### **Issue**

The Department of Defense still has not fully implemented a contract services budget capturing all covered contract services as part of the president’s budget submission, required by Section 2329 of Title 10 as enacted in the FY 2018 NDAA, and has largely dodged these requirements. Directive report language in the HAC-D markup for the FY 2020 Defense Appropriation states: “Appropriated funds should not be used to fund service contracts that have not complied with the planning, programming, budgeting and total force management requirements of 10 USC Sections 2329 and 2330a.” Section 817 of the FY 2020 NDAA clarified comptroller and CAPE responsibility for these programming and budgeting requirements. The impact of this non-compliance results in wasteful contract service spending that is not subjected to the same level of scrutiny as currently is applied to the DoD civilian workforce, who become the primary area for finding offsets and reductions. This only serves to incentivize further shifts to more costly contracts while constraining the civilian workforce.

### **Background/Analysis**

- Congress initially tasked Service Requirements Review Boards (SRRBs) and the USD (Acquisition and Sustainment) to improve the planning, programming, and budgeting for services contracts requirements over the Future Year Defense Program (FYDP) in Section 2329 of Title 10, as enacted in the FY 2018 NDAA, and clarified in the FY 2019 NDAA.
- The director of Cost and Program Evaluation (CAPE) is responsible for the Program Objective Memorandum (POM) process that prioritizes resources over the FYDP, and the USD (Comptroller) is responsible for the budget submission developed from the POM process.
- No contract services budget exhibit fully compliant with section 2329 of Title 10 requirements has been submitted to Congress. During budget and posture hearings, little attention is provided by Congress over this spending, which has been estimated by Congress, the GAO, and DoD to comprise at least one quarter of DoD's top line and cost double the amount spent for weapon systems.
- These problems with service contracts planning, programming, and budgeting have not consistently been linked to the department's financial auditability plans by the department, and some congressional staff have allowed the department to get by with that poor performance.

### **Congressional Action**

- Enforce compliance with section 2329 by demanding fully compliant, comprehensive and timely contract services budget exhibits.
- Direct the GAO and DoD IG to audit compliance with HAC-D directive report language to assess if there have been fiscal violations resulting in illegal outsourcing of work or expenditure of funds on service contracts that have not complied with Section 2329 of Title 10.
- Withhold or reduce funding to degree DoD fails to document timely and full compliance in its budget submissions with Section 2329 of Title 10.

**ALTHOUGH CONGRESS SIGNIFICANTLY IMPROVED STATUTORY LANGUAGE ON PERSONNEL CAPS IN DOD, TWO ADDITIONAL CLARIFICATIONS ARE REQUIRED TO REMOVE AMBIGUITY AND CLARIFY APPROPRIATE USE OF TERM AND TEMPORARY HIRING AUTHORITIES**

### **Issue**

Section 8012 of Defense Appropriation for FY 2021 and Section 129 of Title 10 currently provides: “The management of such [DoD civilian] personnel in any fiscal year shall not be subject solely to any constraint or limitation in terms of man years, end strength, full-time equivalent positions, or maximum number of employees.” The use of the word “solely” introduces ambiguity in the meaning of the statute. Additionally, the department often uses term or temporary hires because such hires are not counted against informal personnel caps imposed during the programming process over the course of the FYDP.

## BACKGROUND/ANALYSIS

- A 2017 Defense Business Board study, “Fully Burdened and Life Cycle Costs of the Workforce,” dated Dec. 6, 2017 shows the department as spending twice as much on “service contracts” as it does on the DoD civilian workforce for roughly the same number of people.
- DoD will claim it does not constrain the civilian workforce to personnel caps because it interprets statutory prohibitions against caps as applying only once funds are made available in annual appropriations and do not apply across the FYDP.
- When the civilian workforce is arbitrarily constrained or reduced in programmatic “wedges,” this adversely affects the length of the hiring process, workload and mission requirements, readiness, and costs. When a civilian position is not filled or is cut, and the requirement remains, the work shifts to more expensive contractors or military.
- These bad business practices result in excessive levels of under-execution documented by the Government Accountability Office for the FY 2015-2019 timeframe, where civilian pay under-execution averaged \$1.8 billion overall.
- The DoD IG has documented this under-execution as being used to pay contractors instead.
- During its Program Objective Memorandum and Defense-Wide Reviews, most funding reductions or offsets are levied exclusively on the DoD civilian workforce, most recently about \$5 billion taken primarily out of Defense agencies and field activities, medical activities, and installation support functions (including first responders) to pay for more platforms.
- Contract services largely evade these programmatic drills because the so-called Service Requirements Review Boards overseen by the ASD (Acquisition and Sustainment) focus more on procurement planning for individual contract actions rather than challenging the requirement or competing it in these programmatic reviews led by the Deputy Secretary of Defense and CAPE director. (See H.R. 6395, Report 116-442, p. 167-8, July 9, 2020).
- The use of personnel caps and arbitrary programmatic “savings wedges” against the civilian workforce also adversely affects readiness. The National Commission on Military Aviation Safety final report identified the effect of arbitrary civilian reductions

on reduced military aviator training and flying hours leading to more accidents as military aviators take on the duties formerly performed by civilian employees. And the GAO recently documented that the department no longer reports borrowed military manpower in its readiness reporting systems.

- Both section 912 of the FY 2021 NDAA and the FY 2021 Omnibus Appropriation Section 8012 have clarified longstanding prohibitions against the use of appropriated funds with personnel caps by applying these restrictions to the program years of the FYDP and requiring analyses of the impact of reductions on workload, fully burdened costs, military force structure, readiness, lethality, stress on the force and operational effectiveness.

### CONGRESSIONAL ACTION

- Amend section 129 of Title 10 and corresponding omnibus section 8012 Defense Appropriation language by eliminating the word “solely.”
- Prohibit use of appropriated funds for term or temporary hiring for “enduring functions.” (Note: an “enduring function” has funding programmed over the course of the FYDP.)
- Revive borrowed military manpower reporting in unit readiness reporting.
- Prohibit the use of appropriated funds for service contracts unless they have been programmed and budgeted in compliance with section 2329 of Title 10

### CLARIFYING AMBIGUITIES IN THE “BUSINESS CASE” ANALYSIS REQUIREMENTS OF SECTION 375 OF NDAA FY2020 TO ENSURE FAIR AND MEANINGFUL COST COMPARISON AND RISK ANALYSIS FOR THE GLOBAL HOUSEHOLD GOODS CONTRACT SOLICITATION ISSUED BY UNITED STATES TRANSPORTATION COMMAND (TRANSCOM)

#### Issue

Section 375 of the FY 2020 NDAA mandated a “business case analysis” by TRANSCOM to be reviewed by the GAO on the “Personal Property Program Improvement Action Plan” that was developed by the Personnel Relocation/Household Goods Movement Cross-Functional Team. The cost comparison used by DoD was skewed because of its insufficient consideration of the risks from privatizing the “closely associated with inherently governmental” and “critical” functions of managing the movement of military members and their families’ household goods by creating a monopoly for performing this function. If anything goes wrong with contract performance, the government will be ill-equipped to ensure there are no disruptions to mission performance, creating additional stresses for military families. Although the GAO overturned the department’s \$7.2 billion contract to move service members’ household goods because of pervasive violations of procurement rules in response to protests where the parent company of

the contractor had been convicted in 2016 on federal antitrust charges and paid a \$100 million fine, that action does not preclude TRANSCOM from proceeding ahead again with new solicitation.

### Background/Analysis

- Section 375 is addressing the stresses that relocating military families during peak periods in the summer endure arising from lack of capacity in TRANSCOM to ensure efficient coordination between offices in handling moves and lack of technological upgrades to the information technology systems that track the movements of goods.
- However, these capacity problems are attributable, at least in case of the Army, to prior management decisions to downsize the in-house workforce as a cost-saving measure, which at one time used to have one transportation specialist assigned to each move. Additionally, the capability of the government to track each step of the move had been planned for but no longer exists in the government because of management decisions to stop the purchase of software upgrades so that the contractor can buy their own software.
- The impact on the in-house workforce is ambiguous, and will likely vary by military department, although the current workforce has been told there will be no net effect on jobs initially, but that the federal workforce will be engaged in contract specialist and quality assurance work in overseeing the contractor rather than the transportation specialist work they are currently performing. There are at least three problems with this:
  - Those military departments like the Air Force that have a uniformed transportation specialist career field may assess this issue differently than the Army, which largely performs these functions with civilian employees.
  - It appears that neither the GAO nor TRANSCOM have performed as part of the business case a “closely associated with inherently governmental” or “critical” function risk assessment before contracting these requirements, a statutory requirement of sections 129a, 2330a, 2383, 2463 and current report language in the HASC markup of the FY 2020 NDAA. This is a particularly important concern because of the conflict of interest risks associated with a sole source contractor performing this function, and the risks if there is insufficient capability within the government to oversee the contract. For a “critical function”, as defined in section 2463 of Title 10, “special consideration” is required for governmental performance of the function if there would be significant mission risk if the contractor defaulted in performance of the function.
  - An “apples to apples” comparison of a “most efficient organization” between the government and private sector is not being performed by TRANSCOM or the GAO. Instead, the capabilities of a downsized in-house workforce deliberately starved of technological updates is being compared to a single sole-source contractor who TRANSCOM intends to fully invest in the requisite staffing and technology upgrades to address performance metrics required by section 375.

- In the absence of the A-76 process, DOD undertook a comparison of the organic and contract workforces in selected functions across the department using DoD Instruction 7041.04, Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (July 3, 2013), which they completed in April 2017 in response to an FY 2016 NDAA reporting requirement. This effort was evaluated by the GAO-18-399, Civilian and Contractor Workforces: DoD’s Cost Comparisons Addressed Most Report Elements but Excluded Some Costs. However, there is no indication that TRANSCOM, or the GAO, attempted to replicate a fully accounting of costs for purposes of section 375, a task that is arguably affected by the very short timelines for the section 375 analysis.
- Nonetheless, when TRANSCOM awarded the contract this generated protests from the losing bidders and criticisms by Senator Manchin on the process uses. The GAO overturned the department’s \$7.2 billion contract to move service members’ household goods because of pervasive violations of procurement rules in response to protests where the parent company of the contractor had been convicted in 2016 on federal antitrust charges and paid a \$100 million fine.
- The risk of creating an unresponsive monopoly would have been part of the “closely associated with inherently governmental” and “critical” function risk assessment that was not done by TRANSCOM. If anything goes wrong with contract performance, the government will be ill-equipped to ensure there are no disruptions to mission performance, creating additional stresses for military families.

### **Congressional Action**

- Prohibit the use of appropriated funds to implement the global household goods contract provided for in section 375 of the Fiscal Year 2020 NDAA.

### **PROHIBITING USE OF APPROPRIATED FUNDS FOR TERM OR TEMPORARY HIRING FOR ENDURING WORK**

#### **Issue**

The department sometimes misuses term or temporary hiring authorities, most often to avoid personnel caps and to circumvent Budget Control Act caps, to the detriment of the job security of the employee.

#### **Background/Analysis**

- The department sometimes misuses term or temporary hiring authorities for enduring functions where funding is not programmed for the position over the course of the FYDP.

- This typically happens when funds are migrated from base budget to overseas contingency operations funds to circumvent Budget Control caps and thus increase department top line.
- But this harms the employee who is performing enduring work under a temporary appointment.
- Some mischaracterization is ideologically motivated to simulate less secure, at-will workforce conditions.

### **Congressional Action**

- Prohibit use of appropriated funds for term or temporary authority for enduring work.

## **REVIVE REPORTING OF BORROWED MILITARY MANPOWER IN DEPARTMENT READINESS REPORTING**

### **Issue**

The department sometimes has replaced civilian jobs by diverting military from their training assignments or assigned units, often for budgetary reasons when the civilian workforce is subjected to personnel caps or arbitrary reductions and the work still needs to be performed. Civilian employees in law enforcement, security, base operations, and training support functions are typically affected by these conversions.

### **Background/Analysis**

- The Defense Science Board in the early 1990s identified borrowed military manpower as an indicator of a hollow force.
- Readiness reports included borrowed military manpower until 2003.
- When the Trump administration first imposed a hiring freeze on the federal government workforce, senior military leaders testified before the readiness subcommittee of the HASC that this resulted in increased borrowed military manpower, harming readiness.
- The National Commission on Military Aviation Safety reported in December 2020 to Congress that diversions of military aviators from training and flying missions reduced flying hours and increased aviation accidents, also resulting in military pilots leaving the service.

## **CONGRESSIONAL ACTION**



- Congress should direct the department to start reporting borrowed military manpower.

## **ESTABLISH FACTUAL BASIS FOR DUE PROCESS AND APPEALS PROCESS FOR SECURITY CLEARANCE DETERMINATIONS**

### **Issue**

Most federal employees in DoD must retain a security clearance as a condition of employment and those not requiring a security clearance may still be subjected to the same procedures if they have access to sensitive, unclassified information. These procedures are established pursuant to a Clinton-era executive order and afford insufficient due process protections for federal employees.

### **Background/Analysis**

- The Senate version of the FY2021 NDAA bill included language purporting to establish transparent appeal procedures for adverse security clearance determinations – Section 9401, “Exclusivity, Consistency and Transparency in Security Clearance Procedures, and Right to Appeal.”
- The Senate language had several defects:
  - No clarity on whether or not the procedures could be applied to positions not requiring security clearances but merely requiring access to sensitive information.
  - No clear provision for judicial review.
  - Agency head could waive the procedures.
  - Summaries of testimony were permissible in lieu of verbatim transcripts.
- The Senate language was struck in conference.

### **Congressional Action**

- Request GAO review on whether DoD and other agencies had applied the executive order procedures in a discriminatory or retaliatory manner against classes protected under equal employment opportunity laws, or in retaliation for whistleblowing activity.

## Department of Veterans Affairs

### Introduction

Adequate staffing, strong workplace protections for rank and file employees, and a VA health care system that is the primary provider and coordinator of veterans' care are essential to the continued viability of the Department of Veterans Affairs (VA). This is especially significant as our nation continues to battle the deadly COVID-19 pandemic. It is crucial that VA employees have adequate personal protective equipment (PPE) while on the job, as well as paid leave to take care of themselves should they fall ill due to the virus.

In 2021, AFGE and its National VA Council (AFGE) will work to make sure every VA worker is protected from COVID-19, to restore our rights to due process and collective bargaining and official time, and to establish and fund staffing mandates and fight privatization. AFGE will also seek comprehensive congressional oversight of VA spending and mismanagement in the Veterans Health Administration (VHA), Veterans Benefits Administration (VBA), Board of Veterans Appeals (BVA), and other VA functions.

### COVID-19 PANDEMIC

#### *Personal Protective Equipment*

Since the start of the COVID-19 pandemic, AFGE has received a tremendous number of reports from front-line health care workers facing unprecedented risks to themselves and their families while trying to care for veterans. Amidst the widespread chaos at almost every VA medical center, the only consistency appears to be inconsistency.

With few exceptions, management policies and practices for PPE, leave, staffing, telework, testing, and hazard and incentive pay have been unpredictable, uneven, and arbitrary. VA medical facilities still do not have adequate masks, respirators, gowns, hand sanitizers, testing, and other medical resources essential for the safe treatment of patients or to control the spread of this deadly virus.

AFGE remains deeply concerned that the VA's medical equipment supply chain has been severely weakened by the absence of coordination, transparency, national guidance, and consultation with front-line workers and their labor representatives. PPE acquisitions and distribution have been left largely to each medical center. These medical centers were not provided sufficient guidance from the VA Central Office (VACO), nor did they receive adequate recommendations from the Centers for Disease Control and Prevention (CDC), and thus, have failed to fully utilize the extensive expertise and experience of VA contracting officers and front-line employees who experience firsthand the risks of working during this pandemic.

As a result, local procurement officers have been forced to compete for known PPE supplies instead of working together. At the same time, the VA's outdated inventory system has not allowed for the accurate tracking of PPE inventory levels. There is still no centralized system in

place for facilities to exchange information about best practices and reliable suppliers, or to ensure reasonable pricing.

Every VA employee who works at a medical facility needs adequate PPE – not just those who work in COVID units and “hot zones.” Every employee can on short notice find themselves in a high-risk situation even if their official duties are not within a “hot zone” because of a reassignment to a short-staffed area or an unexpected medical emergency involving a COVID-positive patient.

**Congressional Action Needed:**

- Ensure that every VA facility and employee has the needed amount of safe personal protective equipment.
- Provide adequate oversight of the VA’s PPE supply chain and coordination efforts between facilities.

*Presumption of Illness*

As we continue to navigate this crisis, it is important that front-line employees who risk daily exposure to COVID-19 receive adequate resources and protection. AFGE urges Congress to amend the Federal Employees Compensation Act (FECA), the law that governs workers’ compensation for federal employees, to provide an automatic presumption of workplace illness for employees who contract COVID-19 and who are working at their regular duty stations during the pandemic.

As VA employees are required to interact with the public, with individuals who are quarantined, and those who have been diagnosed with COVID-19, there should be a presumption that the employee contracted the virus at work. AFGE supports legislation that would create a workplace presumption of illness will that allow federal employees who have contracted the virus and who have been required to continue to report to their regular duty station throughout the pandemic make a FECA claim without facing a potentially lengthy denial and appeals process, and help these workers receive the care and services they need.

**Congressional Action Needed:**

- Enact legislation to provide VA workers with an automatic presumption of workplace illness for any employee who contracts COVID-19 and continues to work at their regular duty station.
- Ensure that every employee who has tested positive for COVID-19 is provided paid leave and not required to return to work until they are negative for the virus.

*Pandemic Pay*

AFGE supports COVID-19 premium pay for VA employees who are taking care of America’s veterans and exposing themselves to the virus. While certain VISNs and medical centers have allowed for special pandemic pay or special pandemic awards, neither Congress nor the VA have

required or directed a uniform system to help front-line health care workers. Due to this lack of centralization and uniformity, local directors and managers have been given extraordinary discretion to give awards, which has produced uneven results.

There is no consistency in the amount or type of pandemic compensation paid in different facilities around the country. Many facilities provided no special pay or awards. In fact, whether an employee receives any kind of extra compensation for working in hazardous conditions during the pandemic has been decided on the basis of individual supervisors' discretion. Throughout 2020, AFGE received reports of grossly unfair pandemic pay policies, such as supervisors with no patient contact receiving pandemic pay while front-line employees got none or select nursing assistants and licensed practical nurses receiving varying amounts of pandemic pay arbitrarily.

We were disturbed to receive a report from a facility that contractors hired to take the temperatures of patients entering the facility were given pandemic pay, while VA employees working in COVID-19 units received nothing. Similarly, at another facility, some employees did not earn the same amount of pandemic pay as their colleagues because they contracted COVID-19 while on duty and had to quarantine. This is a violation of the merit system. AFGE calls on Congress to conduct oversight of the consistency and fairness of the VA's administration of pandemic pay differentials.

### **Congressional Action Needed**

- Provide a uniform policy for providing pandemic premium pay for VA employees.
- Conduct oversight of how this problem originated and developed in 2020.

## **PRIVATIZATION OF VA HEALTH CARE**

### *Impact of the VA MISSION Act of 2018*

In 2018, the VA MISSION Act created a private sector care program that would not expire. With this law Congress set in motion a chain of events that created a "community care" program that threatens the absolute existence of the VA as we know it today. AFGE and the NVAC argued from the beginning that this would lead to the cannibalization of the VA and its core services. Over the last two years our view has been validated.

In 2021, AFGE will work with Congress to dial back the MISSION Act. We will pursue legislation to put stricter parameters around the contracting out of care and services, put remediation plans in place for any service line closures, and work to ensure that an unelected BRAC-style commission does not have broad authority to decide to close VA facilities.

Specifically, we ask that Congress enact legislation to repeal the Asset and Infrastructure Review (AIR) section of the MISSION Act. The AIR language establishes a BRAC-style commission tasked with reviewing all physical assets of the department. This means that an unelected, unaccountable commission of bureaucrats will be in charge of making decisions about closing

facilities – not the elected representatives of the people in Congress. AFGE will continue to push for legislation to remedy the MISSION Act and help our members immediately.

### **Congressional Action Needed**

- Enact legislation that will repeal the AIR Act portion of the MISSION Act.
- Oppose funding for the AIR Commission.
- Enact legislation to ensure the VA has a plan in place to fix deficiencies in service lines identified for privatization so that those services can be brought back into the VA.
- Increase appropriations for VA internal capacity building.
- Maintain a firewall between private “community care” funding and VA medical services/infrastructure.

### **RESTORING VA WORKPLACE RIGHTS**

#### *Title 38 Collective Bargaining Rights*

The Title 38 collective bargaining rights law, 38 U.S.C. 7422 (“7422”) has been interpreted and applied by the VA in an arbitrary and unfair manner for many years. As a result, the employees covered by 7422 have not been able to bargain or grieve over a wide range of routine workplace issues grieved by other VA employees and health care professionals working at other agencies.

In both 2003 and 2017, the White House voided a commonsense Memoranda of Understanding (MOU) that had expanded Title 38 collective bargaining rights and improved labor management relations. In the 116<sup>th</sup> Congress H.R. 1133 and S. 462, the VA Employee Fairness Act, was introduced respectively by Rep. Mark Takano (D-Calif.) and Sen. Sherrod Brown (D-Ohio) to eliminate the three exceptions in current law that VA has applied to deny every labor request to grieve, arbitrate or negotiate over workplace matters, including schedules, overtime pay, professional education and many other matters. AFGE will work to have this legislation reintroduced in the 117<sup>th</sup> Congress.

#### **Congressional Action Needed:**

- Enact legislation to provide full collective bargaining rights to Title 38 employees.
- Reform and strengthen pay-setting processes for VA physicians, dentists and podiatrists including restoration of an independent, transparent market pay panel, and a fair process for setting performance pay criteria and determining performance pay awards.
- Conduct oversight into VA provider (physician, nurse practitioner, dentist, physician assistant, therapists) workload, work hours and leave policies.
- Enact legislation to ensure that VA physicians and dentists on alternative work schedules are covered by fair leave accrual policies that recognize all their hours of work.

## Veterans Benefits Administration

### *National Work Queue*

The National Work Queue (NWQ) was created with the intention of relieving the claims backlog and improving the pace of claims processing. However, its implementation has had a negative impact on veterans and front-line VA workers. AFGE agrees with a recent Inspector General's (IG) report (VA OIG 17-05248-241) that eliminating specialization has had a detrimental impact on veterans with claims, particularly claims that are more complex and sensitive in nature. As the IG report explains, prior to the implementation of the NWQ:

“The Segmented Lanes model required Veteran Service Representatives (VSRs) and Rating Veteran Service Representatives (RVSRs) on Special Operations teams to process all claims VBA designated as requiring special handling, which included [Military Sexual Trauma (MST)]-related claims. By implementing the NWQ, VBA no longer required Special Operations teams to review MST-related claims. Under the NWQ, VSRs, and RVSRs are responsible for processing a wide variety of claims, including MST-related claims. However, many VSRs and RVSRs do not have the experience or expertise to process MST-related claims.”

Because of the level of difficulty in processing MST claims, AFGE supports returning MST and other former “Special Operations” cases including Traumatic Brain Injury back to a specialized lane or lanes in Regional Offices. This is particularly important, as new specialty claims are becoming more prevalent, including “Blue Water Navy” claims as well as toxic exposure claims.

The VA must also modify the NWQ so that cases remain within the same regional office while they are being processed, and that VSRs and RVSRs are more clearly identified on each case file. This will allow for better collaboration between VSRs and RVSRs (as was done prior to the implementation of the NWQ).

### **Congressional Action Needed:**

- Conduct extensive oversight of the National Work Queue and the challenges it creates for veterans and the VBA workforce including a study of the impact of transferring cases between Regional Offices while they are being processed.
- Introduce legislation to repair the NWQ by requiring specialized personnel including VSRs and RVSRs to process highly complex claims including Military Sexual Trauma and Traumatic Brain Injury.

### *Information Technology*

Information Technology issues continue to plague VBA on a variety of fronts, negatively affecting VA's mission of serving veterans and AFGE members striving to fulfill that mission every day. These problems have been analyzed by the Government Accountability Office (GAO) on processing legacy appeals under the Appeals Modernization Act. In late 2018, there was a hearing excoriating the VA regarding the way IT problems were causing delays in the processing

of education benefits and housing stipends for veterans connected to the Colmery Veterans Educational Assistance Act of 2017, better known as the Forever GI Bill. The committee has followed up on this issue since. AFGE is working with the committee to show how these delays negatively affect the ability of AFGE members to do their jobs, and how combined with the Accountability Act and ever-changing performance standards, these IT problems can result in unfair discipline for AFGE members.

### **Congressional Action Needed:**

- Conduct oversight on the impact of IT malfunctions on both the performance ratings of VBA employees and number of employees removed or disciplined under the VA Accountability Act.
- Conduct oversight on the time allotted for employees to learn new IT systems and processes to ensure fair performance ratings and adequate training.

### *Compensation and Pension Exams*

Compensation and Pension (C&P) exams are required for many veterans applying to receive VA benefits related to their military service. The VA started to contract out these examinations in the late 1990's and has been increasing the number of contracted exams ever since. The vast majority of all VA disability exams are now contracted out by VBA instead of being processed by VA's own clinicians.

According to a recent GAO report (GAO-19-13, "VA DISABILITY EXAMS: Improved Performance Analysis and Training Oversight Needed for Contracted Exams," Oct. 12, 2018), VBA reported that the clear majority of contractors' quality scores fell well below VBA's target – 92 % of exam reports with no errors – for the first half of 2017. VA clinicians are far better prepared and more likely to diagnose veterans correctly compared to private contractors without expertise in the unique and complex problems that veterans present. The VA should process C&P exams internally instead of hiring outside contractors, and fill vacancies to bring this vital function back into the VA.

AFGE had a significant victory in the 116<sup>th</sup> Congress by getting legislation enacted into law that required the VA to maintain the same number of C&P positions at the VA that it has as of March 1, 2020. This requirement will remain in place at least until the backlog of C&P Exams is reduced to where it was on March 1, 2020. This action was the result of vigorous advocacy and has led to heightened interest in the issue from the Congress. AFGE will continue demand vigorous oversight of C&P exams and lobby to bring exams, particularly specialty exams, back within the VA.

### **Congressional Action Needed:**

- Conduct oversight on the current status of contract C&P exams including a comparison between the quality, timeliness, and cost of contract exams and exams performed within the Veterans Health Administration.

- Enact legislation that requires the VA to bring C&P exams back in-house where they are performed with a higher degree of accuracy and at a lower cost.

### *Performance Standards*

Performance standards exist to show employees what the expectation is of their performance and the criteria upon which they will be evaluated. These standards should be fair and attainable for all employees while retaining the flexibility to adjust for variable difficulty in an employee's workload. While this should be the case, VBA management has found different ways over the years to alter their performance standards or fail to act in ways that negatively impact the employee and in turn negatively impact veterans. Some of examples of this include:

- The VBA's "#BestYearEver" Initiative, which was designed "[t]o improve production and achieve the #BestYearEver," has instituted counterproductive restrictions on excluded time. Excluded time is the time removed from an employee's production quota to account for situations that would make it more difficult to reach their production goal. The most basic example of this would be if an employee is expected to process 50 transactions a week (10 per day), and they are on work travel for a day, the travel day would be granted excluded time and make their quota 40 for that week.
- Under the #Bestyearever initiative, the use of excluded time would be drastically reduced for both training claims processors in new procedures and technology, how to process new types of claims, and the ability to give excluded time for an employee processing a particularly difficult or specialty claim. This sets up the employee to fail and hurts the veteran by sacrificing quality over quantity.
- VBA has created standards that do not fairly award claims processors credit for work that does not result in an approval of benefits, including deferring a case for further review. Employees should not be penalized for being assigned work that requires more information and creates a system that serves neither the worker nor the veteran.
- In the name of efficiency, VBA has reduced the amount of time that Legal Administrative Specialists, who speak to veterans with questions about their claims, can speak to a veteran on the phone and still meet the criteria for an "outstanding" or "satisfactory" rating on a call. This system does not factor in calls with veterans who have highly complex questions or are disabled and need additional assistance to communicate. VA should not set standards that reward rushing veterans.
- VBA management has failed to universally hold five quality reviews monthly for claims processors. Failing to do this sets up the employee repeatedly make the same mistake, which will hurt the employee's overall performance, and negatively impact the veterans who have a preventable mistake made on their claim.

### **Congressional Action Needed:**



- Increase oversight on the current status of VBA performance standards and if they are best serving veterans.
- Enact into law limitations on criteria the VA can implement in performance standards.

## Federal Prisons

### INCREASE HIRING AND STAFFING OF FEDERAL CORRECTIONAL WORKERS

#### Issue

Congress must demand oversight and accountability in the recent increases of federal funding of the Federal Bureau of Prisons (BOP). In an attempt to remedy the serious correctional officer understaffing and prison overcrowding problems that continue to plague BOP prisons, the appropriations committees in both chambers have substantially increased the funding of the BOP. The BOP's staffing crisis continues with little to no increase in overall staffing, despite increases in appropriated money over the past two years. The FY 2021 Commerce, Justice, and Science (CJS) Appropriations bill included the following specific language:

Vacancies – BOP is directed to improve hiring policies to ensure that, within the funding provided, it can promptly fill existing and future vacancies in order to staff its 122 Federal facilities at January 2016 levels, and forgo further position eliminations. BOP shall report not later than 90 days after the date of enactment of this Act on the number of vacancies at each facility, further detailed by job title, job series, and General Schedule level as well as the number of applicants going through the hiring process for each vacant position. DOJ is directed to explore ways to expedite BOP hiring, such as working with OPM to provide expedited hiring for BOP facilities with vacancy rates exceeding ten percent and making use of recruitment and retention bonuses. BOP shall describe such efforts in the aforementioned report. BOP is directed to continue to ensure at least two correctional officers are on duty for each housing unit for all three shifts at all high-security institutions, including United States Penitentiaries and Administrative and Federal Detention Centers. BOP is directed to continue to submit quarterly reports showing compliance with this directive and to provide a cost estimate and strategic plan for implementation at medium-security institutions that currently do not have a second officer for all three shifts.

#### Background/Analysis

More than 152,000 prison inmates are confined in BOP correctional institutions today. More than 124,000 of those inmates are confined in BOP-operated prisons, while approximately 28,700 are managed in private prisons and other facilities. Staffing at our federal prisons has not kept up with this explosion in the federal prison inmate population.

Serious correctional officer understaffing and prison inmate overcrowding problems have resulted in significant increases in prison inmate assaults against correctional officers and staff. Illustrations of this painful reality include: (1) the savage murder of Correctional Officer Jose Rivera on June 20, 2008, by two prison inmates at the United States Penitentiary in Atwater, Calif.; (2) the lethal stabbing of Correctional Officer Eric Williams on Feb. 25, 2013, by an inmate at the United States Penitentiary in Canaan, Pa.; and (3) the murder of Lieutenant Osvaldo Albarati on Feb. 26, 2013, while driving home from the Metropolitan Detention Center

in Guaynabo, Puerto Rico. This past year, a correctional officer at FCC Allenwood was stabbed in the eye with a homemade weapon. This staff member lost his eye and suffered brain injuries.

Yet even after correctional workers lost their lives in the line of duty, and continue to be seriously assaulted, BOP has failed to adequately remedy their chronic understaffing. One troubling practice in place at nearly every BOP installation across the country is “augmentation” which allows wardens to use non-custody employees to fill custody vacancies. For example, if a correctional officer calls out sick, that correctional officer position could be filled by a teacher, case manager, secretary, or other non-correctional officer. The bureau has used augmentation to meet staffing needs and to get around paying officers overtime; this irresponsible practice puts lives in danger and must be stopped.

The overuse of augmentation is also one factor leading to higher rates of attrition in the BOP. While 15 years ago employees would often work past their minimum retirement eligibility dates, the current trend is to leave the agency as soon as an employee is eligible to retire. This results in a rapid loss of experience and quality employees who keep our facilities safe and secure. The attrition rate has increased as the agency is having difficulty recruiting new employees. The hiring process in BOP is unnecessarily lengthy and burdensome. The minimum of 90 days, and often much longer, it takes to bring a new employee on board is hindering the bureau’s efforts to hire critical positions. Having OPM grant direct hiring authority could speed up the hiring process at the facilities with the lowest compliments without lowering the stringent law enforcement standards. This direct hiring authority could be limited and temporary until the facilities can elevate their staffing levels to a safer level.

Finally, federal correctional officers are some of the lowest paid federal law enforcement officers. In some states correctional officers make over \$10,000 more a year than their BOP counterparts. A substantial number of new officers get their foot in the door in the BOP, but once their probationary year is complete, they leave for a job in another federal agency whose law enforcement pay bands are much higher. BOP pay bands similar to the U.S. Marshals Service and the Border Patrol would be appropriate for the law enforcement professionals of the Bureau of Prisons. The BOP’s current pay bands are GL-5, 6, 7, with a competitive GL-8. More appropriate would be GL-7, 9, 10, with a competitive GL-11.

### **Congressional Action**

AFGE strongly urges the Administration and the 117<sup>th</sup> Congress to:

- Increase federal funding of the BOP Salaries and Expenses account and **require** BOP to hire additional correctional staff to return to at least the January 2016 levels as listed in the language included in the FY 2021 CJS Appropriations bill. Any increase in funding for new hires must be strictly enforced/controlled by appropriations language.
- Demand that BOP hire the necessary staff to fill custody positions instead of relying on augmentation.
- Bring federal correctional officer pay levels up to the levels of similar federal law enforcement agencies such as the U.S. Marshals Service and U.S. Customs and Border Patrol.

## **INTERDICT / ELIMINATE DANGEROUS CONTRABAND IN OUR FACILITIES (DRUGS/MAIL/CELLPHONES)**

### **Issue**

Federal prisons are being inundated with illegal and synthetic drugs and other contraband items that often cause harm to staff members. This uncontrolled drug introduction and use are the direct result of years of agency-wide staffing shortfalls and a deliberate reduction in inmate supervision.

### **Background/Analysis**

Many BOP facilities have seen a major increase in the number and scale of contraband introductions in recent years, including cell phones and drugs, especially synthetic drugs such as K-2, Spice, and fentanyl, which create potentially life-threatening exposures to correctional staff. This epidemic is a direct result of the chronic understaffing plaguing BOP facilities. With less staff supervising more inmates, the inmates have become increasingly brazen in the amount and the means they use to get contraband, particularly drugs, into federal prison facilities.

One of the major ways synthetic drugs are getting into federal prisons is through the mail. As an example, in second half of 2019, approximately 40 federal prison employees from three different facilities were taken to local emergency medical facilities for their exposures to these substances. Last year, in response to numerous incidents of staff members being sickened by mail tainted with synthetic drugs, the Pennsylvania Department of Corrections instituted a new system in which nearly all mail is sent to an off-site facility where it is opened, scanned, and emailed to prisons, much the same way mail is processed for Congress.

The current pilot program of scanning mail has been extremely successful in curtailing the introduction of these hazardous drugs.

### **Congressional Action**

AFGE strongly urges the administration and the 117<sup>th</sup> Congress to:

- Immediately expand this pilot program, without delay, to best protect the employees of the BOP.

## **PROTECT EMPLOYEES FROM SEXUALLY AGGRESSIVE/DEVIANT INMATE PREDATORY BEHAVIOR**

### **Issue**

As staffing levels have continued to fall, assaults on our staff by inmates have risen, including sexual assaults. The bureau has failed to protect prison employees from sexually aggressive/deviant inmate predatory behavior and has willfully not held inmates accountable for this behavior and has failed to correct the calloused management culture across the agency that

has let this persist. The Bureau of Prisons lack of enforcement/protections has led to multiple class actions suits and left employees with long lasting effects of their abuse.

### **Background/Analysis**

In one recent high-profile incident in November 2019, the Occupational Health and Safety Administration (OSHA) issued a “Notice of Unsafe and Unhealthy Working Conditions” to the low-security Federal Correctional Institution Miami for assaults on staff members by inmates. OSHA labeled this violation as “serious” and stated, “The Agency head did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were exposed to the hazard of being assaulted by inmates with a history of violent behavior.” It then cited two specific incidents in which inmates, one “with a history of exhibiting sexually aggressive disruptive behavior,” assaulted prison staff members. These assaults at FCI Miami are hardly an isolated incident, however, and instead this is a systemic problem across the BOP and is due to the failure of the Bureau to both hold inmates accountable for their behavior and also due to the management culture the Bureau fosters.

### **Congressional Action**

AFGE strongly urges the administration and the 117<sup>th</sup> Congress to:

- Conduct congressional oversight and hearings
- Pass stricter consequences for inmate that are found guilty of being sexually aggressive/deviant inmate predatory behavior

## **PASS THE THIN BLUE LINE ACT**

### **Issue**

Congress should pass the Thin Blue Line Act (H.R. 72), which would make targeting and killing a law enforcement officer or first responder an “aggravated factor” in sentencing for a capital crime when a jury evaluates whether or not to impose the death penalty.

### **Background/Analysis**

Congress must punish those who actively target and kill our members who are federal law enforcement officers. Too many times we have witnessed our fallen brothers go without justice. Our fallen officers deserve respect, and their families deserve better than plea bargains. These men and women are heroes, and we demand that Congress treat them as such.

The Thin Blue Line Act will ensure that any time a member of the law enforcement community is targeted and killed; the murderer will have a greater chance of facing the death penalty.

## **Congressional Action**

AFGE strongly urges the administration and the 117<sup>th</sup> Congress to:

- Pass this important legislation introduced by Rep. Vern Buchanan (R-Fla.) because there is no justice in giving second-consecutive life sentences to cold-blooded killers. The AFGE Council of Prisons refuses to stand by while our men and women are put in harm's way every single day.
- Send a message that our lives and our safety matter. We demand action on this legislation so that every inmate will know that if they target and kill one of our brothers or sisters, they will be facing the possibility of the death penalty.

## **PASS ERIC'S LAW**

### **Issue**

Congress should pass Eric's Law, which is named for slain officer Eric Williams and would permit the court to impanel a new jury if a jury in a federal death penalty case fails to reach a unanimous decision on a sentence.

### **Background/Analysis**

Far too often law enforcement officers fall victim to violent assaults. Our officers put their lives on the line every day to keep our communities safe – and sometimes, they don't come home. In the most extreme cases we have seen officers murdered by an inmate – like Correctional Officers Jose Rivera and Eric Williams.

There must be an adequate deterrent in place to show criminals that murdering a law enforcement officer will have serious consequences. If capital punishment isn't on the table, how can Congress ask our officers to do these dangerous jobs and make these officers feel reasonably safe on the job? What deterrent is adequate for a repeated murderer?

### **Congressional Action**

The AFGE Council of Prisons strongly urges the administration and the 117<sup>th</sup> Congress to:

- Pass this important legislation which is soon to be re-introduced by Sen. Pat Toomey (R-Pa.) and Rep. Fred Keller (R-Pa.).

## **PROHIBIT BOP FROM EXPANDING THE USE OF PRIVATE PRISONS**

### **Issue**

Congress should prohibit BOP from expanding its use of private prisons, as they are not more cost effective than public prisons, nor do they provide higher quality, safer correctional services.

## Background/Analysis

In August 2016, a Department of Justice Inspector General report found that prisons run by private companies have greater problems with contraband, inmate discipline and other issues than those run by BOP. According to the report, “In recent years, disturbances in several federal contract prisons resulted in extensive property damage, bodily injury, and the death of a correctional officer.” Shortly thereafter, in August 2016, AFGE and the Council of Prison Locals (CPL) were successful in lobbying the previous Administration to phase out its private prison contracts. This was the first major rollback of private prisons since the bureau began contracting services out in the mid-1990s.

In February 2017, this policy was reversed. For the remainder of 2017, BOP continued to use private prisons but did not actively attempt to move inmates from BOP-operated facilities into them. In February 2018, BOP issued a memo<sup>3</sup> fulfilling their new stated goal of “increasing population levels in private contract facilities.” The memo directed BOP to “submit eligible inmates for re-designation” in order to transfer those inmates from low security BOP facilities to private contract facilities. DOJ says that this decision was made “in order to alleviate overcrowding” in our federal prisons, but this is nothing more than a thinly veiled excuse to privatize government work and federal jobs.

The author of that memo, Assistant Director for Correctional Programs Division Frank Lara, retired a few months later and took a senior-level job at one of the biggest private prison operators, GEO Group<sup>4</sup>. On Oct. 19, 2018, 18 senators and members of Congress wrote to the DOJ IG asking him to investigate this potential conflict of interest.

BOP must stop relying on private facilities to supervise and rehabilitate inmates. These facilities fail to provide adequate safety, security, and rehabilitative services as compared to their federal counterparts. Further, the real overcrowding at BOP exists at facilities that are classified as medium-and-above security levels. Pushing the least dangerous offenders into private custody does nothing to alleviate the real problem of overcrowding, and it does nothing to keep correctional workers safe while on the job. Real lives are at risk when the bureau fails to address chronic and widespread understaffing, and it is foolish to believe this problem can be solved by more outsourcing. As research shows, BOP must abolish private prisons and reinvest those dollars into its fulltime law enforcement staff.

## Congressional Action

The AFGE Council of Prisons strongly urges the Administration and the 117<sup>th</sup> Congress to:

- Prohibit BOP from meeting additional bed space needs by incarcerating federal prison inmates in private prisons.

<sup>3</sup> “Leaked Memo: Trump Admin to Boost Use of Private Prisons While Slashing Federal Staff,” *Government Executive*, 1/25/18.

<sup>4</sup> “Federal Official Boosted Use of Private Prisons; Now He Has a Top Job at One” *Government Executive*, 8/29/18.

## **CONTINUE THE EXISTING PROHIBITION AGAINST THE USE OF FEDERAL FUNDING FOR PUBLIC-PRIVATE COMPETITION UNDER OMB CIRCULAR A-76 FOR WORK PERFORMED BY FEDERAL EMPLOYEES OF BOP AND FPI**

### **Issue**

Congress should continue to prohibit the privatization of BOP and FPI positions under OMB Circular A-76.

### **Background/Analysis**

The FY 2021 Consolidated Appropriations Act (P.L. 116-260), which contains the FY 2021 Commerce-Justice-Science (CJS) Appropriations bill, includes a general provision — Section 210 — to prohibit the use of FY 2020 funding for a public-private competition under OMB Circular A-76 for work performed by federal employees of the Bureau of Prisons (BOP) and Federal Prison Industries (FPI).

Competing these BOP and FPI employee positions would not promote the best interests or efficiency of the federal government with regard to ensuring the safety and security of federal BOP prisons. Federal correctional officers and other federal employees who work for BOP and FPI are performing at superior levels and at a lower cost. It therefore would be ill-advised to privatize their positions merely to meet arbitrary numerical quotas.

It should also be noted that various studies comparing the costs of federally operated BOP prisons with those of privately operated prisons have concluded – using OMB Circular A-76 cost methodology – that the federally operated BOP prisons are more cost effective than their private counterparts. For example, a study comparing the contract costs of services provided by Wackenhut Corrections Corporation (now The Geo Group) at the Taft Correctional Institution in California with the cost of services provided in-house by federal employees at three comparable BOP prisons (Forrest City, Ark.; Yazoo City, Miss.; and Elkton, Ohio) found that “the expected cost of the current Wackenhut contract *exceeds* the expected cost of operating a Federal facility comparable to Taft....” (*Taft Prison Facility: Cost Scenarios*, Julianne Nelson, Ph.D, National Institute of Corrections, U.S. Department of Justice.).

### **Congressional Action**

The AFGE Council of Prisons strongly urges the Administration and the 117<sup>th</sup> Congress to:

- Continue to include the Section 210 language in the FY 2022 CJS Appropriations bill.

## **HAZARDOUS DUTY PAY FOR BOP STAFF WORKING THROUGH THE COVID PANDEMIC**

### **Issue**

Federal law enforcement staff working in federal prisons have been working, and will continue to work, in federal prisons that are super spreader locations for COVID-19.



## **Background/Analysis**

Inmates are housed in quarters that are not set up for social distancing. Prisons are built to house large numbers of inmates in one location. Even as inmates are released under provisions to help with lessening the chance of super spreading, staff still have to work hands on with inmates, as a matter of public safety, in this environment. Over 200 inmates and three staff members have perished to date from COVID-19. This is a stark reminder of the hazardous conditions that employees of the Bureau of Prisons must work in.

Although requested by the Council of Prisons and by multiple members of Congress to halt the practice, the Bureau of Prisons and U.S. Marshals continued to move inmates around the country, assisting in spreading COVID-19 from areas with higher concentrations to areas that had not been affected. On Jan. 31, 2020, President Donald Trump declared a public health emergency for COVID-19. He then declared a national emergency on March 13, 2020. OPM has stated that an agency head can request hazardous duty pay for exposure to COVID-19. Every Bureau of Prisons location has had COVID-19 in it at some level. Both staff and inmates in these locations have been affected by positive results. Staff members must wear PPE daily and still test positive and have taken COVID-19 home to family members.

## **Congressional Action**

The Council of Prisons strongly urges the administration and the 117<sup>th</sup> Congress to:

- Pay hazardous duty pay at the rate of 25%, retroactive to the date the public health emergency was declared (Jan. 31, 2020), to all Bureau of Prisons staff except those working in the agency's Central or Regional Offices.

## **Transportation Security Administration**

### **TITLE 5 FOR TRANSPORTATION SECURITY OFFICERS**

#### **What is Title 5?**

Title 5 is the section of the U.S. Code that sets the labor rights and protections for almost all federal workers, including:

- Collective bargaining rights with Federal Labor Relations Administration oversight, including exclusive representative elections, and collective bargaining rights;
- Enforcement of prohibited personnel practices (discrimination based on age, race, national origin, religion, marital status, enforcement of legal recourse, political affiliation or retaliation for filing a discrimination, work safety complaint or whistleblower disclosure);
- Pay under the General Schedule (GS) system, including overtime and night differential pay;
- The grading and classifications of positions based on the duties of the job, made consistent with other jobs classified under the GS system;
- Worker protections under the Family and Medical Leave Act and the Federal Labor Standards Act, and;
- Appeal rights of adverse personnel actions to the Merit Systems Protection Board (MSPB).

#### **Why Are TSOs Denied These Rights and Protections?**

The Aviation and Transportation Security Act, or ATSA, passed by Congress to correct inadequacies in aviation security identified after Sept. 11, 2001, included a statutory footnote that granted the TSA administrator the authority to set the terms and conditions of employment for TSOs.

#### **What Does the TSO Workforce Lose Without Title 5 Rights?**

- TSO pay is determined by the administrator, not federal law. As a result, TSOs do not receive longevity pay or step increases.
- TSA does not follow the Fair Labor Standards Act that regulates overtime and work hours.

- TSA dictates the timeline for collective bargaining, and what matters are subject to bargaining.
- TSA refuses to negotiate an objective grievance procedure like those at almost every federal agency with a union, including other components at the Department of Homeland Security, which are already under Title 5.
- TSA forced a contract under unfair executive orders issued by the previous president that undermine the union's ability to represent its members and maintain membership.
- TSA fires TSOs based on medical symptoms and diagnoses that do not affect their work performance.

**Congress Should Pass Legislation Providing Statutory Title 5 Rights to the Entire TSA Workforce for the Following Reasons:**

- In the last Congress, the House passed H.R. 1140, the “Rights for Transportation Security Officers Act” by a bipartisan vote of 230-171. The bill was also added to H.R. 2, the “INVEST Act” which also passed the House but failed to be considered by the Senate. Sen. Brian Schatz (D-Hawaii) introduced identical language in the Senate, S. 944. The bill garnered 34 cosponsors, many more than in the previous Congress, but the Senate did not take up the bill. AFGE will be encouraging co-sponsorship and an active push to gain Title 5 rights and better pay for TSOs.
- It is a matter of fundamental fairness that the entire TSA workforce be treated the same as other federal workers. TSA has become a revolving door for TSOs; between 2007 and 2018, roughly the entire agency was replaced due to attrition. During this time, 45,576 TSOs resigned from the agency. In 2017, one in five new hires quit within the first six months. These high attrition rates do not occur in other DHS components where the rank and file workforce are afforded workplace rights and protections and a transparent pay system under Title 5 of the U.S. Code.
- The TSO workforce is underpaid. TSA created its own pay band system lacking the stability and transparency of the General Schedule pay system of compensation used by most federal agencies. In December 2019 the president issued an executive order providing for an average 3.1% pay increase for federal employees. TSOs were not covered by this order, but the TSA administrator agreed, solely at his discretion, to comply with that increase.
- TSA has promoted a career progression program, but there is no assurance of being promoted to a vacant, available position with higher wages for TSOs who complete training and certification requirements for various career paths. In March 2019, the Department of Homeland Security's Office of Inspector General issued a report, “*TSA Needs to Improve Efforts to Retain, Hire and Train Its Transportation Security Officers,*” that said TSA should develop better recruitment and retention strategies, pay TSOs better, and provide better training and advancement opportunities.

- TSOs face constant training and changing of procedures and are required to pass more certifications than armed federal law enforcement officers. The screening workforce deserves a pay system that is fair and adequately reflects their training, complexities of tasks, and seniority.
- TSA's failure to adequately staff checkpoint and baggage screening areas leads to overworked officers and less security for the flying public. TSOs at some airports are subject to ongoing mandatory overtime due to short staffing, while other full-time TSOs are working split shifts between two airports because of shortages. TSA has not reduced the average 252 days it takes from application to be a TSO to reporting for duty.
- AFGE is especially concerned that female TSOs continue to face denial of shift or line bids or delayed breaks due to chronic underrepresentation of women among the TSO ranks.
- Despite congressional investments in screening technology and canines, as many as two million passengers departing on flights from U.S. airports daily must be screened by a person, not by canines or solely by use of technology.
- TSOs face discipline that is swift and severe without the ability to testify and challenge witnesses. There is no right to appeal to an objective body such as the Merit Systems Protection Board. TSOs do not have progressive discipline; they can be removed for unrelated violations, even though most violations are tardiness, uniform violations and failure to properly report illness or other unexpected absence.
- Over 42,000 TSA employees are denied the protections of the Fair Labor Standards Act and the Back Pay Act simply because their job classification is that of Transportation Security Officer and TSA has blocked the application of the law to them.
- Throughout the coronavirus pandemic, TSOs have been on the job even as their health and lives have been at risk. Over 6,000 TSOs have contracted the virus and some have lost their lives. Some measures have been taken to provide equipment and distancing at checkpoints, but the rate of the spread of the virus is accelerating. If the price of airline security is worth someone's life, it is worth paying them a decent living.

Management misconduct, retaliation, and obstruction at TSA runs deep within the organization and is a direct result of the lack of accountability and transparency within TSA's personnel systems. The nation's security is enhanced when the workers who contribute to our protection have a personnel system that is fair, transparent, and consistent. For these reasons, legislation is needed in Congress that would apply Title 5 of the U.S. Code to the entire TSA workforce in the same manner as other security employees at the Department of Homeland Security (DHS).

The FAA Reauthorization Act of 2018 required the formation of a TSA-AFGE Working Group to recommend reforms to TSA's personnel management system, including appeals to the Merit Systems Protection Board (MSPB) and grievance procedures. TSA did not utilize this Working

Group as an opportunity to make many of the sensible changes to pay, discipline, grievance and fitness for duty changes proposed by AFGE Council 100 representatives. Some nominal changes the agency would agree to were put into effect in 2020.

Denial of commonsense statutory workplace rights and protections was unnecessary to stand up TSA in 2001, and it is wrong to continue this unfair system 19 years later.

### **CONGRESS SHOULD APPROPRIATE FUNDING TO RAISE TSO PAY**

The American public learned during the December 2018 – January 2019 shutdown that TSOs were among the lowest paid federal workers required to work without a paycheck for over one month. The average starting salary for a TSO is about \$32,600 (\$15.62/hr), and the average pay for a full-time TSO ranges from between \$35,000 and \$40,000 a year. Depending on schedules, the lowest end of the current scale is lower than the mandatory \$15 per hour minimum wage in some jurisdictions. TSO pay increases cannot continue to be the lowest priority for application of TSA appropriations.

The wages of TSOs with many years on the job remained low because of a number of actions taken by TSA. For a five-year period, there was no increase in TSO base pay. Because TSOs are not on the GS pay scale, they did not receive regular step increases to reward their successful performance and experience. TSA's various pay-for-performance offered meager pay raises for most TSOs and small bonuses that are not counted in base pay for determination of pensions. There are few promotion opportunities at TSA. TSOs are the only federal workforce facing the number and type of pay limitations put in place by the agency.

AFGE calls on Congress to appropriate dedicated funding in the FY 2021 DHS Appropriations bill to provide every TSO a pay raise. Congress must pass legislation that would apply Title 5 to the TSO workforce, especially application of the GS system of compensation.

### **CONGRESS MUST REFORM THE SCREENING PARTNERSHIP PROGRAM**

Following the terrible events of Sept. 11, 2001, the nation demanded that Congress improve the aviation security of the U.S. by federalizing the duties of screening passengers and baggage at airports. Most airport operators continue to depend on the experience, training, and commitment of federal TSOs and are uninterested in the opportunity to convert to private contractors under the Screening Partnership Program (SPP). Unlike other efforts to convert federal jobs to contractors, the SPP does not require the contractor to demonstrate taxpayer savings or allow the federal workforce to compete in the bid. Current law shortens the period TSA can consider an SPP application, requires collusion with the airport operator on contractor choice and limits the administrator's discretion to determine the appropriateness of privatizing screening at an airport. Jobs with an SPP contractor include salary stagnation and fewer and more expensive benefits. Unlike the constant scrutiny of the TSO workforce, there is almost no transparency regarding attrition rates or security breaches at SPP airports.

During 2018, AFGE prevented attempts to privatize screening under the SPP at Orlando International Airport and San Luis Munoz Marin (San Juan) Airport. In 2019, AFGE also fought efforts by the St. Louis Board of Aldermen to expand screening privatization under the airport

privatization program of the Federal Aviation Administration at St. Louis Lambert International Airport and an effort by the former governor of Georgia for a state takeover of the nation's busiest airport, Atlanta Hartsfield Airport. Atlanta Hartsfield currently uses private contractors to monitor exit lanes in direct violation of federal law. The Georgia legislature has just convened its 2020 session and promoters of the takeover are trying again.

AFGE strongly supports reintroduction of legislation similar to the Contract Screener Reform Act, introduced by Rep. Bennie Thompson (D-Miss.) during the 114<sup>th</sup> Congress. The Contract Screener Reform Act would apply transparency and accountability to the SPP. AFGE also calls on Congress to examine if the FAA's airport privatization program can open the door to private screening without consideration of national security risks.

### **HONORING OUR FALLEN TSA HEROES**

Rep. Julia Brownley (D-Calif.) plans to reintroduce the "Honoring Our Fallen TSA Heroes Act." The bill had 139 cosponsors in the last Congress and would grant TSOs Public Safety Officer benefits in the event of their death or severe injury while in the line of duty. AFGE strongly believes TSOs protect the public and are deserving of these benefits. We will continue our efforts to advance legislation in the House and encourage introduction in the Senate.

### **FUNDING FOR AVIATION SCREENERS AND THREAT ELIMINATION RESTORATION (FASTER) ACT**

To fund aviation security, including the work of TSA, Congress passed an Aviation Passenger Security Fee. Since 2014, that fee is \$5.60 one-way and \$11.20 roundtrip. However, the increase that took effect in 2014 included a diversion of one third of the security fee funds to deficit reduction, costing \$19 billion over 10 years. The "FASTER Act" would end that diversion and dedicate the fee entirely to aviation security operations. The funds would allow for more aviation security personnel, and checkpoint and baggage screening technology. The legislation would also allow the administrator to pay TSOs in the event of a government shutdown.

### **FEHB COVERAGE FOR PART-TIME TSOS; WORKERS' COMPENSATION; HAZARDOUS DUTY PAY**

In response to the coronavirus pandemic, members of the House Homeland Security Committee introduced legislation to restore part-time TSOs' full federal share of their health benefit, provide the presumption of workplace illness for those who contract the virus, and provide hazardous duty pay for TSOs on the job and risking their lives. Since that time, the TSA administrator has restored the part-time health benefit and directed the agency to presume workplace illness for Federal Employee Compensation Act coverage. As new legislation is introduced in this Congress, we will continue to push for fairness for TSOs in their benefits and treatment on the job.

## CONCLUSION

The TSO workforce is integral to aviation security defenses put in place to prevent a repeat of the act of terrorism against the U.S. Continued second-class treatment of this workforce is not only detrimental to the agency and its employees, but also harmful to aviation security. Congress must pass legislation to ensure the TSO workforce has the same civil service protections as other federal workers and provide funding to compensate TSOs for the important service they provide in protecting the U.S.

### **AFGE urges Congress to:**

- Repeal the statutory provision that authorizes the TSA administrator to create a separate personnel system for the TSO workforce.
- Protect Homeland Security by applying civil service rights protections under Title 5 of the U.S. Code to all TSA personnel.
- Prevent privatization of passenger and baggage screening currently performed by trained, experienced federal workers.
- Provide fair compensation to the TSO workforce by appropriating funds for a pay raise.
- Pass legislation to extend the same rights and protections under Title 5 of the U.S. Code and most DHS employees to the TSO workforce and all employees at TSA and place them on the GS pay scale.
- Support the Honoring our Fallen TSA Heroes Act.
- Support the Funding for Aviation Screeners and Threat Elimination Restoration Act.
- Support full-time health insurance and workers' compensation and hazardous duty pay as legislation is developed.

## Voter Rights, Civil Rights, and Judicial Nominations

### Background

AFGE is a full and active partner in the traditional alliance between the civil rights and workers' rights movement. AFGE created the Fair Practices Department in 1968 to fight racial injustice in federal employment and expanded it in 1974 to become the Women's and Fair Practices Department protecting the federal workforce. AFGE leaders marched in Selma in 2015 and 2019 with many others to honor the sacrifice of those who fought for the Voting Rights Act of 1965 and to ensure those rights will not be denied or diluted by state legislatures or federal judges. AFGE has recognized disparities in the criminal justice system and has worked with advocates on sentencing reforms. AFGE fights for equal pay between men and women and against the use of discriminatory pay-for-performance schemes. AFGE fights for the federal government to become the model employer, and for the rights and dignity of all federal workers regardless of race, sex, religion, orientation or gender identification, national origin, age, or disability status.

### Legislative and Judicial Attacks on the Right to Vote

The preclearance section of the Voting Rights Act blocked discriminatory voting changes before implementation. Fifty-three percent of the states covered by the preclearance requirements due to past discrimination passed or implemented voting restrictions that disenfranchised tens of thousands of voters. Immediately following the Supreme Court's decision in *Shelby County v. Holder*, striking the preclearance provision of the Voting Rights Act, states previously subject to preclearance (Texas, Alabama, and North Carolina) implemented restrictive identification requirements, purged voter rolls, eliminated same day voting registration and limited early voting. Since the beginning of 2019, bills to restrict voter access to the polls were introduced or extended in 14 states. The intent is clear: Political control will be maintained by denying the ballot to those who may vote in opposition.

Voting rights restrictions have a direct impact on federal workers. Statistics from the American National Election Studies indicate that union household turnout is 5.7% higher than that of nonunion households. It is likely that voters who favor a strong federal government and recognize the contributions of the federal workforce are more likely to show that support when they cast a ballot.

### Voting Rights Advancement Act

The John Lewis Voting Rights Advancement Act has not yet been introduced in the 117<sup>th</sup> Congress. In the 116<sup>th</sup> Congress, H.R. 4, the "Voting Rights Advancement Act of 2019," introduced by Rep. Terri Sewell (D-Ala.), passed the House of Representatives on Dec. 6, 2019. This bill would have restored the Voting Rights Act of 1965 by outlining a process to determine which states and localities with a recent history of voting rights violations must pre-clear election changes with the Department of Justice. AFGE is working with Representative Sewell and Sen. Patrick Leahy (D-Vt.) to reintroduce the John Lewis Voting Rights Act and urges Congress to swiftly pass this legislation.



## **Make Federal Elections a Federal Holiday**

AFGE supports legislative efforts to protect and extend the right to vote. Since the beginning of the year, 16 states have introduced voting reforms. Provisions include extending early and Sunday voting, same day registration, eliminating voting roll purges, and restrictive identification requirements that are barriers to voting. We expect Rep. Anna Eshoo (D-Calif.) to reintroduce the Election Day Holiday Act and we call on Congress to pass the legislation. This bill would establish the Tuesday after the first Monday in November in the same manner as any legal public holiday for purposes of federal employment. The bill would create “Democracy Day,” a federal holiday to boost voter turnout on Election Day.

According to the U.S. Census Bureau, in 2016, 14.3% of the 19 million citizens who did not vote said they were “too busy” on Election Day to cast a vote. Currently 20 states have varying laws allowing workers paid time off to vote. Voting is a constitutional right supported by federal law. Over 30% of federal workers are veterans, many of whom fought in Iraq, Afghanistan, and Syria to protect the voting rights of citizens in other countries. One of the bill’s harshest critics is Senate Minority Leader Mitch McConnell (R-Ky.), who has dubbed efforts to make federal elections a federal holiday a “power grab” by one party. It is a “power grab” for democracy by U.S. citizens.

## **Equal Pay**

The Paycheck Fairness Act has not yet been introduced in the 117<sup>th</sup> Congress. In the 116<sup>th</sup> Congress, H.R. 7, the “Paycheck Fairness Act,” introduced by Rep. Rosa DeLauro (D-Conn.), passed in the House of Representatives on March 27, 2019. AFGE is working with Representative DeLauro and Sen. Patty Murray (D-Wash.) to reintroduce the bill. AFGE urges Congress to pass the Paycheck Fairness Act when it is reintroduced.

The bill closes loopholes that hinder the Equal Pay Act’s effectiveness, prohibits employer retaliation against employees who share salary information among colleagues, and ensures that women who prove their case in court receive awards of both back pay and punitive damages. A 2018 study by the American Association of University Women found that fulltime working women on average earn 80% of what men earn, and that the gap increases for working women of color. Working families can lose hundreds of thousands of dollars over the course of a woman’s lifetime due to the pay gap.

## **Discrimination Against Federal Workers with Targeted Disabilities**

Federal employees with targeted disabilities deserve to have their workplace rights respected. Reports have shown that federal government agencies are removing employees with targeted disabilities right before the end of their probationary period. Targeted disabilities are a subset of the larger disability category. The federal government has recognized that qualified individuals with certain disabilities, particularly manifest disabilities, face significant barriers to employment, above and beyond the barriers faced by people with a broader range of disabilities. These include developmental disabilities, deafness or serious difficulty hearing, and blindness.

The federal government should be a model employer of persons with targeted disabilities. Losing a job as a federal employee could plunge these disabled workers into financial peril. According to the 2017 Census Bureau Poverty and Income Report, the official poverty rate for those with disabilities is 24.9%. The unemployment rate is 15.1% for persons with disabilities. Only about one-third of persons with disabilities are working. There is no explanation for the disparity in retention between federal employees with targeted disabilities and other members of the federal workforce. It is important to ensure that workers with targeted disabilities are not victims of discrimination in the federal workplace.

AFGE is working with members of Congress to obtain data about the rates of persons with targeted disabilities removed at the end of their probationary period. As this is documented, AFGE will call upon Congress to strengthen protections for disabled federal workers.

AFGE will continue to work with Rep. James Langevin (D-R.I.) and Sen. Tammy Duckworth (D-Ill.) to advocate for rights for federal employees with targeted disabilities.

### **Judicial Nominations**

The U.S. Constitution provides the president the authority to nominate qualified individuals to the federal courts. Because federal judgeships are lifetime appointments, the role of the U.S. Senate is a responsibility to advise and consent on those nominees. During the last Congress under the previous administration, AFGE publicly opposed the nominations of Brett Kavanaugh and Amy Coney Barrett to the U.S. Supreme Court, and the nominations of Chad Readler and Eric Murphy to serve on the Sixth Circuit Court of Appeals. AFGE has consistently opposed federal judicial nominees who have shown hostility to federal worker collective bargaining and due process rights, failed to protect employees against discrimination on the job, or have a documented history of voter disenfranchisement.

### **AFGE urges Congress to:**

- Pass legislation to protect the voting rights of each American, including a law establishing the day of federal elections as a federal holiday.
- Reject schemes to disenfranchise voters and create permanent majorities through gerrymandering.
- Expand civil rights enforcement efforts.
- Protect the rights of federal workers with a targeted disability.
- Support federal judicial nominees who have a record of supporting civil and voting rights protections, and those for workers and unions.

## Paid Leave

H.R. 6395, the “National Defense Authorization Act for Fiscal Year 2021,” which became Public Law Number 116-283 on Jan. 1, 2021, extended the 12 weeks of paid parental leave to approximately 100,000 federal employees outside of Title 5 who were inadvertently excluded from last year’s legislation, including workers at the Department of Veterans Affairs, Transportation Security Administration, Federal Aviation Administration, and D.C.’s Courts and Public Defender Service.

H.R. 2500, the “Fiscal Year 2020 National Defense Authorization Act,” which was signed into law on Dec. 20, 2019, included a provision granting 12 weeks of paid parental leave for civilian federal employees to care for a newborn, newly adopted, or newly placed foster child. The benefit went into effect on October 1, 2020.

On Jan. 28, 2021, House Oversight and Reform Chairwoman Carolyn Maloney (D-N.Y.) introduced H.R. 564, the “Comprehensive Paid Leave for Federal Employees Act,” to provide federal employees with 12 weeks of family leave for all instances covered under the Family and Medical Leave Act (FMLA). This includes paid leave to care for seriously ill or injured family members; to tend to an employee’s own serious health condition; and to address the health, wellness, financial, and other issues that could arise when a loved one is serving overseas in the military or is a recently discharged veteran. No federal employee should have to choose between caring for a loved one and receiving a paycheck. Sen. Brian Schatz (D-Hawaii) will be introducing the Senate companion bill soon.

Congressional opponents of paid family leave for federal employees have raised arguments largely based on cost. Unrealistic assertions about the ability of federal workers to accumulate and save other forms of paid leave continue. It is not difficult to speculate on the cost of failing to extend this benefit to families. Productivity is lost when a federal employee returns to work too soon without securing proper care for a loved one or when federal employees come to work when they are ill because they used all their sick leave during the caretaking of a loved one. A lack of paid family leave also negatively affects the government when a good worker, trained at taxpayer expense, decides to leave federal service for another employer, often a government contractor, who does offer paid family leave.

There is public-private employer agreement that improving the quality of life for working families is good policies. Growing numbers of private employers, including taxpayer-funded federal contractors, and most governments across the globe have acknowledged the benefits that accrue to employers when workers are provided paid family leave. Only 12% of U.S. workers have paid family leave and only 61% have paid sick leave according to the Bureau of Labor Statistics.

### **Congress Should Recognize the Benefits of Leave to Workers and Agencies**

Congress must face the reality of the difficulties federal workers face in accumulating annual leave. Federal employees are only able to accumulate a maximum of 30 days of annual leave, not an adequate amount of time for other potential instances covered under FMLA. By

most conservative estimates it would take a federal worker who takes two weeks of annual leave and three days of sick leave per year close to five years to accrue enough sick and annual leave to receive pay during the 12 weeks of family leave allowed under FMLA. Even if a federal worker never got sick and never went on vacation it would take over two years to accumulate enough leave to pay for 12 weeks of family leave. The alternatives suggested by federal employee paid family leave opponents are far too simplistic and unrealistic to adequately address the problem. Federal workers who take unpaid FMLA leave too often fall behind on their bills and face financial ruin.

AFGE believes the paid family leave will result in the retention of talented workers who would otherwise leave federal government work for private sector jobs because of the availability of paid family leave. The federal government currently reimburses federal contractors and grantees for the cost of providing paid family leave to their workers. Surely if such practice is affordable and reasonable for contractors and grantees, federal employees should be eligible for similar treatment.

The COVID-19 pandemic has shown the critical need for paid leave for federal employees to be able to perform the mission of their agency and have time for dependent care needs. Paid family leave is critical to ensure federal employees can succeed in their job and support their loved ones.

## The Equality Act

The Equality Act has not yet been introduced in the 117<sup>th</sup> Congress. In the 116<sup>th</sup> Congress, H.R. 5, the “Equality Act,” introduced by Rep. David Cicilline (D-R.I.), passed in the House of Representatives on May 17, 2019. AFGE is working with Representative Cicilline and Sen. Patty Murray (D-Wash.) to reintroduce the bill. AFGE urges Congress to pass the Equality Act when it is reintroduced.

This bill will extend existing civil rights protections to LGBTQ Americans in the areas of employment, education, housing, credit, jury service, public accommodations, and federal funding.

The pursuit of justice has not always been easy or popular, but AFGE stands true to a basic tenet of fairness: all individuals should be judged by the same criteria. Accordingly, AFGE strongly opposes employment discrimination based on sexual orientation or gender identification. Currently it is not violation of federal civil rights law to fire, deny housing, or educational opportunities to individuals simply because they are a member of the LGBT community – and that is wrong. Although this protection has applied administratively to federal employees for decades, the Special Counsel under the Bush administration systematically denied federal workers a process to remedy discrimination based on sexual orientation. This demonstrated the need for statutory protections. The Equality Act extends protections against discrimination based on sexual orientation in employment, housing, and access to public places, federal funding, credit, education, and jury service based on orientation or gender identification.

AFGE supports the Equality Act and calls for Congress to pass the Equality Act when it is reintroduced in the 117<sup>th</sup> Congress.

## Equal Employment Opportunity Commission

### THE CIVIL RIGHTS AGENCY MUST REBUILD FROM RECORD LOW STAFFING AND RESTORE FOCUS ON HELPING VICTIMS OF WORKPLACE DISCRIMINATION

#### Summary

AFGE's National Council of Equal Employment Opportunity Commission (EEOC) Locals is proud to represent investigators, attorneys, mediators, administrative judges and other EEOC staff who enforce civil rights laws, which protect against discrimination on the job based on race, religion, color, national origin, sex, age, disability, and genetics. EEOC needs resources so that a new leadership can get back to enforcing civil rights.

For the past four years, civil rights were under attack. Each year, the former administration sought to slash the funding and employees needed to carry out EEOC's mission. EEOC implemented backlog reduction strategies, which relied on closing cases, not investigating discrimination. EEOC ended FY 2020 with a record low 1,939 employees nationwide. Appointments are booked for months in advance due to an investigator shortage. It takes up to an hour on hold to get live help from the understaffed in-house call center.

In the midst of the #MeToo era, a national reckoning on racial injustice, and a pandemic, workers need a robust EEOC to seek redress. Instead, the former administration exploited the agency for ideological ends to weaken laws and the agency's ability to enforce them.

Just two weeks before the change in administrations, EEOC approved changes to a governmentwide rule to make it harder for federal employees to bring forth discrimination complaints. The new rule, if implemented, would strip federal workers of the right to get help on an EEO complaint from their experienced union representatives on duty time. Congress must review and reject this anti-worker and anti-union EEO official time rule.

#### Summary of Priorities

For FY 2022, AFGE Council 216 will:

- Urge Congress to increase EEOC's budget to hire up to the staff ceiling of 2,347 employees.
- Wage a campaign with union and civil rights activists to overturn the mendacious EEO official time rule.
- Request new agency leadership review EEOC's performance system and backlog reduction strategies to determine any harmful impact on enforcement and benefits for the public.
- Press new agency leadership to reboot labor-management relations, insist on management compliance with impact and implementation obligations, and ensure a CBA that protects employee rights.

## Discussion

### 1. Congress Should Overturn EEOC's Eleventh Hour Bid to Strip Federal EEO Complainants of their Right to a Union Representative

*AFGE Council 216 will fight to get EEO rights back for federal employees.*

Congress must review and reject EEOC's lame-duck attack on federal victims of discrimination, which is inherently inconsistent with its civil rights mission. If implemented, this rule would impact federal employees governmentwide.

The longstanding regulation has allowed a federal employee pursuing a discrimination complaint to designate the representative of his or her choice – and if that person is a federal employee, they may assist on official time. The rule change creates an exclusion singling out and barring only a union representative from assisting on official time, but would allow official time for any other employee asked to represent.

This would leave a federal employee to select a random coworker, instead of a union representative knowledgeable in the EEO process. While theoretically the employee may still choose a union representative, there would be obstacles representing after hours, taking leave or leave without pay. Moreover, the prohibition would likely chill a complainant from designating the union. The alternatives would be to pay an attorney, which may be cost-prohibitive, give up on filing, or quit. This leaves discrimination to fester, which is the opposite of EEOC's mission.

EEOC ignored over 11,000 public comments received opposing the rule. Unions, civil rights groups, lawmakers, and concerned citizens all disputed the premise that federal employees need less help, not more, fighting discrimination. Fewer than a handful of comments expressed any support.

Nevertheless, EEOC's lame-duck chair was determined to weaken federal worker EEO rights in her waning days in charge of the agency. EEOC apparently wanted to distract attention from the controversial action by posting notice for the vote on New Year's Eve. However, EEOC still received 1,300 e-mails in the days before the vote urging a NO vote.

Unfortunately, on a party-line vote of 3-2 the vote passed. Now lawmakers should overturn this eleventh-hour unwarranted rule, including by utilizing the Congressional Review Act.

### 2. The Trump Administration Tried to Cut EEOC's Budget Each Year, Even with Workplace Discrimination in the National Spotlight

*AFGE Council 216 will urge Congress to boost EEOC's budget.*

Every year the Trump administration proposed budget and staff cuts for EEOC. With the bipartisan support of the House and the Senate, these fatal cuts were avoided. For instance, for FY 2021, EEOC requested \$362 million (\$27 million below FY 2020), which would have caused devastating harm to civil rights enforcement. But thankfully due to bipartisan support, EEOC received \$404 million.

EEOC needs resources to accomplish the mission and certainly not budget cuts. EEOC's "do more with less" strategies have come at the expense of providing substantive help to the public. With a significant budget boost EEOC could instead do "more with more." EEOC must not only rebuild but expand to handle a convergence of emerging issues: the impact of the pandemic on workers; a national reckoning of racial injustice; the #Metoo era; and a confirmation of LGBT coverage in Title VII, per last year's Supreme Court decision in *Bostock* and recent executive order implementing it in federal agencies.

### **3. EEOC Must Rebuild from Record Low Staffing to Help the Public**

*AFGE Council 216 will urge Congress to direct EEOC hire front-line staff.*

In FY 2020, the Trump administration's proposed budget cut to EEOC would have resulted in the loss of 102 positions, including losing 55 investigators. Despite Congress rejecting the budget cut, EEOC remained stingy with its hiring, which did not keep pace with departures. This attrition is also referred to as "separation savings." As a result, EEOC ended FY 2020 with only 1,939 employees nationwide. This was a record low even for the chronically underfunded and understaffed agency. EEOC's overall workforce has plummeted compared to FY 2011's 2,453 employees. While Congress has wanted EEOC "to address sexual harassment," EEOC failed to properly invest in the most important resource to make this happen – front-line employees.

EEOC's workload and rock-bottom staffing justify increasing the budget and making EEOC target the funds to hire front-line staff. EEOC must hire staff for charge intake and to process the charges. In FY 2020, EEOC staff handled 67,448 charge filings, 470,000 calls to the toll-free number, more than 37,300 emails, and over 187,000 inquiries in field offices.

Enforcing laws to prevent employment discrimination requires front-line staff. Investigators are the primary resource in the agency's efforts to process discrimination claims. However, investigator staffing has sunk from a high of 917 in FY 2001 to approximately 548 available investigators (the last reported number, included in the FY 2019 budget).

There must be adequate front-line staff to receive inquiries and process charges. When the digital charge system (DCS) appointment system kicked off in FY 2018, the calendars immediately booked up for weeks out and has stayed that way, because there are not enough investigative staff to cover the appointments. During this time, jobs are lost, and retaliation cases surge.

Likewise, EEOC's in-house call center shrunk to approximately 30 intake information representatives (IIRs) from 65. The IIR shortage means the public waits almost 60 minutes to speak to a live person.

Additional support staff such as Investigative Support Assistants (ISA) and Office Automation Assistants (OAA) would allow EEOC to handle calls, mail, and email better and relieve professional staff of clerical work that detracts from their primary duties.

Additional mediators could more quickly resolve cases where participants seek an early resolution. Yet, the agency froze mediator hiring in FY 2019, and most offices still have



vacancies. EEOC supplements the program with contract mediators, who are paid \$800 per case. These mediations should be brought back in-house. COVID-19 demonstrates that EEOC's mediators could do more virtual mediations, also alleviating the need for contractors.

In the federal sector, very limited backfills of administrative judges have meant years-long vacancies. In response to thinning ranks, EEOC has focused on pilots that harm federal complainants. Instead, EEOC should hire AJs, paralegals, and support staff to address the caseloads and support federal agency compliance with EEO regulations.

EEOC's litigation program needs more trial attorneys, as well as additional paralegals to help manage the caseloads. Clerical support is also necessary to assist in managing the litigation workload, especially systemic cases.

When front-line staff are not replaced, these haphazard vacancies disrupt operations. EEOC transfers thousands of old cases across the country from short-staffed offices to those with a few more bodies. Offices receiving the old cases simply close them to meet arbitrary performance requirements.

For FY 2022, AFGE Council 216 will urge Congress to direct EEOC to hire up to the staff ceiling of 2,365 employees. As EEOC hires up, the priority should be on front-line positions with an eye towards achieving a flatter, more efficient organization.

#### **4. EEOC Should Improve Retention and Avoid Costly Staff Turnover by Fulfilling its Role as the Model Employer**

*AFGE Council 216 will fight for EEOC to comply with labor-management obligations.*

Sadly, EEOC is a long way from realizing its goal to be the "model employer." EEOC should limit costly turnover by stopping attacks on its employees and union and improving working conditions and morale.

EEOC routinely fails to comply with its labor-management obligations under the statute and CBA. The agency's OEO department is unresponsive and has made zero findings of discrimination in the last 13 years.

EEOC field offices score 10 percentage points below the government average score on this FEVS inquiry: "I can disclose a suspected violation of any law, rule or regulation without fear of reprisal." It is a sad irony that retaliation for protected activity is a legal basis that EEOC enforces.

Despite its poor ranking for work-life balance in the Best Places to Work in Federal Government survey, EEOC has refused to establish a permanent Maxiflex program.

The EEOC also must stop delaying, denying, and failing to participate in the interactive process on reasonable accommodation requests. Likewise, EEOC often fails to comply with the FMLA. EEOC must support its vets and reservists by complying with USERRA.

By taking these measures, EEOC can benefit from reduced turnover costs, greater employee engagement and innovation, and other efficiencies of a satisfied workforce:

- EEOC should embrace a strong CBA as a master agreement between the parties of their rights and responsibilities.
- New EEOC leadership should send a message to managers to comply with bargaining obligations, e.g., providing the union notice and an opportunity to negotiate the impact of changes to working conditions.
- The union needs a seat at the table including in labor-management workgroups, EEOC's COVID-19 taskforce, and awards committees.
- Performance improvement plans (PIPs) must provide a reasonable opportunity to improve, including a reasonable timeframe and no predetermined outcomes.
- When discipline is warranted: (a) ensure that the deciding official is a different manager than the proposing official; and (b) consider progressive discipline at the lowest level needed to remedy the conduct, which should not always be removal.
- The efficacy of the grievance system must be restored: Step 1 grievances handled locally, separate decision makers should process each step, culminating with the agency head, and attempting to resolve the dispute at the lowest possible level.
- Ensure that the RESOLVE internal ADR program operates as it was intended: independent; reporting directly to the chair's office; and tolling first-step grievances.
- Offer robust work schedule flexibilities, such as a permanent Maxiflex program.
- EEOC should ensure the neutrality and independence of its EEO, harassment policy, and reasonable accommodation order programs.
- EEOC's Labor and Employee Relations Division needs to be more employee-centric and decentralize local labor-management matters back to managers in the field.

## 5. EEOC Must Refocus on Providing Real Help, not Closure Quotas

*AFGE Council 216 will call for a review of EEOC's backlog strategies and new performance system, which pressures staff to deter, downgrade, and close cases.*

EEOC has been slashing its backlog by relying on questionable strategies that provide less substantive assistance to the vast majority of the public. EEOC's backlog consistently stood at over 70,000 cases for a decade, because EEOC is generally overworked, understaffed, and underfunded. Historically, the backlog got worse when staffing declined. However, the historic trend reversed starting in FY 2017, when EEOC began announcing incredible reductions in the backlog despite fewer staff: for FY 2017, 16% reduction from 73,508 cases to 61,621; for FY 2018, 19.5% reduction to 49,607 cases; for FY 2020, 3.7% reduction to 41,951. How so many case closures could be generated with fewer staff raises red flags.

According to the OIG section of the EEOC's 2017 Performance and Accountability Report, "Acting Chair Victoria Lipnic, in July 2017, addressed the inventory issue by distributing a discussion memo to senior managers describing how to reduce the inventory substantially." The backlog reduction initiatives exploit the priority charge handling process (PCHP), the agency's traditional A, B, C triage system. There is a relentless emphasis to increase charges categorized

as “C,” which are the easiest to close. “C” charges (previously estimated to naturally fall between 10-20%) typically were untimely, non-jurisdictional, or self-defeating. Now offices are pushed by headquarters to categorize approximately 30% of cases as “C” charges.

Charges categorized as “C” are dismissed out of intake without even requesting an employer position statement. The mantra is “the interview is the investigation.” The result is a press for cursory closures after the intake interview, e.g., a dismissal with a right to sue. A review of EEOC’s enforcement statistics starting FY 2017 show a decrease in merit resolutions and settlements and a rise in dismissals. Many workers cannot navigate the court system or afford an attorney. Those who can, add to the federal docket, with the type of cases that EEOC previously processed and resolved.

The case closure phenomenon has not gone unnoticed. For FY 2020 and FY 2021, the Senate Appropriations report has stated, “EEOC is directed to report to the Committee and post on its public website within 30 days of enactment of this act on the number of A, B, and C charges for each of the last 5 fiscal years.” Also, *Vox* did a deep dive: “More and more workplace discrimination cases are being closed before they’re even investigated.”

EEOC’s charge receipts for FY 2020 are the lowest in decades and have been dropping steadily since the inventory reduction emphasis kicked off in FY 2017. Given the heightened awareness of racial injustice and #MeToo, are there fewer workers facing discrimination? More likely, the drop off in charge filings reflects a press to counsel out inquiries, so there are fewer charges to process. In its FY 2018 PAR, EEOC bragged that 22,000 individuals (8,000 above the previous year) were interviewed but “decided” not to file. EEOC changed up the terminology, and now credits “pre-charge counseling” with a 4.9% reduction in charge receipts in FY 2019 and a 7.2% reduction in FY 2020.

Meanwhile, inquiries through the online system shot up 11% in FY 2019 and stayed up in FY 2020. That translates to 187,000 inquiries in the field offices, including 122,775 through the online system, but only 67,488 charges filed. AFGE Council 216 will call upon new leadership to review the mismatch between the public’s inquiries for help and decreased charge filings.

EEOC paired its backlog strategies with changes to its evaluation system. In FY 2017, EEOC first included the percentile of aged inventory in investigator performance standards. In FY 2018, closure quotas for federal sector cases were first inserted in standards for administrative judges. New leadership should review performance standards agencywide, including District Director standards, which roll down to staff, and retract case closure and other quotas (a/k/a numeric metrics). Quotas harm the EEOC’s mission, which is to enforce laws, not close cases.

EEOC’s other rationale for inventory reduction strategies is for manageable caseloads for a smaller workforce. How many charging parties saw their discrimination complaints moved off the books for this goal? Keeping caseloads low, with haphazard vacancies around the country due to attrition, will mean more doomed case transfers.

EEOC has cited a lack of resources as an excuse for all these backlog reduction schemes. Instead, EEOC should hire front-line staff and allow them to perform the real work of stopping

discrimination. EEOC must focus on how many members of the public it helps, not how many cases it closes.

## **6. Federal Employees Must Also Maintain Rights to Discovery and Full and Fair Hearings**

*AFGE will fight for federal workers to have access to the full EEO process.*

AFGE Council 216 will also continue to protect federal workers' rights to discovery and a full hearing. These rights are threatened by EEOC's schemes to drive down backlog with closure schemes, similar to the private sector.

Changes to administrative judge (AJ) performance plans contain arbitrary and unrealistic closure quotas that create a strong pressure to find more often in favor of agencies.

The standards direct AJs to make these numbers by relying on pilot initiatives that are a recipe for denying discovery. Discovery is the only way to keep the EEOC process fair. The standards also press unnecessary quick closures, such as through micromanaged summary judgment and bench decisions. Dismissals to meet the numbers may not meet due process. The standards also do not consider case complexity, varying caseloads, aged inventory transferred from other short-staffed offices, and lack of support staff.

Administrative judges should retain judicial independence to categorize cases, provide for and manage the discovery process and not be forced to meet arbitrary numbers for case processing activities. Subpoena authority will continue to be sought to improve the due process afforded to both federal sector claimants and federal agencies.

## **7. EEOC Should Improve and Staff Its Digital Charge Initiatives to accomplish the Purported Goal of Efficiency**

*AFGE Council 216 will urge that EEOC improve DCS to support constituents.*

EEOC's Digital Charge System (DCS), which was rolled out nationwide in 2017, steers workers to use an online system. The system pushes workers through questions about their work situation. Workers must respond correctly to jurisdictional questions in order to file an online inquiry and schedule an interview through an online appointment system. Generally, expanding technology enhances efficiency and access. However, DCS is not particularly user friendly for the public or efficient for EEOC staff.

DCS can act as a deterrent to workers trying to get help from the EEOC, especially those who do not have computers, are not computer literate, do not speak English, or have intellectual or physical disabilities that would interfere with a self-help online process.

Some may self-select out due to booked appointments, the length of the processor being discouraged by the system indicating that they may be ineligible, even if that is not necessarily the case, e.g., the complexity of the 15-employee minimum.

EEOC must improve these digital systems so that they support front-line staff and serve the public. Even then, EEOC must prioritize front-line staff so that when the public pushes “send” there is someone at the agency to take the call or appointment. Finally, EEOC must retain access for those who do not use computers or cannot access one for online charge filing.

The DCS operates off of a legacy platform called IMS. EEOC has claimed that DCS saves staff time, but the result is a Frankenstein system stitched together from non-integrated programs. Staff has to spend time going between DCS, IMS, and email, downloading and uploading forms. With some forms not available electronically, the system has not been fully digitized. EEOC received a grant-loan to upgrade dated systems. Now that EEOC is working on a successor to IMS, the Union should be included in the planning to make sure it is user-friendly for employees and the public.

## **8. EEOC Should Adopt a Real Efficiency: Dedicated Intake Staff**

*AFGE Council 216 will continue to promote ways for EEOC to work smarter.*

AFGE Council 216 has long promoted a full-service dedicated intake plan to address the efficient use of resources to benefit the public. The heart of the plan is utilizing trained senior investigator support assistants in dedicated units to advance the intake process from pre-charge counseling through charge filing. Investigators, who now must stop investigating their cases to regularly rotate into intake, would be able to focus on their caseload.

In FY 2019, EEOC finally took a key idea from the plan and hired five GS-8 Senior Investigator Support Assistant (SISA) positions to assist at intake with the booked appointment calendars. But when EEOC finally created the SISA position, it only filled 10 slots. Efforts to have these SISAs cover multiple offices have not worked, due to technical issues of the online appointment system, time zones, and cross-district priorities. Instead of trying to spread 10 people out to help 53 offices, EEOC should hire at least 53 SISAs, one for each office.

## **9. Stop Conciliation Changes that Hurt Workers and Bog Down Staff**

*Congress should overturn this rule.*

The Trump EEOC skewed the conciliation process in favor of the employer. Led by former Chair Janet Dhillon, EEOC initiated a pilot, an NPRM, and voted on party lines to require that in any conciliation the EEOC provide the respondent employer with: 1) summary of facts relied upon for cause finding; 2) summary and explanation of the legal basis for cause finding by applying the law to facts; 3) basis for relief sought, including any underlying calculations; and, 4) identification of a systemic, class or pattern or practice designation and basis for such designation. These additions are not required by statute or case law.

In the Civil Rights Act of 1964, Congress instructed that after the EEOC finds reasonable cause for any charge, “the Commission shall *endeavor* to eliminate any such alleged unlawful employment practice by informal methods of conference conciliation, and persuasion” (42 U.S.C. §2000e-5(b); emphasis added). However, some employers and defense attorneys sought

to shift attention away from the merits to whether the EEOC sufficiently sought to resolve the case.

In *Mach Mining LLC v. EEOC*, 575 U.S. 480 (2015), the Supreme Court rejected a prelitigation procedural “code of conduct.” The court held that review is limited to whether EEOC had given the employer the “chance to discuss and rectify a specified discriminatory practice.” *Id.* at 489.

Yet, the EEOC recently voted to change the regulation to codify the “code of conduct” rejected by the Supreme Court. Never before has the EEOC been required to provide such detailed analysis regarding its underlying investigation. These burdensome requirements stretch EEOC’s already thin staff. They also open the door for protracted litigation regarding EEOC’s conciliation efforts and the sufficiency of EEOC’s investigation. “The Trump Administration Gutted the EEOC,” featured in *The Nation*, provides in depth perspective into the harmful impact of this change.

Now lawmakers under the Congressional Review Act can overturn this unwarranted rule that was voted on two weeks prior to a new administration.

#### **AFGE URGES CONGRESS TO DO THE FOLLOWING:**

- Overturn EEOC’s EEO Official Time Rule, which strips federal complainants of their right to a union representative, by utilizing legislative powers including the Congressional Review Act.
- Request increased funding for EEOC in FY 2022.
- Direct EEOC to hire front-line staff up to the staff ceiling to provide real and timely help to the public and federal sector.
- Review EEOC’s backlog reduction strategies and numerical requirements to determine the impact on the public, including deterring and closing cases without substantive processing.
- Reduce costly turnover by improving poor morale, including stopping attacks on its own employees and union, providing accommodations, FMLA, timely acting on and finding EEO violations.
- Hire dedicated intake staff, including at least one Senior Investigator Support Assistant for each EEOC office.
- Overturn EEOC’s last minute and harmful changes to the conciliation process.

## One America, Many Voices Act

### Introduction

According to the U.S. Census Bureau, 60.6 million people currently living in the U.S. speak a language other than English. Of those, 22.4% self-reported that they either did not speak English “very well” or “at all.” They are considered linguistically isolated, meaning that they lack a command of the English language and have no one to help them with language issues on a regular basis. A growing number of federal employees provide services to the linguistically isolated by using multilingual skills in their official duties to explain application processes, determine benefit eligibility and provide public safety. Increasingly, the multilingual skills of federal employees are an absolute necessity to serve the public and accomplish the mission of federal agencies. Yet there is no standard across federal agencies to provide compensation for federal workers who make substantial use of their multilingual skills in the workplace.

AFGE calls on Congress to reintroduce and pass legislation to recruit, retain and reward federal workers with the bilingual skills necessary to serve our nation’s increasingly diverse population.

### The “One America, Many Voices” Act

It has been over 10 years since the One America, Many Voices Act was introduced in Congress. The One America, Many Voices Act would ensure that all federal workers who use their multilingual skills in the workplace on a regular basis are fairly compensated by amending 5 U.S.C. §5545 by adding multilingual skills to the list of factors for which a differential might be paid. Current law provides for a pay differential to federal workers for night, standby, irregular, and hazardous duty work. The modification authorizes the head of an agency to pay a 5% differential to any employee who makes substantial use of a foreign language in his or her official duties.

The necessity for a multilingual pay differential has been recognized by federal law enforcement agencies. Agencies such as the Border Patrol recognize multilingual skills through either a pay differential or bonuses. Other agencies require some employees to use multilingual skills who are paid at the same rate as other employees that are not required to use such skills. Multilingual skills are essential for federal agency mandates to serve the diverse public. These mandates are only met with the skills of employees who can communicate effectively with Limited English Proficiency populations. Without legislation like the One America, Many Voices Act, there is no standard for compensating those skills across the federal government.

In addition to adequately recognizing the skills of current federal workers, a multilingual pay differential would also help to entice young workers with multilingual skills into federal civil service. Although the private sector often pays a substantial dividend for the ability to speak fluently more than one language, many young workers with a commitment to their communities would be more likely to consider the civil service as a career option if they were to receive adequate compensation for their much sought-after language skills.

Many federal agency offices are in areas with a large and growing population of citizens with limited English proficiency, such as California, New Mexico, Texas, New York, and Hawaii. An August 2013 report of the Census Bureau notes the percentages of people with limited English abilities increased in Alabama, Kentucky, Mississippi, Arkansas, and Oregon. Multilingual skills will become increasingly necessary to foster client communication for effective delivery of services and for the successful function of federal agencies. If enacted, the One America, Many Voices Act would provide both a mechanism to pay current federal workers using their bilingual skills on the job, and work as an incentive to aid in the future recruitment of bilingual applicants.

### **Congressional Action**

AFGE will work for the reintroduction of the One America, Many Voices Act or similar legislation in the House and Senate during the 117<sup>th</sup> Congress. The skills of a federal workforce that uses multilingual skills to provide a more efficient government and better services to the public are advanced by the passage of legislation like the One America, Many Voices Act. AFGE is working with Reps. Nydia Velazquez (D-N.Y.), Gregorio Sablan (D-Northern Mariana Islands), Raul Grijalva (D-Ariz.), Judy Chu (D-Calif.), David Price (D-N.C.) and Al Green (D-Texas) and Sen. Martin Heinrich (D-N.M.).



## **Federal Employees' Compensation Act**

The Federal Employees' Compensation Act (FECA) is administered by the U.S. Department of Labor's Office of Workers' Compensation Programs and currently covers roughly three million civilian federal employees from more than 70 different agencies. FECA benefits include payments for (1) loss of wages when employees become injured or ill through a work-related activity, (2) schedule awards for loss of, or loss of use of, a body part, (3) vocational rehabilitation, (4) death benefits for survivors, (5) burial allowances, and (6) medical care for injured employees.

The FECA program is particularly important to those men and women whose work-related activity is inherently dangerous – Bureau of Prison correctional workers, U.S. Customs and Border Protection officers, federal firefighters, and other federal law enforcement officers. Its importance has expanded as front-line workers in dozens of agencies have been exposed to COVID-19 in the workplace. Among them are medical professionals at the Department of Veterans Affairs and the Department of Defense, food inspectors at the Department of Agriculture, and Transportation Security Officers at the Transportation Security Administration. Unfortunately, it has not been significantly reformed since 1974, and as a result, several challenges have emerged.

### **Support an Automatic Presumption of Worksite Illness Through FECA for COVID-19**

AFGE supports an automatic presumption of workplace illness when a worker who is required to report for duty and interact with the public, individuals who are quarantined, or who have been diagnosed with COVID-19 during the performance of their duties contracts the virus. This workplace presumption of illness will allow these federal employees to make a FECA claim without facing a potentially lengthy denial and appeals process and help these workers receive much needed benefits and health care services. This provision was included in H.R. 6800, the HEROES Act, but did not become law in 2019. AFGE is working to include it in the next COVID-19 stimulus package.

### **Support the Reintroduction of the Federal Workers' Compensation Modernization and Improvement Act**

AFGE strongly urges the reintroduction of the bipartisan Federal Workers' Compensation Modernization and Improvement Act, which the House passed by voice vote on Nov. 29, 2011, and has not been reintroduced or updated since that time.

New legislation is needed to enhance and update the FECA program, thereby ensuring the program meets the needs of both employees and taxpayers. Legislation should reform the FECA program by:

- Authorizing physician assistants and advanced practice nurses, such as nurse practitioners, to provide medical services and to certify traumatic injuries.

- Updating benefit levels for severe disfigurement of the face, head, or neck (up to \$50,000) and for funeral expenses (up to \$6,000) – both of which have not been increased since 1949.
- Making clear that the FECA program covers injuries caused from an attack by a terrorist or terrorist organization.
- Giving federal workers who suffer traumatic injuries in a zone of armed conflict more time to initially apply for FECA benefits and extending the duration of the “continuation of pay” period from 45 days to 135 days.
- Including program integrity measures recommended by the Inspector General and the Government Accountability Office.

## **Food Safety Inspection Service**

### **SLOW DOWN SLAUGHTER LINE SPEEDS AND PUT THE SAFETY OF WORKERS AND THE AMERICAN PUBLIC FIRST**

#### **Background/Analysis**

The Food Safety and Inspection Service (FSIS) has increasingly favored deregulation that has allowed increased line speeds for all slaughtered species and in turn removed many federal inspectors from the lines. This has drastically increased profits for meatpacking companies and drastically decreased safety for inspectors, workers, consumers, and animals.

#### **Congressional Action**

- Congress should pass legislation to mandate slower line speeds in meatpacking plants and prohibit the inspection systems that have allowed these increased and unsafe line speeds including the New Poultry Inspection System, the New Swine Inspection System, the Egg Products Rule and Beef Slaughter line speed waivers.

### **DIRECT FSIS TO FILL VACANCIES AMONG INSPECTION STAFF TO HELP PROTECT OUR NATION'S FOOD SUPPLY**

#### **Background/Analysis**

For years, FSIS has acknowledged difficulties in recruiting and retaining personnel, resulting in double-digit inspector vacancy rates in many districts. Without a robust workforce of federal inspectors, important monitoring and reporting of foodborne pathogens will not allow for timely interventions to preserve public health. In order to protect the public and workers, FSIS needs a full contingent of inspectors in every plant.

FSIS is the public health agency in the U.S. Department of Agriculture responsible for ensuring that the nation's commercial supply of meat, poultry, catfish, and egg products is safe, wholesome, and correctly labeled and packaged. The National Joint Council of Food Inspection Locals (Council) of the American Federation of Government Employees, AFL-CIO, which represents the 6,200 FSIS inspectors, believes that hiring more meat and poultry inspectors, in addition to other priorities, would help those hardworking inspectors better accomplish the FSIS mission.

Created in 1981, FSIS is federally mandated to continuously monitor the slaughter, processing, labeling, and packaging of meat and poultry products to ensure the safety and wholesomeness of the billions of pounds of meat and poultry products that enter the market each year.

Unfortunately, FSIS is suffering a serious shortage of inspectors at some of the nation's meat and poultry plants, a shortage that is threatening our nation's food supply. This permanent inspector shortage is causing the inspection system to be strained to the point of breaking. There have been an increasing number of recalls of products under FSIS jurisdiction due to the lack of inspection.

### **Congressional Action**

- Congress should increase FSIS's budget for full-time employees, which would allow for a full complement of government inspectors at all plants at all times.
- Congress should mandate that FSIS fill all current vacancies of food inspectors and consumer safety inspectors.
- Congress should support efforts to overcome the longstanding problem of recruiting and retaining employees by increasing the starting wage for inspectors. Most Inspectors start as a GS-5, which is below the plant employee's starting wage. AFGE's FSIS Council recommends starting at GS-7 and offering the same retention bonuses that are offered to public health veterinarians (who are not bargaining unit employees).

## **D.C. Government**

### **SUPPORT STATEHOOD FOR THE DISTRICT OF COLUMBIA**

#### **Background/Analysis**

The United States of America is a nation that was founded on the belief that all people are endowed with certain inalienable rights and that to secure these rights, governments are instituted, deriving their just powers from the consent of the governed. The rights of the residents of the District of Columbia are abridged when Congress imposes its will on local matters and denies D.C. residents voting representation on federal issues in both houses of Congress. The residents of D.C. are Americans who bear all the responsibilities of citizenship, but who do not enjoy all the rights of citizenship.

States are the fundamental basis for our system of government and to deny a population the ability to form a state denies them the ability to fully participate in self-governance. The voters of the District spoke loud and clear on this issue when 86% approved a referendum in support of D.C. statehood on Nov. 8, 2016.

The District has a greater population, 693,000, than two states (Wyoming and Vermont). Over 192,000 District residents have served in the armed forces and sacrificed for our country. One in five residents of the District of Columbia – more than 140,000 in total – work for the federal government and yet do not have equal representation in the government for which they work. In 2016, the District paid more than \$26 billion in federal taxes, more than 22 other states. Statehood will ensure that residents of the District of Columbia enjoy full rights in state and local matters and representation in both houses of Congress and is a matter of simple justice. Any solution short of statehood would simply continue the two-tiered system of citizenship the residents of the District of Columbia have endured for 200 years.

In 2020, for the first time, Congress passed legislation, H.R. 51, to make D.C. a state and preserve a constitutionally required Federal District that enshrines the area that houses the three branches of our federal government, our iconic monuments, and the National Mall and preserves it for all Americans. AFGE strongly supported that bill and supports it again in the 117<sup>th</sup> Congress.

#### **Congressional Action**

- AFGE urges Congress to pass H.R. 51, the “Washington, D.C. Admissions Act.”

## Expansion of the Law Enforcement Officer Statutory Definition

### Background

Congress must amend Title 5 of the United States Code to include federal law enforcement professionals whose duties meet the current statutory definition of a federal law enforcement officer (LEO). Under present law, the definition of a 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.

Despite having duties like or identical to other LEOs, these law enforcement professionals do not have equal pay and benefits status with their occupational counterparts in other agencies. Specifically, they have lower rates of pay and are not eligible for full retirement benefits until years after their LEO peers. As a result of this disparity, the law enforcement agencies with lower pay and benefits are greatly disadvantaged when recruiting and retaining trained law enforcement professionals and have far lower employee morale.

### Statutory Definition of a Law Enforcement Officer

Because law enforcement positions require officers to be “young and physically vigorous,” and LEO positions have a mandatory retirement age of 57, the federal government makes special provision for unreduced retirement at a younger age than that applied to other federal employees. Under the Federal Employee Retirement System (FERS), an employee who qualifies for LEO retirement status is eligible to retire upon attaining the age of 50, after completing 20 years of eligible LEO service. To be eligible for LEO retirement coverage, positions must meet both the statutory definition under Title 5 U.S.C. Section 8401, as well as LEO requirements under FERS.

Under 5 U.S.C. Section 8401(17)(A), the term LEO means “an employee the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the U.S., or the protection of officials of the U.S. against threats to personal safety; and are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals.”

To be eligible under FERS, the duties of the employee’s position must be “primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States.” “Primary duties” means those duties of a position that:

1. Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position.
2. Occupy a substantial portion of the individual's working time over a typical work cycle; and
3. Are assigned on a regular and recurring basis.

The definition under FERS adds the further requirement that the duties of the position “are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals.”

### **The Importance of LEO Status**

LEOs are entitled to many benefits that reflect the government’s acknowledgement of their unique status. Under 5 U.S.C. Section 8336(c), a federal LEO with a minimum of 20 years of service at age 50, or 25 years of service, is eligible to retire with an unreduced federal annuity. In contrast, federal employees who are not LEOs may begin to collect their annuities only after reaching age 60 with 20 years in federal service. Law enforcement retirement rules mandate LEOs contribute more of their salary toward retirement than federal employees who are not LEOs. As a result of this contribution, LEOs are eligible to continue participation in the Federal Employees Health Benefits Program (FEHBP) and the Federal Employees Group Life Insurance (FEGLI) immediately after they retire.

In contrast, employees without LEO status are not eligible for continued FEHBP or FEGLI coverage after early retirement unless the retirement was a result of a downsizing, Reduction in Force (RIF), or offered in some other context under Voluntary Early Retirement Authority (VERA). Additionally, annuities for federal law enforcement officers and firefighters are calculated according to a substantially more generous contribution formula than that used for regular FERS employees.

Under FERS, LEOs also receive a “special retirement supplement” (SRS) if they retire when they are under age 62. This SRS provides an approximation of their Social Security benefit if they had retired at an age when they were eligible for Social Security retirement benefits. Legislation was recently signed into law that eliminated the early withdrawal penalty fee for LEOs who retire early after age 50. Congress passed this legislation in recognition of the fact that LEOs are often forced to retire before they become eligible to receive Social Security retirement benefits or can make withdrawals from their Thrift Savings Plan (TSP) without a financial penalty.

Early retirement without financial penalties, as well as the aforementioned benefits available to retired LEOs serve as recruitment and retention tools and reflect the government’s interest in having “young and physically vigorous” individuals in law enforcement positions. All federal law enforcement personnel deserve equal treatment. The inequities in pay and benefits across law enforcement agencies lead to high turnover after law enforcement professionals are trained because they are recruited by other agencies that give them full respect, status, pay, and benefits.

### **Expansion of LEO Statutory Definition**

AFGE continues to support the Law Enforcement Officer Equity Act. In the 116<sup>th</sup> Congress AFGE supported H.R. 1195 / S.473, the “Law Enforcement Officers Equity Act,” introduced by Rep. Peter King (R-N.Y.) and Sen. Cory Booker (D-N.J.). This legislation was reintroduced in the 117<sup>th</sup> Congress on Feb. 11, 2021, in the House (H.R. 962) by Reps. Bill Pascrell Jr. (D-N.J.), Gerry Connolly (D-Va.), Brian Fitzpatrick (R-Pa.), and Andrew Garbarino (R-N.Y.)

The bill would amend the definition of the term "law enforcement officer" to include federal employees whose duties include the investigation or apprehension of suspected or convicted individuals and who are authorized to carry a firearm.

The primary duties of these law enforcement professionals include the protection of federal buildings, federal employees, officials, and the American public; as well as duties and responsibilities that are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the U.S., or the protection of officials against threats to personal safety. These professionals are trained to use and carry authorized firearms, yet they are only considered law enforcement officers when they are killed in the line of duty and their names are inscribed on the wall of the National Law Enforcement Officers Memorial.

FPS officers, and police officers from VA, DoD, and the U.S. Mint are honorable protectors of the public and they deserve recognition as law enforcement officers. The primary duties and responsibilities of these law enforcement professionals are not only rigorous but are also in direct alignment with the statutory definition of a LEO.

**Congressional Action Needed:**

AFGE strongly urges the 117th Congress to pass the Law Enforcement Officers Equity Act to amend 5 U.S.C. Section 8401 to include FPS officers, and police officers from the VA, DoD, and the U.S. Mint in the definition of a law enforcement officer.



## Census Bureau AFGE Council 241

### Census Bureau Funding

Congress passed a FY 2021 funding package that funds the Census Bureau at \$8.1 billion. This new funding level is \$1.4 billion more than the previous administration's funding request.

AFGE is working with the Census Task Force headed by the Leadership Conference and Members of Congress to secure adequate funding for the Census Bureau in future funding bills.

AFGE supports adequate funding for the Periodic Censuses and Programs (PCP) account. AFGE was successful in maintaining status quo funding and avoiding the draconian cuts in President Trump's FY 2020 budget to significantly deplete the Census Bureau of resources. AFGE is continuing to work with relevant Committee members to ensure AFGE Census Bureau employees have the necessary resources to complete fair and accurate Census in 2030.

AFGE represents over 1,500 members at the Census Bureau in Maryland, Kentucky and Arizona. Our employees ensure accurate and comprehensive data collection and analysis which informs research and federal, state, and local funding initiatives. Census Bureau work ensures fair political representation from Congress down to local school boards—and the prudent distribution of federal aid to states and communities each year. The Census Bureau data are central to sustaining democracy and facilitating informed decision-making. The Census Bureau programs are irreplaceable sources of data for key economic indicators and socio-economic characteristics that support government and private sector decision-making.

### Congressional Ask

AFGE will continue educating members of Congress and staff about the important work Census Bureau employees do for the American public and to advance civil and human rights. Advocate for full funding and staffing for Census Bureau employees to perform the mission of the agency.

## Federal Firefighters

AFGE represents federal firefighters at DoD, VA, and other agencies across the country. Too many firefighters are living with and dying from cancer in the United States every year. Firefighters are frequently exposed to smoke, toxic chemicals, and debris, which can cause cancer. These civil servants and American heroes deserve the highest quality data and best public health solutions to help prevent and treat work-related illnesses.

Federal firefighters put their lives on the line every day to protect and serve the American people. Most federal firefighters are located at military facilities. These federal firefighters have specialized training to respond to emergencies involving aircraft, ships, artillery, and ammunition. 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, hazardous material containment, and fight fires.

The National Institute of Occupational Safety and Health (NIOSH) has conducted studies about the prevalence of cancer among firefighters; however, these studies have had two critical flaws: 1) the sample sizes were too small; and 2) they do not include many minority populations. This limited NIOSH's ability to draw productive statistical conclusions from their data. More comprehensive public health data must be collected to develop solutions to preventing the high rates of cancer in firefighters.

The Centers for Disease Control and Prevention's (CDC) National Program of Cancer Registries (NPCR) provides support for states and territories to maintain registries that provide high-quality data. Data collection systems like cancer registries help identify and diagnose work related illnesses. For instance, registries help bring attention to the fact that professional groups like firefighters are not getting much needed cancer screening tests, and more precaution is needed to decrease the likelihood of illness.

### Congressional Action

- AFGE continues to advocate for the Federal Firefighter Fairness Act. This bill has not yet been reintroduced in the 117<sup>th</sup> Congress. In the 116<sup>th</sup> Congress, AFGE supported H.R. 1174 / S. 1942, the "Federal Firefighter Fairness Act," introduced by Rep. Salud Carbajal (D-Calif.) and Sen. Tom Carper (D-Del.). This bill creates a presumption of disability for firefighters who have expenses related to death or disability benefits because of heart disease or cancer after working as a federal firefighter. AFGE urges Congress to reintroduce this bill to build support and urge passage for this legislation.
- AFGE continues to advocate for fair retirement benefits for federal firefighters. Rep. Gerry Connolly (D-Va.) introduced H.R. 393, a bill to provide for the more accurate computation of retirement benefits for certain firefighters employed by the federal government. AFGE will work with Representative Connolly to build support for this bill to ensure federal firefighters receive retirement benefits for their mandatory overtime hours. AFGE continues to garner cosponsors for this legislation.

## Issues Facing Federal Retirees

### COST-OF-LIVING ADJUSTMENT (COLA)

In the 115<sup>th</sup> and 116<sup>th</sup> Congresses, in unprecedented moves, the previous president's budget proposals would have eliminated the COLA for current retirees and all future FERS (Federal Employee Retirement System) retirees and cut the COLA for CSRS (Civil Service Retirement System) retirees by 0.5% per year. AFGE opposed the move and would oppose such a move in future budget proposals because it would lead to long-term erosion of retirees' income. For instance, based on the past 20 years of COLAs in FERS and CSRS, this is how the changes would look for someone who retired with an average high three income of \$50,000:

#### FERS: 62YO, 30 Yrs /No COLA

#### CSRS: 60YO, 25 Yrs/COLA cut 0.5%/Yr

1998	\$16,500	\$16,500	\$23,125	\$23,125
2018	\$23,362	\$16,500	\$35,075	\$32,341

Also related to cost of living, the COLA is calculated differently for FERS retirees than it is for CSRS retirees. Under current law, CSRS and Social Security COLAs are calculated based on the Consumer Price Index. The FERS COLA is the same if the CPI is 2% or less; if the CPI is 2.01-3.0%, the COLA is 2%, and if the CPI increase is more than 3%, the FERS COLA is 1% less than the CSRS COLA. In January, Rep. Gerry Connolly (D-Va.) introduced H.R. 304, the Equal COLA Act, to bring the FERS COLA up to the same amount as the CSRS COLA. AFGE supports this legislation.

#### Legislative Action:

1. Oppose any COLA cuts to federal retirement for active and retired employees.
2. Cosponsor and support H.R. 304, the Equal COLA Act.

### CUTS TO SOCIAL SECURITY

In addition to FERS, CSRS and TSP benefits, which are detailed in the Federal Retirement section, retirees under the Federal Employees Retirement System (FERS) and some who are under the Civil Service Retirement System (CSRS) are also beneficiaries of Social Security and could be affected by budget proposals before Congress.

AFGE strongly opposes legislation that would:

- Cut or eliminate Social Security's annual cost-of-living adjustments for all beneficiaries, which would erode the value of Social Security benefits as people age into their most vulnerable years;
- Raise Social Security's full retirement age — already at age 67, to 69 or 70 — which would cut benefits across-the-board for all new retirees.

- Privatize Social Security, turning our guaranteed earned benefits over to Wall Street in the form of limited private accounts, subject to the whims of the economy.

## **SOLVENCY AND IMPROVED SOCIAL SECURITY BENEFITS**

AFGE supports legislative efforts to address the long-term solvency of Social Security through progressive means such as eliminating or raising the cap on earnings subject to payroll tax.

AFGE supports expanding benefits through legislation, including:

- Enacting a consumer Price Index-Elderly (CPI-E) to provide for a fairer COLA that reflects seniors' expenditures;
- A 2% across-the-board benefit increase;
- Improving widows'/widowers' benefits so a household does not experience a devastating drop in income when one spouse dies;
- Increasing the Special Minimum Benefit for low-income earners; and
- Creating a caregiver credit for workers who have taken time out of the workforce to care for children or elderly family members.

### **Legislative Action:**

- 1) Sens. Bernie Sanders (D-Vt.) and Elizabeth Warren (D-Mass.) and Rep. John Larson (D-Conn.) formed the Expand Social Security Caucus in 2018, with a goal of achieving the above described provisions. Senators and Representatives should be asked to join the Caucus if they have not done so already.
- 2) Support legislation to expand Social Security benefits and extend solvency, including bills such as Rep. Larson and Sen. Richard Blumenthal's (D-Conn.) Social Security 2100 Act, (H.R. 860/S. 269) and Sen. Sanders' and Rep. Peter DeFazio's (D-Ore.) Social Security Expansion Act (H.R. 1170/S. 478) to improve benefits and the solvency of Social Security.

## **SOCIAL SECURITY BENEFIT CUT FOR THOSE BORN IN 1960**

If you were born in 1960, your Social Security benefit will be less unless Congress takes action. Your benefit is calculated based on your lifetime of work, 35 years of earnings, but it is also calculated on the average wage index (AWI). That index was predicted to go up in 2020 by 3.5% when the year began, but because of the economic impact of the coronavirus pandemic, that figure actually dropped by 5.9% last year.

Social Security benefits are calculated on the AWI for the year that is two years before your first eligibility at age 62, which is 2020 for those born in 1960. That means *if you were born in 1960, your Social Security benefit will be 9.1% lower than it would have been without the impact of the pandemic*. This can be fixed, but Congress needs to hold America's newest 60 year olds harmless from this pandemic-induced reduction in their earned Social Security benefits.

**Legislative Action:**

- 1) AFGE urges Congress to work together to hold workers harmless from the 2020 impact on the average wage index.

**GPO/WEP**

AFGE supports the elimination of the Government Pension Offset and the Windfall Elimination Provision, which cut Social Security benefits for federal government retirees and their survivors because these provisions unfairly reduce both a retiree's benefit and a spouse's benefit. It applies to federal employees who retired under the Civil Service Retirement System (CSRS), as well as many state, county, school district and municipal public employees. For 74% of affected spouses, the benefit is reduced to zero.

These provisions have had the effect of disproportionately reducing the Social Security benefits Americans have earned. Many CSRS retirees have enough earnings from other work to qualify for Social Security, but unless this is addressed, they will receive little or no benefit.

**Legislative Action:**

1. AFGE supports legislation to eliminate GPO and WEP. In the 117<sup>th</sup> Congress, this legislation is H.R. 82, the "Social Security Fairness Act of 2021," authored by Rep. Rodney Davis (R-Ill.). Sen. Sherrod Brown (D-Ohio) introduced the same legislation in the last Congress and plans to do so again in this Congress. Please cosponsor H.R. 82 in the House and the Senate bill when it is introduced and take action in committee and on the House and Senate floors.

**MEDICARE**

Most federal retirees become eligible for Medicare at age 65. Many opt not to enroll in Medicare Part B for out-patient medical services because they are also covered by the Federal Employees Health Benefits Program (FEHBP). Because of FEHBP coverage federal retirees would be less adversely affected by proposals in Congress to eliminate traditional Medicare and turn it into a voucher program as has been proposed in past budgets.

The hospital coverage, Medicare Part A, along with the rest of the program, could be turned into a capped benefit to purchase insurance on the open market. Older and sicker beneficiaries would find it difficult to purchase adequate coverage to insure them for extended or chronic illness. It would be harder for seniors, particularly lower-income beneficiaries, to choose their own doctors if their only affordable options were private plans that have limited provider networks.

AFGE has opposed efforts to repeal the Affordable Care Act. Under this law, Medicare beneficiaries are eligible for an annual wellness examination, which extends lives and can detect serious illness early enough to take curative action.

AFGE opposes legislation efforts to raise the Medicare eligibility age from 65 to 67, further straining the Medicare system by skewing to an older, less healthy cohort. Budget proposals have included higher hospital co-payments and substantial increases in deductibles. AFGE opposes these proposals that shift significantly more out-of-pocket costs to beneficiaries.

AFGE is also concerned with efforts to shift more Medicare beneficiaries to Part C under Medicare Advantage. While they have attractive features for younger, healthier seniors, they do not always provide sufficient coverage for high-cost care. Additionally, when a beneficiary shifts back to traditional Medicare Part B, pre-existing conditions are not covered by most supplemental policies.

### **Legislative Action:**

1. Oppose budget cuts and eligibility age increases in Medicare.
2. Carefully monitor efforts to expand Medicare (i.e. Medicare for All)

### **MEDICAID**

Medicaid provides health care for low-income children and families. It is also the largest source of funding for long-term care and community-based support for the elderly and people with disabilities, providing about 62% of all such services.

The House passed a budget in 2018 that would have capped Medicaid and turned it into a “block grant” program to the states by replacing the current joint federal/state financing partnership with fixed dollar amount block grants. States would have less money, resulting in significant reductions to beneficiaries, including nursing home residents and their families. AFGE opposes this block grant approach to funding Medicaid. While these proposals were in the previous president’s budget, new leadership in the House did not advance them in 2019 and we will monitor to ensure no such proposal is advanced in 2021.

There have been numerous attacks on the Affordable Care Act. While some of its underpinnings remain, Congress agreed to a tax plan that eliminated the “individual mandate” which created a broad universe of insured individuals that determines pricing of insurance. Older adults not yet eligible for Medicare, aged 50-64, are already experiencing sharp increases in insurance premiums and are most likely to drop coverage. As aging adults experience increasing chronic illness, they will have little or no health care and will reach Medicare eligibility with untreated conditions that increase costs to that system.

Additionally, the erosion of the ACA may affect AFGE families. While members and retirees usually enjoy FEHBP coverage, dependents such as grandchildren or aging parents in the household could lose their coverage and find that basic preventive services, coverage of pre-existing conditions and long-term care are no longer available.

AFGE has opposed ACA cuts, noting the risk of leaving an estimated 13 million more Americans without health care and of an increase in insurance premiums. We will work with the new administration to expand the ACA without cutting coverage others enjoy.

**Legislative Action:**

1. Oppose cuts to Medicaid and the ACA through budget proposals and stand-alone legislation and support efforts to strengthen and broaden access to quality affordable health care.

## **Social Security Administration – General Committee**

The General Committee represents the six AFGE councils at the Social Security Administration (SSA), including AFGE Council 224, AFGE Council (and Local) 1923, AFGE Council 109, AFGE Council 215, AFGE Council 220, and AFGE Council (and Local) 2809. The General Committee (GC) advocates for the large majority of bargaining unit employees that serve the American public.

### **The 2019 National Agreement (NA)**

The 2019 NA was signed by the GC under duress and as a direct result of President Trump's anti-employee executive orders.

It was the worst NA in decades, revoking official time to engage in representation matters, reducing union space, and hampering our ability to advocate on behalf of employees. The reduction in telework at OARO, OHO, and ODAR and elimination of it at field offices was especially myopic and only served to undermine morale. This decision made the agency vulnerable last spring when the pandemic made telework a necessity to protect our employees and continue the mission of service.

The 2019 NA must be immediately discarded and replaced with the 2012 NA that was fair and balanced to protect our bargaining unit members. The GC is prepared to return to the bargaining table to work with an agency leadership that is acting in good faith to create a contract that works for both the agency and employees.

### **Agency Leadership**

Social Security Commissioner Andrew Saul and Deputy Commissioner David Black must be replaced. They created an environment of anti-union, anti-employee hostility that has undermined morale, harmed the productivity of countless SSA employees, and targeted union officials with discipline. They were the ones that forced the GC to accept the 2019 NA under threat of unilateral implementation of something worse as permitted by Trump's EOs.

Throughout their tenure, Saul and Black have been slow to communicate with the AFGE Councils on decisions impacting employees. Commissioner Andrew Saul has only briefly met with AFGE twice since he has been with the agency and has never tried to work collaboratively.

### **SSA Distrust and Micromanagement**

The agency exhibits a total distrust of SSA employees and pursues excessive monitoring of them. Recently, the agency has implemented Skype video recording capabilities. In the future, the agency could employ this device to create an invasive and hostile work environment in violation of privacy rights while teleworking.



## **Presidential Executive Orders**

President Biden's EOs on federal labor-management relations will go a long way to restore federal employee rights by rescinding President Trump's EOs of 2018. Biden issued his EOs on Jan. 22, 2021, but SSA has not implemented them yet. This is important since the aftereffects of the destructive management policies implemented by SSA as directed by the Office of Management and Budget remain. SSA removed and/or disciplined many SSA employees unnecessarily because of them. This was especially the case for AFGE union officials at the agency. In addition to reversing Trump's EOs, we are seeking restoration of leave taken when official time was revoked and reversal of removals of officers directly connected to the implementation of the EOs.

## **Underfunding and Understaffing**

There are approximately 61,000 employees at SSA currently providing service to 70 million fellow citizens who get benefits. On top of that, the agency handled 33.5 million calls and over 40 million individuals who visited their local SSA office in FY 2019 alone. No other agency provides the in-depth services that SSA provides to that many citizens. Unfortunately, SSA is severely underfunded and understaffed to handle such a workload with a budget totally inadequate to provide the service that the American public is entitled to receive. It should be at least \$15 billion.

Note that SSA has a long history of prudent use of resources, which justifies improved funding. For example, administrative expenses continue to be less than 1.3% of SSA benefits paid while most companies have administrative costs of at least 20%. With adequate, steady funding, SSA can hire more staffing in all components of the agency nationwide to provide and maintain the level of service our fellow citizens deserve.

SSA's Office of Quality Review within OARO reviews around a half million disability cases each year (among many other tasks) to prevent incorrect allowances and denials. It is very challenging and technical work that compels the recruitment and retention of highly skilled federal employees. Each incorrect disability allowance that we prevent saves the SSA Trust Fund and the federal treasury a total of \$300,000 on average. This has translated to over \$11 in savings for every \$1 spent on budgeting. These results cannot be sustained if federal employment is not appealing to current and future civil servants due to understaffing and outsourcing.

SSA should be focused on protecting the trust funds, stopping improper payments, formulating a non-discriminatory performance appraisal system of employees, charging for use of Social Security numbers, providing robust advice to the public on potential SSA benefits, and protecting the Affordable Care Act.

## **Securing the SSA Trust Funds**

The SSA Trust Funds can be saved by changing the law concerning taxing unearned Social Security income. Beginning in 1984, Social Security beneficiaries with earned income over \$25,000 were required to pay federal income taxes at various percentages up to \$44,000 and 85%

thereafter on his/her Social Security benefits. Since these are taxes that are based on unearned Social Security benefits and are not earned income, they should be routed directly to the SSA Trust Funds instead of the U.S. Treasury. This simple act to change the law in addition to eliminating the Social Security payroll tax cap would go far to secure the SSA Trust Funds.

### **Expanding the Affordable Care Act**

The Affordable Care Act (ACA) seemed to have substantially reduced the number of citizens filing for SSA disability benefits in the past and should be expanded. According to an AFGE analysis, approximately 3 million fewer disability claims have been filed since the ACA came into effect because more people could access health insurance. This suggests that the lack of insurance has propelled SSA disability program filings for years. Further studies are warranted, but this is another reason to retain the ACA and then further expand health-insurance access to all nationwide as we deal with the pandemic.

### **Training and Career Ladders**

We strongly recommend more training and establishing genuine General Schedule career-ladder promotional opportunity for SSA employees. SSA should develop a plan for broad-based training so that the agency provides more consistent “one-stop shopping” to the public. This would improve service delivery and employee career advancement.

Further, the agency needs to return to meritorious advancement. Time and resources are wasted on cancelling vacancy announcements when managers’ “favorites” are not chosen. This, along with excessive vacancies has led to early retirement among some of the most experienced employees and is counter to efficient and effective public service delivery.

### **New Appraisal System**

SSA needs a new performance appraisal system that is not discriminatory. SSA’s current system is producing disparate results for individuals with disabilities, African Americans, other minorities, and employees in lower GS levels. A revised and just performance appraisal system would not yield such results.

### **Ratio of Employees to Management**

The ratio of employees to management is quite high at SSA especially when you consider all the automated processes that we utilize today instead of manual ones of the past, which consumed a lot of managerial time. The ratios vary from component to component. It is as low as 4 employees to 1 supervisor in some components and as high as 20 to 1 in others. The ratio is like this because very few vacancies in bargaining unit positions are filled while every management vacancy is replaced immediately. There should be a standard 20 to one ratio consistently across the agency. This would delayer the complicated and inconsistent management structure with fewer unneeded middle managers, supervisors, and program leaders. While SSA has critical staffing deficits in bargaining-unit personnel providing direct service to the American public, management is bloated. This must be corrected. Once this problem is resolved and we can put

the maximum personnel at the service of the people, we can better determine what specific additional staffing needs are outstanding.

### **Improper Payments**

The agency should be focusing more attention on improper payments. Most of them are caused by unreported or over reported anticipated wages or capital gains. Most of the improper payments can be eliminated if Congress made it mandatory under penalty of perjury for claimants and beneficiaries to report both anticipated wages and anticipated capital gains on the Form 1040 or “Form Requesting an Extension to File.” Improper payments are also generated secondary to a less thorough quality review of all SSA programs when “quantity” expectations for employees (“good numbers”) are prioritized over quality handling to protect the trust funds from these improper payments.

Another important component to prevent fraud and waste is have OQR employees scrutinize more disability claims prior to final decision and greater post-entitlement review of more beneficiaries once they are on the rolls.

### **Charging for Use of Social Security Numbers**

Legislation should be pursued to charge companies for using Social Security numbers (SSNs) for purposes other than employment. SSNs were not established for companies to use for any purpose that they needed, but the practice is creating extra work for SSA relating to identity theft. When someone loses his/her driver license or wallet, SSA is contacted for identity protection. SSA work in this area should be limited to loss of Social Security cards and not what third parties choose to use SSNs for. If companies desire to use SSNs beyond recording wages, they should be charged for using proprietary data of SSA. In turn, collected fees should go directly into SSA’s administrative budget.

### **Establish a Mission, Then Deliver**

SSA needs to recognize that our mission is to provide a quality commodity to the public. In actuality we are providing the public with their "own benefits." We need adequate time and resources to get these benefits in the correct amounts from the outset and to allow only disability claims that are correct. SSA’s current priorities do not facilitate this.

SSA was at one time a first-class agency with a mission to recognize that we dealt with individuals and their very specific needs and concerns. Lately, it appears that Social Security applicants and beneficiaries are considered just anonymous voices at the end of a phone line not worthy of sufficient attention or respect. Waiting times for those callers to our toll-free number can be up to an hour or more. SSA employees handling those calls express frustration in not being able to serve people adequately due to time constraints. Numerous callers are very angry by the time they get through often after more than one attempt over several days. In establishing a new SSA mission, we should consider a mission statement to “make every effort to confirm that the right recipient is receiving the right payment for the right reason at the earliest time.”

## **Information Technology**

SSA's cost for information technology (IT) is steadily rising without any quality oversight reviews to ensure the appropriateness and return on these system expenditures. SSA should have certified programmers on staff to perform assessments in all areas of IT because this is requiring more and more SSA resources. In addition, SSA needs more IT resources to get rid of COBOL and other antiquated software. SSA usually excludes employee representatives in making suggestions/changes on these matters, which often leads to bad results. The agency should reconsider this since employees could be of great help in designing programs that work.

## **Government Contracts**

SSA spends on average of about \$1 billion on government contracts annually. Although it seems that SSA is looking to reduce some of this excessive spending after wasting millions of dollars, the agency is still spending too much. Many of the government contractors may be performing inherently government related work or tasks that could be done cheaper in-house concerning disability, representative payees for incapable beneficiaries, special studies, surveys, programs to return beneficiaries to work, research and development, and career development projects. Much of this can be done by lower graded employees who have had some clerical duties disappear in a more paperless environment. They are available for work being done by contractors and can perform it at much less cost. Bargaining unit employees often have had to redo some of the work that contractors did not do correctly. The agency should start insourcing this work back in-house so that it will be done right the first time and our lower-graded employees will have work to perform that could truly enhance their careers.

## **Resume Providing Robust Advice**

Many years ago, SSA provided robust advice to members of the public on what SSA benefits they would potentially receive upon retirement. Now, many beneficiaries are paying fees to financial advisers to help them to determine their potential SSA benefits and when they should retire. SSA employees should be providing direct, correct information on these matters regarding benefits to members of the public since they already paid payroll taxes to have retirement possible and explained by the source of it. We are a government agency that is supposed to deliver to our citizens, applicants, and beneficiaries the information, advice, and benefits that they deserve.

Lastly, we believe management has lost sight of Social Security's mission to serve the public and administer the program in a fair and equitable manner. Without proper planning and consideration of employee-representative participation, staffing, training, funding, and management commitment to service of the public; SSA will continue to fail in its attempts to address the problems of rising applications, the backlog of disability related appeals, and to properly address the information technology needs of the workforce and the public they serve.

# Environmental Protection Agency

## STRENGTHEN COLLECTIVE BARGAINING RIGHTS AT EPA

### Background

The EPA workforce suffered numerous attacks to their workplace rights under the previous administration. Administrator Wheeler and his senior staff fostered a hostile workplace through disregard for federal labor laws, union busting, and outright lies. Under Administrator Wheeler, there were numerous efforts to distract employees from their substantive work and strip the union of their rights to protect employees in the workplace.

One of the most flagrant attacks on EPA workers during the Trump administration has been the issuance in July 2019 of a unilaterally imposed directive (UMAD) to displace the 2007 MCBA between the Agency and the workers represented by AFGE. Modeled after the three anti-worker Executive Orders, the July 2019 UMAD stripped AFGE-represented EPA employees of basic workplace rights, put in place union-busting provisions, and severely curtailed telework with minimal notice. The Agency slammed the union with the UMAD just weeks before the parties were scheduled to resume mid-term negotiations under the 2007 MCBA.

Over two hundred members of Congress sent a letter to EPA urging the agency to bargain with the union in good faith. However, the Agency forced the union to base negotiations on its unilaterally imposed directive rather than the collectively bargained agreement. AFGE Council 238 negotiated with the Agency to obtain at least some relief from the UMAD for EPA employees and agreed to many of the provisions in the 2020 MCBA. This union-busting move has had an incredibly demoralizing impact on career employees at EPA.

### Congressional Ask

AFGE asks Congress to conduct oversight of EPA to ensure the agency is working collaboratively with the union to ensure full collective bargaining rights are restored to workers and the union is an equal partner in workplace decisions.

AFGE EPA Council 238 supports H.R. 249, the “Protecting the Federal Workers Act,” introduced by Representative Derek Kilmer (D-WA) to provide that certain Executive orders with respect to Federal employee collective bargaining and workplace rights shall have no force or effect.

## ENSURE HEALTHY AND SAFE RETURN TO WORK FOR EPA EMPLOYEES

### Background

EPA began reopening regional offices in 2020 without clear and comprehensive guidelines ensuring worker safety and health and cleaning procedures to decontaminate the EPA buildings. As the federal government continues to respond to the unprecedented COVID-19 pandemic,

EPA workers should be able to protect human health and the environment without fear of being exposed to the virus.

Former EPA Administrator Wheeler's plan to reopen offices at EPA during COVID was based on the Trump Administration's Plan to Reopen America.

Under the Biden-Harris administration, we urge EPA management to work in collaboration with the unions in the development and implementation of the COVID-19 Workplace Safety Plan based on mission-related, science-based rationales for EPA office reopening.

EPA employees have been tremendously productive during full-time telework in the face of the COVID pandemic. Allowing EPA employees to maximize telework currently keeps everyone safer until vaccines are widely available and the spread of the virus is under control.

### **Congressional Ask**

AFGE supports H.R.978, to require the head of each agency to establish a safety plan relating to COVID-19 for any worksite at which employees or contractors are required to be physically present during the COVID-19 pandemic." This bill was introduced by Representative Gerry Connolly (D-VA). This bill has 7 cosponsors, however none from Region 5.

AFGE asks that the Federal Labor-Management COVID Partnership Act be reintroduced and passed in the Senate and introduced/passed for the first time in the House of Representatives. S. 4347, the "Federal Labor-Management COVID Partnership Act," was introduced in the 116<sup>th</sup> Congress by Senator Brian Schatz (D-HI). (Cosponsors included Sens. Peters and Brown) This bill would establish the Coronavirus Rapid Response Federal Labor-Management Partnership Task Force to assess the response of federal agencies to the COVID-19 (i.e., coronavirus disease 2019) public health emergency with respect to agency employees, including the adequacy of agency communications and necessary physical assets. This task force would provide guidance to prepare for future pandemics, including with respect to equipment levels, cleaning protocols, and leave and telework policies, and must also recommend ways to ensure labor organizations participate in agency decision-making. This task force would also provide the union a seat at the table to provide an important perspective in decisions related to employee working conditions.

AFGE EPA Council 238 urges Congress to conduct oversight of EPA to ensure the agency develops a mission-based office reopening plans which will ensure that those in positions with functions that require being physically present in offices, labs and the field are able to do so safely, while those in fully telework ready positions are given the resources and support to continue to perform remotely and effectively.

AFGE also calls on Congress to conduct oversight of EPA to ensure the agency implements a safe and effective rollout of the COVID-19 vaccine for those workers who most need it including any EPA workers who respond to environmental emergencies, and those that support those workers.

## FUNDING AND STAFFING

### Background

EPA is currently short staffed. The current EPA workforce is down to 14,172, its lowest level since 1988 when the US population was 242 million. EPA's peak staffing year was 1999 with 18,110 employees, when the US population had grown to 279 million. Now with a current population of 328 million people, EPA is at levels last seen in the late 1980s. This is when the EPA is managing significantly more programs and regulations. Prior to the current administration, EPA was already suffering from working with a skeletal budget that did not afford full attention to the many issues in front of us; drastic cuts and exodus from the workforce during the past 4 years has made conducting our daily work a challenge difficult to meet. A fully staffed workforce moving forward is essential to protecting human health and the environment, enforcing current EPA statutes and regulations, and tackling climate change. Full funding will help attract candidates and retain the best talent to take on science-based climate change work as well as rebuild work on existing environmental law and regulations. EPA should disclose the total funding amounts for returned or unused hiring and workforce training for FY2017 - FY2020. This funding could be used to hire adequate number of staff.

To hire the top professional talent to best serve the public, EPA needs competitive salaries and opportunities for career growth comparable to the private sector. Currently a starting GS-7 scientist or engineer who joins the Agency and starts working in Washington DC would make \$48,670 per year; comparatively, 20% lower than the lowest entry level salary for an environmental engineer with a private firm in the DC area is \$57,000. This disparity increases as career employees rise in the ranks, and locality pay adjustments, especially in locations of many EPA offices in high cost-of-living areas i.e. Boston, NYC, DC, Chicago, Denver, San Francisco, and Seattle are not competitive with other workplaces. The Agency also must increase funding for research and technology so that we can better understand and evaluate potential hazards to public health nationwide.

### Congressional Ask

AFGE EPA Council 238 urges Congress to fully fund EPA, with sufficient funds allocated to EPA's Environmental Programs and Management (EPM) account to fund at least 20,000 full time employees (FTEs) with an emphasis on recruitment to reflect diverse communities.

AFGE Council 238 supports funding the Superfund program adequately. AFGE Council 238 urges Congress to reintroduce, cosponsor and pass H.R.5101, the "Superfund Polluter Pays Act" introduced by Representative Pallone (D-NJ) and Representative Pascrell (D-NJ) and S. 3157 the "Superfund Polluter Pays Restoration Act of 2020" introduced by Senator Booker (D-NJ).

AFGE will work with Chairwoman Chellie Pingree (D-ME) and Ranking Member Tom Udall (D-NM) of the Interior and Environment Appropriations Subcommittee to fund the agency at over \$11 Billion with enough resources to hire 20,000 EPA employees to ensure employees can successfully protect human health and the environment.

## **RELOCATION OF EPA LABS AND OFFICES**

### **Background**

The relocation of EPA labs and offices away from important industrial and population centers must be stopped to have the personnel and resources to rapidly address both routine activities and catastrophic events. As an example, the plan to move the Region 6 Houston Lab to Ada, Oklahoma removes a lab from one of the main cores of the petrochemical industry in the nation, where the ability to conduct sampling and process samples quickly is necessary to address the significant needs of the broader Gulf of Mexico region. Moving the Richmond, California lab to Corvallis, Oregon removes it entirely from the Pacific Southwest Region that it serves.

Office and lab moves are a significant driver in early retirements and quitting by knowledgeable staff with years of experience that cannot be easily replaced nor be transferred to those in faraway states. In addition to the offices and labs already moved, EPA Labs in Michigan, Nevada, California are all at some stage of moving. The first impact is essentially the forced early retirement of EPA scientists, losing specialized expertise and experience. Proposed moves to remote areas also expose real infrastructure issues, from reduced availability of calibration gas to increased holding time for samples.

Importantly, the proposed move sites are not turn-key. They have required at least some renovation, often at significant cost, to bring the proposed new locations up to modern lab function and safety standards. A recent IG Report found that the lab consolidations lacked planning and, as a result, had cost overruns that overshadowed the potential cost savings of any consolidation.

### **Congressional Ask**

AFGE asks for the reintroduction and passing of the Recognizing the Environmental Gains In Overcoming Negligence (REGION) Act originally introduced as H.R. 4149 in the 116<sup>th</sup> Congress by Representative Debbie Dingell (D-MI) and Senator Tammy Duckworth (D-IL). This bill prohibits funds made available for any fiscal year from being used to close, consolidate, or eliminate an office of the Environmental Protection Agency, including a regional or program office. AFGE also urges support for language in the Interior and Environment Appropriations bill to prohibit relocation, consolidation, or closure of any EPA facility.

## **EXPAND LEAVE FOR EPA WORKERS DURING THE COVID-19 PANDEMIC**

### **Background**

AFGE Council 238 has observed that caps on administrative leave by location and circumstance are problematic. The Council urges EPA to administer new agency-wide administrative leave policies for civic service or participation, for example, voting and neutral poll watching. The Council urges the agency to improve policies for advanced leave for new employees and



evaluate the effectiveness of EPA's leave bank transfer programs and prohibit unilateral management withdrawals from the leave bank.

Despite the consistent diligent work of the EPA workforce, EPA management has been unduly parsimonious with leave, including administrative leave, advanced leave, Health & Safety Leave, and Leave Without Pay, despite the applicable laws and regulations allowing for discretion in the use of each category of leave. This has been highlighted during the COVID-19 pandemic where similarly situated federal agencies continue to provide administrative leave to employees acknowledging the difficulty of functioning during a world-wide public health crisis. EPA management has refused to provide for administrative leave during the COVID pandemic through individual request or through bargaining. Additionally, employees have reported being discouraged from using FFCRA leave because of administrative processing concerns.

EPA does not utilize the leave banks to which the employees contribute to their full potential, and operation of EPA's leave bank is vulnerable to misuse. Employees who are not appropriately informed of Leave Bank options use up their personal leave and often take leave without pay instead. A 2017 Inspector General Report (report no. 17-P-0374) found that because EPA has not implemented adequate internal controls for the leave bank, the resources are vulnerable to fraud, waste, and misuse. As an example, EPA management improperly unilaterally withdrew hours from the leave bank to provide to employees impacted by Hurricane Maria when administrative leave or Weather & Safety Leave could have been granted.

The lack of leave flexibility has added to low morale at EPA, with some newer employees leaving the agency due to lack of leave and many employees having exhausted leave options during COVID-19 simply to attend to dependent care responsibilities. Many parents report feeling frustrated and at the end of their ropes during COVID.

Lack of leave could force some veteran career employees to leave the Agency abruptly after exhausting their leave, taking their institutional knowledge with them. This will stress already understaffed teams left behind and making knowledge transfer to new staff even more difficult.

Adequate leave for federal workers allows for a healthy and productive workforce. Leave policy options have been conveyed to EPA employees in a misleading, intimidating, and coercive manner.

### **Congressional Ask**

AFGE will continue to support H.R. 564, the "Comprehensive Paid Leave for Federal Workers Act," introduced by Representative Carolyn Maloney (D-NY) and soon to be introduced by Senator Brian Schatz (D-HI) in the Senate. AFGE EPA Council 238 will also continue to advocate for broader paid emergency leave provisions to be included in future COVID-19 stimulus packages.

## **National Energy Technology Laboratories (NETL)**

### **NETL FACILITIES ARE UNDER THE THREAT OF CONSOLIDATION**

AFGE represents engineers and scientists at National Energy Technology Laboratories across the country. NETL has three main campuses in Pittsburgh, Pa., Morgantown, W. Va., and Albany, Ore., which are under continued threat of consolidation and closure. NETL partners with universities and private institutions at hundreds of sites across the country.

#### **Congressional Ask**

AFGE is working to keep the top line increase in funding for NETL in the Energy and Water Subcommittee Appropriations Bill as well as the inclusion of report language that prohibits consolidation of NETL laboratories.

On AFGE supported the Fossil Energy Research and Development Act and worked with Committee staff to draft compromise language to fund innovative research, technology development, workforce development projects, manufacturing partnerships and most importantly revitalization, recapitalization, and minor construction of the Laboratory infrastructure. We are working with our AFGE NETL members and key Members of Congress to address significant downsizing occurring at NETL by not back filling positions as feds leave the workforce, either through retirement or other job opportunities and increased contracting out of NETL positions.

### **ADVANCEMENT OPPORTUNITIES FOR NETL RESEARCHERS**

NETL scientists and researchers are not able to advance in their careers because the OPM RGEG advancement process has been stalled for the last two years. This OPM process requires NETL scientists and engineers to go through a four-factor process including external publications, reviews for external research and other requirements in order to receive a grade increase. As a result, NETL has been hiring contractors as direct hires.

Employees who want professional advancement opportunities are finding it difficult while the RGEG process is still stalled. This causes recruitment and retention issues at NETL.

#### **Congressional Ask**

AFGE will work with Congress to urge NETL to reinstate the RGEG process as an annual requirement and reinstate the Human Capital Authority.

## **Federal Emergency Management Agency (FEMA)**

### **STRENGTHEN LABOR MANAGEMENT PARTNERSHIPS AND MEET AND COMMUNICATE WITH UNION AND RANK AND FILE EMPLOYEES**

#### **Background**

Most workplace disputes can be resolved without lengthy and costly litigation simply by bringing workers and managers together. Labor-management partnerships help government work better for the American people. FEMA working collaboratively with employee unions when making decisions about policies and proposals will improve the overall health and safety of workers and their families as well as employees' ability to perform the mission of the agency.

#### **Congressional Ask**

AFGE will work with Congress to support strengthening labor management partnerships. Specifically, AFGE will work with Congress to reintroduce and pass the Federal Labor-Management COVID Partnership Act. This bill was introduced in the 116<sup>th</sup> Congress as S. 4347, introduced by Sen. Brian Schatz (D-Hawaii). This bill would establish a task force of federal officials and representatives from unions and other federal employee groups to review agencies' policies related to the COVID-19 emergency.

### **HIRE MORE FULL TIME TITLE 5 EMPLOYEES**

FEMA employees work long hours responding to national disasters and sometimes work so many hours that they exceed the number of hours they are eligible for pay. We urge the incoming FEMA Administrator to work with the Biden administration to institute a pay cap waiver to allow FEMA employees to be compensated for their work.

AFGE Local 4060 has a positive working relationship with the agency. We urge the incoming FEMA administrator to reinstitute labor management partnerships and forums to allow the union to have a seat at the table and contribute valuable perspectives that will allow the agency to thrive and succeed.

FEMA only has 5,000 full time employees out of 26,000 total employees. We strongly urge the incoming FEMA administrator to prioritize hiring more full-time Title 5 federal employees with collective bargaining rights. Hiring more Title 5 employees would allow FEMA to avoid pulling employees out of the field. This would help with recruitment and retention as many Disaster Response Workforce (DRW) staff quit given the grueling working conditions because of low staffing levels of full-time workers.

FEMA has had to rebuild its workforce during floods, fires, and the COVID-19 pandemic because employees do not want to stay at an agency where they do not have adequate workplace rights. AFGE Local 4060 also urges the incoming administrator to support our efforts to work with Congress to seek a study on workforce needs at FEMA specifically related to hiring and vacancies of full-time Title 5 staff.

### **Contracting Out of FEMA Positions**

FEMA has been contracting out permanent full-time Title 5 employment to subcontractors. For example, flood plain management and Federal Insurance & Mitigation Administration (FIMA) positions are being contracted out without proper labor-management negotiation processes taking place. AFGE FEMA Local 4060 President Steve Reaves testified before Congress on March 13, 2019, to discuss employee issues at FEMA.

### **Congressional Ask**

AFGE will work with the House and Senate Homeland Security Committee to conduct oversight of FEMA and the House and Senate Homeland Security Appropriations Subcommittee to draft appropriations language to increase staffing levels for full-time Title 5 employees to ensure FEMA employees can successfully protect the American public from national disasters. This language is still in the draft phase and will continue to be developed.

AFGE will work to urge Congress to amend language that allows CORE employees to become full time employees without the standard hiring practices and advocate for raising the pay cap waivers for FEMA employees so that FEMA employees can be compensated for hours worked in disaster zones.

## Bureau of Labor Statistics

### Background

AFGE represents employees at the Bureau of Labor Statistics (BLS), which provides objective data essential to the US economy, including the Consumer Price Index (CPI), productivity and employment data and analysis. The Bureau of Labor Statistics (BLS) national office headquarters has been located at the Postal Square Building (PSB) in Washington, D.C., since 1992.

The GSA building lease will expire in May 2022. The Office of Management and Budget (OMB) has announced that BLS headquarters will be relocated from Washington to the Suitland Federal Center (SFC) to be co-located with the Bureau of Economic Analysis (BEA) and the Census Bureau. The Trump administration also outlined its proposal to reorganize the U.S. Census Bureau, the Bureau of Economic Analysis, and the Bureau of Labor Statistics under Commerce with the Census Bureau in its 2018 Reorganization Plan. The administration informed BLS employees that the purpose of the move was for cost savings and formally declared elsewhere that its intent was to remove BLS from the Department of Labor and merge BLS into the Commerce Department.

The Suitland, Md., facility lacks the adequate facilities, infrastructure, and resources to effectively house BLS. The previous administration did not consider any other options for reducing costs and keeping BLS in its current location and in USDOL. On Oct. 8, 2020, AFGE Local 12 and AFGE Census Council 241 sent a letter to the General Services Administration Public Buildings Service commissioner and the GSA administrator expressing concerns and urging health and safety be prioritized during the relocation. AFGE Local 12 has worked with Congress and reached out to the Biden administration to express concerns over the impact of relocating BLS from Washington to the Suitland Federal Center (SFC) in Suitland, Md.

Local 12's main concerns are:

### Health and Safety of Employees

Because of the current pandemic and any future similar public health crises, it is our contention that the proposed open floor plan will unnecessarily put bargaining unit employee health and safety at risk, contrary to evolving guidance. Employees should not be exposed to preventable hazards at work.

### Space Equity

The Rentable square feet (RSF) per employee must be consistent among Bureau of Economic Analysis (BEA), BLS, and Census. The overall space needs to be consistent with the RSF per employee at the other federal statistical agencies' headquarters buildings. Employees need the agency to demonstrate that this is a fair process and GSA is not favoring one agency over another. Space equality is a basic principle that should be followed during this process.



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO