COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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May 19, 1978

The Honorable Robert N.C. Nix
Chairman, Committee on Post Office
and Civil Service
House of Representatives

Dear Mr. Chairman:

We are pleased to respond to your request for our comments on H.R. 11280, the "Civil Service Reform Act of 1978."

As a preface to our comments, I believe you will agree that it is appropriate to recognize that as the role of the Federal government increases and affects more and more the lives of all citizens, it is inevitable that attention will be drawn to the level of competency of Federal employees, their compensation, incentives, and other conditions of their employment. Discussion of these issues has gone on for many years and intensified since the growth of the Federal government in the depression days of the 1930's and World War II. Civil Service reforms are necessary but that issue should not cloud the essential point that most civil service employees are able, highly motivated, and dedicated to their work.

We believe that the Civil Service system can be improved. During the past several years we have studied many of the issues with which H.R. 11280 is concerned. We have made a number of specific recommendations and have highlighted conflicting policies and objectives that needed to be addressed. These have included:

--the conflicting roles of the Civil Service Commission as policymaker, prosecutor, judge and employee protector; (June, 1977)

--the need for simplifying the appeals systems; (February, 1977)

--the adverse impact of veterans' preference on equal employment objectives; (September, 1977)

--the need to improve performance appraisals and ratings; (March, 1978)

--the need for more flexible hiring procedures; (July, 1974)

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--the need for a new salary system for federal executives; (February, 1977)

--the need to relate pay to performance; (October 1975; March 1978)

--the need for an overall Federal retirement policy. (August, 1977)

H.R. 11280 attempts to deal with the above issues as well as others and we strongly support those objectives.

H.R. 11280 should be considered in conjunction with the proposed Reorganization Plan No. 2 of 1978. The Civil Service Commission (CSC) now serves simultaneously as the protector of employee rights and the promoter of efficient personnel management policy. The reorganization plan divides those two roles between two separate agencies, the Merit Systems Protection Board (MSPB) and the Office of Personnel Management (OPM). H.R. 11280 would provide additional legislative authority for these two agencies.

The Reorganization Plan would also create a Federal Labor Relations Authority which would consolidate the third-party function in the Federal labor-management relations program by assuming the functions of the Federal Labor Relations Council and certain responsibilities of the Assistant Secretary of Labor for Labor-Management Relations. In addition, Reorganization Plan No. 1 of 1978, would transfer CSC's current equal employment opportunity and discrimination complaint authority to the Equal Employment Opportunity Commission (EEOC).

Office of Personnel Management

The Office of Personnel Management would be the primary agent advising the President and helping him carry out his responsibilities to manage the Federal work force. It would develop personnel policies, provide personnel leadership to agencies, and administer central personnel programs. It would be headed by a director and a deputy director, both appointed by the President and confirmed by the Senate.

We are aware of the concern which has been expressed that a single director of personnel, serving at the pleasure of the President and replacing a bipartisan commission, could be accused of partisan political motivations in actions which, by their very nature, are controversial. The argument

is made that the Merit System Protection Board, important as its role would be, would not be in a position to influence substantially policies, rules and regulations, including positions on legislative matters, in the same manner as a bipartisan commission. On the other hand, a commission form of organization tends to be cumbersome and divides responsibility and accountability. It is of some interest to note that President Roosevelt's Committee on Administrative Management recommended in 1937 a single-headed director of personnel for the Federal Government. While this proposal was not adopted, the idea of a strong Director of Personnel Management has continued to be discussed and proposed and, in fact, has been extensively adopted at the State and local level. On balance, we favor the President's proposal and believe that this part of the reorganization plan should be adopted.

It should be pointed out, however, that under the plan and H.R. 11280 the Director of OPM would be concerned entirely with the civil service and would not have advisory or other responsibilities with respect to other personnel systems within the Federal Government. GAO has repeatedly pointed to the need for a stronger focal point within the executive branch to concern itself with consistent and common policies and procedures which are relevant to all or several of the personnel systems within the Government. This responsibility today is clouded by the lack of certainty with respect to the roles of the Civil Service Commission and the Office of Management and Budget.

To remedy this situation and to strengthen the case for the proposed pay level for the Director of OPM, we believe that the Director should have responsibility for advising, assisting and coordinating with the President with respect to common policies and practices in the personnel management area throughout the Executive Branch of the Federal Government. He could share the responsibility for pay systems with the Director of the OMB but it seems to us that the President and the Congress need a focal point which can address itself to the common problems and concerns. This responsibility could be dealt with in the legislation, either by developing a specific statutory charter for the Director of the OPM, or a strong statement of intent of the Congress could be developed, leaving to the President the development of a more detailed charter.

Merit Systems Protection Board (MSPB)

The MSPB would have three members appointed by the President for 7-year terms removable only for misconduct, inefficiency, neglect of duty, or malfeasance in office. Not more than two of the members could be from the same political party. One member would be designated Chairman and one member Vice-Chairman. A special Counsel would also be appointed for a 7-year term. The independence and authority of MSPB and its ability to protect the legitimate concerns of employees is the overriding factor on how much flexibility can be provided to managers.

We believe it would be desirable for MSPB to provide both the agencies and employees information on matters that have been resolved by MSPB. We also believe that the special studies to be conducted by MSPB and reported to the President and the Congress should be made available to the public.

Federal Labor Relations Authority

The reorganization plan would establish an independent Federal Labor Relations Authority to assume the third party functions currently fragmented among the Federal Labor Relations Council and Assistant Secretary of Labor for Labor Management Relations. The establishment of the Authority is intended to overcome the criticisms of the structure and administration for the existing Federal labor relations program.

The Authority and the labor relations provisions are not now incorporated in the Reform bill. We understand that on April 25, 1978, the Administration informed the cognizant committees of Congress of the decision to incorporate further improvements in the labor relations program as part of the Civil Service reform legislative package.

The concept of an independent labor relations authority or board has been included in proposed legislation, introduced in recent sessions of Congress, to provide a statutory basis for the Federal labor management relations program. In commenting on these legislative proposals on May 24, 1977, GAO supported the establishment of a central labor relations body to consolidate the third party functions in the Federal labor management relations program. We believed then, as we do now, that such a central body is needed and would be perceived by both labor organizations and agency management as a credible and viable third party mechanism.

The proposed reorganization plan provides that decisions of the Authority on any matter within its jurisdiction shall be final and not subject to judicial review. We believe a provision should be added to the legislation to make it clear that the existing right of agency heads and certifying officers to obtain a decision from the Comptroller General of the United States on the propriety of payments from appropriated funds are not modified. Also, we question whether the right to judicial review of the Authority's decision should be prohibited.

Equal Employment Opportunity Commission

EEOC's role is not discussed in either Reorganization Plan No. 2 or H.R. 11280. However, we believe we should address the relationship between EEOC and MSPB in view of the proposed transfer of EEO enforcement and discrimination appeals authority from CSC to EEOC under Reorganization Plan No. 1 of 1978.

Under the Plan all discrimination appeals relating solely to discrimination will be filed directly with EEOC, and processed by it. Under delegation from EEOC, all appeals involving both Title V and Title VII matters will be filed with and acted upon by MSPB. The decision of MSPB will be final unless the employee requests EEOC to review the elements of the case involving Title VII. EEOC may examine the matter on the record, grant a de novo hearing or remand the case to MSPB for further hearings at its option.

A clear distinction between an equal employment and merit principle complaint is difficult, if not impossible, and employees frequently perceive their problems to be both. We believe that placing the adjudication of these complaints in different organizations will invite duplicate or two track appeals on the same issues simultaneously, or sequentially, to EEOC and MSPB. In addition to wasting time, effort and money, this situation poses a very real potential for differing definitions of issues, inconsistent interpretations of laws, regulations and irreconcilable decisions.

An additional problem in having EEOC responsible for receipt and processing appeals is that it establishes the same kind of role conflict that the Civil Service reform proposals seek to correct. EEOC would in effect be the

enforcement as well as the adjudicative agency. We are inclined to favor the approach taken in H.R. 11280 which provides:

> "Notwithstanding any other provision of law, an employee who has been affected by an action appealable to the Board (Merit System Protection Board) and who alleges that discrimination prohibited by Section 2302(b)(1) of this title was basis for the action should have both the issue of discrimination and the appealable action decided by the Board in the appeal decision under the Boards' appellate procedures."

Additionally, we believe EEOC should be given the authority to intervene, on Title VII matters, with all the rights of a party in all the adjudicatory proceedings of MSPB and in any subsequent appeals to the courts. This alternative would avoid many of the problems we have mentioned and save considerable time by having all issues of a complaint decided by the same adjudicative body.

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H.R. 11280 proposes changes to: performance appraisals, adverse action appeals, veterans preference, retirement, selection methods, management and compensation of senior executives, merit pay, and personnel research. We have made recommendations to the Congress and to the executive branch concerning the need for improvement in most of these areas. H.R. 11280 provides the vehicle for making necessary changes and we support that objective. We do have concerns about the specifics of some of the proposals and believe they can be improved upon.

Performance Appraisals

We believe the current system of performance appraisals should be improved. We recommended that performance appraisal systems should include four basic principles.

--First that work objectives be clearly spelled out at the beginning of the appraisal period so that employees will know what is expected of them.

--Second that employees participate in the process of establishing work objectives thereby taking advantage of their job knowledge as well as re-enforcing the understanding of what is expected, and

--Third that there be clear feed back on employee performance against the preset objectives.

--Fourth that the results of performance appraisals be linked to such personnel actions as promotion, assignment, reassignment, and to discipline.

The proposed legislation generally conforms to our recommendations.

Adverse Actions and Employee Appeals

One of the major purposes of H.R. 11280 is to make it easier to remove employees for misconduct, inefficiency, and incompetence. It provides for new procedures based on unacceptable performance. In so doing, the Bill proposes major changes in the rights now afforded Federal employees. We believe the Bill contains many provisions which would improve the present processes by which Federal employees are removed, demoted, and disciplined. However, we have concerns that certain of the proposed changes in adverse action and appellate procedures would not provide a proper balance between the interest of the Federal Government and the rights and protection of Federal employees.

For example, in an appeal, the decision of the agency must be sustained by MSPB unless the employee shows an error in procedure which substantially impairs his or her rights, discrimination, or an arbitrary or capricious decision. We suggest a fourth basis, that is, the absence of substantial evidence in the administrative record to support the decision of the agency.

Veterans' Preference

We believe that changes can be made to veterans' preference legislation so that the system for examining and selecting for Federal employment can be improved and employment assistance can be better provided to those veterans who most need it. We believe the Administration's proposals are designed to balance the Government's obligation to its veterans for their sacrifices, its obligation to provide equal employment opportunity, and its commitment to improve Federal staffing operations.

We favor amending the rule-of-three selection requirement of the Veterans' Preference Act of 1944. Examinations are not precise enough to judge the potential job success of persons with identical or nearly the same scores. As a result, the rule-of-three unfairly denies to many applicants who have equal qualifications the opportunity to be considered for Federal employment. We have previously recommended that the Congress amend the rule-of-three requirement similar to the way in which the proposed legislation authorizes OPM to prescribe alternate referral and selection methods.

The present statutory prohibition against passing over a veteran on a list of eligibles to select a nonveteran would be retained under the proposed legislation. In our opinion, the flexibility to be gained by eliminating the rule-of-three and using alternate examining and selection methods will be seriously diminished by retaining this pass-over prohibition.

The bill authorizes agencies to make non-competitive appointments of certain compensably disabled veterans--those with service connected disabilities of 50 percent or more and those who take job-related training prescribed by the Veterans Administration. We believe employment assistance to those veterans with special employment problems--such as disabled and Vietnam-era veterans--is appropriate.

Retention Preference

The bill proposes changes to the preference given veterans in retention rights in a reduction-in-force. Only a disabled veteran (or certain relatives of a veteran) would retain permanent retention preference. Other veterans would retain absolute retention preference for a 3 year period. Once the 3 year period has been completed, non-disabled veterans will be entitled to 5 years service credit in computing length of service for retention determinations.

As a general rule, veterans have retention rights over nonveterans regardless of length of service. Since veterans are predominately male and non-minority, absolute preference works to the disadvantage of women and minorities. The proposed changes should help to remedy this situation.

Retirement

The bill would greatly expand the provisions allowing employees to retire before reaching normal retirement eligibility. Presently, the civil service retirement system generally allows employees to retire at age 55 with 30 years of service. Employees who are separated involuntarily, except for reasons of misconduct or delinquency, may receive an immediate annuity if they are 50 with 20 years of service or at any age with 25 years. Current law allows employees to volunteer for early retirement when their employing agency is undergoing a major reduction-in-force, even if they are not directly affected by the reduction. Under H.R. 11280, the early retirement option would also be made available to employees if their agency is undergoing a major reorganization or a major transfer of function.

We cannot support the liberalization of the early retirement provisions proposed by H.R. 11280. As you are undoubtedly aware, GAO has long been concerned about the civil service and other Federal retirement systems. As we disclosed in an August 3, 1977, report on retirement matters, the civil service system already costs much more than is being recognized and covered by agency and employee contributions. As of June 30, 1976, the system's unfunded liability was $107 billion and is estimated to grow to $169 billion by 1986. Any additional early retirements resulting from H.R. 11280 would add to this tremendous liability.

Senior Executive Service

Some excellent Government managers have been provided by the present system. However, we think that more managers of this calibre would result from a Senior Executive Service.

We agree with the objectives of H.R. 11280 to establish a Senior Executive Service which would cover about 9,000 positions above General Schedule 15 and below Executive Level III. The proposed Senior Executive Service would establish at least five executive salary levels, from the sixth step of GS-15 ($42,200) to an Executive Level IV salary level ($50,000). Under the proposal executives could increase their compensation through performance awards, to 95 percent of a Level II salary, or $54,625 at the present pay levels.

There is a problem of compression at the senior levels of the General Schedule. Because the salary rate for Level V of the Executive Schedule is the ceiling for salary rates of most other Federal pay systems, all GS-18s and 17s, and some GS-16s now receive the same salary--$47,500. This creates a situation where many levels of responsibility receive the same pay and is not consistent with basic Federal pay principles of:

--comparability with private enterprise, and

--distinctions in keeping with work and performance levels.

Such a situation creates inequities and can have adverse effects on the recruitment, retention, and incentives for advancement to senior positions throughout the Federal service.

We believe that changes are needed to give management greater flexibility in assigning pay and establishing responsibility levels. In February 1975, we reported on the need for a better system for adjusting salaries of top Federal officials. One of our main concerns at that time, and which still exists, was the compression of salary rates which result in distorted pay relationships in the Federal

pay systems. Our recommendation was for the Congress to insure that executive salaries are adjusted annually--either based on the annual change in the cost-of-living index or the average percentage increase in GS salaries. The law now provides for automatic adjustment of Executive Schedule pay rates equal to the average General Schedule increase.

We believe there is a need to establish a new salary system for Federal executives. We do have some concerns, however, that the provisions of the proposed Senior Executive Service do not go far enough in this regard. We are not sure, for example, that the proposed salary range including performance awards--$42,200 to $54,625--provides sufficient flexibility. Most of the employees that will be covered are already at the $47,500 ceiling, and could reach the proposed $54,625 ceiling by receiving less than the maximum 20 percent pay increase for performance allowed by the Bill. Therefore, there may not be enough of a pay differential to provide an incentive for executives to join the new Service or for the Service to be successful.

We also question the advisability of limiting incentive awards and ranks, as well as performance pay, to an arbitrarily selected percentage of employees.

Proposals have been made by GAO and others to provide more flexibility in the pay-setting processes for top Federal officials. We favor a salary system with a broad salary band; compensating within this broad band, on the basis of an individual's capability or contributions to the job, with congressional control over the average salary level for the Service, by agency.

In summary, we question whether there is enough pay incentive to make the Senior Executive Service a success. We believe it would be more acceptable to senior executives if the salary ranges were substantially increased or if performance awards were not subject to the proposed $54,625 ceiling. To do this, however, would require breaking the linkage between executive and congressional salaries. In its December 1975 report, the President's Panel on Federal Compensation pointed out that the "existing linkage between level II of the Executive Schedule and Congressional salaries should not be permitted to continue to distort or improperly depress executive salaries."

Two features of the proposed Service affect the civil service retirement system. An executive who is separated for less than fully successful performance would be entitled to an immediate annuity if he or she is at least 50 years of age with 20 years of service or at any age with 25 years. In addition, each year of service in which an executive receives a performance award will include a retirement factor

of 2.5 percent in lieu of the lesser percentage (1.5, 1.75, or 2 percent) that would otherwise be applied. We cannot support either of these provisions. They would add to the system's unfunded liability, and, in our opinion, would be inappropriate uses of the Retirement Program.

Merit Pay

The concept of basing pay increases on employee performance is not new. GAO and other groups have recognized that a need exists to recognize employee performance rather than longevity in awarding within-grade salary increases. In October 1975, we recommended that the Chairman, CSC, in coordination with the Director of OMB develop a method of granting within-grade salary increases which is integrated with a performance appraisal system.

In December 1975, the President's Panel on Federal Compensation, chaired by the Vice President, reviewed within-grade increases as part of its study of Federal compensation issues. The Panel concluded that for employees in occupations which provide significant opportunity for individual initiative and impact on the job, a new procedure was needed to provide a connection between performance and within-grade advancement. The Panel recommended a method of within-grade advancement for these employees that would be based on performance. The Panel noted, however, that the system should take into consideration the experience of the private sector with such plans and that the system should be thoroughly tested prior to implementation. In its December 1977 final staff report the Personnel Management Project similarly recommended using merit pay to improve and reward performance of managers below the levels included in the Senior Executive Service. That report also noted that the new approach should be carefully tested and evaluated before full scale application.

While we endorse the principle of performance pay incentives, we have some concern over the equity of the proposed system. We believe it would be more equitable if it were limited to within-grade increases, covered employees in other GS grades, and included all employees in affected grades rather than just managers and supervisors.

Personnel Research and Demonstration Projects

The cost of personnel resources in the Federal Government is enormous. In fiscal year 1978, the Government will pay an estimated $75 billion in direct compensation and personnel benefits to its civilian employees and active-duty

military personnel. In view of these expenditures, it is vital that we develop and use the most effective methods and techniques to manage personnel resources. An aggressive personnel research and demonstration program is a key link in doing this. Further, if Government is to effectively deal with the recent decline in productivity growth, it must support a research base directed towards developing and applying new techniques and ways to better manage its human resources.

With this in mind, we support the need for an aggressive personnel research and development program. We do not believe, however, that adequate controls and safeguards are provided in H.R. 11280 to protect the employees affected by the demonstration projects and to assure that the most effective and efficient use is made of research funds. As a minimum, we recommend that Congress be informed of projects which may be inconsistent with existing laws or regulations before they are begun. Congress should have an opportunity to satisfy itself as to the seriousness of such infractions. We also believe that Congress should be informed of research and development actual accomplishments for which it has provided authorization and funding.

Responsibility of the General Accounting Office

One other matter of concern to us is the proposed language concerning GAO's role in auditing personnel practices and policies. The proposed new section 2303 of title 5, U.S.C. may be susceptible of misinterpretaton in its present form which is as follows:

> "If requested by either House of the Congress (or any Member or committee thereof), or if deemed necessary by the Comptroller General, the General Accounting Office shall conduct, on a continuing basis, audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the Executive Branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management."

It should be made clear that the function of GAO is to assist in congressional oversight and that the Executive Branch is not in any way relieved of its responsibility for reviewing, evaluating, and improving personnel management or for investigating and correcting deficiencies therein. As elsewhere, GAO's role is more properly one of overseeing the working of the program rather than intervening on a case-by-case basis. We suggest that the language be amended to conform, in substance, to that used in the Legislative

Reorganization Act of 1970, 84 Stat. 140, 1168, as follows:

> "When ordered by either House of Congress or upon his own initiative, or when requested by any committee of the House of Representatives or the Senate, or any joint committee of the two Houses having jurisdiction over Federal personnel programs and activities, the Comptroller General shall conduct audits and reviews to determine compliance with the laws, rules, and regulations governing employment in the Executive Branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management."

I trust that this letter and enclosure recommending technical amendments will meet your needs.

Sincerely yours,

Elmer B. Staats

Comptroller General
of the United States

Enclosure