THE COUNTDOWN TO COMPLETION: IMPLEMENTING THE NEW DEPARTMENT OF HOMELAND SECURITY PERSONNEL SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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THE COUNTDOWN TO COMPLETION: IMPLEMENTING THE NEW DEPARTMENT OF HOMELAND SECURITY PERSONNEL SYSTEM

WEDNESDAY, MARCH 2, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERAL WORKFORCE AND AGENCY ORGANIZATION,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2247, Rayburn House Office Building, Hon. Jon C. Porter (chairman of the subcommittee) presiding.

Present: Representatives Porter, Davis, Issa, McHenry, Mica, Cummings, Norton, and Van Hollen.

Staff present: Ron Martinson, staff director; B. Chad Bungard, deputy staff director and chief counsel; Chris Barkley and Shannon Meade, professional staff members; Patrick Jennings, senior counsel and OPM detailee; Reid Voss, legislative assistant/clerk; Mark Stephenson and Tania Shand, minority professional staff members; and Teresa Coufal, minority assistant clerk.

Mr. PORTER. A quorum being present, the Subcommittee on the Federal Workforce and Agency Organization will come to order.

This is the first hearing of the Government Reform Subcommittee on the Federal Workforce and Agency Organization in the 109th Congress, and my first hearing as chairman of this subcommittee. I am very excited about my new position and the opportunity to examine ways the Federal Government can improve the way it hires, pays, recruits, trains, and rewards its employees, while at the same time improving individual agency performance. Representing over 14,000 Federal workers and retirees myself in Nevada, I know all too well the sacrifices made by the Federal family, who work diligently—sometimes putting their lives in danger—in the name of public service. Admittedly, I have a lot to learn about this subject matter, and I look forward to hearing from the various stakeholders, agencies, and experts to figure out ways to make the Federal Government better.

Today's hearing is of the utmost importance. February 1, 2005 marked a new day for our Federal employees—the Department of Homeland Security and the Office of Personnel Management issued final regulations for the new personnel management system at the Department of Homeland Security. It was the first major change to our Civil Service process in 50 years. This is something I don't take lightly. It took over 2 years to design this new system, but

there are still a lot of details to be worked out, and I can assure everyone here that this subcommittee will closely monitor the progress and implementation of this new system over the next several years.

The Department must have top talent in order to meet its critical mission, and it cannot rely on the old system of rewarding longevity rather than motivating and rewarding performance. Change can be difficult, however, and I know that this is a nerve-wracking experience for the Department's work force. My predecessor, Congresswoman Jo Ann Davis, and Chairman Tom Davis have worked on ensuring a smooth transition—Chairman Davis couldn't join us today—and they have worked hard to make sure this new system is one that is fair and credible. I am quite encouraged to see the final regulations now require that the development of any internal directives implementing the personnel systems authorities provided by these regulations involve employees and employee representatives. I am also encouraged to see that the final regulations require that the Department issue implementing directives requiring new supervisors to meet certain assessment or certification points as a part of a formal training program. This will go a long way in ensuring the equitable application of this new pay-for-performance system and conducting performance reviews. These are much welcomed changes from the proposed regulations, and, as I have read the background testimony that has been prepared for today, I think that you would all agree.

Since the passage of the Homeland Security Act of 2002, which authorized the creation of a new flexible personnel system for Homeland Security Department employees, there has been a continued trend to modernize personnel systems governmentwide; not only in Government, but also in the private sector, as we prepare for this global economy that is based upon terrorism and impacts on our communities. In January 2003, the Bipartisan National Commission on the Public Service, chaired by Paul Volcker, called for the abolishment of the General Schedule and recommended it be replaced with a more flexible personnel management system. That same year, Congress granted the Department of Defense flexibility to create a new personnel system and also authorize senior executive service to meet to a pay-for-performance personnel system governmentwide. Now, more than 50 percent of the Federal work force will soon be under this new, modern, flexible personnel system, outside of the General Schedule.

In a forum hosted by the Government Accountability Office and the National Commission on Public Service last April, there was broad agreement among participants that a governmentwide framework should be established to guide human capital reform, balancing the need for consistency across the Federal work force, and the need for a flexible system tailored to particular needs of the agencies.

Moving the rest of the Federal workfoce outside the General Schedule into a new performance-based compensation framework is an issue for another day, which we will be discussing. With that said, however, this subcommittee is well aware that all eyes are on the success or failure of the new DHS personnel management system. It is very important that we get it right the first time, and

we will spend the requisite amount of time overseeing the system's implementation to ensure its successes.

I would like to, of course, express my many thanks to our witnesses who have agreed to join us today. We brought together what I believe is a broad and knowledgeable array of voices as we begin our exploration of this new system, and look forward to hearing all of your perspectives. I want you to know that as I begin this hearing, I begin it with an open mind. I am a new member of this committee and a new member as the chairman of this committee, and look forward to your insights and your perspective. As I mentioned, I have been in a public office, as has many of my colleagues on this committee, for over 20 years, and I plan on using that experience as I listen and make my own independent decisions based upon the input that is going to be provided. Of course, this session the subcommittee is going to look at a number of other issues, but realize that this will remain and continue to be a priority as we move forward.

[The prepared statement of Hon. Jon C. Porter follows:]

TOM DAVIS, VIRGINIA
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ONE HUNDRED NINTH CONGRESS

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Prepared Statement of Chairman Jon Porter
Hearing of the House Government Reform Subcommittee on Federal Workforce and Agency Organization

"The Countdown to Completion:
Implementing the New Department of Homeland Security Personnel System"

March 2, 2005

This is the first hearing of the Government Reform Subcommittee on the Federal Workforce and Agency Organization in the 109th Congress, and my first hearing as Chairman of this Subcommittee. I am very excited about my new position and the opportunity to examine ways the Federal Government can improve the way it hires, pays, recruits, trains and rewards its employees, while at the same time improving individual agency performance. Representing over 14,000 Federal workers and retirees myself in Nevada, I know all too well the sacrifices made by the Federal family, who work diligently – sometimes putting their lives in danger – in the name of public service. Admittedly, I have a lot to learn about this subject matter and I look forward to hearing from the various stakeholders, agencies, and experts to figure out ways to make the Federal Government better.

Today's hearing is of the utmost importance. February 1, 2005 marked a new day for our Federal employees - the Department of Homeland Security and the Office of Personnel Management issued final regulations for the new personnel management system at the Department

of Homeland Security. It was the first major change to our civil service process in fifty years. This is something I don't take lightly. It took over two years to design this new system but there are still a lot of details to be worked out and I can assure everyone here that this subcommittee will closely monitor the progress and implementation of this new system over the next several years.

The Department must have top talent in order to meet its critical mission and it cannot rely on the old system of rewarding longevity rather than motivating and rewarding performance. Change can be difficult, however, and I know that this is a nerve-wracking experience for the Department's workforce. My predecessor, Congresswoman Jo Ann Davis, and Chairman Tom Davis have worked on ensuring a smooth transition and that the new system is one that is fair and credible. I am quite encouraged to see that the final regulations now require that the development of any internal directives implementing the personnel system authorities provided by these regulations involve employees and employee representatives. I am also encouraged to see that the final regulations require that the Department issue implementing directives requiring new supervisors to meet certain assessment or certification points as part of a formal training program. This will go a long way in ensuring the equitable application of the new pay-for-performance system and in conducting performance reviews. These are much welcomed changes from the proposed regulations.

Since the passage of the Homeland Security Act of 2002, which authorized the creation of a new flexible personnel system for Homeland Security Department employees, there has been a continued trend to modernize personnel systems government-wide. In January 2003, the bipartisan National Commission on the Public Service chaired by Paul Volcker called for the abolishment of the General Schedule and recommended that it be replaced with more flexible personnel management systems. That same year, Congress granted the Department of Defense flexibility to create a new personnel system and also authorized the Senior Executive Service to move to a pay-for-performance personnel system government-wide. Now more than fifty-percent of the Federal workforce will soon be under new modern, flexible personnel systems outside of the General Schedule.

In a forum hosted by the Government Accountability Office and the National Commission on the Public Service last April, there was broad agreement among participants that a government-

wide framework should be established to guide human capital reform, balancing the need for consistency across the Federal workforce and the need for flexible systems tailored to the particular needs of an agency. Moving the rest of the Federal workforce outside the General Schedule into a new performance-based compensation framework is an issue for another day. With that said, however, this Subcommittee is well aware that all eyes are on the success or failure of the new DHS personnel management system. It is very important that we get this right and we will spend the requisite amount of time overseeing the system's implementation to ensure its success.

I would like to express my thanks to the witnesses who have agreed to join us today. We have brought together a broad and knowledgeable array of voices as we begin our exploration of the new system, and look forward to hearing all of your perspectives. I want you to know that I begin this hearing with an open mind. I see this session as a learning opportunity for the Subcommittee.

Mr. PORTER. I now would like to make sure that our majority ranking member, Mr. Davis, is recognized. I know he is not here today, but possibly Mr. Cummings would like to add something in opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman, and thank you for calling this important hearing on the newly issued personnel regulations for the Department of Homeland Security.

Following the tragic events of September 11th, the Department of Homeland Security was created, which brought together 22 agencies for the purpose of protecting our country. The Homeland Security Act gave the Secretary of DHS and the Director of the Office of Personnel Management the authority to construct a new personnel system for the DHS. In 2002, Congress agreed it was a top priority to make modern human resources management system at the DHS capable of supporting its mission. However, many of my colleagues and I had some serious reservations that the authority granted to the DHS would needlessly undermine our Nation's longstanding commitments to employee protections, management accountability, and collective bargaining rights. Unfortunately, these newly issued regulations validate that my fears were well founded.

To begin, the administration has consistently justified its proposed sweeping changes in the DHS human resources management system as necessary to ensure national security. While national security must remain our top priority, I can think of no instances in which collective bargaining rights or employee protections in the Civil Service were a specific obstacle to protecting our Nation. These regulations substantially restrict what issues are covered by collective bargaining. As described in the new regulations, the DHS is no longer mandated to bargain over the number, types, grades, or occupational clusters and bands of employees or positions assigned to any organizational subdivision work project or tour of duty.

I believe that it is important that we maintain the integrity of our top priority by ensuring that the efforts we take in the name of national security genuinely impact the security of our Nation. As such, I look forward to the testimony of T.J. Bonner, of the American Federation of Government Employees, that describes numerous instances where collective bargaining has protected employees in the Civil Service and strengthened our homeland security.

It is troubling that the DHS and OPM rejected the proposal by unions for a post-implementation bargaining policy in the new DHS personnel system, which could have provided a balanced approach that respected the needs of all interested parties and provided the DHS with needed flexibilities to respond to national security emergencies.

More troubling is the replacement of the General Schedule with a performance-based pay system. Such a system could provide a means for politicization and/or cronyism within DHS without the necessary safeguards and clear standards to measure employee performance. These regulations also fail to establish an independent entity to resolve labor-management disputes.

Under the new regulations, DHS employees must take their grievances to an internal board appointed by the DHS Secretary called the Homeland Security Labor Relations Board, replacing the

independent Federal Labor Relations Authority as arbiter of disputes, with the Homeland Security Labor Relations Board being completely comprised of appointments by the top authority representing management at the DHS. This poses a major obstacle to ensuring impartiality in the resolution of labor-management disputes. This is analogous to having the empires of the World Series being chosen by an owner of a team involved in the game. Even if one would make the argument that such a selection process is reasonable, it certainly does not give the perception of fairness to the American people and to those playing the game.

Mr. Chairman, the Human Resources Management System at DHS is no game. The regulations and laws which govern that system directly impact the quality of life of some of our Government's most important civil servants and, as a result, impact the DHS's ability to fulfill its vital mission. I do not believe that these regulations support an efficient and inclusive relationship between employers and employees at the DHS, specifically the type of relationship needed to keep morale high, support retention, and attract skilled and capable prospective employees to serve at the DHS. We best honor our public servants by having a human capital system that embraces time-honored and time-tested traditions of collective bargaining, due process, and employee protections instead of undermining them.

With that, Mr. Chairman, I yield back and look forward to hearing from our witnesses.

[The prepared statement of Hon. Elijah E. Cummings follows:]

Opening Statement of

Representative Elijah E. Cummings, D-Maryland

Hearing on "The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System."

Subcommittee on the Federal Workforce and Agency Organization
U.S. House of Representatives
109th Congress

March 2, 2005 at 10:00 a.m.

Mr. Chairman, thank you for calling this important hearing on the newly issued personnel regulations for the Department of Homeland Security (DHS).

Following the tragic events of 9/11, the DHS was created, which brought together 22 agencies for the purpose of protecting our country. The Homeland Security Act gave the Secretary of the DHS and the Director of the Office of Personnel Management the authority to construct a new personnel system for the DHS.

In 2002, Congress agreed it was a top priority to make a modern human resources management system at the DHS capable of supporting its mission.

However, many of my colleagues and I had some serious reservations that the authority granted to the DHS would needlessly undermine our nation's long-standing commitments to employee protections, management accountability, and collective bargaining rights.

Unfortunately, these newly issued regulations validate that my fears were well-founded.

To begin, the Administration has consistently justified its proposed sweeping changes in the DHS human resources management system as necessary to ensure national security.

While national security must remain our top priority, I can think of no instances in which collective bargaining rights or employee protections in the civil service were a specific obstacle to protecting our nation.

These regulations substantially restrict what issues are covered by collective bargaining. As described in the new regulations, the DHS is no longer mandated to bargain over "the number, types, grades, or occupational clusters and bands of employees or positions assigned to any organizational subdivision work project or tour of duty…"

I believe that it is important that we maintain the integrity of our top priority by ensuring that the efforts we take in the name of national security genuinely impact the security of our nation.

As such, I look forward to the testimony of T.J. Bonner of the American Federation of Government Employees that describes numerous instances where collective bargaining has protected employees in the civil service and strengthened our homeland security.

It is troubling that the DHS and OPM rejected the proposal by unions for a "post-implementation bargaining" policy in the new DHS personnel system, which could have provided a balanced approach that respected the needs of all interested parties and provided the DHS with needed flexibilities to respond to national security emergencies.

More troubling is the replacement of the General Schedule with a performance-based pay system. Such a system could provide a means for politicalization and, or cronyism within the DHS without the necessary safeguards and clear standards to measure employee performance.

These regulations also fail to establish an independent entity to resolve labor-management disputes.

Under the new regulations DHS employees must take their grievances to an internal board appointed by the DHS Secretary called the Homeland Security Labor Relations Board (HSLRB), replacing the independent Federal Labor Relations Authority as arbiter of disputes.

With the HSLRB being completely comprised of appointments by the top authority representing management at the DHS, this poses a major obstacle to ensuring impartiality in the resolution of labor-management disputes.

This is analogous to having the umpires of the World Series being chosen by an owner of a team involved in the game—even if one would make the argument that such a selection process is reasonable, it certainly does not give the perception of fairness to the American people and to those playing the game.

Mr. Chairman, the human resources management system at the DHS is no game. The regulations and laws, which govern that system directly, impact the quality of life of some our government's most important civil servants and as a result, impact the DHS's ability to fulfill its vital mission.

I do not believe that these regulations support an efficient and inclusive relationship between employers and employees at the

DHS. Specifically, the type of relationship needed to keep morale high, support retention, and attract skilled and capable prospective employees to serve at the DHS.

We best honor our public servants by having a human capital system that embraces time honored and time tested traditions of collective bargaining, due process, and employee protections instead of undermining them.

Mr. Chairman, I yield back the balance of my time.

Mr. PORTER. Thank you.

I would like to now recognize our ranking minority member, Mr. Davis.

Mr. DAVIS. Thank you very much, Mr. Chairman. Let me apologize for being a trifle late, but I had all of the television owners in my hometown in my office, as well as the radio.

Mr. PORTER. I think we understand.

Mr. DAVIS. It is pretty difficult to put them out. We need them.

Well, let me thank you very much, Mr. Chairman, for calling this hearing, and I would like to welcome you and all the new Members who have come to the very first hearing of the Federal Workforce and Agency Organization Subcommittee.

Last February this subcommittee held a joint hearing with our Senate counterparts on, at the time, the proposed Department of Homeland Security's DHS personnel regulations. At that hearing I stated that we had embarked on a sad and troubling era in the history of the Civil Service and asked if agencies were being granted exemptions from Title V to fix inefficient regulations or to simply change what is inconvenient for management. The answer is now painfully clear. It is as if DHS put management in a room and said, come up with your dream personnel system; you don't have to worry about fairness or credibility, just tell us what you would want to make your life easier and more convenient. They did and DHS put their recommendations in these regulations, right down to Section 9701–406, that states that employee performance expectations do not have to be put in writing. These are the same expectations that will determine whether or not an employee gets a pay raise, and not one word of these expectations have to be put in writing.

The one thing that DHS allowed employees is that the expectations have to be communicated to them before they can be held accountable to them. Employees should be grateful for that concession. If putting employee expectations in writing is too onerous for DHS managers, then asking them to negotiate with unions is practically out of the question. DHS is prohibited from bargaining over the number types and grades of employees and the technology methods and means of performing work. Even individual components of DHS are prohibited from bargaining over these subjects, even at their own discretion. DHS even rejected a proposal by the unions to bargain over personnel changes after they have been implemented and shown to have had an adverse impact on affected employees.

Now, I am sure that we are going to hear today that all of this is being done in the name of national security. But let me caution witnesses from the outset that their answers to questions on these matters need to be more substantive than that. It is simply not enough to say that national security prevents you from putting employee performance expectations in writing, or that it is in the national interest or the best interest of national security for the Secretary of DHS to have sole authority to appoint members to DHS's Internal Mandatory Removal Panel or Homeland Security Labor Relations Board. These regulations are not fair, they are not credible, and they are not transparent. As a matter of fact, most of the

regulations have been defined as implementing directives, and are not even outlined in the regulations.

Members on both sides of the aisle should be outraged. These regulations go beyond the need for DHS to have personnel flexibility. These regulations reflect DHS's and this administration's desire to have unfettered and unchecked authority over the Civil Service period. As one article I read on DHS and DOD personnel regulations noted, we are going back to the past; back 120 years, when Andrew Jackson was President and there were only about 20,000 Federal employees and the work required few skills; back to when the entire work force faced possible replacement after each election and the newly installed politicians doled out jobs to reward campaign workers, donors, and party operatives. Wasn't it earlier this year that it came to light that DOD gave political non-career employees higher pay raises than career employees? These were across-the-board pay raises for political appointees that were not based on merit or individual performance. What is ironic about DOD's actions is that these political appointees did not have any more skill, any more knowledge, or any more performance than that performed by career employees.

And so, Mr. Chairman, I look forward to these hearings and thank all of the witnesses for appearing and, again, thank you for calling it. I yield back.

[The prepared statement of Hon. Danny K. Davis follows:]

**STATEMENT OF THE HONORABLE DANNY K. DAVIS
AT THE SUBCOMMITTEE ON FEDERAL WORKFORCE
AND AGENCY ORGANIZATION
HEARING ON**

THE COUNTDOWN TO COMPLETION: IMPLEMENTING THE NEW DEPARTMENT OF HOMELAND SECURITY PERSONNEL SYSTEM

March 2, 2005

Chairman Porter, I would like to welcome you, new members, and returning members on both sides of the aisle to the first Federal Workforce and Agency Organization Subcommittee hearing.

Last February, the Subcommittee on Civil Service and Agency Organization held a joint hearing with our Senate counterparts on the then *proposed* Department of Homeland Security (DHS) personnel regulations. At that hearing, I stated that we had embarked on a sad and troubling era in the history of the civil service, and I asked if agencies were being granted exemptions from Title V in order to fix inefficient regulations or to change what is simply inconvenient for management.

The answer is now painfully clear. It is as if DHS management was put in a room and told, "Come up with your dream personnel system. You don't have to worry about fairness or credibility. Just tell us what would make your life easier and more convenient." It appears that they did, and DHS put their recommendations in the regulations, right down to Section 9701.406, which states that employee performance expectations do not have to be put into writing!!

These are the same expectations that will determine whether or not an employee receives a pay raise, still not one word of these expectations must be

put into writing. DHS did allow one concession though -- expectations are to be communicated to an employee before an employee can be held accountable to them. For that, employees should be grateful.

If putting employee expectations into writing is too onerous for DHS managers, then asking them to negotiate with unions is practically out of the question. DHS is prohibited from bargaining over "the number, types, and grades of employees and the technology, methods, and means of performing work." This includes individual components of DHS, which are prohibited from bargaining over these subjects at their own discretion. DHS even went so far as to reject a proposal by the unions to bargain over personnel changes AFTER the changes have been implemented and have been shown to have an adverse impact on the affected employees.

Now I am sure that we are going to hear to today that all this is being done in the name of national security. But let me caution witnesses from the outset that their answers to questions on these matters need to be more substantive than that. It simply is not enough to say that national security prevents DHS from putting employee performance expectations in writing, or that it is in the interest of national security for the Secretary of DHS to have sole authority to appoint members to DHS's internal Mandatory Removal Panel or Homeland Security Labor Relations Board. Concern for national security alone cannot account for why most of the regulations have been defined as "implementing directives," and why they are not so much as

outlined in the regulations. These regulations and implementing directives are not fair, they are not credible, and they are not transparent.

Members on both side of the aisle should be outraged. These regulations go beyond the need for DHS to have personnel flexibility. These regulations reflect DHS's and this Administration's desire to have unfettered and unchecked authority over the civil service. Period.

As one article I read on DHS and DOD personnel regulations noted, we are going "back to the past." Back 120 years to when Andrew Jackson was president – when there were only about 20,000 federal employees, and the work required few skills. Back to the days when the entire federal workforce faced possible replacement after each election, and newly installed politicians doled out jobs to reward campaign workers, donors, and party operatives.

Wasn't it earlier this year that it came to light that DOD gave political and noncareer employees higher pay raises than career employees? These were across the board pay raises for political appointees, and they were not based on merit or individual performance. The irony of DOD's actions is that these political appointees are responsible for our national security, but they are not held to the same standards as rank-in-file federal employees. Yes, we are indeed, 'Back to the Past."

Thank you, Mister Chairman.

Mr. PORTER. Thank you, Mr. Davis.

I ask at this time for unanimous consent that all Members have 5 legislative days——

Ms. NORTON. Mr. Chairman.

Mr. PORTER. Yes.

Ms. NORTON. I ask to make an opening statement.

Mr. PORTER. Absolutely. I would like to go through a few procedural matters, then certainly we will have the balance of the committee with their openings. Thank you.

At this time, again, I would like to ask unanimous consent that the Members have 5 legislative days to submit written statements and questions for the hearing record; that any answers to written questions provided by the witnesses also be included in the record.

Without objection, so ordered.

I also ask unanimous consent that all exhibits, documents, and other materials referred to by the Members and the witnesses may be included in the hearing record, and that all Members be permitted to revise and extend their remarks.

Without objection, so ordered.

I also ask unanimous consent that all future meetings be held in Las Vegas. Hearing none——

Mr. ISSA. Half in California.

Mr. PORTER. Half in California.

Know that, again, we have these formal procedural matters, but as a community we would welcome the committee at any time in Las Vegas.

Also, it is the practice of this committee to administer the oath to all witnesses, which we will do shortly, but I would like to continue with opening statements.

I believe Member Issa, do you have anything you would like to add?

Mr. ISSA. In the interest of hearing our speakers, I will submit for the record.

Mr. PORTER. Thank you.

Congresswoman Holmes Norton.

Ms. NORTON. Thank you very much, Mr. Chairman. I want to thank you for making this your first hearing. I have been on this committee for all of my 14 years in Congress, and you have chosen a subject of special importance because what we do here is essentially going to be what we do or what the committee will hope to do for the entire merit system, and, therefore, it is a very important subject, given what that system has meant for more than a century to Federal employees and to the efficiency and integrity of the Federal system.

Mr. Chairman, I think the older system is more in need of reform, and I say that from my own experience as chair of the Equal Employment Opportunity Commission. It was a dysfunctional agency when I came, buried in backlog. I am credited with modernizing the system, getting rid of the backlog in part by using such efficiencies as reducing litigation, depending on settlements before they were widely used in the Federal Government at all. So I approach every system as old as this as if it needed reform, rather than not needing reform. And I certainly think that after September 11th, with the rise of terrorism and with the special mis-

sion of the Homeland Security Commission, a very close look at Civil Service reform was closely called for.

We began by believing, I think, exercising a presumption in favor of a merit system, rather than seeing the beginning of the end of the merit system and the stripping of collective bargaining protections. Improvements have been made, and I congratulate the unions involved and the agency for as much collaboration as they did. Now we face lawsuits and delays, some demoralization in the agency. Remember how many agencies we are putting together for the first time. And if I may say so, about the last agency we need to see any demoralization in is the agency that protects the homeland, an agency that involves 180,000 employees.

We have here involved most of the Federal work force, when you get the DOD, where we have also begun this process, and Homeland Security. Very careful attention is therefore merited.

We are eliminating important protections at the same time that we are establishing a new pay system, the pay banding system, at the total discretion of management. With pay involved, the time could not be worse for eliminating protections. Pay is perhaps what makes a merit system with impartiality most essential.

The point of any regulation we do, it seems to me, should be efficiency. Yet I look at the MSPB changes in particular, where it takes 3 months to resolve a complaint. The MSPB is the outside agency that looks at what the agency has done. The hallmark of due process is that you do not investigate yourself, but somebody with fresh eyes, not imbedded in protection of one or the other of the parties gets to look at the matter. Very, very serious when you eliminate some of that. And for what? Is 3 months too long? Find me a system that resolves these matters in less time.

Indeed, the indications are that there isn't a problem at all here, since 80 percent of the time the agency prevails. What is it that we are after? I need to know what is it that we were after that we were not achieving by outside review, particularly given the predominance of evidence standard and even a lower standard in performance cases, substantial evidence.

Mr. Chairman, the more I learn about how other countries run their governments, the more I appreciate what the merit system has meant in eliminating those kinds of matters—bribes, favoritism—in our own system. Our system stands up among the systems of the world in this regard. Impartiality has been its hallmark. The Homeland Security regulations do not yet meet that burden. This matter needs more work; it needs greater consultation with those who will be bound by the system. I think it needs more work at the drawing board.

Thank you very much, Mr. Chairman.

Mr. PORTER. And thank you for your testimony.

I believe that is the end of our opening statements.

At this time, what I would like to do is ask if everyone would stand on all the panels so I can administer the oath, please.

[Witnesses sworn.]

Mr. PORTER. Let the record reflect the witnesses have answered in an affirmative manner, and we will now start with our first panel.

On our first panel today we will hear from David Walker, the U.S. Comptroller General from the Government Accountability Office.

Mr. Walker, as always, it is a pleasure to have you here, and you are recognized for 5 minutes.

STATEMENT OF DAVID M. WALKER, COMPTROLLER GENERAL, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. WALKER. Thank you, Mr. Chairman. Congratulations on your appointment, and thank you for the opportunity to appear before this inaugural meeting under your chairmanship.

Mr. Davis, always good to see you, and other members of the subcommittee.

Mr. Chairman, I respectfully request that my entire statement be included into the record so that I can move to summarize it now.

Mr. PORTER. Absolutely.

Mr. WALKER. Thank you, Mr. Chairman.

Two comments at the outset. First, as you know, GAO put the lack of an effective human capital strategy by the Federal Government on our high risk list on January 2001. Much progress has been made since then, but quite a bit remains to be done. I do agree that this is a very important subject matter, because whatever happens at DHS obviously has broader implications for reform elsewhere in the Federal Government.

Second, I would note that GAO has been leading by example in this area. We have had broad banding since 1989; we have had pay-for-performance since 1989. And with the assistance of this subcommittee, this committee and the Congress at large, we now have additional flexibilities, as a result of legislation that was enacted last year, to move to a more market-based and performance-oriented classification and compensation system that will enable us to reward people based upon skills, knowledge, and performance, while maintaining important principles and incorporating adequate safeguards to maximize consistency and avoid abuse of employees, which is very important, because, after all, our people are our most valuable asset, no matter what agency you are dealing with.

In GAO's longstanding professional approach to try to take a fair and balanced view, I would like to say, Mr. Chairman, three positive things, three areas of concerns, and three points about the way forward with regard to the matter before this committee.

On the positive side, the Department of Homeland Security is proposing to move to a more flexible, contemporary performance-oriented and market-based compensation system that will include consideration of occupational clusters and pay bands that will endeavor to try to better reflect labor market conditions in various labor markets, and that will end up having a variety of features that are more reflective of the knowledge-based work force that now is represented by the Federal Government. Second, it is pledging to continue to involve employees and union officials throughout the implementation process. They have had more collaboration than some others in the past in this regard, although it is important that it be meaningful collaboration, not just pro forma collaboration; and obviously that is a facts and circumstances determination. Third, they are pledging to evaluate the implementation of

the new system, and it is my understanding they are also proposing to engage in a phased implementation process. I think that is critically important given the significance and size and the scope of the Department of Homeland Security.

As far as three areas of concern, there are a lot of details that are yet to be defined, and details matter. And depending upon how these details are defined could have a direct effect on the likelihood that it will be successful and with regard to areas such as fairness and consistency. Second, DHS is proposing to consider adopting core competencies, but has not committed to do so, and as has been mentioned, is not necessarily committing to put all expectations in writing. My personal view is that one should strongly consider core competencies as a way to move forward in this area. Those should be in writing, and I think that they can very much prove to help set expectations at the same point in time. Third, there is no guarantee that the proposed approaches that DHS is going to follow will result in meaningful differentiation in performance. While in general they do not propose to have a pass-fail approach other than for possible certain entry-level positions, they are talking about possibly a three summary rating level categorization beyond the pass-fail, and I have serious concerns as to whether or not you can achieve meaningful differentiation in performance based upon just a three level of rating system.

As far as the three issues for going forward, first, I think that DHS could benefit for consideration of having a chief operating officer or chief management officer to elevate, integrate, and institutionalize responsibility not just for the success of this effort, but also for the overall business transformation effort and integrating the 22 different departments and agencies that have come together to make DHS, because achieving that is something that is going to take many years, is going to take the sustained attention of a top executive with a proven track record of success. Second, it is absolutely critically important that there be effective on-going, two-way consultation and communication in order to make this reform a reality. And last, but certainly not least, it is absolutely critical that there be an adequate infrastructure in place to make effective use of these authorities before they are implemented. There needs to be, among other things, an effective human capital planning process—modern, effective, credible, and hopefully validated performance appraisal systems—with adequate safeguards in order to maximize consistency and to prevent abuse before the new authorities are implemented. Failure to do that is a high risk strategy.

So in summary, Mr. Chairman, there are some positive areas, there are some areas of concern, and there a few comments about the way forward. But as I would reinforce where I started, we have been on this business longer than just about anybody in the Federal Government, so I can speak from real live experience, rather than theory, with regard to a lot of these issues.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Walker follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, House of Representatives

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HUMAN CAPITAL

Observations on Final DHS Human Capital Regulations

Statement of David M. Walker
Comptroller General of the United States

GAO-05-391T

March 2, 2005

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Highlights

Highlights of GAO-05-391T, a report to Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, House of Representatives

HUMAN CAPITAL

Observations on Final DHS Human Capital Regulations

Why GAO Did This Study

People are critical to any agency transformation, such as the one envisioned for the Department of Homeland Security (DHS). They define an agency's culture, develop its knowledge base, and are its most important asset. Thus, strategic human capital management at DHS can help it marshal, manage, and maintain the people and skills needed to meet its critical mission. Congress provided DHS with significant flexibility to design a modern human capital management system. DHS and the Office of Personnel Management (OPM) have now jointly released the final regulations on DHS's new human capital system.

Last year, with the release of the proposed regulations, GAO observed that many of the basic principles underlying the regulations were consistent with proven approaches to strategic human capital management and deserved serious consideration. However, some parts of the human capital system raised questions for DHS, OPM, and Congress to consider in the areas of pay and performance management, adverse actions and appeals, and labor management relations. GAO also identified multiple implementation challenges for DHS once the final regulations for the new system were issued.

This testimony provides overall observations on DHS's intended human capital system and selected provisions of the final regulations.

www.gao.gov/cgi-bin/getrpt?GAO-05-391T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Eileen Larence at (202) 512-6806 or larencee@gao.gov.

What GAO Found

GAO believes that DHS's regulations contain many of the basic principles that are consistent with proven approaches to strategic human capital management. Positively, the final regulations provide for (1) a flexible, contemporary, performance-oriented, and market-based compensation system, including occupational clusters and pay bands; (2) continued involvement of employees and union officials throughout the implementation process, such as by participating in the development of the implementing directives and holding membership on the Homeland Security Compensation Committee; and (3) evaluations of the implementation of DHS's system.

On the other hand, GAO has three areas of concern that deserve attention from DHS senior leadership. First, DHS has considerable work ahead to define the details of the implementation of its system and getting those details right will be critical to the success of the overall system. Second, the performance management system merely allows, rather than requires, the use of core competencies that can help to provide reasonable consistency and clearly communicate to employees what is expected of them. Third, the pass/fail ratings or three summary rating levels for certain employee groups do not provide the meaningful differentiation in performance needed for transparency to employees and for making the most informed pay decisions.

Going forward, GAO believes that especially for this multiyear transformation, the Chief Operating Officer/Chief Management Officer concept could help to elevate, integrate, and institutionalize responsibility for the success of DHS's new human capital system and related implementation and transformation efforts. Second, a key implementation step for DHS is to assure an effective and on-going two-way communication effort that creates shared expectations among managers, employees, customers, and stakeholders. Last, DHS must ensure that it has the institutional infrastructure in place to make effective use of its new authorities. At a minimum, this infrastructure includes a human capital planning process that integrates human capital policies, strategies, and programs with its program goals, mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and importantly, the existence of a modern, effective, and credible performance management system that includes adequate safeguards to help assure consistency and prevent abuse.

While GAO strongly supports federal human capital reform, how it is done, when it is done, and the basis on which it is done can be the difference between success and failure. Thus, the DHS regulations are especially critical because of their potential implications for related governmentwide reform.

Chairman Porter and Members of the Subcommittee:

I appreciate the opportunity to be here today to provide our observations on the Department of Homeland Security's (DHS) final regulations on its new human capital system, which were published last month jointly by the Secretary of DHS and the Director of the Office of Personnel Management (OPM). As you know, I recently testified on these regulations before the Senate's Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia.[1] Since then, GAO issued its report on 21st century challenges, which is intended to help Congress address a range of 21st century trends and challenges, including our current unsustainable fiscal path, by providing a series of illustrative questions that could help support a fundamental and broad-based reexamination initiative.[2] Among the questions relevant to this hearing is one that asks: "How should the federal government update its compensation systems to be more market-based and performance-oriented?"

As the title of this hearing suggests—"The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System"—DHS, and in many cases the federal government, must transform how it classifies, develops, motivates, and compensates its employees to achieve maximum results within available resources. People are critical to any agency's transformation, such as the one envisioned for DHS. They define an agency's culture, develop its knowledge, and are its most important asset. Thus, strategic human capital management at DHS can help it marshal, manage, and maintain the people and skills needed to meet its critical mission.

As we recently reported in our High-Risk Series, significant changes in how the federal workforce is managed, such as DHS's new human capital system, are underway.[3] Consequently, there is general recognition that the government needs a framework to guide this human capital reform, one

[1]See Highlights page attached to this statement and GAO, *Human Capital: Preliminary Observations on Final Department of Homeland Security Human Capital Regulations*, GAO-05-320T (Washington, D.C.: Feb. 10, 2005).

[2]GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: February 2005).

[3]GAO, *High-Risk Series: An Update*, GAO-05-207 (Washington, D.C.: January 2005).

that Congress and the administration can implement to enhance performance, ensure accountability, and position the nation for the future. These final regulations, which according to DHS will affect about 110,000 federal employees, are especially critical because of their implications for governmentwide reforms.

Today, I will discuss some of the major features of the DHS regulations. In doing so, I will touch on several key themes. Specifically, I will highlight three positive features, three areas of concern, and three comments going forward that are suggested in my statement today. Let me start by summarizing three positive features of the intended DHS human capital system. First, we believe that, consistent with the observations we made a year ago, the final regulations provide for a flexible, contemporary, performance-oriented, and market-based compensation system.[4] Under the regulations, DHS is to establish occupational clusters and pay bands and may, after coordination with OPM, set and adjust pay ranges taking into account mission requirements, labor market conditions, availability of funds, and other relevant factors. Second, DHS appears to be committed to continue to involve employees and union officials throughout the implementation process, including participating in the development of the implementing directives, holding membership on the Homeland Security Compensation Committee, and helping in the design and review of the evaluations of the new system. Third, high-performing organizations continually review and revise their human capital systems. To this end, the final regulations state that DHS is to establish procedures for evaluating the implementation of its system.

On the other hand, I have three areas of concern that I believe need to be addressed to maximize DHS's chance of success. First, DHS has considerable work ahead to define the details of the implementation of its system and understanding these details is important in assessing the overall system. Second, the performance management system merely allows, rather than requires, the use of core competencies that can help to provide reasonable consistency and clearly communicate to employees what is expected of them. Employees validating these competencies would

[4]GAO, *Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations*, GAO-04-479T (Washington, D.C.: Feb. 25, 2004); *Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*, GAO-04-570R (Washington, D.C.: Mar. 22, 2004); and *Additional Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*, GAO-04-617R (Washington, D.C.: Apr. 30, 2004).

help to gain their acceptance and credibility and minimize adverse actions. This has certainly been our experience with our own internal efforts at GAO. Third, pass/fail ratings for employees in the "Entry/Developmental" band or three summary rating levels for other employee groups do not provide the meaningful differentiation in performance needed for transparency to employees and for making the most informed pay decisions.

Going forward, we believe that especially for this multiyear transformation, the Chief Operating Officer/Chief Management Officer concept could help to elevate, integrate, and institutionalize responsibility for the success of DHS's new human capital system. Second, a key implementation step for DHS is to assure an effective and on-going two-way communication effort that creates shared expectations among managers, employees, customers, and stakeholders. Last, we are very concerned that DHS must ensure that it has the institutional infrastructure in place to make effective use of its new authorities. At a minimum, this infrastructure includes a human capital planning process that integrates human capital policies, strategies, and programs with its program goals, mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and importantly, the existence of a modern, effective, and credible performance management system that includes adequate safeguards to help assure consistency and prevent abuse.

This morning I would like to provide some observations on the final DHS regulations, discuss the multiple challenges that DHS confronts as it moves towards implementation of its new human capital system, and then suggest a governmentwide framework that can serve as a starting point to advance human capital reform.

Observations on Final DHS Human Capital Regulations

The final regulations establish a new human capital system for DHS that is intended to assure its ability to attract, retain, and reward a workforce that is able to meet its critical mission. Further, the human capital system is to provide for greater flexibility and accountability in the way employees are to be paid, developed, evaluated, afforded due process, and represented by labor organizations while reflecting the principles of merit and fairness embodied in the statutory merit systems principles.

Predictable with any change management initiative, the DHS regulations have raised some concerns among employee groups, unions, and other stakeholders because they do not have all the details of how the system will be implemented and impact them. We have reported that individuals inevitably worry during any change management initiative because of uncertainty over new policies and procedures.[5] A key practice to address this worry is to involve employees and their representatives to obtain their ideas and gain their ownership for the initiative. Thus, a significant improvement from the proposed regulations is that now employee representatives are to be provided with an opportunity to remain involved. Specifically, they can discuss their views with DHS officials and/or submit written comments as implementing directives are developed, as outlined under the "continuing collaboration" provisions. This collaboration is consistent with DHS's statutory authority to establish a new human capital system, which requires such continuing collaboration. Under the regulations, nothing in the continuing collaboration process is to affect the right of the Secretary to determine the content of implementing directives and to make them effective at any time.

In addition, the final regulations state that DHS is to establish procedures for evaluating the implementation of its human capital system. High-performing organizations continually review and revise their human capital management systems based on data-driven lessons learned and changing needs in the environment. Collecting and analyzing data is the fundamental building block for measuring the effectiveness of these systems in support of the mission and goals of the agency.

We continue to believe that many of the basic principles underlying the DHS regulations are generally consistent with proven approaches to strategic human capital management. Today, I will provide our observations on the following elements of DHS's human capital system as outlined in the final regulations—pay and performance management, adverse actions and appeals, and labor-management relations.

[5]GAO, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, GAO-03-669 (Washington, D.C.: July 2, 2003) and *Highlights of a GAO Forum: Lessons Learned for a Department of Homeland Security and Other Federal Agencies*, GAO-03-293SP (Washington, D.C.: Nov. 14, 2002).

Pay and Performance Management

Last year, we testified that the DHS proposal reflects a growing understanding that the federal government needs to fundamentally rethink its current approach to pay and better link pay to individual and organizational performance.[6] To this end, the DHS proposal takes another valuable step towards modern performance management. Among the key provisions is a performance-oriented and market-based pay system.

We have observed that a competitive compensation system can help organizations attract and retain a quality workforce.[7] To begin to develop such a system, organizations assess the skills and knowledge they need; compare compensation against other public, private, or nonprofit entities competing for the same talent in a given locality; and classify positions along levels of responsibility. While one size does not fit all, organizations generally structure their competitive compensation systems to separate base salary—which all employees receive—from other special incentives, such as merit increases, performance awards, or bonuses, which are provided based on performance and contributions to organizational results.

According to the final regulations, DHS is to establish occupational clusters and pay bands that replace the current General Schedule (GS) system now in place for much of the civil service. DHS may, after coordination with OPM, establish occupational clusters based on factors such as mission or function, nature of work, qualifications or competencies, career or pay progression patterns, relevant labor-market features, and other characteristics of those occupations or positions. DHS is to document in implementing directives the criteria and rationale for grouping occupations or positions into clusters as well as the definitions for each band's range of difficulty and responsibility, qualifications, competencies, or other characteristics of the work.

As we testified last year, pay banding and movement to broader occupational clusters can both facilitate DHS's movement to a pay for performance system and help DHS to better define occupations, which can improve the hiring process. We have reported that the current GS system as defined in the Classification Act of 1949 is a key barrier to comprehensive human capital reform and the creation of broader occupational job clusters

[6]GAO-04-479T.

[7]GAO-04-617R.

and pay bands would aid other agencies as they seek to modernize their personnel systems.[8] Today's jobs in knowledge-based organizations require a much broader array of tasks that may cross over the narrow and rigid boundaries of job classifications of the GS system.

Under the final regulations, DHS is to convert employees from the GS system to the new system without a reduction in their current pay. According to DHS, when employees are converted from the GS system to a pay band, their base pay is to be adjusted to include a percentage of their next within-grade increase, based on the time spent in their current step and the waiting period for the next step. DHS stated that most employees would receive a slight increase in salary upon conversion to a pay band. This approach is consistent with how several of OPM's personnel demonstration projects converted employees from the GS system.

The final DHS regulations include other elements of a modern compensation system. For example, the regulations provide that DHS may, after coordination with OPM, set and adjust the pay ranges for each pay band taking into account mission requirements, labor market conditions, availability of funds, pay adjustments received by other federal employees, and any other relevant factors. In addition, DHS may, after coordination with OPM, establish locality rate supplements for different occupational clusters or for different bands within the same cluster in the same locality pay area. According to DHS, these locality rates would be based on the cost of labor rather than cost of living factors. The regulations state that DHS would use recruitment or retention bonuses if it experiences such problems due to living costs in a particular geographic area.

[8]GAO, *Human Capital: Opportunities to Improve Executive Agencies' Hiring Processes*, GAO-03-450 (Washington, D.C.: May 30, 2003).

Especially when developing a new performance management system, high-performing organizations have found that actively involving employees and key stakeholders, such as unions or other employee associations, helps gain ownership of the system and improves employees' confidence and belief in the fairness of the system.[9] DHS recognized that the system must be designed and implemented in a transparent and credible manner that involves employees and employee representatives. A new and positive addition to the final regulations is a Homeland Security Compensation Committee that is to provide oversight and transparency to the compensation process. The committee—consisting of 14 members, including four officials of labor organizations—is to develop recommendations and options for the Secretary's consideration on compensation and performance management matters, including the annual allocation of funds between market and performance pay adjustments.

While the DHS regulations contain many elements of a performance-oriented and market-based pay system, there are several issues that we identified last year that DHS will need to continue to address as it moves forward with the implementation of the system. These issues include linking organizational goals to individual performance, using competencies to provide a fuller assessment of performance, making meaningful distinctions in employee performance, and continuing to incorporate adequate safeguards to ensure fairness and guard against abuse.

Linking Organizational Goals to Individual Performance

Consistent with leading practice, the DHS performance management system is to align individual performance expectations with the mission, strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. DHS's performance management system can be a vital tool for aligning the organization with desired results and creating a "line of sight" showing how team, unit, and individual performance can contribute to overall organizational results.[10] However, as we testified last year, agencies struggle to create this line of sight.

[9]GAO, *Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success*, GAO-03-488 (Washington, D.C.: Mar. 14, 2003).

[10]GAO-03-488.

Using Competencies to Provide a Fuller Assessment of Performance

DHS appropriately recognizes that given its vast diversity of work, managers and employees need flexibility in crafting specific performance expectations for their employees. These expectations may take the form of competencies an employee is expected to demonstrate on the job, among other things. However, as DHS develops its implementing directives, the experiences of leading organizations suggest that DHS should reconsider its position to merely allow, rather than require, the use of core competencies that employees must demonstrate as a central feature of its performance management system. Based on our review of others' efforts and our own experience at GAO, core competencies can help reinforce employee behaviors and actions that support the department's mission, goals, and values and can provide a consistent message to employees about how they are expected to achieve results.[11] For example, an OPM personnel demonstration project—the Civilian Acquisition Workforce Personnel Demonstration Project—covers various organizational units within the Department of Defense and applies core competencies for all employees, such as teamwork/cooperation, customer relations, leadership/supervision, and communication.

Similarly, as we testified last year, DHS could use competencies—such as achieving results, change management, cultural sensitivity, teamwork and collaboration, and information sharing—to reinforce employee behaviors and actions that support its mission, goals, and values and to set expectations for individuals' roles in DHS's transformation. By including such competencies throughout its performance management system, DHS could create a shared responsibility for organizational success and help assure accountability for change.

Making Meaningful Distinctions in Employee Performance

High-performing organizations seek to create pay, incentive, and reward systems that clearly link employee knowledge, skills, and contributions to organizational results. These organizations make meaningful distinctions between acceptable and outstanding performance of individuals and appropriately reward those who perform at the highest level.[12] The final regulations state that DHS supervisors and managers are to be held accountable for making meaningful distinctions among employees based on performance, fostering and rewarding excellent performance, and

[11]GAO, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, D.C.: Jan. 23, 2004).

[12]GAO-03-488.

addressing poor performance. While DHS states that as a general matter, pass/fail ratings are incompatible with pay for performance, it is to permit use of pass/fail ratings for employees in the "Entry/Developmental" band or in other pay bands under extraordinary circumstances as determined by the Secretary.

DHS is to require the use of a least three summary rating levels for other employee groups. We urge DHS to consider using at least four summary rating levels to allow for greater performance rating and pay differentiation. This approach is in the spirit of the new governmentwide performance-based pay system for the Senior Executive Service (SES), which requires at least four levels to provide a clear and direct link between SES performance and pay as well as to make meaningful distinctions based on relative performance.[13] Cascading this approach to other levels of employees can help DHS recognize and reward employee contributions and achieve the highest levels of individual performance.

Providing Adequate Safeguards to Ensure Fairness and Guard Against Abuse

As DHS develops its implementing directives, it also needs to continue to build safeguards into its performance management system. A concern that employees often express about any pay for performance system is supervisors' ability to assess performance fairly. Using safeguards, such as having an independent body to conduct reasonableness reviews of performance management decisions, can help to allay these concerns and build a fair, credible, and transparent system.

It should be noted that the final regulations no longer provide for a Performance Review Board (PRB) to review ratings in order to promote consistency, provide general oversight of the performance management system, and ensure it is administered in a fair, credible, and transparent manner. According to the final regulations, participating labor organizations expressed concern that the PRBs could delay pay decisions and give the appearance of unwarranted interference in the performance rating process. However, in the final regulations, DHS states that it continues to believe that an oversight mechanism is important to the credibility of the department's pay for performance system and that the Compensation Committee, in place of PRBs, is to conduct an annual review of performance payout summary data. While much remains to be

[13]For more information, see GAO, *Human Capital: Senior Executive Performance Management Can Be Significantly Strengthened to Achieve Results*, GAO-04-614 (Washington, D.C.: May 26, 2004).

determined about how the Compensation Committee is to operate, we believe that the effective implementation of such a committee is important to assuring that predecisional internal safeguards exist to help achieve consistency and equity, and assure non-discrimination and non-politicization of the performance management process.

We have also reported that agencies need to assure reasonable transparency and provide appropriate accountability mechanisms in connection with the results of the performance management process.[14] For DHS, this can include publishing internally the overall results of performance management and individual pay decisions while protecting individual confidentiality and reporting periodically on internal assessments and employee survey results relating to the performance management system. Publishing this information can provide employees with the information they need to better understand the performance management system and to generally compare their individual performance with their peers. We found that several of OPM's personnel demonstration projects publish information for employees on internal Web sites that include the overall results of performance appraisal and pay decisions, such as the average performance rating, the average pay increase, and the average award for the organization and for each individual unit.

Adverse Actions and Appeals

DHS's final regulations are intended to simplify and streamline the employee adverse action process to provide greater flexibility for the department and to minimize delays, while also ensuring due process protections. It is too early to tell what impact, if any, these regulations would have on DHS's operations and employees or other entities, such as the Merit Systems Protection Board (MSPB). Close monitoring of any unintended consequences, such as on MSPB and its ability to manage cases from DHS and other federal agencies, is warranted.

In terms of adverse actions, the regulations modify the current federal system in that the DHS Secretary will have the authority to identify specific offenses for which removal is mandatory. In our previous testimony on the proposed regulations, we expressed some caution about this new authority and pointed out that the process for determining and communicating which

[14]GAO-04-83.

types of offenses require mandatory removal should be explicit and transparent. We noted that such a process should include an employee notice and comment period before implementation and collaboration with relevant congressional stakeholders and employee representatives. The final DHS regulations explicitly provide for publishing a list of the mandatory removal offenses in the *Federal Register* and in DHS's implementing directives and making these offenses known to employees annually.

In last year's testimony, we also suggested that DHS exercise caution when identifying specific removable offenses and the specific punishment. When developing and implementing the regulations, DHS might learn from the experience of the Internal Revenue Service's (IRS) implementation of its mandatory removal provisions.[15] We reported that IRS officials believed this provision had a negative impact on employee morale and effectiveness and had a "chilling effect" on IRS frontline enforcement employees who were afraid to take certain appropriate enforcement actions.[16] Careful drafting of each removable offense is critical to ensure that the provision does not have unintended consequences.

Under the DHS regulations, employees alleged to have committed these mandatory removal offenses are to have the right to a review by a newly created panel. DHS regulations provide for judicial review of the panel's decisions. Members of this three-person panel are to be appointed by the Secretary for three-year terms. In last year's testimony, we noted that the independence of the panel that is to hear appeals of mandatory removal actions deserved further consideration. The final regulations address the issue of independence by prescribing additional qualification requirements which emphasize integrity and impartiality and requiring the Secretary to consider any lists of candidates submitted by union representatives for panel positions other than the chair. Employee perception concerning the independence of this panel is critical to the mandatory removal process.

Regarding the appeal of adverse actions other than mandatory removals, the DHS regulations generally preserve the employee's basic right to appeal decisions to an independent body—MSPB—but with procedures different

[15]Section 1203 of the IRS Restructuring and Reform Act of 1998 outlines conditions for the firing of IRS employees for any of ten acts of misconduct.

[16]GAO, *Tax Administration: IRS and TIGTA Should Evaluate Their Processing of Employee Misconduct Under Section 1203*, GAO-03-394 (Washington, D.C.: Feb. 14, 2003).

from those applicable to other federal employees.[17] However, in a change from the proposed regulations in taking actions against employees for performance or conduct issues, DHS is to meet a higher standard of evidence—a "preponderance of evidence" instead of "substantial evidence." For performance issues, while this higher standard of evidence means that DHS would face a greater burden of proof than most agencies to pursue these actions, DHS managers are not required to provide employees performance improvement periods, as is the case for other federal employees. For conduct issues, DHS would face the same burden of proof as most agencies.

The regulations shorten the notification period before an adverse action can become effective and provide an accelerated MSPB adjudication process. In addition, MSPB may no longer modify a penalty for a conduct-based adverse action that is imposed on an employee by DHS unless such penalty was "wholly without justification." The DHS regulations also stipulate that MSPB can no longer require that parties enter into settlement discussions, although either party may propose doing so. DHS expressed concerns that settlement should be a completely voluntary decision made by parties on their own. However, settling cases has been an important tool in the past at MSPB, and promotion of settlement at this stage should be encouraged.

The final regulations continue to support a commitment to the use of Alternative Dispute Resolution (ADR), which we previously noted was a positive development. To resolve disputes in a more efficient, timely, and less adversarial manner, federal agencies have been expanding their human capital programs to include ADR approaches, including the use of ombudsmen as an informal alternative to addressing conflicts.[18] ADR is a tool for supervisors and employees alike to facilitate communication and resolve conflicts. As we have reported, ADR helps lessen the time and the cost burdens associated with the federal redress system and has the advantage of employing techniques that focus on understanding the disputants' underlying interests over techniques that focus on the validity

[17]Employees under collective bargaining agreements can choose to grieve and arbitrate adverse actions other than mandatory removals through negotiated grievance procedures or take these actions to MSPB.

[18]GAO, *Human Capital: The Role of Ombudsmen in Dispute Resolution*, GAO-01-466 (Washington, D.C.: Apr. 13, 2001).

of their positions.[19] For these and other reasons, we believe that it is important to continue to promote ADR throughout the process.

Labor-Management Relations

Under the DHS regulations, the scope and method of labor union involvement in human capital issues are to change. DHS management is no longer required to engage in collective bargaining and negotiations on as many human capital policies and processes as in the past. For example, certain actions that DHS has determined are critical to the mission and operations of the department, such as deploying staff and introducing new technologies, are now considered management rights and are not subject to collective bargaining and negotiation. DHS, however, is to confer with employees and unions in developing the procedures it will use to take these actions. Other human capital policies and processes that DHS characterizes as "non-operational," such as selecting, promoting, and disciplining employees, are also not subject to collective bargaining, but DHS must negotiate the procedures it will use to take these actions. Finally, certain other policies and processes, such as how DHS will reimburse employees for any "significant and substantial" adverse impacts resulting from an action, such as a rapid change in deployment, must be negotiated.

In addition, DHS is to establish its own internal labor relations board—the Homeland Security Labor Relations Board—to deal with most agencywide labor relations policies and disputes rather than submit them to the Federal Labor Relations Authority. DHS stated that the unique nature of its mission—homeland protection—demands that management have the flexibility to make quick resource decisions without having to negotiate them, and that its own internal board would better understand its mission and, therefore, be better able to address disputes. Labor organizations are to nominate names of individuals to serve on the Board and the regulations established some general qualifications for the board members. However, the Secretary is to retain the authority to both appoint and remove any member. Similar to the mandatory removal panel, employee perception concerning the independence of this board is critical to the resolution of the issues raised over labor relations policies and disputes. These changes have not been without controversy, and four federal employee unions have filed suit alleging that DHS has exceeded its authority under the statute

[19]GAO, *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace*, GAO/GGD-97-157 (Washington D.C.: Aug. 12, 1997).

establishing the DHS human capital system.[20] The suit discusses bargaining and negotiability practices, adverse action procedures, and the roles of the Federal Labor Relations Authority and MSPB under the DHS regulations.

Our previous work on individual agencies' human capital systems has not directly addressed the scope of specific issues that should or should not be subject to collective bargaining and negotiations. At a forum we co-hosted exploring the concept of a governmentwide framework for human capital reform, which I will discuss later, participants generally agreed that the ability to organize, bargain collectively, and participate in labor organizations is an important principle to be retained in any framework for reform. It was also suggested at the forum that unions must be both willing and able to actively collaborate and coordinate with management if unions are to be effective representatives of their members and real participants in any human capital reform.

DHS Confronts Many Challenges to Successful Implementation

With the issuance of the final regulations, DHS faces multiple challenges to the successful implementation of its new human capital system. We identified multiple implementation challenges at last year's hearing. Subsequently, we reported that DHS's actions to date in designing its human capital system and its stated plans for future work on its system are helping to position the department for successful implementation.[21] Nevertheless, DHS was in the early stages of developing the infrastructure needed for implementing its new system. For more information on these challenges, as well as on related human capital topics, see the "Highlights" pages attached to this statement.

We believe that these challenges are still critical to the success of the new human capital system. In many cases, DHS has acknowledged these challenges and made a commitment to address them in regulations. Today I would like to focus on two additional implementation challenges—ensuring sustained and committed leadership and establishing an overall consultation and communication strategy—and then reiterate challenges we previously identified, including providing adequate resources for

[20]*National Treasury Employees Union v. Ridge*, No. 1:05cv201 (D.D.C. filed Jan. 27, 2005).

[21]GAO, *Human Capital: DHS Faces Challenges in Implementing Its New Personnel System*, GAO-04-790 (Washington, D.C.: June 18, 2004).

implementing the new system and involving employees and other stakeholders in implementing the system.

Ensuring Sustained and Committed Leadership

As DHS and other agencies across the federal government embark on large-scale organizational change initiatives, such as the new human capital system DHS is implementing, there is a compelling need to elevate, integrate, and institutionalize responsibility for such key functional management initiatives to help ensure their success.[22] A Chief Operating Officer/Chief Management Officer (COO/CMO) or similar position can effectively provide the continuing, focused attention essential to successfully completing these multiyear transformations.

Especially for such an endeavor as critical as DHS's new human capital system, such a position would serve to

- elevate attention that is essential to overcome an organization's natural resistance to change, marshal the resources needed to implement change, and build and maintain the organizationwide commitment to new ways of doing business;
- integrate this new system with various management responsibilities so they are no longer "stovepiped" and fit it into other organizational transformation efforts in a comprehensive, ongoing, and integrated manner; and
- institutionalize accountability for the system so that the implementation of this critical human capital initiative can be sustained.

We have work underway at the request of Congress to assess DHS's management integration efforts, including the role of existing senior leadership positions as compared to a COO/CMO position, and expect to issue a report on this work in the coming weeks.

[22]GAO, *The Chief Operating Officer Concept and Its Potential Use as a Strategy to Improve Management at the Department of Homeland Security*, GAO-04-876R (Washington, D.C.: June 28, 2004) and *Highlights of a GAO Roundtable: The Chief Operating Officer Concept: A Potential Strategy To Address Federal Governance Challenges*, GAO-03-192SP (Washington, D.C.: Oct. 4, 2002).

Establishing an Overall Communication Strategy

Another significant challenge for DHS is to assure an effective and ongoing two-way consultation and communication strategy that creates shared expectations about, and reports related progress on, the implementation of the new system. We have reported this is a key practice of a change management initiative.[23] DHS's final regulations recognize that all parties will need to make a significant investment in communication in order to achieve successful implementation of its new human capital system. According to DHS, its communication strategy will include global e-mails, satellite broadcasts, Web pages, and an internal DHS weekly newsletter. DHS stated that its leaders will be provided tool kits and other aids to facilitate discussions and interactions between management and employees on program changes.

Given the attention over the regulations, a critical implementation step is for DHS to assure a communication strategy. Communication is not about just "pushing the message out." Rather, it should facilitate a two-way honest exchange with, and allow for feedback from, employees, customers, and key stakeholders. This communication is central to forming the effective internal and external partnerships that are vital to the success of any organization. Creating opportunities for employees to communicate concerns and experiences about any change management initiative allows employees to feel that their experiences are acknowledged and important to management during the implementation of any change management initiative. Once this feedback is received, it is important to consider and use this solicited employee feedback to make any appropriate changes to its implementation. In addition, closing the loop by providing information on why key recommendations were not adopted is also important.

Providing Adequate Resources for Implementing the New System

OPM reports that the increased costs of implementing alternative personnel systems should be acknowledged and budgeted for up front.[24] DHS estimates the overall costs associated with implementing the new DHS system—including the development and implementation of a new pay and performance management system, the conversion of current employees to that system, and the creation of its new labor relations board—will be approximately $130 million through fiscal year 2007 (i.e.,

[23]GAO-03-669.

[24]U.S. Office of Personnel Management, *Demonstration Projects and Alternative Personnel Systems: HR Flexibilities and Lessons Learned* (Washington, D.C.: September 2001).

over a 4-year period) and less than $100 million will be spent in any 12-month period.

We found that based on the data provided by selected OPM personnel demonstration projects, direct costs associated with salaries and training were among the major cost drivers of implementing their pay for performance systems. Certain costs, such as those for initial training on the new system, are one-time in nature and should not be built into the base of DHS's budget. Other costs, such as employees' salaries, are recurring and thus would be built into the base of DHS's budget for future years.

We found that the approaches the demonstration projects used to manage salary costs were to consider fiscal conditions and the labor market and to provide a mix of one-time awards and permanent pay increases. For example, rewarding an employee's performance with an award instead of an equivalent increase to base pay can reduce salary costs in the long run because the agency only has to pay the amount of the award one time, rather than annually. However, one approach that the demonstration projects used to manage costs that is not included in the final regulations is the use of "control points." We found that the demonstration projects used such a mechanism—sometimes called speed bumps—to manage progression through the bands to help ensure that employees' performance coincides with their salaries and prevent all employees from eventually migrating to the top of the band and thus increase costs.

According to the DHS regulations, its performance management system is designed to incorporate adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the system. Each of OPM's personnel demonstration projects trained employees on the performance management system prior to implementation to make employees aware of the new approach, as well as periodically after implementation to refresh employee familiarity with the system. The training was designed to help employees understand their applicable competencies and performance standards; develop performance plans; write self-appraisals; become familiar with how performance is evaluated and how pay increases and awards decisions are made; and know the roles and responsibilities of managers, supervisors, and employees in the appraisal and payout processes.

Involving Employees and Other Stakeholders in Implementing the System

We reported in September 2003 that DHS's and OPM's effort to design a new human capital system was collaborative and facilitated participation of employees from all levels of the department.[25] We recommended that the Secretary of DHS build on the progress that had been made and ensure that the communication strategy used to support the human capital system maximize opportunities for employee and key stakeholder involvement through the completion of design and implementation of the new system, with special emphasis on seeking the feedback and buy-in of frontline employees. In implementing this system, DHS should continue to recognize the importance of employee and key stakeholder involvement. Leading organizations involve employee unions, as well as involve employees directly, and consider their input in formulating proposals and before finalizing any related decisions.[26]

To this end, DHS's final regulations have attempted to recognize the importance of employee involvement in implementing the new personnel system. As we discussed earlier, the final DHS regulations provide for continuing collaboration in further development of the implementing directives and participation on the Compensation Committee. The regulations also provide that DHS is to involve employees in evaluations of the human capital system. Specifically, DHS is to provide designated employee representatives with the opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluation. Further, employee representatives are to be involved at the identification of the scope, objectives, and methodology to be used in the program evaluation and in the review of draft findings and recommendations.

Framework for Governmentwide Human Capital Reform

DHS has recently joined some other federal departments and agencies, such as the Department of Defense, GAO, National Aeronautics and Space Administration, and the Federal Aviation Administration, in receiving authorities intended to help them manage their human capital strategically to achieve results. To help advance the discussion concerning how governmentwide human capital reform should proceed, GAO and the

[25]GAO, *Human Capital: DHS Personnel System Design Effort Provides for Collaboration and Employee Participation*, GAO-03-1099 (Washington, D.C.: Sept. 30, 2003).

[26]GAO, *Human Capital: Practices that Empowered and Involved Employees*, GAO-01-1070 (Washington, D.C.: Sept. 14, 2001).

National Commission on the Public Service Implementation Initiative hosted a forum in April 2004 on whether there should be a governmentwide framework for human capital reform and, if so, what this framework should include.[27] While there was widespread recognition among the forum participants that a one-size-fits-all approach to human capital management is not appropriate for the challenges and demands government faces, there was equally broad agreement that there should be a governmentwide framework to guide human capital reform. Further, a governmentwide framework should balance the need for consistency across the federal government with the desire for flexibility so that individual agencies can tailor human capital systems to best meet their needs. Striking this balance is not easy to achieve, but is necessary to maintain a governmentwide system that is responsive enough to adapt to agencies' diverse missions, cultures, and workforces.

While there were divergent views among the forum participants, there was general agreement on a set of principles, criteria, and processes that would serve as a starting point for further discussion in developing a governmentwide framework in advancing human capital reform, as shown in figure 1.

[27]GAO and the National Commission on the Public Service Implementation Initiative, *Highlights of a Forum: Human Capital: Principles, Criteria, and Processes for Governmentwide Federal Human Capital Reform*, GAO-05-69SP (Washington, D.C.: Dec. 1, 2004).

Figure 1: Principles, Criteria, and Processes

Principles that the government should retain in a framework for reform because of their inherent, enduring qualities:

- Merit principles that balance organizational mission, goals, and performance objectives with individual rights and responsibilities
- Ability to organize, bargain collectively, and participate through labor organizations
- Certain prohibited personnel practices
- Guaranteed due process that is fair, fast, and final

Criteria that agencies should have in place as they plan for and manage their new human capital authorities:

- Demonstrated business case or readiness for use of targeted authorities
- An integrated approach to results-oriented strategic planning and human capital planning and management
- Adequate resources for planning, implementation, training, and evaluation
- A modern, effective, credible, and integrated performance management system that includes adequate safeguards to ensure equity and prevent discrimination

Processes that agencies should follow as they implement new human capital authorities:

- Prescribing regulations in consultation or jointly with the Office of Personnel Management
- Establishing appeals processes in consultation with the Merit Systems Protection Board
- Involving employees and stakeholders in the design and implementation of new human capital systems
- Phasing in implementation of new human capital systems
- Committing to transparency, reporting, and evaluation
- Establishing a communications strategy
- Assuring adequate training

Source: GAO.

As the momentum accelerates for human capital reform, GAO is continuing to work with others to address issues of mutual interest and concern. For example, to follow up on the April forum, the National Academy of Public Administration and the National Commission on the Public Service Implementation Initiative convened a group of human capital stakeholders to continue the discussion of a governmentwide framework.[28]

Summary Observations

The final regulations that DHS has issued represent a positive step towards a more strategic human capital management approach for both DHS and the overall government, a step we have called for in our recent High-Risk Series. Consistent with our observations last year, DHS's regulations make progress towards a modern classification and compensation system. DHS's overall efforts in designing and implementing its human capital system can be particularly instructive for future human capital reform. Nevertheless, regarding the implementation of the DHS system, how it is done, when it is done, and the basis on which it is done can make all the difference in whether it will be successful. That is why it is important to recognize that DHS still has to fill in many of the details on how it will implement these reforms. These details do matter and they need to be disclosed and analyzed in order to fully assess DHS's proposed reforms. We have made a number of suggestions for improvements the agency should consider in this process. It is equally important for the agency to ensure it has the necessary infrastructure in place to implement the system, not only an effective performance management system, but also the capabilities to effectively use the new human capital authorities and a strategic human capital planning process. This infrastructure should be in place before any new flexibilities are operationalized.

DHS appears to be committed to continue to involve employees, including unions, throughout the implementation process, another critical ingredient for success. Specifically, under DHS's final regulations, employee representatives or union officials are to have opportunities to participate in developing the implementing directives, as outlined under the "continuing collaboration" provisions; hold four membership seats on the Homeland Security Compensation Committee; and help in evaluations of the human capital system. A continued commitment to a meaningful and ongoing two-

[28]See The National Commission on the Public Service Implementation Initiative and The National Academy of Public Administration, *A Governmentwide Framework for Federal Personnel Reform: A Proposal* (Washington, D.C.: November 2004).

way consultation and communication strategy that allows for ongoing feedback from employees, customers, and key stakeholders is central to forming the effective internal and external partnerships that are vital to the success of DHS's human capital system. It is critically important that these consultation and communication processes be meaningful in order to be both credible and effective. Finally, to help ensure the quality of that involvement, sustained leadership in a position such as a COO/CMO could help to elevate, integrate, and institutionalize responsibility for the success of DHS's human capital system and other key business transformation initiatives.

Mr. Chairman and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have.

Contacts and Acknowledgements

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Appendix I

"Highlights" from Selected GAO Human Capital Reports

GAO
Accountability · Integrity · Reliability

Highlights

Highlights of GAO-05-320T, a testimony before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate

February 10, 2005

HUMAN CAPITAL

Preliminary Observations on Final Department of Homeland Security Human Capital Regulations

Why GAO Did This Study

At the center of any agency transformation, such as the one envisioned for the Department of Homeland Security (DHS), are the people who will make it happen. Thus, strategic human capital management at DHS can help it marshal, manage, and maintain the people and skills needed to meet its critical mission. Congress provided DHS with significant flexibility to design a modern human capital management system. DHS and the Office of Personnel Management (OPM) have now jointly released the final regulations on DHS's new human capital system.

Last year, with the release of the proposed regulations, GAO observed that many of the basic principles underlying the regulations were consistent with proven approaches to strategic human capital management and deserved serious consideration. However, some parts of the human capital system raised questions for DHS, OPM, and Congress to consider in the areas of pay and performance management, adverse actions and appeals, and labor management relations. GAO also identified multiple implementation challenges for DHS once the final regulations for the new system were issued.

This testimony provides preliminary observations on selected provisions of the final regulations.

www.gao.gov/cgi-bin/getrpt?GAO-05-320T

To view the full product, including the scope and methodology, click on the link above. For more information, contact Eileen Larence at (202) 512-6806 or larencee@gao.gov.

What GAO Found

GAO believes that the regulations contain many of the basic principles that are consistent with proven approaches to strategic human capital management. For example, many elements for a modern compensation system—such as occupational clusters, pay bands, and pay ranges that take into account factors such as labor market conditions—are to be incorporated into DHS's new system. However, these final regulations are intended to provide an outline and not a detailed, comprehensive presentation of how the new system will be implemented. Thus, DHS has considerable work ahead to define the details of the implementation of its system and understanding these details is important in assessing the overall system.

The implementation challenges we identified last year are still critical to the success of the new system. Also, DHS appears to be committed to continue to involve employees, including unions, throughout the implementation process. Specifically, according to the regulations, employee representatives or union officials are to have opportunities to participate in developing the implementing directives, hold four membership seats on the Homeland Security Compensation Committee, and help in the design and review the results of evaluations of the new system. Further, GAO believes that to help ensure the quality of that involvement, DHS will need to

- *Ensure sustained and committed leadership.* A Chief Operating Officer/Chief Management Officer or similar position at DHS would serve to elevate, integrate, and institutionalize responsibility for this critical endeavor and help ensure its success by providing the continuing, focused attention needed to successfully complete the multiyear conversion to the new human capital system.
- *Establish an overall communication strategy.* According to DHS, its planned communication strategy for its new human capital system will include global e-mails, satellite broadcasts, Web pages, and an internal DHS weekly newsletter. A key implementation step for DHS is to assure an effective and on-going two-way communication effort that creates shared expectations among managers, employees, customers, and stakeholders.

While GAO strongly supports human capital reform in the federal government, how it is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful. GAO's implementation of its own human capital authorities, such as pay bands and pay for performance, could help inform other organizations as they design systems to address their human capital needs. The final regulations for DHS's new system are especially critical because of the potential implications for related governmentwide reforms.

United States Government Accountability Office

GAO
Accountability Integrity Reliability

Highlights

Highlights of GAO-04-479T, testimony before subcommittees of the Senate Committee on Governmental Affairs and the House Committee on Government Reform

February 25, 2004

HUMAN CAPITAL

Preliminary Observations on Proposed DHS Human Capital Regulations

Why GAO Did This Study

The creation of the Department of Homeland Security (DHS) almost one year ago represents an historic moment for the federal government to fundamentally transform how the nation will protect itself from terrorism. DHS is continuing to transform and integrate a disparate group of agencies with multiple missions, values, and cultures into a strong and effective cabinet department. Together with this unique opportunity, however, also comes significant risk to the nation that could occur if this transformation is not implemented successfully. In fact, GAO designated this implementation and transformation as high risk in January 2003.

Congress provided DHS with significant flexibility to design a modern human capital management system. GAO reported in September 2003 that the design effort to develop the system was collaborative and consistent with positive elements of transformation. Last Friday, the Secretary of DHS and the Director of the Office of Personnel Management (OPM) released for public comment draft regulations for DHS's new human capital system. This testimony provides preliminary observations on selected major provisions of the proposed system. The subcommittees are also releasing *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects* (GAO-04-83) at today's hearing.

www.gao.gov/cgi-bin/getrpt?GAO-04-479T.

To view the full testimony statement, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

What GAO Found

The proposed human capital system is designed to be aligned with the department's mission requirements and is intended to protect the civil service rights of DHS employees. Many of the basic principles underlying the DHS regulations are consistent with proven approaches to strategic human capital management, including several approaches pioneered by GAO, and deserve serious consideration. However, some parts of the system raise questions that DHS, OPM, and Congress should consider.

- Pay and performance management: The proposal takes another valuable step towards results-oriented pay reform and modern performance management. For effective performance management, DHS should use validated core competencies as a key part of evaluating individual contributions to departmental results and transformation efforts.
- Adverse actions and appeals: The proposal would retain an avenue for employees to appeal adverse actions to an independent third party. However, the process to identify mandatory removal offenses must be collaborative and transparent. DHS needs to be cautious about defining specific actions requiring employee removal and learn from the Internal Revenue Service's implementation of its mandatory removal provisions.
- Labor relations: The regulations recognize employees' right to organize and bargain collectively, but reduce areas subject to bargaining. Continuing to involve employees in a meaningful manner is critical to the successful operations of the department.

Once DHS issues final regulations for the human capital system, it will be faced with multiple implementation challenges:

- DHS plans to implement the system using a phased approach, however, nearly half of DHS civilian employees are not covered by these regulations, including more than 50,000 Transportation Security Administration screeners. To help build a unified culture, DHS should consider moving all of its employees under a single performance management system framework.
- DHS noted that it estimates that about $110 million will be needed to implement the new system in its first year. While adequate resources for program implementation are critical to program success, DHS is requesting a substantial amount of funding that warrants close scrutiny by Congress.
- The proposed regulations call for comprehensive, ongoing evaluations. Continued evaluation and adjustments will help to ensure an effective and credible human capital system.
- DHS has begun to develop a strategic workforce plan. Such a plan can be used as a tool for identifying core competencies for staff for attracting, developing, evaluating, and rewarding contributions to mission accomplishment.

The analysis of DHS's effort to develop a strategic human capital management system can be instructive as other agencies request and implement new strategic human capital management authorities.

United States General Accounting Office

GAO
Highlights

Highlights of GAO-04-790, a report to congressional requesters

June 2004

HUMAN CAPITAL

DHS Faces Challenges in Implementing Its New Personnel System

Why GAO Did This Study

DHS was provided with significant flexibility to design a modern human capital management system. Its proposed system has both precedent-setting implications for the executive branch and far-reaching implications on how the department is managed. GAO reported in September 2003 that the effort to design the system was collaborative and consistent with positive elements of transformation. In February, March, and April 2004 we provided preliminary observations on the proposed human capital regulations.

Congressional requesters asked GAO to describe the infrastructure necessary for strategic human capital management and to assess the degree to which DHS has that infrastructure in place, which includes an analysis of the progress DHS has made in implementing the recommendations from our September 2003 report.

DHS generally agreed with the findings of our report and provided more current information that we incorporated. However, DHS was concerned about our use of results from a governmentwide survey gathered prior to the formation of the department. We use this data because it is the most current information available on the perceptions of employees currently in DHS and helps to illustrate the challenges facing DHS.

www.gao.gov/cgi-bin/getrpt?GAO-04-790.

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

What GAO Found

To date, DHS's actions in designing its human capital management system and its stated plans for future work on the system are helping to position the department for successful implementation. Nonetheless, the department is in the early stages of developing the infrastructure needed for implementing its new human capital management system.

DHS has begun strategic human capital planning efforts at the headquarters level since the release of the department's overall strategic plan and the publication of proposed regulations for its new human capital management system. Strategic human capital planning efforts can enable DHS to remain aware of and be prepared for current and future needs as an organization. However, this will be more difficult because DHS has not yet been systematic or consistent in gathering relevant data on the successes or shortcomings of legacy component human capital approaches or current and future workforce challenges. Efforts are now under way to collect detailed human capital information and design a centralized information system so that such data can be gathered and reported at the departmentwide level.

DHS and Office of Personnel Management leaders have consistently underscored their personal commitment to the design process. Continued leadership is necessary to marshal the capabilities required for the successful implementation of the department's new human capital management system. Sustained and committed leadership is required on multiple levels: securing appropriate resources for the design, implementation, and evaluation of the human capital management system; communicating with employees and their representatives about the new system and providing opportunities for feedback; training employees on the details of the new system; and continuing opportunities for employees and their representatives to participate in the design and implementation of the system.

In its proposed regulations, DHS outlines its intention to implement key safeguards. For example, the DHS performance management system must comply with the merit system principles and avoid prohibited personnel practices; provide a means for employee involvement in the design and implementation of the system; and overall, be fair, credible, and transparent. The department also plans to align individual performance management with organizational goals and provide for reasonableness reviews of performance management decisions through its Performance Review Boards.

United States General Accounting Office

GAO
Accountability * Integrity * Reliability

Highlights

Highlights of GAO-03-488, a report to congressional requesters

March 2003

RESULTS-ORIENTED CULTURES

Creating a Clear Linkage between Individual Performance and Organizational Success

Why GAO Did This Study

The federal government is in a period of profound transition and faces an array of challenges and opportunities to enhance performance, ensure accountability, and position the nation for the future. High-performing organizations have found that to successfully transform themselves, they must often fundamentally change their cultures so that they are more results-oriented, customer-focused, and collaborative in nature. To foster such cultures, these organizations recognize that an effective performance management system can be a strategic tool to drive internal change and achieve desired results.

Based on previously issued reports on public sector organizations' approaches to reinforce individual accountability for results, GAO identified key practices that federal agencies can consider as they develop modern, effective, and credible performance management systems.

www.gao.gov/cgi-bin/getrpt?GAO-03-488.

To view the full report, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

What GAO Found

Public sector organizations both in the United States and abroad have implemented a selected, generally consistent set of key practices for effective performance management that collectively create a clear linkage—"line of sight"—between individual performance and organizational success. These key practices include the following.

1. Align individual performance expectations with organizational goals. An explicit alignment helps individuals see the connection between their daily activities and organizational goals.

2. Connect performance expectations to crosscutting goals. Placing an emphasis on collaboration, interaction, and teamwork across organizational boundaries helps strengthen accountability for results.

3. Provide and routinely use performance information to track organizational priorities. Individuals use performance information to manage during the year, identify performance gaps, and pinpoint improvement opportunities.

4. Require follow-up actions to address organizational priorities. By requiring and tracking follow-up actions on performance gaps, organizations underscore the importance of holding individuals accountable for making progress on their priorities.

5. Use competencies to provide a fuller assessment of performance. Competencies define the skills and supporting behaviors that individuals need to effectively contribute to organizational results.

6. Link pay to individual and organizational performance. Pay, incentive, and reward systems that link employee knowledge, skills, and contributions to organizational results are based on valid, reliable, and transparent performance management systems with adequate safeguards.

7. Make meaningful distinctions in performance. Effective performance management systems strive to provide candid and constructive feedback and the necessary objective information and documentation to reward top performers and deal with poor performers.

8. Involve employees and stakeholders to gain ownership of performance management systems. Early and direct involvement helps increase employees' and stakeholders' understanding and ownership of the system and belief in its fairness.

9. Maintain continuity during transitions. Because cultural transformations take time, performance management systems reinforce accountability for change management and other organizational goals.

United States General Accounting Office

GAO
Accountability Integrity Reliability

Highlights

Highlights of GAO-05-69SP

December 2004

HIGHLIGHTS OF A FORUM

Human Capital: Principles, Criteria, and Processes for Governmentwide Federal Human Capital Reform

Why GAO Convened This Forum

There is widespread agreement that the federal government faces a range of challenges in the 21st century that it must confront to enhance performance, ensure accountability, and position the nation for the future. Federal agencies will need the most effective human capital systems to address these challenges and succeed in their transformation efforts during a period of likely sustained budget constraints.

More progress in addressing human capital challenges was made in the last 3 years than in the last 20, and significant changes in how the federal workforce is managed are underway.

On April 14, 2004, GAO and the National Commission on the Public Service Implementation Initiative hosted a forum with selected executive branch officials, key stakeholders, and other experts to help advance the discussion concerning how governmentwide human capital reform should proceed.

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What Participants Said

Forum participants discussed (1) Should there be a governmentwide framework for human capital reform? and (2) If yes, what should a governmentwide framework include?

There was widespread recognition that a "one size fits all" approach to human capital management is not appropriate for the challenges and demands government faces. However, there was equally broad agreement that there *should* be a governmentwide framework to guide human capital reform built on a set of beliefs that entail fundamental principles and boundaries that include criteria and processes that establish the checks and limitations when agencies seek and implement their authorities. While there were divergent views among the participants, there was general agreement that the following served as a starting point for further discussion in developing a governmentwide framework to advance needed human capital reform.

Principles

- Merit principles that balance organizational mission, goals, and performance objectives with individual rights and responsibilities
- Ability to organize, bargain collectively, and participate through labor organizations
- Certain prohibited personnel practices
- Guaranteed due process that is fair, fast, and final

Criteria

- Demonstrated business case or readiness for use of targeted authorities
- An integrated approach to results-oriented strategic planning and human capital planning and management
- Adequate resources for planning, implementation, training, and evaluation
- A modern, effective, credible, and integrated performance management system that includes adequate safeguards to ensure equity and prevent discrimination

Processes

- Prescribing regulations in consultation or jointly with the Office of Personnel Management
- Establishing appeals processes in consultation with the Merit Systems Protection Board
- Involving employees and stakeholders in the design and implementation of new human capital systems
- Phasing in implementation of new human capital systems
- Committing to transparency, reporting, and evaluation
- Establishing a communications strategy
- Assuring adequate training

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Mr. PORTER. Thank you very much, Mr. Walker.

We now move into the question and answer period, and I have a few questions I would like to begin with, and some comments. First of all, I very much appreciate your testimony. I appreciate that in the Federal Government we like to kill trees, because I see there is a lot of backup paper here, and that is OK; I know that is how it works. But some of your comments I think can certainly scare some employees. And I appreciate the fact that as a new Member I am looking at all sides equally. Flexibility scares employees, because right, wrong, or indifferent, they are accustomed to a process that they have followed for, in some cases, 50 years, in some cases less. There is concern about the collaboration, having read some of the backup testimony, that there was, other than hearings, true collaboration. Add to that the fact that flexibility is a real concern. I share that not only do you pledge, we do also, to evaluate these different phases as they unfold.

But noW on to some specific questions.

As the chief operating officer, you mentioned you are calling for DHS to establish a COO. Can you explain that a little bit, how you think we should do that and go about implementing that position?

Mr. WALKER. I think there are selected departments and agencies that could benefit for having a level two official. You can call it deputy secretary for management, you can call it a principal undersecretary for management or operations who in effect would be responsible for the planning and the integration of the overall business transformation process. That includes things like financial management, human capital strategy, information technology, knowledge management, change management.

As Ms. Holmes Norton has mentioned, the fact of the matter is this is a merger of 22 different departments and agencies with different systems, with different personnel practices, with different policies, and it is a massive effort to be able to effectuate this integration with minimal disruption and while protecting our homeland security. The fact of the matter is that it is going to require sustained attention over several years in order to achieve this, and I think consideration should be given to establishing such a position that would be a person with a proven track record of success, with a performance contract, with a term appointment hopefully of around 7 years, who would be able to help make sure that there is consistent attention over a sustained period of time in order to try to help maximizing success and to ultimately institutionalize these issues, which otherwise may not occur.

Mr. PORTER. Additional question. In hearing your testimony again, talking how this would improve or help prevent future terrorist attacks. And I know from my colleagues, they mentioned the concern that this is going to make a difference. Would you be very specific how you think this is going to make this country a safer place to live?

Mr. WALKER. Well, this is not a panacea, but I can tell you that do not underestimate the degree of difficulty in achieving all the different business transformation elements of the Department of Homeland Security; it is the largest merger since the establishment of the Department of Defense in 1947 and, quite frankly, they have huge challenges on their own. I think the fact of the matter is, as

you know, Mr. Chairman, we just added to our high risk list, information sharing, and the merger and integration of the Department of Homeland Security remains on our high risk list. So the fact of the matter is if you have somebody focused on this full-time, over a sustained period of time, you are going to make a lot more progress in trying to help facilitate effective information sharing; you are going to make a lot more progress in helping to assure that you are implementing these new flexibilities in a fair and responsible manner, and within a reasonable timeframe. That is obviously going to help homeland security because, as was mentioned, if this isn't done right, it can have a significant adverse effect on morale, it can have a significant adverse effect on a variety of other operational matters.

Mr. PORTER. Thank you, Mr. Walker. I have additional questions, but I will wait until later.

Any questions, Mr. Davis?

Mr. DAVIS. Thank you very much, Mr. Chairman.

Mr. Walker, it is always good to see you, and I appreciate your testimony. On the next panel, Ron Sanders of OPM will testify that the DHS regulations provide for a balanced human resources system that will hold managers accountable and provide for due process. He also states in his testimony that there is no danger whatsoever that the pay of individual DHS employees will be politicized. Given what has been outlined in the regulations, do you concur with Mr. Sanders' assessment of the system?

Mr. PORTER. I have little doubt that is what their intent is, but I think there are a lot of details that need to be outlined in order to provide reasonable assurance that in fact that will be the case. We have, for example, in our agency, a number of checks and balances that exist outside of the normal line management structure to provide reasonable assurance that the standards are applied consistently, fairly, and in a non-discriminatory fashion. Furthermore, we have transparency over the results, reasonable transparency over the results of the effort; and obviously transparency can be a good thing in order to try to provide some checks and balances. In addition to that, we have both internal grievance processes and external appeal processes to an independent party. I think having elements like that are important in order to maximize the chance that in fact that intent will be a reality.

So I am confident as to their intent, but without knowing all the details it is tough to say that you can say that with certainty.

Mr. DAVIS. I have some concerns about the composition of the Mandatory Removal Panel and the labor relations board. I grew up on the farm, and it seems to me like the Constitution suggests that the fox will determine when to let the chickens out. Do you think that with the appointment simply being that of the secretary, that this board is likely to have a balanced approach to making decisions about employees who would come before it?

Mr. WALKER. I think if it is made by the secretary, one has to think about what is the process that is followed in coming up with candidates from whom the secretary would select. And let me give you an example, first-hand experience. We at GAO have something called a Personnel Appeals Board. It is a group of individuals who are appointed by me to be able to hear appeals of our employees

and to make an independent judgment as to whether or not we have acted fairly and consistently with our policies and procedures and applicable laws. But when I make appointments to that body, the Personnel Appeals Board, I seek advice and counsel from our Employee Advisory Council, I seek advice and counsel from a variety of parties; they present candidates that are acceptable to the broad range of interests and I will select from that list of candidates.

So part of the issue is if the secretary is going to make the appointments, you need to be concerned with what is the process that takes place to submit candidates to the secretary from whom he will select to try to provide reasonable assurance that they are not only qualified, but they are credible with regard to all the different stakeholders.

Mr. DAVIS. The individuals that you select, where do they come from? Are you given any kind of list or can you just go out in the open environment?

Mr. WALKER. We have a notice that we go out with. We seek nominations; people can nominate themselves. We have a review panel within the agency that will end up reviewing potential candidates. We seek input from our employees; we seek input from others within the agency. We also actively seek to achieve balance. People that have past experience representing employees, as well as people that have past experience representing agencies. The whole thing has to be balanced and it has to be credible, because if it is not balanced and credible, it is not going to be used and it is not going to be effective. I am pleased to say that the system that we now had in place for 20 plus years has worked very well, and I am also pleased to say they don't have a lot of work to do, and I want to keep it that way, if I can.

Mr. DAVIS. Thank you very much, Mr. Chairman. I have another question, but I will wait and come back.

Mr. PORTER. Thank you, Mr. Davis.

Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Walker, my concern goes a little bit more to sort of the drift toward performance-related pay. Later on we are going to hear from T.J. Bonner, and we have already had a number of instances where although Mr. Bonner is not restricted from speaking about what he feels to be policies inconsistent with the best interest of national security, there has been an effort to say that his local officials aren't allowed to make those statements. My own office has been discouraged or people have been discouraged from coming to my office unless it is a formal hearing, from the Border Patrol.

If you add to it the ability to affect somebody's pay based on whether they bucked policy, don't you create a potential that you simply are going to have higher pay for those who go along with this administration or the next administration's trick-down feeling of what they would like to have said or done versus those who may legitimately be defending the best interest of the job that their agency is required to do? How do you prevent policy trickling all the way down to pay when in fact agencies very often, particularly within Homeland Security, differ, and differ in the most strident

ways, about the best way to achieve homeland security, border integrity, etc.?

Mr. WALKER. Well, a number of ways. No. 1, we have competencies that are clearly defined in writing that were developed in conjunction with all of our employees for each applicable occupation, and which have been validated by employees through a formal process to maximize acceptance and credibility, and to minimize litigation. So they are evaluated based upon these written competencies, which they are actively involved in developing. We also have safeguards in place so that if somebody believes that they have been unfairly treated, there are mechanisms within our agency that they can go to, either informally or formally, and they also have the Personnel Appeals Board, which is an independent outside body that they can go to in lieu of the Federal courts, although on certain circumstances they continue to have the right to go to the Federal courts.

So, again, that is why I am saying having a competency-based system that grounds these types of decisions, having adequate safeguards, having appropriate transparency and, as far as the safeguards, both internal as well as external appeal rights I think can go a long way to minimize that possibility of abuse.

Mr. ISSA. One followup question, but on a different area. When you talked about a chief operating officer and a 7-year term as a hypothetical, I come from corporate America, where our term is only however the last quarter went very often, and rightfully so, although I notice that Carly Figurino will probably be running the World Bank in return for having been fired from her last job, so just getting fired is not always the end of a career. But I guess my question is no matter how good the past performance of a proposed chief operating officer, by definition there is no equivalent to this job; there is nothing where you say, boy, this person did this in Connecticut, with its couple million papers and GDP about equal to San Diego, but we are going to run them over and we are going to provide them this opportunity to head this huge agency. What safeguards would you have on, particularly the first term of that person, if you give them a 7-year term and they don't perform?

Mr. Walker. Well, for one thing, I think there should be statutory criteria that would have to be met in order for somebody to be appointed. Second, I also believe that this level position should be a PAS, president appointee, Senate confirmation. Third, I believe that it should have a performance contract. I believe that somebody should have a performance contract, and that could be grounds for removal if they are not in compliance with their performance contract. It also should have an effect on how much they get paid, as to what type of results they are generating within certain limitations.

One last thing, if I may, on your prior comment about compensation. We clearly have to reform our compensation system in the Federal Government. And let me give you two reasons why. No. 1, the current methodology for determining market-based competition by locality is fundamentally flawed. No. 2, at the present point in time, for executive branch agencies that are subject to the General Schedule, 85 percent plus of annual pay adjustments have nothing to do with skills, knowledge, and performance; 85 percent plus.

And, in addition, under current law, individuals, although they are not big in number, individuals who are unacceptable performers are guaranteed across-the-board pay adjustments, even if they are unacceptable performers. That just doesn't make sense, I would respectfully suggest.

Mr. ISSA. Thank you, Chairman.

Mr. PORTER. Thank you.

Mr. Cummings.

Mr. CUMMINGS. Thank you very much.

Mr. Walker, I was listening to what you just said, and, you know, pay is a big deal. In the Congress we have this book. I haven't looked at it, but apparently it tells everybody's salary by position, and if you see the alleged director in one office making $85,000 and the one in your office is making $80,000, you ought to have a conference to figure out why there is a difference. So people are concerned about their pay; it touches every aspect of their lives, and it goes to morale, as you well know. And this whole thing of requiring performance expectations be in writing, that is a concern of yours, is that right?

Mr. WALKER. Oh, it is, absolutely. There are different ways you can do it, but I clearly think you have to have things in writing, and I think competencies are a way to do that, to accomplish a number of objectives.

Mr. CUMMINGS. So elaborate on what you just said on the competencies.

Mr. WALKER. Take, for example, GAO. One of the things that we do is we have different kinds of occupations. One of the type of occupations we have are auditors, investigators, analysts, evaluators. And one of the things that we did is we worked with those individuals to come up with a set of competencies, things like thinking critically, achieving results, effective communications; and we defined them in very specific terms. They then validated that, yes, these are the type of competencies you have to have in order to be successful in that particular occupation. We then came up with different rating levels, in other words, when would you be rated meets expectations, role model, exceeds expectations, below expectations, based upon these different standards. So that is a basis by which you can set expectations and you can also be able to implement a performance appraisal system that has some credibility and that can meaningfully differentiate in performance. It is not perfect. There is no system that is ever perfect, but it is light years ahead of where we were.

Mr. CUMMINGS. You said that 80-some percent was not based on competency. Do you know what that 80 percent is based on?

Mr. WALKER. Yes, sir. Yes, sir. What that is related to is when the Congress each year passes the across-the-board pay adjustment, which, as you know, is more than inflation, it is intended to include a number of factors—for example, last year it was 3½ percent. Under current law, it is my understanding that every single individual is entitled to that 3½ percent below the SES level, irrespective of their performance. Furthermore, as you know, under the GS schedule, you get a step increase due to the passage of time. So if you combine that 3½ percent, which was the case last year, along with the step increase, which is merely due to passage of

time, that is, my understanding, roughly about 85 percent of comp. And then when you consider that the merit step increases are based upon performance appraisal systems that, frankly, in many cases are long outdated and don't meaningfully differentiate in performance, a vast majority of people, or a significant percentage of people get those as well. So we have a system that is really not related very much at all to skills, knowledge, and performance, and in a knowledge-based work force, there is a fundamental disconnect.

Mr. CUMMINGS. And having run a law office for about 20 years where, if you don't perform, you don't get paid, I also understand you have to have a balance there. While you don't want people to just be sitting and getting a check, where is no real incentive because it is not connected with merit, you also want to make sure, particularly in a subjective system, that there is fairness. And one of the things that—and this will be my last question. Where does cultural sensitivity come in? Do you think that should be a part of the criteria when you are looking at expectations? The reason why I raise that is that when you look at the private companies that are doing well and are good places to work for and have the most diversity, there is a trend taking place, as I am sure you may be well aware, where cultural sensitivity becomes very significant. They want to know how many minorities this manager hired, what outreach he did, how many women did he or she bring in, or whatever. And that becomes a part of their performance evaluation. Do you think that is important here?

Mr. WALKER. Well, I think you do need to make sure, as we try to in our performance appraisal system, to try to achieve a diverse work force that is inclusive, that maximizes opportunities for all, and that does not have any tolerance for discrimination at all. And I know that is something that we end up incorporating into our evaluation. At the same point in time, one has to make sure that you are hiring people that have the skills and knowledge, and who can end up performing at the level that you expect. You can't compromise that, but we should have an active and ongoing outreach effort to achieve an inclusive work force, a diverse work force, and to have zero tolerance for discrimination.

Mr. CUMMINGS. Thank you very much.

Mr. PORTER. Thank you.

Ms. Holmes, do you have a question, please?

Ms. NORTON. Yes. Thank you very much, Mr. Chairman.

Mr. Walker, I appreciate the work you have done in this area, but this is not chicken feed we are fooling with here. We have involved agencies that had nothing in common until September 11th and, frankly, they don't have a lot in common now; many of them still have missions that are largely or very substantially devoted to things that have nothing to do with homeland security. So we are trying to meld people who we never would have thought of putting together except for September 11th.

You bragged on what you did before you went to a more flexible approach. Do I understand—I heard you talk about it before—that the kind of personnel infrastructure to assure fairness and collaboration that you had in place before you went to a new system is

not in place when, on March 3rd, Department of Homeland Security is supposed to move to this new system?

Mr. WALKER. It is not clear to me that they are going to have the same kind of safeguards that we have in our system. And I will say, as well, Ms. Holmes Norton, that we have strengthened our safeguards in the last several years as Congress has given us additional flexibility, because that is critically important.

Ms. NORTON. So you would recommend, I take it, that DHS do the same based on your own experience.

Mr. WALKER. I think they could be informed by our experience and adjust it as they deem appropriate, but certain aspects I think have broad-based application elsewhere in Government.

Ms. NORTON. One of the things you emphasized in your testimony and in the way you dealt with your own employees was what you called meaningful collaboration, two-way consultation. Do you believe that sufficient "meaningful collaboration" and "two way consultation" has occurred in this instance involving this agency with 180,000 employees?

Mr. WALKER. I haven't made an independent judgment on that. I will tell you this: it is very clear to me that there were a number of efforts taken to get input from a variety of parties and, frankly, a lot more than some other departments and agencies have done.

Ms. NORTON. Well, what other departments and agencies are trying to put together a brand new system? Mr. Walker, if we can't get some independent view from you on this because you haven't made a judgment, which is what this whole thing is about, I don't know who we are going to get it from. That is what the GAO is for. I am asking you whether, in your view at this point, there has been sufficient collaboration, two-way consultation, or whether you would recommend more of that.

Mr. WALKER. Based upon my understanding, there was significant interaction that occurred in coming up with these proposed regulations; however, there are differences of opinion between the parties as to whether or not it was meaningful enough. And part of it is how do you define what is meaningful enough. They clearly have done a better job than the Defense Department has been doing, and the Defense Department is now trying to be informed by some of the things that DHS did. I wish I could be more definitive than that.

Ms. NORTON. All I can say, Mr. Walker, is that I bet if I asked your employees, they would have something more definitive to say. We never expect people to have the same view, but, again, if we can't get an outside opinion on that, I don't know how to judge what the unions are saying against what management is saying.

Let me ask you this. The Department of Homeland Security has the authority to replace the MSPB appeal system altogether with an internal review process, and it has chosen not to do that, with few changes. Would you recommend that they continue to place themselves under MSPB, as they have now chosen to do?

Mr. WALKER. I think unless there is a clear and compelling reason to change, then I would question why you would. My understanding is, as you said, that they are not proposing to change that, although with some modifications.

Ms. NORTON. And you think that is wise at this time?

Mr. WALKER. I think you have to have a qualified and independent external body to be able to hear certain types of employee appeals, and MSPB is obviously one option.

Ms. NORTON. If you have emphasized as well the necessity to have a full personnel approach and evaluation approach in place, let me ask you this. If these expectations of employees are not in writing, if the core competencies that you have testified are not in writing and no one knows what they would be, and there was some kind of adverse action or somebody protested her pay, would you tell me how that would be handled under the present situation, without those things in writing?

Mr. WALKER. I would respectfully suggest you ought to ask the Department of Homeland Security officials on that. I think it would make it very difficult and it would probably end up being interviewing people as to who said what to whom when, and what, if any, evidential matter is there that might exist through emails or notes or other type of correspondence in order to be able to corroborate one side or the other.

Ms. NORTON. Finally, let me ask you this. Eighty percent of the people get a satisfactory; you are talking about a mandatory system, unlike any system in the world. The Civil Service system was created precisely because of the difficulty, when people are basically competent, of drawing nice distinctions. I mean, based on what you say, the implication is that large numbers of Federal employees are incompetent and, therefore, you shouldn't expect across-the-board notions of competence. Beyond that, I would like to ask if the problem is one that anybody could see is unacceptable, and that is that even if, as you say, you have unacceptable performance you are guaranteed a raise, then why in the world haven't we gone at that first, rather than go at the whole system, as if the average Federal employee should feel that perhaps she is not competent because so many of you in fact get raises?

I wonder if you can find a better way to state what the problem of this system is, rather than implying that large or much larger numbers of people are incompetent because they are rated satisfactory and get their automatic raise at the same time that we here in the Congress give everybody else because they are not performing so poorly that we think that they should receive no raise. And, of course, if they are performing so poorly, I don't know of a Member that would keep that person working. So I want to know what it is in the present regulations of the Civil Service that says you don't care how bad you are, you qualify for your raise, while you haven't come forward to say this is what we ought to do about that and why we haven't done something about that earlier.

Mr. WALKER. Let me make it clear. I have run three Federal agencies, three in the executive branch, one in the legislative branch. I have run worldwide operations of one of the world's leading consulting firms. My experience has been, at least with the agencies that I have dealt with, civil servants are as good or better than the private sector. So let me make that very clear.

Ms. NORTON. Well, it is real important to say that every once in a while, Mr. Walker.

Mr. WALKER. No, no, I think it is very important. I have said it many, many, many times.

Ms. NORTON. Not a word was said of that kind in your testimony, sir.

Mr. WALKER. Well, I just said it.

Ms. NORTON. Until I, on cross examination, drew that out of you.

Mr. WALKER. Well, I would respectfully suggest that if you end up asking 100 people who is a champion for human capital in the Federal Government, you will get my name probably 90 plus times.

So understand they are as good or better than the private sector. My comment was not whether or not they had a meets expectation rating. My comment is where you have a few people, and not a lot—for example, at GAO there is less than two dozen people out of over 2,000 that would be in the category that I am talking about.

Ms. NORTON. How do they get their raises, then?

Mr. WALKER. The way that they——

Ms. NORTON. What is there in the regulations that guarantees—that is what you said, guaranteed them their raises?

Mr. WALKER. Federal law guarantee does not provide an exception. For individuals who are not performing an acceptable level or who want to—performance improvement plan or whatever, does not provide an exception for them getting the across-the-board adjustment. And I have testified on more than one occasion that Congress ought to re-look at that. I do not believe that you should guarantee people a raise if they are not performing at an acceptable level.

Ms. NORTON. So you are telling me that if somebody repeatedly performs at an unacceptable level, his raises keep coming in?

Mr. WALKER. My understanding is unless and until they are removed, that is the case, if they are ever removed.

Ms. NORTON. Have you ever made any recommendations as to how we ought to handle that?

Mr. WALKER. Yes, I have.

Ms. NORTON. How should we handle that?

Mr. WALKER. I think you ought to change the law such that if somebody is not performing at an acceptable level, they do not receive the across-the-board adjustment. There are not that many people in that category, but especially when we are in a circumstance in which we are increasingly constrained budgets, I think it is something that needs to be considered.

Ms. NORTON. Well, it certainly is, but I would suggest to you that when speaking about reforms of an entire system as large as the 180,000 Homeland Security system, you speak about that group, not give it as a justification for everything that has been done with respect to these changes.

Thank you very much, Mr. Chairman.

Mr. WALKER. And if I can, Mr. Chairman, come back.

I agree with you on several things, Ms. Norton, and that is these 22 agencies that were combined to make the Department of Homeland Security, before September 11, 2001, before they were combined, many of them weren't in the homeland security business. OK? A lot of them are in it now, but to very differing degrees. You have very different kinds of career streams, very different kinds of cultures, very different types of systems, even different kinds of uniforms. OK? As little things as that. So it is a massive undertaking. That is why I come back to say we need to approach this in

a considered manner, with the right type of attention, on an installment basis, and it is really important they get it right, because it is not only important to the Department of Homeland Security, it has implications beyond the Department of Homeland Security as well.

Mr. PORTER. Thank you, Mr. Walker. I know that you are trying to depart in about 5 or 10 minutes. I am going to hold my questions.

Actually, Ms. Holmes Norton, you asked some questions for me, and I appreciate it.

I would like to turn it over to Mr. Davis for one additional question.

Mr. DAVIS. Thank you very much, Mr. Chairman. I only have one additional question.

Mr. Walker, you described how you select individuals for the Mandatory Removal Panels from the list, but I understand the Secretary of DHS can actually ignore anybody that is submitted or lists that the unions might provide for those recommendations, and he or she really has sole discretion to make those selections. The other question, though, is you have just gone through modernization of your agency, of the GAO. If you were making recommendations to Homeland Security, what would you say to them that they really need to do?

Mr. WALKER. Well, I think there is quite a bit in my testimony, and I can tell you that we have shared a lot of our knowledge and experience with the Department of Homeland Security, as we are doing with the Department of Defense, about what we have done and how we have gone about it; what has worked and what hasn't worked, for their consideration as they deem appropriate. I would be happy to provide for the record, if you want, Mr. Davis, if I can think of additional things that I haven't already put in my testimony or something, to provide that for the record.

Mr. DAVIS. OK.

Mr. PORTER. Thank you.

Mr. DAVIS. Thank you very much, Mr. Chairman.

Mr. PORTER. Thank you.

And we thank you, Mr. Walker, for being here and for your testimony.

Mr. VAN HOLLEN. Mr. Chairman, if I could ask Mr. Walker just a few questions.

Mr. PORTER. Certainly.

Mr. VAN HOLLEN. I know your time is short, but just to followup on the pay-for-performance issue, because we have had a lot of testimony in this subcommittee and the full committee, and even joint committees with the Senate, on this, and I think everyone agrees that the concept of paying people based on performance or merit or contribution, the result we want for taxpayers, is important. The devil is in the details. And I do recall testimony you gave before a joint Senate-House committee last year where you sort of graded different agencies and departments within the U.S. Government as to how prepared they were at laying the groundwork for that. And I know you and the GAO worked very hard over many years to try to build predictability, reliability into the system, and I am very concerned that rushing into this is going to create havoc, it is going

to undermine the confidence in the system. There is a story in the Metro section today about pay-for-performance at NASA, I believe, where people feel that employees are being rewarded based on going along to get along, as opposed to merit, and that is always the trouble when you go to these systems, where there are not clear indicators.

Are you confident that the Department of Homeland Security has in place today the kind of system that would inspire confidence, predictability, clear standards for performance that would make sure that we avoid what I think we probably all want to avoid, is people being rewarded based either on political loyalty or because they're the boss's favorite, or something other than merit.

Mr. WALKER. Well, they have stated their intention to have it in place. They don't have it in place today. Several comments that I would make that I think are relevant to this. First, you need to move on an installment basis, and they have intimated that is what they intend to do. You have 170,000-plus individuals, very different occupations, a number of different locations. You need to move on an installment basis. Second, you need to have that modern effective and credible, and hopefully validated, preferably validated, performance appraisal system based on competencies or other written factors in place, and I would recommend tested for 1 year, before you go to broader-based pay-for-performance. And I do, however, believe that, as Ms. Holmes Norton and I exchanged earlier, that individuals, even before you go to the broader-based pay-for-performance, I do not believe that individuals—and there are not many, let me make that clear, there are not many—who are not performing at an acceptable level should be guaranteed any pay increase, whether they are under the GS system or under a more flexible market-based and performance-oriented compensation system.

Mr. VAN HOLLEN. Thank you. I hope that the Department of Homeland Security will take your advice and hopefully what will be the advice of this committee in that regard, because, again, if you undermine confidence in the system at the beginning, it is very difficult to gain that confidence down the road; and I think it very dangerous to move too quickly in this particular area. Talk about expanding this whole notion beyond, to the rest of the Government, before we have even begun a small installment program at the Department of Homeland Security worries me a lot, and the whole Defense Department, given the management problems at the Defense Department that you at GAO have chronicled, I am really concerned about it there as well.

So, Mr. Chairman, I just hope that we will make sure that this is not done in a way that will, in the end, undermine confidence and destroy the merit system that has been in place, albeit with some certain faults, which you have identified.

Mr. PORTER. Thank you, Mr. Van Hollen. I appreciate your questions and input.

I have a couple of questions I wish you could respond to later. One, I am very, very concerned about the collaborative process and some additional insights on that. Also, I am a large supporter of keeping things simple, and it seems to me this pay system is very complicated. And as I mentioned earlier, the term flexibility has a

tendency to frighten people. If you would, again—you don't have to do it right now, Mr. Walker, because I know your time is limited, but if you would give some of your insights on this not very simple pay system and how we can help share that with some of the employees.

Having said that, let me conclude by saying that I concur, we cannot rush into a major change. I am anxious to hear from DHS this morning to get their perspective. My understanding is that they are going to be considering extending this through 2009. But I share those concerns and definitely appreciate your input and your comments this morning, Mr. Walker.

Mr. WALKER. Thank you, Mr. Chairman. Happy to answer any questions that you or other Members may have for the record. Thank you so much.

Mr. PORTER. Thank you.

I would like to bring up the next panel, the second panel of witnesses. If they would come to the table, please.

Good morning, gentlemen. Do you all agree that our meeting should be in Las Vegas? Is that OK? Just checking.

First to open with a statement from the Honorable Mr. Neil McPhie, the chairman of the Merit Systems Protection Board. Following the Honorable Mr. McPhie, we will have Mr. Ronald Sanders, the Associate Director of Strategic Human Resources Policy at the U.S. Office of Personnel Management; and, finally, we will hear from Mr. Ronald James, Chief Human Capital Officer to the Department of Homeland Security.

I thank you all for joining us today.

Mr. McPhie.

STATEMENTS OF NEIL A.G. MCPHIE, CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD; RONALD SANDERS, ASSOCIATE DIRECTOR FOR STRATEGIC HUMAN RESOURCES POLICY, U.S. OFFICE OF PERSONNEL MANAGEMENT; AND RONALD JAMES, CHIEF HUMAN CAPITAL OFFICER, DEPARTMENT OF HOMELAND SECURITY

STATEMENT OF NEIL A.G. MCPHIE

Mr. MCPHIE. Thank you, Mr. Chairman. Mr. Chairman, members, I am Neil McPhie. I am the chairman of the U.S. Merit Systems Protection Board. As you know, the Board is an independent quasi-judicial agency established to protect Federal merit systems against partisan, political, and other prohibited personnel practices. We carry out our statutory mission through the adjudication of employee appeals of personnel actions and by conducting objective studies of the Federal merit systems.

I appreciate the opportunity to appear before you this morning to discuss the potential impact of the new Department of Homeland Security appeal system on the Board. I respectfully submit my written statement and request that it be included in the hearing record.

I will use this time simply to summarize some of my comments.

Mr. PORTER. Thank you.

Mr. MCPHIE. As mandated by statute, the Board participated in the consultative process with DHS and OPM for developing these

regulations. The Board took its consultant role very seriously; it is a small agency. However, members of my staff attended numerous meetings with DHS and OPM representatives throughout this process. We provided comments and written responses to draft regulations. After numerous hours of consulting with DHS, the results were that DHS decided to keep MSPB as the adjudicator of the employee appeals, with modified and expedited process.

I want to tell you this, in my judgment, was a major accomplishment for the Board. Beginning this process, there was palpable fear in the agency that the Board was going to be deprived of some 40 percent of its cases. While we are pleased that DHS has decided to retain the services of the Board for the adjudication of employee appeals, the new regulations will significantly impact the Board's procedures and operations.

Let me first begin by what has not changed. The DHS appeal system provides an employee who is subjected to an adverse action, such as removal or suspension, the right to a de novo review before an outside body, the Merit Systems Protection Board. An appeal is filed with a Board administrative judge, and upon either party's request the administrative judge's decision is reviewable to the full Board. The burden of proof remains on the employing agency, and the standard of proof is preponderance of the evidence. After a final Board decision has been made, if dissatisfied, the employee has the right to seek judicial review.

As someone who values the Board role in the Federal Civil Service system, I am pleased that DHS has included these basic features in its appeal scheme.

Now to the changes. At Board headquarters, the most significant effect of the new appeal system is that the shortened timeframes may require the Board to create two administrative tracks for processing the appeals. We call them petitions for review. Traditionally, the Board has adjudicated cases on a first-in, first-out basis at headquarters. The Board will not be able to treat DHS cases in this way, given the deadlines that DHS has imposed for Board decision. It is possible that the Board will have to create a separate track for DHS cases and place priority on these cases over other equally important cases. This arrangement may likely mean that parties to non-DHS cases will have to wait longer than they otherwise would have for a Board decision.

At the Board's regional offices, the DHS system would also change many aspects of the processing of cases by administrative judges. The point is both the agency and the employee will feel the immediate impact of this compressed time table. They will have less time for discovery, less time to pursue settlement discussions, and less time to prepare for a hearing that they would under the Board's rules governing non-DHS cases.

Another major change in practice before Board judges is the introduction of summary judgment. Summary judgment is a well known and well utilized device in courts of law; however, that system has not been used in the Board's procedure before now. Therefore, it seems to me the average employee who suddenly discovers that he or she no longer has that right to a hearing before a judge will be, in all likelihood, surprised, confused, and in some instances even angry. A similar right, the right to a hearing, is a staple of

Civil Service systems in many States. This is no longer the case with DHS employees.

My red light is on, but with your permission, there are a couple of more points I would like to make.

The overall thrust of the other changes are described in my written statement, and that is to reduce the discretion of Board administrative judges to manage cases according to their individual circumstances, a discretion that historically has been exercised and, in the main, exercised wisely. For example, the DHS system imposes detailed rules on case suspensions and the conduct of settlement conferences, matters that ordinarily have been left to the administrative judge's discretion to manage a case.

Perhaps the biggest limit on discretion of administrative judges, a limit that also applies to the Board, concerns the mitigation of penalties. The designers of the new system apparently believe that administrative judges and the full Board have too much freedom to set whatever penalty they deem appropriate. As explained in detail in my written statement, the Board has not chosen penalties willy-nilly , but instead has historically given deference to the judgment of agency managers and the mission of the agency. In any event, under the new system, the Board may not mitigate a penalty unless it is to disproportionate to the offense as to be wholly without justification. Naturally, this new standard will be the subject of interpretation by the Board and ultimately by the court, so I can't tell you, at this point in time, what a Board's decision will be until a live case comes before it.

I want to also point out I was intrigued by the focus on mitigation and asked for and received statistics. I wanted to know how many cases, on average, have been mitigated by the Board over time, and I looked at some 3 years worth of numbers, 2002, 2003, and 2004; and what I find is at the field level, between 2 to 3 percent of cases involve mitigation. Some of those cases, when appealed, that decision is reversed by the full Board, so the number of cases in which mitigation is issued is even smaller.

It should also be noted that the portion of the DHS rules concerning mandatory removal of fences may not work as well as intended. First, in some cases, this portion of the rules could work against the stated goal of streamlining the appeals process. As DHS envisions it, if a mandatory removal action is taken but not sustained, DHS may take a second action based on the same conduct. The second action would then be appealable. DHS rules do not allow for hybrid action based on a mandatory removal charge or lesser included charge. If there was such a hybrid action, the possibility of two Board appeals, and perhaps inconsistent decisions, arising out of the same conduct would be eliminated.

The second problem spot, and I think it is a significant problem spot, concerns judicial review in mandatory removal matters. According to the DHS rules, if the Board does not render a decision within 30 days, or 45 days if the deadline is extended, the Board will be considered to have denied review. In that situation, again, according to the rules, the DHS decision will become the final Board decision and, therefore, appealable to the circuit court. There is no right to judicial review without a final Board decision. That is in 5 U.S.C. Section 7703. The statute says it quite clearly. What

remains to be seen is whether the Board's reviewing court will take jurisdiction in a mandatory removal matter where the Board has not actually rendered a decision. Here too the answer will have to await the word of a court in a live case, but I will be surprised if the court does in fact find jurisdiction in such a case.

The changes I have discussed, and I have discussed in more detail in my written response, will impact all aspects of the Board's processes. It is likely that the Board will have to increase its career staff so as to meet the expedited timeframes in the DHS appeal system, and still provide fair and timely adjudication for cases involving other agencies. Whatever the cost, we are confident that we will provide the same high quality of services for which have become known, even in the compressed timeframes mandated by the new appeals system.

We look forward to working with DHS to ensure the success of its new personnel system. Thank you very much for the opportunity.

[The prepared statement of Mr. McPhie follows:]

Hearing Statement

Submitted by

Neil A. G. McPhie, Chairman

U. S. Merit Systems Protection Board

"The Countdown to Completion: Implementing the New Homeland Security Personnel System"

Subcommittee on the Federal Workforce and

Agency Organization

Committee on Government Reform

United States House of Representatives

The Honorable Jon Porter
Chairman

The Honorable Danny K. Davis
Ranking Member

March 2, 2005

Dear Mr. Chairman,

Thank you for the opportunity to submit this statement for the hearing record regarding the regulations developed by the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) to implement the employee appeals process under the DHS Human Resources Management System. My remarks will address the impact of these regulations on the Merit Systems Protection Board (MSPB or "the Board"). As mandated by statute, the Board participated in the consultative process with DHS and OPM for developing these regulations. Members of my staff participated in working groups and attended numerous meetings with DHS and OPM representatives throughout this process.

We are pleased that DHS decided to retain the services of the Board for the adjudication of employee appeals. We are confident that we will provide the same high quality of services for which we have become known, even in the compressed timeframes mandated by the DHS appeals system. I believe that, when DHS conducts its evaluation at the end of the regulatory two year period, its officials, managers and line employees will see that retention of the Board as an independent neutral adjudicatory body was the right decision.

While we anticipate the challenges we will face in implementing the appeals process mandated by the new DHS personnel system, we must be realistic about the implications these challenges will present on our existing structure and procedures. Undeniably, there will be significant impact on the Board's operations. Staffing considerations and other resources will require critical adjustments in light of this partnership and our continuing duties and responsibilities in the federal employment arena. The DHS personnel flexibilities, while promulgated specifically for that agency's mission, will present an alteration of the Board's policies and procedures. I would like to describe, to some extent, the way in which we will have to alter our current procedures to accommodate the new DHS system, citing specific provisions. From the Board's perspective, the DHS regulations most significantly impact the Board's current procedures with respect to shortened timeframes, mitigation of penalties and summary judgment.

Shortened timeframes

First, I would like to address the shortened timeframes that will be applied to DHS cases. As a practical matter, the Board may have to create two tracks for adjudication of these cases at the regional and headquarters levels – one for DHS adverse action cases and one for all other cases. It is likely that non-DHS cases will take longer to decide, as new DHS cases may take priority in order to enable the Board to meet the compressed deadlines mandated by the DHS regulations. As such, the Board's traditional system of adjudicating cases on a "first-in, first-out" basis will have to change to facilitate expedited processing of DHS cases.

For example, subsection 9701.706(k)(1) of the DHS regulations modifies the time limit for appeals as set forth in 5 C.F.R. § 1201.22(b), from 30 days after the effective date or receipt, to 20 days after effective date or service, still retaining the "whichever is later" language. Thus, our regional and field offices will have to apply different time limits to DHS adverse action appeals.

Additionally, subsection 9701.706(k)(7) shortens the Board's 120-day standard for the issuance of initial decisions, and requires issuance in 90 days. Moreover, contrary to the current practice of counting from date of receipt, the 90-day period under the DHS regulations is to be counted from the filing date, which generally means postmark or its equivalent. This results in a double burden on the Board's administrative judges.

With respect to appeals involving mandatory removal offenses (MRO), subsection 9701.707(c)(2) requires the Board to render a decision on appeals in mandatory removal cases within 30 days of receipt of a response to a request for MSPB review, or OPM's intervention brief, whichever is later. Under certain circumstances, the Board may extend the deadline by 15 days. MSPB has previously questioned the advisability of placing a limit on the amount of time the Board may take to issue a decision on these cases. In earlier draft regulations, the specified time limit was 20 days for the issuance of a Board decision. The current version provides that such decisions must be issued in 30 or 45 days. It is not clear that this revision provides adequate time for the Board to conduct a thorough review.

A 90-day requirement is also set for decisions by the Board on petition for review, but it is counted from the close of the record date. There is currently no time limit for the issuance of decisions on petition for review and the average age of pending petitions for review at the end of fiscal year 2004 was approximately 141 days. The DHS regulation significantly reduces that time and may require the Board to put DHS cases on a faster track than cases from other agencies which are currently taken in order of receipt.

Mitigation

A second area of concern is the limitation on the Board's authority to mitigate penalties. Pursuant to subsection 9701.706(k)(6), the Board must sustain the penalty imposed by the agency unless it "is so disproportionate to the basis for the action as to be wholly without justification." Currently, the Board reviews the penalty imposed by an agency in accordance with the standard set in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), to ensure that it is "within the range of reasonableness." Under the DHS regulations, if mitigation is found proper, the "maximum justifiable penalty," rather than the "maximum reasonable penalty" provided for by *Douglas*, must be imposed. The implication of this substitution is that DHS will have to meet a much lower threshold to sustain a penalty. In any event, it requires administrative judges and the Board to depart from the familiar penalty standard than has been used for 25 years by the Board and its reviewing court, and of course to develop entirely new precedent under it.

We believe that this mitigation limitation is based on a perception that the Board's practice is to second guess the reasonableness of an agency's penalty decision without giving deference to the agency's mission or the manager's discretion. In fact, the Board considers a number of relevant factors in determining whether a penalty should be sustained, including whether it is within the range of penalties allowed for the offense in the agency's table of penalties. The MSPB only mitigates a penalty if it finds that the penalty clearly exceeds the maximum reasonable penalty. The Board's policy and practice was most recently illustrated in *Casteel v. Department of Treasury*, 97 M.S.P.R. 521 (2004). In that case, the MSPB held that in deciding whether to mitigate an agency's penalty, "the [MSPB] must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that

the [MSPB]'s function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised." *Id.* at 524. Thus, the MSPB does not take lightly an agency's mission or the discretion of its managers to determine the appropriate penalty for employee misconduct.

Summary Judgment

The third area I would like to address is the Board's new summary judgment authority. Under the DHS regulations at subsection 9701.706(k)(5), the Board is granted the authority to render summary judgment. In fact, under these provisions, the Board is required to render a summary judgment on the law without a hearing, when there are no material facts in dispute. Currently, the Board does not have summary judgment authority. This new authority will be helpful in expediting the adjudication of cases, although it may also prove controversial in that civil servants' long-held right to a hearing after discharge has been eliminated.

Provisions that may delay adjudication

The DHS regulations will have wide-reaching impact on the Board's adjudicatory procedures. In several instances, however, we are not certain that these procedural changes will facilitate the expedited process that DHS seeks. Specifically, it appears that the provisions governing OPM's right to intervene, the requirement of a separate settlement judge, and the right to challenge a party's representative, may increase the time it takes the Board to adjudicate DHS cases.

Subsection 9701.706 (e) permits the Director of the OPM to intervene, as a matter of right, at any time in an MSPB proceeding where the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation or policy directive. The current rules as specified in 5 U.S.C § 7701(d), 5 C.F.R. § 1201.34(b) and 5 C.F.R. § 1201.114(g) require the Director of OPM to intervene as early in the proceeding as practicable, and they limit his or her right to do so to situations where he or she perceives that there will be substantial impact on any civil service law, rule, or regulation "under the jurisdiction of [OPM]." DHS's regulation does not contain either limitation. This change, therefore, may result in an increase in the number of interventions filed by OPM, and with that, the Board's workload.

Second, subsection 9701.706(i) modifies 5 C.F.R. § 1201.41(c), which allows the administrative judge assigned to hear the case to "initiate" settlement discussions "at any time." Under the DHS provision, the AJ is not explicitly prohibited from raising settlement, but the parties must agree before settlement may be discussed. Further, any Board involvement in settlement discussions must be by a judge who will not adjudicate the case if settlement is not reached. This change will require the Board's regional offices to allot additional staff resources to each case in which settlement discussions are approved by the parties.

Another significant change in the procedures is necessitated by subsection 9701.706(k)(2) regarding the disqualification of representatives. Under the Board's regulation at 5 C.F.R. § 1201.31(b), a motion to disqualify a party's representative must be based on a conflict of interest or position and be filed within 15 days after the date of service of the notice of designation. The DHS regulation does not limit the reasons on which a motion may be based or

set a time limit for filing the motion. This change may result in longer proceedings because it permits disruption in the adjudication of the merits of any case at any time to permit challenges to a party's representative.

Provisions that affect operations

The DHS regulations governing discovery, case suspensions and OPM requests for reconsideration will also have a significant impact on the Board's operations.

Discovery

Subsection 9701.706(k)(3) modifies the Board's discovery procedures found at 5 C.F.R. § 1201.73(c)(1) by requiring the parties to consult before filing a motion to limit discovery. Additionally, it reduces the limits set in the Board's regulations at § 1201.73(e) on the number of interrogatories a party may submit and the number of depositions it may compel. Given these limits, it is more likely that the administrative judges will have greater involvement in the discovery process, which is generally a matter for the parties, not the administrative judge. Finally, this subsection specifies a standard of proof, both "necessity and good cause," that the administrative judge must apply in considering whether to grant a request for additional discovery. Currently Board administrative judges consider the circumstances of each individual case in making such discovery rulings, without applying a "necessity and good cause" standard.

Case Suspension

The DHS regulation at subsection 9701.706(k)(4) nullifies the Board's regulation at 5 C.F.R. § 1201.28(b) by requiring that all requests for case suspensions be jointly submitted. The Board's current regulation permits an administrative judge to grant a unilateral request for a case suspension. Requiring that such requests be jointly submitted effectively gives the non-moving party the authority to block a request that is based on a legitimate reason, such as illness of a party or representative.

OPM reconsideration requests

The DHS regulation at subsection 9701.706(k)(8), which concerns OPM reconsideration requests to the Board, requires the Board's decision on a reconsideration request to explain its reasons. MSPB understands DHS's need for information about the bases for the MSPB's denial, and would of course take steps to ensure that this information is made known in the Board's decisions. In fact, the Board has almost always issued a fully explanatory Order & Opinion in these cases. However, not all OPM requests for reconsideration present new arguments, and as a result, in some cases, the rule appears to require MSPB to repeat information already set forth in its earlier decision. The need to do so could require unnecessary work that might delay issuance of the reconsideration decision. For these reasons, as to OPM reconsideration requests, I respectfully submit that the MSPB should be able to issue a decision whose length and scope are appropriate to the circumstances of each specific case.

Mandatory Removal Offenses

Finally, I would like to raise two additional points regarding the procedures governing the adjudication of appeals involving mandatory removal offenses (MRO). The first such point concerns subsection 9701.707(c)(4). This subsection provides that "If MSPB does not issue a final decision within the mandatory time limit [30 or 45 days], MSPB will be considered to have denied the request for review of the Mandatory Review Panel's (MRP) decision, which will constitute a final decision of MSPB and is subject to judicial review in accordance with 5 U.S.C. 7703."

This provision is not consistent with the law. The Homeland Security Act of 2002 does not authorize DHS to confer jurisdiction on the U.S. Court of Appeals for the Federal Circuit over appeals from DHS decisions. When the MSPB fails to act on a petition for review of an MRP decision within a stated time, that MRP decision does not constitute the decision of the MSPB. It is unlikely that the Federal Circuit would take jurisdiction over an appeal when there has not been a final MSPB decision, although that determination is for the court to make. *See* 5 U.S.C. § 7703(a) ("[a]ny employee or applicant for employment adversely affected or aggrieved by *a final order or decision of the Merit Systems Protection Board* may obtain judicial review of the order or decision") (emphasis supplied).

Second, subsection 9701.707(d) provides that if a mandatory removal offense is not sustained, DHS may bring a second, non-MRO action against the employee based on the same conduct and on evidence that was not a part of the initial record. The possibility that an employee would be subject to multiple actions based on the same underlying conduct raises a substantial question of fundamental fairness. *Cf. Byers v. Department of Veterans Affairs*, 89 M.S.P.R. 655, ¶ 19 (2001) (an employee may not be disciplined more than once for the same conduct). Additionally, a second disciplinary action based on the same conduct after the MRP issued a decision in favor of the employee could lead to inefficiency and a waste of resources. If the MRP is not deemed to be sufficiently independent of DHS for collateral estoppel purposes, *see Wright v. Department of Transportation*, 89 M.S.P.R. 571 (2001), neither party would be precluded from relitigating (in a second action) all of the issues that were decided by the MRP.

Conclusion

Mr. Chairman, the Board's role in the success of the new DHS appeals system will depend, to a large extent, on the Board's ability to meet the increased demand for expedited case processing with an already lean staff and budget. To this end, the Board will seek additional resources to ensure that it meets the needs of DHS while continuing to deliver high quality services to all other Federal agencies within our jurisdiction. The Board will have to revise its own regulations to integrate the DHS procedures including the shortened timeframes, limitations on discovery, summary judgment and other changes discussed earlier in my statement. It should be noted that, while the new DHS system will require the Board to expedite the adjudication of adverse action appeals and process those appeals under regulations that differ in significant respects from the Board's current regulations, the Board will continue to adjudicate appeals from DHS employees under several laws (e.g., the Whistleblower Protection Act; the Uniformed Services Employment and Reemployment Rights Act; and the Veterans Employment Opportunities Act) through the Board's current procedures.

All aspects of the Board's operations will be affected by these new procedures. The most immediate impact will be the need for Board administrative judges and headquarters attorneys to receive training in the new system. We will likely need additional administrative judges in the regional and field offices to handle the expedited timeframes required by these procedures and to deal with the revised settlement procedures that will require involvement of two administrative judges on one case when settlement discussions are not successful. Similarly, additional attorneys will be needed in headquarters to facilitate the shortened timeframe for issuing decisions on petitions for review. From an information technology standpoint, all of the applications supporting the MSPB appeals process will need to be evaluated and changed, as necessary, to support the new DHS procedures. It is anticipated that additional staff will be needed to develop and support the necessary application changes. Our statutory studies function is also impacted and we will likely need additional analyst positions to evaluate the impact of these broad DHS human resources system changes.

In conclusion, MSPB took its consulting role very seriously, meeting frequently with representatives of DHS and OPM as they developed this appeals system. We provided comments and written responses to draft regulations. After numerous hours of consulting and participating in working groups with DHS, the results were that DHS decided to keep MSPB as the adjudicator of employee appeals, with modified and expedited processes. We believe that our willingness to make changes in our system to expedite the DHS appeals process made the prospect of using our adjudicators more attractive to DHS than the alternative of developing an in-house adjudication system. We look forward to working with DHS to ensure the success of its new personnel system.

Mr. Chairman, again, I appreciate the opportunity to share my views on these significant changes to an important aspect of Federal human resources management. I hope that this information will be helpful to you and your committee members.

Mr. PORTER. Thank you, Mr. McPhie.
Next, Mr. Sanders.

STATEMENT OF RONALD SANDERS

Mr. SANDERS. Thank you, Mr. Chairman. I am Ron Sanders, Associate Director for Strategic Human Resources Policy at the Office of Personnel Management. It is my privilege to appear before you today to discuss the final regulations implementing a new human resource management system in the Department of Homeland Security, a system that we truly believe to as flexible, contemporary, and excellent as the President and the Congress envisioned. It is the result of an intensely collaborative process that has taken almost 2 years, and I want to express our appreciation to your subcommittee for its leadership in this historic effort. Without that leadership, we wouldn't be here today, and we look forward to your personal involvement in the future.

Mr. Chairman, with the Homeland Security Act of 2002, you and other Members of Congress gave the Secretary of DHS and the Director of OPM extraordinary authority, and with it a grand trust, to establish a 21st century human resource management system that fully supports the Department's vital mission without compromising the core principles of merit and fairness that ground the Federal Civil Service. Striking the right balance between transformation and tradition, between operational imperatives and employee interests is an essential part of that trust, and we believe we have lived up to that in these final regulations.

I would like to address that balance this morning with a particular focus on performance-based pay, employee accountability, and labor management relations. First, pay-for-performance.

The new pay system established by the regulations is designed to fundamentally change the way DHS employees are paid, to place far more emphasis on performance and market in setting and adjusting rates of pay. But would it inevitably lead to politicization, as some have alleged? Absolutely not. All Federal employees are "protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." That statutory protection is still in place and binding on DHS, and it most certainly applies to decisions regarding an employee's pay.

If a DHS employee believes that such decisions have been influenced by political considerations or favoritism, he or she has the right to raise such allegations with the Office of Special Counsel, have the OSE investigate and, where appropriate, prosecute them, and to be absolutely protected from reprisal and retaliation in so doing. These rights have not been diminished in any way whatsoever.

The new system also provides for additional protections that guard against any sort of political favoritism in individual pay decisions. Under the new system, supervisors have no discretion with regard to the actual amount of performance pay an employee receives. That amount is driven strictly by mathematical formula, an approach recommended by DHS unions during the meet and confer process. With but one exception, the factors in that formula cannot be affected by an employee's supervisor. Rather, they are set at higher headquarters, with union input and oversight through a

new compensation committee, another product of the meet and confer process, that gives them far more say in such matters than they have today.

The exception is the employee's annual performance rating. That is the only element of the system within the direct control of the employee's supervisor. And the regulations that allow an employee to challenge it if he or she doesn't think it is fair, all the way to a neutral arbitrator if their union permits, another product of the meet and confer process.

Mr. Chairman, with these statutory and regulatory protections providing the necessary balance, as well as intensive training and a phased implementation schedule to make sure DHS gets it right, we are confident that the new pay-for-performance system will reward excellence without compromising merit.

Let us take a similar look at accountability and due process. DHS has a special responsibility to American citizens in that regard. Many of its employees have the authority to search, seize, enforce, arrest, even use deadly force in the performance of their duties; and their application of these powers must be beyond question. By its very nature, the DHS mission requires a high level of workplace accountability. We believe the regulations assure this accountability, but without it compromising any of the due process protections Congress guaranteed. In this regard, DHS employees are still guaranteed notice of proposed adverse action and a right to reply before any final decision is made in the matter. In addition, the final regulations continue to guarantee an employee the right to appeal an adverse action to MSPB or to arbitration, except those involving mandatory removal offenses; and I am sure we will talk about those.

Further, in adjudicating these employee appeals, regardless of forum, the final regulations place a heavy burden on the agency to prove its case against an employee. Indeed, in another major change resulting from the meet and confer process, the regulations actually establish a higher overall burden of proof, a preponderance of the evidence standard, for all adverse actions, whether based on conduct or performance. While this standard currently applies to conduct-based adverse actions, it is greater than the substantial evidence standard presently required for performance-based removals.

Finally, the regulations authorize MSPB, as well as arbitrators, to mitigate penalties in adverse action cases. The proposed regulations precluded such mitigation, as does current law in performance-based adverse actions. Let me repeat. Under current law, no mitigation under performance-based removals. However, the final regulations allow mitigation when the agency proves its case against an employee by a preponderance of the evidence. The standard in the regulation is admittedly tougher than those MSPB and private arbitrators apply today, with far more authority in performance cases, where, again, mitigation is not allowed. However, given the extraordinary powers entrusted to the Department and its employees, and the potential consequences of poor performance and misconduct to its mission, DHS should be entitled to the benefit of the doubt in determining the most appropriate penalty. That

is what the new mitigation standard is intended to do, and it is balanced by the higher standard of proof.

Finally, a quick look at labor relations. Accountability must be matched by authority, and here current law governing relations between labor and management is out of balance. Its requirements potentially impede the Department's ability to act, and that cannot be allowed. Now, you will hear that current law already allows the agency to do whatever it needs to do in an emergency. That is true. However, that same law does not allow DHS to prepare or practice for an emergency, to take action to prevent an emergency, to reassign or deploy personnel or new technology to deter a threat, not without first negotiating with unions over implementation, impact, procedures and arrangements. On balance the regulations ensure that the Department can meet its critical mission, but in a way that still takes union and employee interests into account.

Mr. Chairman, if DHS is to be held accountable for homeland security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM the ability to create this new system. That is why we have made the changes that we did. However, in so doing, we believe that we have succeeded in striking an appropriate balance between union and employee interests on the one hand and the Department's mission imperatives on the other.

That concludes my statement. I would be happy to answer questions at the appropriate time.

[The prepared statement of Mr. Sanders follows:]

Statement of

Dr. Ronald P. Sanders

Associate Director for Strategic Human Resources Policy

U.S. Office of Personnel Management

Before the

Subcommittee on the Federal Workforce and Agency Organization

Committee on Government Reform

U. S. House of Representatives

On

"The Countdown to Completion:

Implementing the New Department of Homeland Security Personnel System"

March 2, 2005

I. Introduction

Mr. Chairman, I am Dr. Ronald P. Sanders, the Associate Director for Strategic Human Resources Policy at the Office of Personnel Management (OPM). On behalf of OPM, it is my privilege to appear before you today to discuss the final regulations implementing a new human resources (HR) management system in the Department of Homeland Security (DHS) – a system that we truly believe is as flexible, contemporary, and excellent as the President and the Congress envisioned. It has been an honor for

OPM (and for me personally) to work with the dedicated men and women of DHS, including its senior leaders, employees and union representatives, other stakeholders, and the Congress, to develop this system. It is the result of an intensely collaborative process that has taken almost two years -- and we are all quite proud of it. However, it is not the end, but only the end of the beginning, and the Department must now embark upon the challenge of implementation.

Mr. Chairman, with the Homeland Security Act of 2002, the Congress gave the Secretary of Homeland Security and the Director of the Office of Personnel Management extraordinary authority, and with it a grand trust: to work together with the Department's employees and their union representatives to establish a "21st century human resources management system" that fully supports the Department's vital mission without compromising the core principles of merit and fairness that ground the Federal civil service. Striking the right balance, between transformation on one hand and tradition on the other, is an essential part of that trust, and we believe we have lived up to it in these final regulations.

I would like to address the question of balance this morning, with a particular focus on three of the most vital components of the new HR system established by the final regulations: performance-based pay, employee accountability, and labor-management relations. In each case, I will discuss the careful and critical balance we have struck between operational imperatives and employee interests, without compromising on either mission or merit. The final result achieves that balance, and in so doing, what we have accomplished may very well serve as a model for the rest of the Federal Government.

II. Pay, Performance, and "Politicization"

The new pay system established by the regulations was designed to fundamentally change the way DHS employees are paid, to place far more emphasis on performance and market in setting and adjusting rates of pay. Instead of a "one size fits all" pay system based on tenure, we have established one that bases all individual pay increases on performance. No longer will employees who are rated as unacceptable performers receive annual across-the-board pay adjustments, as they do today. Instead, only those who meet or exceed performance expectations will receive any such adjustments. No longer will those annual pay adjustments apply to all occupations and levels of responsibility, regardless of market or mission value. Instead, those adjustments will be based on national and local labor market trends, budget, recruiting and retention patterns, and other factors – as well as substantial and substantive union input. And no longer will employees who merely meet time-in-grade receive virtually automatic pay increases, as they do today. Instead, individual pay raises will be determined by an employee's annual performance rating.

This system is entirely consistent with the merit system principles that are so fundamental to our civil service. One of those principles states that Federal employees should be compensated ". . . with appropriate consideration for both national and local rates paid by employers . . . and appropriate incentives and recognition . . . for excellence in performance." See 5 U.S.C. 2301(b)(3). However, some have argued that by placing so much emphasis on performance, we risk "politicizing" DHS and its employees. This

is a most serious charge. Such a result, if true, would constitute a prohibited personnel practice, something expressly forbidden by the Congress in giving DHS and OPM authority to jointly prescribe these regulations. Moreover, it would tear at the very fabric of our civil service system. Fortunately, nothing could be further from the truth.

The merit system principles provide that Federal employees should be ". . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." See 5 U.S.C. 2301(b)(8)(A). And they are. Section 2302(b)(3) of title 5, United States Code, makes it a prohibited personnel practice to "coerce the political activity of any person . . . or take any action against any employee" for such activity. This law is still in place and binding on DHS. The law forbids any political influence in taking any personnel action with respect to covered positions, and it most certainly applies to making individual pay determinations. The DHS regulations did not dilute these prohibitions in any way; indeed, they could not . . . and we would not. This is no hollow promise. A close examination of the DHS regulations reveals that they include considerable protection against such practices – and no less than every other Federal employee enjoys today.

For example, if a DHS employee believes that decisions regarding his or her pay have been influenced by political considerations, he or she has a right to raise such allegations with the Office of Special Counsel (OSC), to have OSC investigate and where appropriate, prosecute them, and to be absolutely protected from reprisal and retaliation in so doing. These rights have not been diminished in any way whatsoever. Moreover, supervisors have no discretion with regard to the actual amount of performance pay an employee receives. That amount is driven strictly by mathematical formula -- an

approach recommended by the DHS unions during the meet-and-confer process. Of the four variables in that formula -- the employee's annual performance rating; the "value" of that rating, expressed as a number of points or shares; the amount of money in the performance pay pool and the distribution of ratings -- only the annual rating is determined by an employee's immediate supervisor, and it is subject to review and approval by the employee's second-level manager.

Once that rating is approved, an employee can still challenge it if he or she doesn't think it is fair – indeed, employees represented by a union will even be able to contest their performance ratings all the way to a neutral arbitrator, if their union permits. And if it gets to arbitration, the arbitrator will review the grievance according to specific standards set forth in the regulations, standards based directly on union input provided during the meet-and-confer process. Finally, the other factors governing performance pay are also shielded from any sort of manipulation. Individual managers will have no say in how many points or shares a rating is worth, or how much money is in the pool; that will be determined at the headquarters level -- with union input and oversight through a new Compensation Committee (another product of the meet-and-confer process) that gives them far more say in such matters than they have today. And as far as the distribution of ratings is concerned, the regulations ban any sort of quota or forced distribution. Period.

Of course, DHS managers will receive intensive training in the new system, a further safeguard against abuse. And they too will be covered by it, with their pay determined by how effectively <u>they</u> administer this system. The same is true of their executives, now covered by the new Senior Executive Service pay-for-performance

system – indeed, OPM regulations governing that system establish clear chain-of-command accountability in this regard. With these considerable protections in place, we believe that there is no danger whatsoever that the pay of individual DHS employees will become "politicized" just because it will be more performance-based. To the contrary, we believe that the American people expect and demand that performance determine the pay of "their" employees. That is exactly what the DHS pay system is intended to do.

III. Accountability and Due Process

Public trust is essential to the success of the Department's homeland security mission. DHS has a special responsibility to American citizens; many of its employees have the authority to search, seize, enforce, arrest, and even use deadly force in the performance of their duties, and their application of these powers must be beyond question. By its very nature, the DHS mission requires a high level of workplace accountability, and Congress recognized this fact when it gave DHS and OPM the authority to waive those chapters of title 5, United States Code, that deal with adverse actions and appeals. However, in so doing, Congress also assured DHS employees that they would continue to be afforded the protections of due process. We believe that the regulations strike this balance. They assure far greater individual accountability, but without compromising the protections Congress guaranteed.

In this regard, DHS employees are still guaranteed notice of a proposed adverse action. While the regulations provide for a shorter, 15-day minimum notice period, (compared to a 30-day notice under current law), this fundamental element of due process

is preserved. Employees also have a right to be heard before a proposed adverse action is taken against them. This too is a fundamental element of due process, and the regulations also provide an employee a minimum of 10 days to respond to the charges specified in that notice – compared to 7 days today. In addition, the final regulations continue to guarantee an employee the right to appeal an adverse action to the Merit Systems Protection Board (MSPB), except those involving a Mandatory Removal Offense (MRO; see below). And as a result of the meet-and-confer process with DHS unions, the regulations also provide bargaining unit employees the option of contesting a non-MRO adverse action through a negotiated grievance procedure . . . all the way to a neutral private arbitrator, if their union permits. The proposed rules had only provided for adverse action appeals to MSPB.

The final regulations continue to authorize the Secretary to establish a number of MROs that he or she determines will ". . . have a direct and substantial adverse impact on the ability of the Department to carry out its homeland security mission" – like accepting a bribe to compromise border security, or aiding and abetting a potential act of terrorism. And, we have provided examples of potential MROs in the supplementary information accompanying the final regulations, as you had requested, Mr. Chairman. At the same time, the regulations provide a number of checks and balances on the use of this authority: MROs must be published in the *Federal Register* after consultation with the Justice Department, and they must be communicated to all employees on an annual basis; in addition, the regulations require case-by-case Department-level approval before an employee is charged with one. The final regulations also provide full due process to employees charged with a Mandatory Removal Offense. An employee is still entitled to

a notice of proposed adverse action, the right to reply to the charges set forth in that notice, and the right to representation.

The regulations also permit an employee to appeal an MRO to an independent Mandatory Removal Panel, comprising three individuals appointed by the Secretary for their "impartiality and integrity," as well as their expertise in the Department's mission. Some have charged that this Panel somehow is unlawful because it lacks independent outside review, but nothing could be further from the truth. First, once appointed, the Panel will operate outside the DHS chain of command– its members do not report to the Secretary or any other management official and are every bit as independent as an agency's administrative law judges (ALJs). And just as ALJ rulings are binding on the agency that appoints them, so too are the Panel's determinations binding on DHS with respect to MROs – subject to appeal by either party to the MSPB and the Federal Circuit Court of Appeals. The Panel's independence is further guaranteed by special protections against removal of its members – protections that are patterned after those that shield members of the MSPB. Second, the Panel's decisions are, indeed, subject to outside review – in fact, at least *two levels* of such review. An employee can appeal a Panel decision to MSPB, under the very same standards that the Federal Circuit employs in reconsidering MSPB decisions. And once the Board has ruled on the matter, the employee is entitled to seek judicial review with the Federal Circuit Court of Appeals.

Further, in adjudicating employee appeals, regardless of forum, the final regulations place a heavy burden on the agency to prove its case against an employee. Indeed, in another major change resulting from the meet-and-confer process, the regulations actually establish a *higher* burden of proof: a "preponderance of the

evidence" standard for all adverse actions, whether based on conduct or performance. While this is the standard that applies to conduct-based adverse actions under current law, it is greater than the "substantial" evidence standard presently required to sustain a performance-based adverse action.

Finally, the regulations authorize MSPB (as well as arbitrators) to mitigate penalties in adverse action cases. The proposed regulations precluded such mitigation, as does current law in performance-based adverse actions. However, mitigation may occur, but only under limited circumstances. Thus, the final regulations provide that *when the agency proves its case against an employee by a preponderance of the evidence,* MSPB (or a private arbitrator) may reduce the penalty involved *only* when it is "so disproportionate to the basis for the action that it is wholly without justification." Much has been made of this standard. Although it is admittedly tougher than the standards MSPB and private arbitrators apply to penalties in conduct cases today, it provides those adjudicators considerably more authority than they presently have in performance cases – current law literally precludes them from mitigating a penalty in a performance-based adverse action. Moreover, MSPB's current mitigation standards basically allow it (and private arbitrators) to second-guess the reasonableness of the agency's penalty in a misconduct case, without giving any special deference or dispensation to an agency's mission. That is untenable.

The President, the Congress, and the American public all hold the Department accountable for accomplishing its homeland security mission. MSPB is not accountable for that mission, nor are private arbitrators. Given the extraordinary powers entrusted to the Department and its employees, and the potential consequences of poor performance

or misconduct to that mission, DHS should be entitled to the benefit of any doubt in determining the most appropriate penalty for misconduct or poor performance on the job. There is a presumption that DHS officials will exercise that judgment in good faith. If they do not, however, providing MSPB (and private arbitrators) with limited authority to mitigate is a significant check on the Department's imposition of penalties. That is what the new mitigation standard is intended to do, and it is balanced by the higher standard of proof that must first be met.

IV. Mission Imperatives and Employee Interests

The Department has a covenant of accountability with the American people, and it goes to the heart of another of the most controversial – and critical – provisions of the regulations: labor relations. Accountability must be matched by authority, and here, the current law governing relations between labor and management is out of balance. Its requirements potentially impede the Department's ability to act, and that cannot be allowed to happen. The regulations ensure that the Department can meet its mission, but in a way that still takes union and employee interests into account.

For example, today, in trying to bring about the most extensive reorganization of the Federal Government since the 1940s, the Secretary of Homeland Security cannot issue personnel rules and regulations that are binding on his subordinate organizational units. Instead, those rules must be negotiated in all of the 70-odd bargaining units currently recognized by DHS (covering only about 25 percent of the Department's workforce) – many of which bear no resemblance to the Department's organizational

structure or chain of command. Congress created DHS to assure unity of effort in the war on terror, but how can that possibly happen if the Secretary cannot even issue regulations that bind together the disparate mission elements that are comprised in that merger? The final rules give him, but only him, the authority to do so. Therein lies the balance: personnel policies, practices, and working conditions are still subject to collective bargaining below the Departmental level, but now, when the Secretary speaks, his organizational components and their patchwork of bargaining units must listen.

Today, if the Department wants to introduce new security or search technology, it cannot – not without first negotiating with the Department's various unions, at their various sub-Department levels of recognition, over the implementation and impact of that new technology on bargaining unit employees . . . and it cannot act until those negotiations have been concluded. How can we hold the Department accountable for homeland security if it cannot act swiftly to take full advantage of new technology in the war on terror? The final regulations give the Department the authority to do so. DHS now will be able to introduce new technology when and as it sees fit. However, that right is balanced by a requirement to negotiate over appropriate arrangements for employees adversely impacted by that new technology...*after the fact* – a recommendation you had made, Mr. Chairman. Thus, new technology cannot be delayed by collective bargaining, but as is the case today, negotiations will still be required over appropriate arrangements for employees adversely affected by it.

Today, the Department cannot assign or temporarily deploy its front-line employees without following complicated, seniority-based procedures governing who, when, and how such assignments and deployments will take place – procedures that have

been negotiated with unions. And if there is an operational exigency that those procedures did not anticipate, they cannot be modified without further negotiations. These procedures can force the Department to assign the least senior employee to a particular task, when the situation may call for the most seasoned. Or they can require the Department to assign volunteers from one unit to meet a critical operational need, and in so doing, leave that unit understaffed. These are real situations, with real operational impact, all the result of current law. The final regulations prohibit negotiations over these operational procedures. However, the regulations do require that managers "confer" with unions over them, and they also permit employees to grieve alleged violations -- all the way to arbitration, if their union permits; in addition, the regulations continue to require full collective bargaining over non-operational procedures governing such important subjects as promotion rules, discipline and layoff procedures, overtime, etc.

You will hear much about what is wrong with these changes. You will hear that current law already allows the agency to do whatever it needs to do in an emergency. However, that statement, while true, explains why the current law is inadequate when it comes to national security matters. The Department needs the ability to move quickly on matters before they become an emergency, and the current law does not allow DHS to take action quickly to prevent an emergency, to prepare or practice for dealing with an emergency, to deploy personnel or new technology to deter a potential threat, or do any of the things I have described above. Rather, the current law requires agencies to first negotiate with union over the implementation, impact, procedures and arrangements before it can take

any of those actions. By the time an 'emergency' has arisen it is literally too late. On balance, that simply cannot continue.

You will also hear that the Homeland Security Labor Relations Board (HSLRB), to be appointed by the Secretary to resolve collective bargaining disputes in the Department, will not be independent, and that its decisions will not be impartial because they are not subject to "outside review." The HSLRB is expressly designed to ensure that those who adjudicate labor disputes in the Department have expertise in its mission, and its members are every bit as independent as those of the Department's Mandatory Removal Panel...or an agency's ALJs. Just as an agency's ALJs operate outside the chain of command, so too will HSLRB's members. Just as ALJ decisions are binding on the agency that employs them, so too will HSLRB's decisions be binding – subject to appeal by either party to the FLRA and the Federal Courts of Appeal. Thus, assertions to the contrary notwithstanding, the regulations make it patently clear that the HSLRB's decisions will be subject to at least *two levels* of outside review.

V. Conclusion

If DHS is to be held accountable for homeland security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM approval to waive and revise the laws governing classification, pay, performance management, labor relations, adverse actions, and appeals. And that is why we have made the changes that we did. However, in so doing we believe that we have succeeded

in striking a better balance – between union and employee interests on one hand, and the Department's mission imperatives on the other.

Mr. Chairman, that concludes my statement. I would be pleased to respond to any questions you and members of the Subcommittee may have.

Mr. PORTER. Thank you, Mr. Sanders. Appreciate it.
Mr. James.

STATEMENT OF RONALD JAMES

Mr. JAMES. Mr. Chairman, members of the committee, I am Ron James, the Chief Human Capital Officer for the Department of Homeland Security. It is a privilege to appear before this subcommittee to discuss the final regulations implementing the new DHS Human Resources Management System. I am proud to report these regulations are the successful culmination of months of difficult work by many players to accomplish the charge that Congress set before us. They contain significant changes that are necessary for the Department to carry out its mission. They also unlock the full potential of our DHS civilian employees.

The collaborative processes used were designed to ensure that a broad variety of viewpoints were considered and the best options were adopted. For example, when the proposed regulations were published, we made a conscious decision to utilize an electronic comment process, facilitating the involvement of DHS employees, their representatives, and the general public. Over 3,800 responses were received, demonstrating the success of this tactic and the very important engagement of our employees.

Another component of our collaboration stemmed from congressional direction that we engage in a "meet and confer process" with employer representatives. We complied with both the letter and the spirit of that direction, meeting before the formal meet and confer sessions to help us better understand each other's positions and extending the overall meet and confer time period in an effort to resolve ongoing issues. The collaborative process has been a meaningful one, and we have made a number of significant changes to our final regulations as a result.

For example, we have created a compensation committee that includes representatives from our two largest labor unions to address strategic compensation matters such as the allocation, as one example, of funds between market and performance pay adjustments. We provided our employees and unions a meaningful role in the design of further details in the pay-for-performance system in a process of "continuing collaboration" in the development of implementing directives. We have modified our schedule for implementing the pay-for-performance system in response to strong union concerns, as well as others, that the proposed schedule did not allow adequate time to train managers, to evaluate system effectiveness, and we agree that mandatory removal offenses [MROs] will be published in the Federal Register and made known annually to all employees.

Throughout the entire collaboration process, we followed a set of guiding principles adopted from the onset of our design process. First and foremost, DHS must ensure that its HR management system is mission-centered, performance-focused, and based on the longstanding principles of merit and fairness embodied in the statutory merit system principles. While we believe that our final regulations achieve that balance, there remains several areas where we have fundamental disagreements with union leadership on aspects of the new HR system. We believe that these issues, such as using

performance rather than longevity as the basis for pay increases and providing for increased flexibilities to respond to mission-driven operational needs, or balancing our collective bargaining, go to the very core of congressional intent in granting these flexibilities.

The final regulations emanating from the collaborative process point to the way to a new paradigm for human capital management not just for DHS, but for the entire Federal service. This paradigm includes a strong correlation between performance and pay, and greater consideration of local market conditions. It adopts streamlined procedures for ensuring conformance with the principles of equal pay for work of equal value; includes simplified and streamlined adverse action and appeals procedures, while ensuring fairness and due process; and reaches a balance between core Civil Service principles and mission essential flexibilities.

Significant changes in the compensation plan include: replacing the General Schedule with open payroll ranges; eliminating the steps in the current system that are largely tied to longevity; creating performance pay pools where all employees meeting performance expectations will receive performance-based increases; basing compensation on local market conditions for different job types, rather than providing all job types in a market with the same geographic pay adjustment; absent such a market-based system, we cannot assure DHS's ability to compete for top talent. And we are making and going to make meaningful distinctions in performance and holding employees accountable at all levels. Current systems which provide a general across-the-board increase and rarely denied within-grade increases do little to encourage or reward excellence in the work force.

Some of our significant changes regarding adverse actions and appeals include: streamlining the adverse action appeals procedures by shortening minimum notice and reply periods. By working with MSPB to modify their procedures to gain efficiencies, without impairing the fair treatment and due process protection; simplifying a process that is confusing to both employees and supervisors by eliminating the requirement for managers to differentiate between an individual's inability or unwillingness to perform in order to address performance issues; creating a category of offenses that have a direct and substantial impact on the ability of the Department to protect homeland security. These offenses would be so egregious that supervisors have no choice but to recommend removal.

Our regulations contain major changes regarding labor-management relations, such as requiring that we confer, not negotiate, with labor unions over the procedures followed to take management actions, such as assigning work or deploying personnel. Also, bargaining over the adverse impact of management actions on employees is only required when the impact is significant and substantial, and the action has exceeded 60 days. Neither the confer process nor the obligation to bargain impact can delay our taking action. Providing for mid-term bargaining over personnel issues, personnel policies, practices, and matters affecting working conditions only when the changes are foreseeable, substantial, and significant in terms of impact and duration. The substantial and significant test is consistent with current FLRA and private sector

case law. And in response to additional union comments and concerns of others, we provided for binding resolution of mid-term impasse by the Homeland Security Labor Relations Board.

Establishing a separate labor relations board focused on the DHS mission to ensure independence and impartiality valued by both us and the unions, the Board will not report to the secretary. Its three external members will be appointed for a fixed term and will be subject to removal only for inefficiency, neglect of duty, or malfeasance.

We pledged at the beginning of this process to preserve fundamental merit principles, to prevent prohibited personnel practices, and to honor and to promote veterans' preferences. We have honored those commitments. These are core values of public service that will not be abandoned. We also set out to fulfill the requirements of the Homeland Security Act to create a 21st century system for human capital management. We believe that the system we have developed accomplishes these objectives. We are proud of what we have created and of the men and women who have made it possible, especially those at DHS.

That concludes my remarks, Mr. Chairman, and I would welcome any questions.

[The prepared statement of Mr. James follows:]

Statement of

Ron James

Chief Human Capital Officer

U.S. Department of Homeland Security

Before the

U.S. House of Representatives

Committee on Government Reform

Subcommittee on the Federal Workforce and Agency Organization

"The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System"

March 2, 2005

Mr. Chairman. It is a privilege to appear before this subcommittee today to discuss the final regulations implementing the new human resource management system in the Department of Homeland Security (DHS). I am Ron James, Chief Human Capital Officer for the Department.

As the Congress recognized in creating the Department, we can't afford to fail in our mission to protect the country from terrorists and keep terrorists' weapons from entering the country. We need the ability to act swiftly and decisively in response to critical homeland security threats and other mission needs. To achieve this it is essential that we continue to attract and retain highly talented and motivated employees who are committed to excellence -- the most dedicated and skilled people our country has to offer. The current human resource system is too cumbersome to achieve this.

Almost a year ago, we issued proposed regulations for this new system – and sought input from the public at large, our employees and their representatives, and members of Congress. The open comment period drew over 3,800 responses. After taking some time to examine those responses, we followed the Congressional direction in the Homeland Security Act to "meet and confer" with employee representatives. Following several pre-meetings with union leaders, we officially began the meet and confer process on June 14th and continued through August 6th. Meetings were conducted at and facilitated by the Federal Mediation and Conciliation Service and resulted in DHS' adoption of many proposals made by the employee representatives. There were, however, major areas where we could not resolve our differences in the meet and confer sessions. As a result, in early September, we invited the National Presidents of

NTEU and AFGE to meet with the Secretary and the Director of OPM to present their concerns. While these discussions further informed the development of the final regulations, there remain several areas where we have fundamental disagreement with union leadership on aspects of the new human resources system. We believe these issues, such as using performance rather than longevity as the basis for pay increases and providing for increased flexibilities to respond to mission-driven operational needs while balancing our collective bargaining obligations, go to the very core of what the Congress intended in granting DHS these flexibilities.

Through this collaborative process, we have continued to follow a set of guiding principles that were adopted from the outset of our design process. Those principles state that the Department of Homeland Security must ensure, first and foremost, that its human resource management system is mission-centered, is performance-focused, and is based on the principles of merit and fairness embodied in the statutory merit system principles. We believe that we have achieved that balance in our final regulations.

These final regulations have a strong correlation between performance and pay and greater consideration of local market conditions. There are three major changes to the current General Schedule pay structure. We are replacing the General Schedule with open pay ranges and have eliminated the "steps" in the current system, which are tied largely to longevity. We are changing how market conditions impact pay. Currently, all job types in a market receive the same increase. Under our new system, pay may be adjusted differently by job type in each market. Finally, we are creating performance pay pools where all employees who meet performance expectations will receive performance based increases.

The system will make meaningful distinctions in performance and hold employees accountable at all levels. Current systems, which provide a general across the board increase and rarely denied within-grade-increases, do little to encourage or reward excellence in the workforce. Similarly, absent a market-based system we have no basis to ensure DHS' ability to compete for top talent for our important mission.

I know that movement to a pay-for-performance model is a big change for our employees and supervisors and there is a high level of internal/external interest in the more detailed aspects of how we plan to define and administer a pay-for-performance program at DHS. As a result of comments on the proposed regulations, and discussions during the meet and confer process we have made significant additions to the regulations to provide employees and their representatives a meaningful role in the design of further details in the pay-for-performance system – through a process of "continuing collaboration" in the development of implementing directives. In addition, we have created a Compensation Committee which will include representatives from the major DHS

labor organizations to address strategic compensation matters such as the annual allocation of funds between market and performance pay adjustments and the annual adjustment of rate ranges.

Additionally, during meet and confer, the labor organizations voiced strong concerns about the implementation schedule we proposed last year. Specifically, there were concerns that it did not allow adequate time to train managers and to evaluate system effectiveness. As a result of those concerns, we have significantly modified our schedule for implementing pay-for-performance. We will be introducing the new performance management system this fall, with extensive training over the summer months for all covered employees. New compensation programs, by contrast, will be phased in over the next 3 years, allowing ample time for training and program evaluation.

Approximately 8,000 DHS employees at Headquarters, Information Analysis and Infrastructure Protection, Science and Technology, Emergency Preparedness and Response, and the Federal Law Enforcement Training Center will be converted to our new pay systems in early 2006 and will not have their pay impacted by performance until early 2007 – some fifteen months after starting new performance management provisions. The balance of employees covered by these regulations will continue to see adjustments to their pay under the current GS system.

In 2007, another approximately 10,000 employees at the Secret Service and the Coast Guard will be converted to new compensation systems, with their first performance-based adjustments not occurring until 2008. Finally, in 2008, the remaining 66,000 employees – namely those in Customs and Border Protection, Immigration and Customs Enforcement, and Citizenship and Immigration Services will be converted from the General Schedule, with their first performance-based adjustments occurring in 2009.

Through this phased approach, the vast majority of DHS employees will have two to three full cycles under new performance management provisions prior to performance being used to distinguish levels of pay. This approach is prudent in ensuring that the organization has time to internalize key aspects of the new system and in ensuring that we have time to build greater employee understanding and confidence in how the compensation systems will be administered.

In addition to this change in the implementation schedule, at the request of the unions during meet and confer, we have provided a formal role for employees and their representatives in helping us to gauge whether the program is having the intended effects both in the short and long term. They will be asked to provide comments on the design and the results of the program evaluation.

Congress also granted us authority to modify the adverse actions and appeals procedures. We have streamlined the adverse action and appeals process while ensuring fairness and due process. We pledged at the beginning of this process to preserve fundamental merit principles, to prevent prohibited personnel practices, and to honor and promote veterans preference and we have honored that commitment. These are core values of public service, which we will not abandon.

We have retained the current definition of adverse actions, and have at the request of labor representatives retained the "efficiency of the service standard" for taking adverse actions. The minimum notice period has been shortened from 30 days in the current system to 15 days, but we have extended the minimum reply period from 7 days to 10 days. In addition, we have established one process for dealing with both performance and conduct issues in place of the separate processes under current title 5 provisions. These changes are needed to ensure that DHS supervisors are able to take administrative action when it is warranted. Standardized processes will make the appeals process easier to understand for those employees that are affected and to bring fair and efficient resolution for all parties. I am confident that the American public expects this level of accountability from the men and women that are charged with protecting our Homeland.

Additionally, we have created a category of offenses that have direct and substantial impact on the ability of the Department to protect homeland security. These offenses would be so egregious that supervisors have no choice but to recommend removal. Although we have not specified these offenses in the final regulations, we do suggest that accepting or soliciting a bribe that would compromise border security or willfully disclosing classified information are offenses that could reach this threshold. We would not propose to use this authority lightly or frequently and employees will know in advance the offenses that would warrant mandatory removal. Only the Secretary could identify these offenses, after consultation with the Department of Justice, and only the Secretary or his designee could mitigate the removal. Employees alleged to have committed these offenses will have the right to advance notice, an opportunity to respond, a written decision, and a further appeal to an independent DHS panel. At the request of DHS labor unions, we agreed that these offenses would be published in the Federal Register and made known annually to all employees.

The Merit Systems Protection Board will continue to hear the vast majority of our cases. Working with the Board, we have made significant procedural modifications to gain greater efficiency in decision-making and provide deference to our DHS mission. These modifications to MSPB procedures – including limited discovery, summary judgment, and expedited timelines – will further DHS mission without impairing fair treatment and due process protections. In

response to comments, we have adopted the "preponderance of evidence" standard for all adverse actions whether conduct or performance based. We also were persuaded by the DHS labor organizations to provide bargaining unit employees the option of grieving and arbitrating adverse actions – an option we had not included in the proposed regulations. Arbitrators and MSPB will use the same rules and standards governing such things as burden of proof and mitigation. In that regard, the Secretary and the Director were convinced by the labor organizations that our proposed bar on any mitigation should be modified – the final regulations provide for mitigation of a penalty only if the penalty is "so disproportionate to the offense as to be wholly without justification".

On the labor management front, the final regulations on labor relations meet our operational needs while ensuring that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions, which affect them. One of the most significant changes from current law is the change to the DHS obligation to negotiate procedures and impact of the exercise of management rights.

In the face of a committed and unpredictable enemy, the Department must have the authority to move employees quickly when circumstances demand; it must be able to develop and rapidly deploy new technology to confront threats to national security; and it must be able to act without delay to properly secure the Nation's borders and ports of entry. In the proposed regulations issued last year the Department was not required to bargain over the exercise of these rights nor over the procedures or impact. This was one of the primary issues raised by NTEU and AFGE both during intense discussions at meet and confer and in their meeting with the Secretary in early September. While they offered proposals to meet exceptional mission needs, those proposals did not go far enough. In today's operational environment, the exceptional has become the rule. Our final regulations require that we confer – not negotiate – with labor unions over the procedures we will follow in taking management actions such as assignment of work or deployment of personnel. The final regulations also require bargaining over the adverse impact of management actions on employees when that impact is significant and substantial and the action is expected to exceed or has exceeded 60 days. Neither the confer process nor the obligation to bargain impact can delay our taking the action.

In addition, we have altered our proposed regulations to provide for mid-term bargaining over personnel policies, practices and matters affecting working conditions. The standard for triggering this obligation is that the changes must be foreseeable, substantial and significant in terms of impact and duration. The "substantial and significant" test is consistent with current FLRA and private sector case law. In response to additional union comments, we have provided for binding resolution of mid-term impasses by the Homeland Security Labor Relations Board. We made several other changes from the proposed regulations as a result of the meet and confer sessions, including restoring Weingarten rights

and reinstating the union's right to be present at formal discussions except when the purpose is to discuss operational matters.

In order to ensure that those who adjudicate the most critical labor disputes in the Department do so quickly and with an understanding and appreciation of the unique challenges that DHS faces, we have established the Homeland Security Labor Relations Board (HSLRB). In response to Union concerns, we have provided a formal opportunity for labor organization participation in the nomination process for Board members. Board members, who will be appointed by the Secretary, should be known for their integrity and impartiality as well as their expertise in labor relations, law enforcement, or national/homeland and other security matters. The HSLRB will have jurisdiction over disputes concerning the duty to bargain, the scope of bargaining, negotiation impasses, and exceptions to arbitration awards involving disputes over the exercise of management rights. We retain the FLRA for all other matters including bargaining unit determinations, union elections, individual employee Unfair Labor Practices, and resolving exceptions to other arbitration awards. The FLRA may also be called on to review the record of an HSLRB decision in order to gain access to judicial review of HSLRB decisions.

We recognize that these are significant changes. They are necessary for the Department to carry out its mission and will unlock the potential of DHS to retain, attract and reward some of the finest civilian employees serving our country today. These final regulations fulfill the requirements of the Homeland Security Act to create a 21st century human resource system that is flexible and contemporary while protecting fundamental employee rights. We have developed these regulations with extensive input from our employees and their representatives and we have listened and made changes as a result of their comments. We believe we have achieved the right balance required between core civil service principles and mission essential flexibility.

That concludes my remarks. I welcome any questions.

Mr. PORTER. Thank you, Mr. James. I appreciate it. I have a couple questions.

Mr. McPhie, having had a chance to look at your written statement and then, of course, hearing your verbal statement, it appears to me that you have made it quite clear that you are not very much in favor of this change.

Mr. MCPHIE. Oh, no, not at all, sir.

Mr. PORTER. If I can finish. I appreciate your role is very important in the process, but my understanding is, from some of the discussions that you had with staff prior, that you were concerned about losing some caseload compared to what you have today; and in your testimony it sounds like you are expecting a major burden upon your organization. I know that you gave some specifics, training of judges, needing additional resources, and I can appreciate that, but can you tell me what you see is good about the change? Do you see anything good that could come of this if it is done properly?

Mr. MCPHIE. Oh, absolutely. Our role is a little bit different from everybody else here. Everybody here at this table is a stakeholder in any case, in any outcome of any case. We are not. Our role simply is when the system that is created—and we take the system that is created as it is created. When that system breaks down in some individual dispute, then we step in and sort of decide who wins, who loses, so on and so forth. So we come at this completely differently.

When I talk about the system—and I have had many a conversation with my good friend now, Dr. Sanders, and he knows where I stand on issues. We have had some very tough conversations and very friendly conversations, but in the end very helpful conversations. I assume that the best way I can serve the Federal employees and the best way I can serve the President, who appointed me, was to do the best darn job I possibly could when it came to establishing an appeals system. I have practiced law before these kinds of systems for many a year. Some of the conversation that was brand new to them had been there, I had seen that. I have represented employers. I have a unique capacity to understand what makes agency people tick; why they get upset with review bodies like the Board. I can tell you I have been privy to many discussions regarding mitigation. They hate it. Why? Because it is a limit on their power to do what they think is right. So there is a natural tension here.

The Board is not in a popularity business. We felt that the best way they can use us in a consultative role was really to say to our colleagues, the designers, have you thought of this or have you thought of that, and so on and so forth. I believe, contrary to what I have read in many statements, that the process provides due process to people. I think what people are reacting to are some of the particulars about the process. But the fundamentals of due process is in this: notice and opportunity to defend yourself in a meaningful fashion. Due process doesn't necessarily require defending before an external body, but this process says let us continue the external body, which is the Board. I think that is a good thing.

So when I talk about some of the timeframes and so forth, I am facing reality. Reality is I look at current caseloads and current

performance, and the Board turns around cases pretty quickly, all things considered. And then you have a whole body of cases that come in the door—and remember, we are going to have DOD cases too, at some point, I hope—and we are required to stop what you are doing and shift all your resources to this case that takes precedence. Well, you know, if you are in a non-DOD or a non-DHS, I am sorry, agency, they would argue that is unacceptable. So we are sort of between a rock and a hard place. But we have given our commitment to DHS. I think they struggled with a lot of different concepts and so forth. I think they started off with the desire not to have the Board, and I think they have come a long way in, in fact, giving the Board some power over their cases, and I think that is extremely important.

Mr. PORTER. Thank you, Mr. McPhie. I appreciate your comments. My point was that some of the discussions had with staff was contrary to what your presentation was this morning. We can continue this some other time, but I appreciate your response to that.

Mr. Davis.

Mr. DAVIS. Thank you.

Chairman McPhie, are you saying that your Board does not have the resources to meet the expedited timeframes of DHS relative to appeal?

Mr. MCPHIE. No, we can meet the expedited timeframes. The question is once we meet those expedited timeframes, how does it impact everything else. I heard Ms. Norton speak in terms of backlogs at the EEOC and what she had to do, so I assume she would appreciate the whole notion and displeasure and distaste of having to explain to people why they can't get a decision.

Mr. DAVIS. Well, when you say impact, are you speaking of positively impacting or negatively impacting?

Mr. MCPHIE. There is a potential for negative impact. I mean, we won't know for sure until—this stuff is a work in progress. We are looking at the numbers, the cases, where they are, the dynamics of personnel, that type of thing, and what we have to do at the various offices to make sure this thing works. Frankly, our preference—and I have been told this by staff over and over and over—in terms of regional offices, where the first-time action is, where the case is filed, where the hearing occurs, where there is a lot of interaction with the public, we don't want to create two tracks of cases.

Mr. DAVIS. Thank you.

Mr. SANDERS. Mr. Davis, let me just interject too. One of the projections that we built into the regulations in response to the concerns that Mr. McPhie shared with us during the consultation process was a provision that says if the Board fails to meet the time limits imposed, that will not prejudice any party to a case. So there is not an automatic default. If they don't meet the 90 days for an AJ decision, which is in fact the current time targets anyway, or 90 days after that for a full Board decision, a total of 180 days, if they fail to meet that, that doesn't mean that one side or the other automatically loses. The regulations say that doesn't prejudice either party, they simply go about their business and render their decision.

Mr. DAVIS. Very good.

Mr. Sanders, let me just ask you. In your testimony you talked about a mathematical formula for performance payouts. Could you amplify that a little bit? How would that work?

Mr. SANDERS. There are four variables, and at the risk of giving you all migraines: performance rating, pay pool and the dollars in the pay pool, and the ratings distribution. We have already talked a little bit about the rating. You will see a multi-level rating system, except for trainees, no pass-fail, and the pay-for-performance system in the Department of Homeland Security. So fully successfully, most likely fully successful exceeds an outstanding. Let us say three levels. If you are unacceptable, you don't participate in performance pay. And as Ron James said, nor do you get across-the-board increases.

So let us focus on those people who meet expectations, exceed expectations, and who are outstanding. Managers rate those employees just as they do today. Each of those ratings has a point value. That point value is established at a higher headquarters through oversight of the Compensation Committee. The funding in that pay pool is also established at a higher headquarters with oversight from the Compensation Committee. You simply take the rating, multiply it times the point value, and divide the points into the dollars, and you get your share of the pool.

And let me anticipate a question. The regulations absolutely positively bar and prohibit forced distributions of ratings. You can't bust the budget because the pool is finite. You simply divide the available dollars in the pool amongst the employees based on their rating. And the amount in the pool, the amount of the Department's payroll that will go to performance pay is set by the secretary on the advice and input of the Compensation Committee, four members of which are from the Department's two major unions, far more influence in those matters than unions currently enjoy today, where they sit on something called a Federal Salary Council and get to talk a little bit about locality pay. Under the Compensation Committee they will determine how much of the Department's annual appropriations increase in payroll goes to performance, the national market adjustments and local market adjustments. Secretary reserves the right to make final decisions; after all, he is accountable for the budget. They will decide how that is divided up by location and occupation, and how much goes into the performance pay pool set up under the system.

Again, unions have involvement. It is not collective bargaining, which is what they preferred, but they have substantial involvement in that process to provide the oversight and credibility to make sure it works.

Mr. DAVIS. Let me ask you what happens to an individual who is rated unacceptable?

Mr. SANDERS. A individual who is rated unacceptable somewhere in the salary range simply doesn't get a pay increase, either performance pay or across-the-board. If the employee is at the bottom of the range—and this is one of the details the unions asked us to address. You have undoubtedly heard a lot of folks complain about the lack of detail in the regulations. I am here to tell you we added substantial detail during the meet and confer process. This is one

of those details. If the employee is at the minimum level of pay, he or she is unacceptable and everybody else in the pay range goes up because they get across-the-board increases, the regulations require management to take action in 90 days. They don't just let the employee sit there. Either the employee's performance improves and they move back up into the range with everyone else, or the Department either demotes or removes the employee.

The unions actually asked us for that provision because it requires management to take on the burden of proving the unacceptable rating and proving the adverse action by a preponderance of evidence against the employee. But if they are in the middle of the salary range, if they are unacceptable, they do not get performance pay or an across-the-board increase.

Mr. DAVIS. So they get counseling, they get help to improve their rating, or they know——

Mr. SANDERS. Exactly, Mr. Davis. That is what that 90-day period is for. It is not an immediate action; 90 days to improve, and hopefully, if they do, they move up in salary along with everybody else who is fully successful. But if they don't, then action is taken.

Mr. DAVIS. Thank you very much, Mr. Chairman, and I ask unanimous consent to have inserted into the record these two articles here from the Washington Post.

Mr. PORTER. Thank you. With no objection.

[The information referred to follows:]

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EDITORIAL

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Pentagon Work Reforms

Tuesday, March 1, 2005; Page A14

AS PROMISED, the Defense Department has followed the Department of Homeland Security in proposing new rules on promotion and pay for its 770,000 civilian employees. Like those proposed at DHS, the new Defense Department rules are intended to modernize a large and often unwieldy bureaucracy, and to better prepare it for the post-Sept. 11 world. As at DHS, the Pentagon's new system sounds terrific on paper. The proposed regulations advocate an "agile and responsive workforce," "fiscally sound" management, and a "credible and trusted" system that ensures accountability and fairness. The new arrangement, known as the National Security Personnel System, is above all intended to link pay more closely to employee performance. Subtly, it may even give performance priority over seniority in hiring and firing decisions.

And -- just like the Department of Homeland Security's proposed changes -- the proposed Defense Department civil service reform raises a number of alarms. This is not because it is wrong in principle, but rather because it contains in practice a number of changes that could, if not monitored, lead to the greater politicization of what should be a neutral government department. An extremely complex system of distributing performance-based pay is proposed, with few details about how performance will actually be measured. It isn't immediately clear, for example, how performance measures in the new system will differ from those in the existing system. Without clarity -- and extensive training for managers -- it would take very little for politicization to creep in.

Second, this proposed reform, even more than its predecessors, appears to curtail union rights in unnecessary ways. Although Pentagon officials deny it, some

Today's Post Editorials
- Dollar Jitters (Post, March 1, 2005)
- An Epidemic of Murder (Post, March 1, 2005)

government employee unions say that they were not properly consulted on the new rules, as the law requires, and they have filed a lawsuit. Union officials also say the new rules seem designed to take away workers' rights, without any clear explanation of why this is necessary. At the moment, for example, they say managers are allowed but not required to bargain with unions over job placements and assignments; the new rules appear to forbid any bargaining. The same is true of decisions about overtime. Officials ought to explain what, if anything, these changes have to do with national security, as opposed to weakening the unions.

More important, Congress ought to ask for explanations and explore in greater depth the whole issue of civil service reform. Because these personnel decisions involve so many people, and could have such national impact, lawmakers should consider stepping in to help define what performance criteria mean, to preserve a meaningful appeals process and to ensure that unions stay involved in government employee affairs, at least when there is no reason to bar them.

• Pentagon Work Reforms (Post, March 1, 2005)

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Guarding the Civil Service

Merit Systems Protection Board's role must be preserved in new personnel plans.

By William L. Bransford and Walter M. Shaub Jr.

After more than a century of building safeguards against conditions that once sparked a nationwide crisis of faith in the federal government, Congress has started a process that could allow at least part of the federal government to disassemble those safeguards.

Among other recent changes to the civil service, Congress has authorized the Department of Defense and the Department of Homeland Security to diminish the quality and nature of the due process protections for more than 800,000 civilian officials.

New personnel systems for these employees are just now taking shape, with the Jan. 26 issuance of final regulations by the Homeland Security Department and the Feb. 14 issuance of proposed regulations by the Defense Department. Some in Congress contemplate extending the same authority throughout the government, possibly as soon as this year.

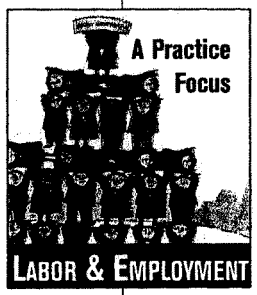
Fears about the consequences of this shift away from due process protections reflect more than a mere policy disagreement on the part of career managers and staff on the one hand and political appointees on the other. At stake is the extent of continued public trust in the impartiality and integrity of public officials whose actions increasingly affect aspects of every American's life.

Law and Merit

Below the political layer of the federal government, which sets policy, thrives a career civil service, which does the work of government. At issue are the influences that affect this career civil service. Unlike countries where bribes are expected and personal connections are necessary in governmental dealings, citizens of the United States expect that the government's decisions will be based on law and merit. To the extent possible, we guard against any improper influences in government operations.

One of our most effective tools for ensuring that governmental decisions are based on merit is the corresponding requirement that the civil servants who make those decisions are judged solely on merit. Loss of this requirement opens the door to influences on government operations that have nothing to do with the public interest. It is precisely this safeguard that could potentially be diminished by these new personnel systems.

The statutory structure underlying due process in the civil service establishes merit systems principles and prohibited personnel practices, which amount to more than a statement of aspiration for principled leadership. These laws lay down rules for what the government must do and must not do with respect to the employment of individual civil servants.



The core value in these laws is that all personnel decisions must be based on merit. The structure expressly safeguards individual officials from retaliation for reporting violations of law, abuses of authority, dangers to public safety, dangers to public health, and gross wasting of appropriated funds. It also protects employees from unlawful discrimination based on factors such as race, gender, national origin, and age, as well as from other forms of favoritism, such as promotions based on misplaced loyalty to individual leaders rather than to the public interest.

These protections have teeth because the Merit Systems Protection Board, an independent executive branch agency, has jurisdiction to enforce them. The MSPB ensures that the major personnel actions of federal agencies are genuinely based on merit, evaluating whether charges are supported by the record and whether penalties exceed the bounds of reasonableness. This watchdog is successful beyond the cases it hears because the potential for the MSPB's review stems abusive practices and creates an environment where such practices are less likely to occur.

At the same time, a federal agency's burden before the MSPB is not onerous. The standard of proof in employee misconduct hearings is just a preponderance of the evidence, and an agency need only show that the charged misconduct more likely than not occurred. It is even lower in performance cases, in which the board gives an agency the benefit of reasonable differences of opinion and requires that a poor performance charge be supported only by substantial evidence.

The MSPB reports that it is able to close cases in an average of 96 days, and the government can take an employee off the payroll while a case is pending. In emergencies, the

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employee is not even entitled to advance notice. As to overall outcomes, the MSPB reports that it sustains agencies' personnel actions in roughly 80 percent of its hearings.

ATTACKING THE MSPB

Notwithstanding this record, the MSPB has been under assault since Congress passed the enabling legislation for the Department of Homeland Security in November 2002. Congress has now granted the Department of Homeland Security authority to replace board appeals with an internal review process. This process is intended to preserve minimal due process, but it potentially eliminates outside review of employees' claims of improprieties.

For now, the department has decided to subject itself voluntarily to the MSPB's continued jurisdiction over most types of major personnel actions, but the department has imposed certain restrictions on its employees' appeals that will diminish the likelihood of the MSPB reversing a disciplinary action.

Carving out a significant exception to the MSPB's authority, the new Homeland Security regulations also create an internal appeal process for disciplinary actions based on certain categories of offenses, and it remains to be seen what categories of offenses the department will designate for this process. The department also continues to have the authority to opt out of the MSPB's jurisdiction altogether.

Having received similar statutory authority, the Defense Department has just issued proposed regulations that will retain MSPB appeals, but with a twist. If an MSPB official overturns the department's disciplinary action, the Defense Department can invoke a national security exception and overrule the MSPB official.

Following such action, an employee can seek appellate review by the full board at the MSPB. However, the Defense Department's proposed regulations would lower the standard for the MSPB's final review to a substantial evidence standard, in place of the preponderance-of-the-evidence standard the MSPB has always employed for misconduct cases.

The unanswered question is how this potential reduction of procedural protections, including the elimination of fully independent review for some offenses, will ultimately impact the impartiality and integrity of government.

Federal officials are subject to standards of conduct that are stricter than those imposed on their private sector counterparts. They may not, for instance, accept courtesies that are commonplace in the private sector, and their personal financial holdings are subject to rigorous divestiture requirements unlike anything in the private sector. Enforcement can be tougher, too, with entire agency offices devoted largely to investigating allegations against employees.

Balanced against such restrictions and investigations are the due process protections that prevent abuse. The coupling of these protections and restrictions was formalized in the late 1970s, when Congress enacted the Civil Service Reform Act in the wake of Watergate, but their origins date back much further.

SPOILS SYSTEM

These civil service protections are logical outgrowths of bipartisan revulsion at the excesses of the "spoils system." When Andrew Jackson was president in the 1830s, there were only about 20,000 federal employees and the work required few skills. The entire workforce faced possible replacement at each election, and newly installed politicians doled out jobs to reward campaign workers, donors, and party operatives.

Corruption flourished under a de facto patronage system through which applicants were known to pay for government posts. The 1881 assassination of President James Garfield by a mentally unstable political supporter who failed to reap any spoils of that victory turned the tide in favor of reformers who wanted to create a meritocracy in the federal government.

Two years later, Congress passed the Pendleton Act, which established a merit-based civil service system. Over the following century, the meaning of the merit principles underlying that system has been fleshed out through legislation and executive order, with appeal rights for veterans dating back to the 1940s and appeal rights for nonveterans dating back to the 1960s.

BACK TO THE PAST

Now, after more than 120 years, Congress is considering allowing the civil service to drift back to earlier times when federal employees lacked these rights.

In November 2002, when Congress passed the legislation involving the Homeland Security Department, the Government Accountability Office cautioned Congress against further enactment of laws allowing personnel flexibility to additional agencies until a "business case" is made for such flexibility. The GAO added that most agencies are not fully using the flexibility that already exists.

While GAO struck the right chord by signaling caution, a business model is not necessarily the right model in connection with inherently governmental activities. Discarding due process protections in favor of a private business model jeopardizes the public's confidence in the integrity and impartiality of decisions by career officials. Unlike business decisions, governmental decisions must be made in the public interest.

In this context, the abridgment of due process is unlikely to enhance either efficiency or effectiveness. Instead of inspiring excellence, it could foster a risk-averse workforce of officials whose responsibilities are inevitably risky.

As a result, officials may factor into decision-making the threat of being penalized with disciplinary actions for any decisions that may later prove unpopular. The inability to have a full and fair review of those disciplinary actions will affect not only the decision-making process, but also the likelihood that an unfounded action will be proposed against an employee.

The very worst of dire predictions is probably premature, especially since the initial trend seems to favor keeping the MSPB for most Homeland Security and Defense employee appeals. Even at the height of civil service protections, it was not unheard of for political appointees to choose outside acquaintances over experienced career officials for senior nonpolitical posts and for other abuses motivated by partisan politics to occur.

We should be mindful that the federal government enjoys a good reputation for impartiality because its institutions are solidly based on a respect for the law and the merit system.

As the Departments of Homeland Security and Defense implement their new personnel systems and as the rest of the civil service prepares to follow, the role of the MSPB should be fully retained to ensure the independence and thoroughness of review that provides integrity and credibility to our government.

William L. Bransford is a partner in the D.C. firm of Shaw, Bransford, Veilleux & Roth. He represents federal executives, managers, and employees. Walter M. Shaub Jr. is an associate at the firm. The firm's Web site is www.shawbransford.com.

Mr. PORTER. I have received numerous questions from law enforcement officers. There is a concern about how they will be evaluated under this, whether it be from Border Protection, but certainly all law enforcement has been very consistent. Could one of you gentlemen address some of those concerns specifically, please?

Mr. SANDERS. How about if I start, Ron, and you leap in?

The key here is what you measure. David Walker talked about competencies. You can measure competencies, you can measure behaviors, you can also measure results. Everyone agrees that measuring results amongst a team of law enforcement officers is problematic. So if you take care as to what you measure, and if teamwork is the most important criterion for performance, you simply structure your performance management system to ensure that is the competency or the behavior that you reward. And we all know that some people contribute more to a team than others. There are observable, objective behaviors that manifest somebody who is an excellent team member and somebody who isn't; and as long as the Department takes great care—and I can tell you, Mr. Porter, the Department is very concerned about the notion of creating destructive competition amongst employees not just in law enforcement groups, but in any workgroup, where they have to operate as a team. And if you take great care as to what you measure, then you can reinforce positive behaviors that actually help the team perform at a higher level rather than negative ones.

One of the reasons the Department has gone to a far more measured implementation schedule, with employees having a minimum of 1 year under the new performance appraisal system before their pay is affected, and in the law enforcement arms of the Department 3 years before their pay is affected, is to make sure that they deal with that very concern you have expressed and that we have heard from numerous employees and their managers.

Mr. PORTER. Thank you.

Ms. Holmes Norton.

Ms. NORTON. Thank you very much, Mr. Chairman.

I must say all your testimony has done, Mr. Sanders, is illustrate just how difficult it is to come up with an objective system for pay-for-performance. Again, I speak from some experience, where, in an agency that wasn't doing well, we had great differences among employees. I am trying to put myself in the place of a manager who finds herself with truly outstanding employees at a certain level, less outstanding at another level, no real incompetent employees. You really drive me back to my other profession. I still am a tenured law professor at Georgetown, and we mark on the curve. When you get to law school, you don't expect anybody to fail, but, particularly if it is a good law school, there is a real necessity to drive yourself as between the As, the A-minuses and the B-pluses. Now, no money is attached to that. And when you tell me there is a number that you divide into the number of employees, I see either what we are trying to get away from, which is kind of driving toward some medium point, perhaps even mediocrity, or rewarding my truly outstanding employees and leaving everybody else in the lurch. Tell me how to get out of that.

Mr. SANDERS. There is enough in the performance pay pool to make sure that fully successful employees get shares that are

worth something, those who exceed expectations get shares that are worth more, and those that are outstanding get even more. Let me drive you to another of your professions—and you have alluded to this—your experience in transforming EEOC. In that experience, it is a sort of microcosm of what is going on at DHS. There are some who are going to take on the tough work of transformation, they are going to do everything they can, they are going to work long hours and take risks to see improvement in the system, and there are others that don't. Some are along for the ride, they still contribute; others actively opposing. I am sure you would have loved to have a tool like this to take those people who took on the risks, worked hard, made the transformation work, where under the General Schedule the best you could do was pat them on the head and said, well, if you are due a step increase this year, you get it, but your colleagues who may not have worked as hard may also get one, and, by the way, everybody else is getting——

Ms. NORTON. You contemplate a kind of curve division of some kind, and yet we heard in the prior testimony from GAO that you had no performance infrastructure in place, that no core competence is spelled out, employee expectation spelled out. I am really wondering if managers aren't in some kind of jeopardy or in as much jeopardy as employees in this so-called scientific system that you have just elaborated.

Mr. SANDERS. With all due respect to General Walker, the regulations are superimposed upon departments and agencies that have exited for some time. For example, Customs and Border Protection, created out of the Customs Service and part of Immigration, has a long history of excellent human capital practices, of identifying competencies and evaluating employees based on them. They are not in the regulation. General Walker is correct, the regulations do not require competencies, but they list competencies as among those things that employees should be evaluated on.

Ms. NORTON. And what else, if not competencies, are you going to be evaluated on?

Mr. SANDERS. Depending on the job, it could be results, it could be behaviors, it could be knowledge and skills.

Ms. NORTON. And it is left up to the manager? Who is going to decide this?

Mr. SANDERS. No, ma'am. That is what the overarching system provides. The Department and its components will be setting those particular performance elements. It is not going to be up to a manager to say, well, I think I am going to judge you on X today and Y tomorrow.

Ms. NORTON. So we are just at the very beginning of this process, because then these various departments—which are all supposed to be in the same thing, but in any case I understand the differences—are not going to have to get together and, I take it, department by department decide their own competencies, performance standards, etc.?

Mr. JAMES. No. If I could just weigh in. Let me make clear that——

Mr. PORTER. Excuse me. Mr. James, would you just state your name for the record?

Mr. JAMES. Yes, sir. Yes.

Mr. PORTER. Thank you.

Mr. JAMES. It is Ron James, of DHS.

The regs in fact have been published, but the regs do not take effect until the secretary signs them. We anticipate that labor relations, adverse actions, and appeals will probably go into effect sometime in the fall.

Ms. NORTON. What is March 3rd?

Mr. SANDERS. That is simply the minimum time——

Mr. PORTER. Mr. Sanders, if I could ask the panel, when you comment, if you would state your name, it would help when they do the minutes. Thank you.

Ms. NORTON. And March 3rd is? I am sorry, I am trying to reconcile that with what was just said. March 3rd what happens?

Mr. SANDERS. That is simply the minimum period of time, 30 days after they are published, they can go in effect. But the regulations provide in the very first subchapter that because of that phase-in that we have talked about, the secretary then signals at the appropriate time, when the infrastructure is in place, it is now time to implement the labor relations and adverse subchapters, or later it is now time to implement the performance management subchapters.

Ms. NORTON. OK, I am going to disregard—particularly based on what you just said, I am going to disregard March 3rd and assume that no rational being would put these into effect before things like core competencies for each of these agencies, does an agency, if so, were developed, before employee expectations were fully down in writing and understood. Is that correct?

Mr. JAMES. It is Ron James again, and that is exactly where I was going. I was going to share with you that right now we are doing employee focus groups. We are doing those in 10 places around the country. We are getting employer management input on our job clusters, that is, what is similar, what is alike, what kind of job make sense. We are doing that with both employees or union employees and non-union employees. At least from our two major unions we have solicited union employees to be involved in those focus groups. We have solicited specifically law enforcement focus groups to be involved, because we understand that we need to understand the dynamics of that particular group.

And let me just add again that we are looking at this very carefully and very slowly; not only feedback from the focus groups, but feedback from the union. We anticipate that our first pilot group to put our performance management in place probably in January of next year. That will be put in place for all of our employees, but the only employees who will be affected pay-wise in January 2007 will be a group of 8,000 employees out of roughly about 90,000 employees who will be impacted, because TSA, which has 45,000 employees, and the Military Coast Guard, which has about roughly 40,000 employees, will not be impacted and will not be part of the pay-for-performance system.

Our second wave, which will take place the following year, will be roughly 18,000 people. And our last wave, which will be almost 65,000 to 70,000 people, mostly law enforcement, they will not be impacted based on the new performance management system or will be impacted in terms of pay until January 2009.

We have taken General Walker's comments to heart; we have taken the unions' comments to heart. We understand that we need to do this, evaluate it, get feedback, and we may need to make changes; and that is part of the reason that we wanted the flexibility of not putting details into the actual regulations, because we may in fact understand we will need to make adjustments. We should let the data and the feedback of the employees drive us where we are going.

Ms. NORTON. Absolutely so. Just so it gets put at some point down in writing.

Mr. JAMES. That is where we are heading.

Ms. NORTON. You are going to have a slue of various kinds of actions of just the kind the whole reform is designed to get rid of unless these things are written down so that employees can understand. I mean, that is minimally what, of course, we would require, and that is something, it seems to me, the committee ought to follow very, very closely.

I have to ask a question about so-called mixed cases. When I was at the EEOC, what really confounded us most was these mixed cases, Mr. McPhie, where you have a combination of an adverse action of some kind and a discrimination action. Now, I understand that some of these cases will be handled within this so-called internal appeals system that is being set up. Will this special panel have members of the EEOC and the MSPB sitting on the panel, the internal panel?

Mr. SANDERS. Yes, ma'am. One of the things we did, although the law—I am sorry, Ron Sanders from OPM. One of the things the law allowed DHS and OPM to do was modify the mixed case procedures. We chose not to do that. We did not want to do anything in the regulations that diminished an employee's right to file a complaint of discrimination. So they can still file a mixed case before the Board, and you know that process probably better than we do. With the Mandatory Removal Panel, the same process identically; the only exception is that instead of MSPB members it is Mandatory Removal Panel members. When the special panel convenes, it is EEOC and the Mandatory Removal Panel getting together to adjudicate the case.

Ms. NORTON. So it is a mixture of the—then the MSPB isn't really involved in that internal system.

Mr. SANDERS. For the cases that the Board does not hear. For the cases it does hear, it sits with EEOC. For the cases it does not hear, but are heard by the Mandatory Removal Panel, it is the panel that sits with the EEOC.

Ms. NORTON. Well, Mr. McPhie, what was your recommendation on that matter, the exclusion of an MSPB member from the mixed case notion, where it could be either discrimination or it could be an adverse action?

Mr. MCPHIE. The special panel hasn't been used for some time, for one reason or another, so there is no recent board history about how effective the special panel is. However, the special panel ought to have the adjudicators where the dispute arises on it.

Ms. NORTON. Can you speak more into that mic, please?

Mr. MCPHIE. It seems to me I don't really understand the distinction in the composition of the panel between mandatory re-

moval offenses and all other kinds of offenses. I heard Ron say that we don't hear those cases, but we do in some respect. We don't hear them initially, but there could be a review of a mandatory removal case before the Board, and then the Board can issue its decision. To the extent that decision conflicts with what EEOC's view of the outcome should be, then it seems to me the two agencies that really have the dispute are EEOC and the Board, as to whether or not discrimination occurred or didn't occur.

So I go back. I have to follow——

Ms. NORTON. And there is an appeal after that.

Mr. MCPHIE. Yes, ma'am.

Ms. NORTON. Well, why is there any time saved?

Mr. MCPHIE. You know, I have to bow to the expertise of my colleagues here. For better or for worse, the Congress intended the statute to work in the way in which it has worked, OPM and DHS are the designers, period.

Ms. NORTON. But if there was an MSPB member and the EEOC member, or somebody with expertise in both sitting on this internal review panel when it hears these mandatory matters, might not that decision be more inclined to be seen as final than having one panel—and God help this internal review person, I can tell you. If he is going to understand this mixed system, he better start going to college right now all over again. But wouldn't it help to bring finality if both agencies were somehow represented in this rather small group of cases for mandatory removal?

Mr. MCPHIE. Well, I hate to speculate. Cases are funny animals. The things you expect to happen don't happen. The things you don't expect, those are the things that happen. I think there is a potential for some improvement in timeliness, but until we really see this thing in action, I don't know that we know for a fact whether or not the special panel is going to be effective or not effective. I don't want to go too far afield in guessing and speculating about matters that may or may not occur, and I hope you understand that. At some point I am going to have to put on my adjudicative hat and decide somebody's case, and I can't bring any preconceived notions or some baggage——

Mr. PORTER. Ms. Norton, we have gone beyond our time, and there certainly——

Ms. NORTON. Yes. Thank you, Mr. Chairman. You have been generous.

Mr. PORTER. We will have another round also, if you would like, and you are welcome to use some of my time if necessary, but if we could wait for a moment.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

Thank you, gentlemen, for your testimony. I just have one comment and a couple quick questions, I hope. The first is on the pay-for-performance. You heard the testimony of Mr. Walker and you have heard some of the comments from the committee. The issue is making sure when you put a system like this in place it has the trust of the employees, the confidence of the employees, it is reliable, it is predictable. People have been working out with these different assessments in the private sector for a long time, and in many cases successfully, in some cases not successfully. But the

key—and the Government Accountability Office itself implemented a similar pay-for-performance system. But if you don't do it right, as I said, you are going to undermine the confidence of employees, and it is very difficult to retrieve that once it is lost. So I think I would just urge you to tread very carefully and consult with this committee and others as you move forward on that.

With respect to the grievance procedure, first I want to say that I am pleased that you decided to adopt the preponderance of the evidence standard. There had been some talk earlier on of having a different standard the traditional standard. I am a little concerned and really question why you would interfere with the Board's ability in some of its current powers in the area of mitigation. And I think, Mr. James, you would agree that part of the reason for having a Merit Systems Protection Board review is because it is an independent body outside of the agency. Is that right?

Mr. JAMES. Yes.

Mr. VAN HOLLEN. OK.

Mr. JAMES. Ron James. Yes, sir, that is right.

Mr. VAN HOLLEN. OK. And so right now the standard is that they would support whatever action is taken by the Department, so long as it is "within the range of reasonableness." That is the standard currently in use. So my question to you is why would you be opposed to having an independent agency mitigate the damages if they found that the action taken against the employee was not within the range of reasonableness? Why isn't that a good standard for an independent body to hold? Why do you want to throw that out in favor of some new standard that has no precedent associated with it and really is not clear?

Mr. JAMES. Sir, this is Ron James again, and let me try to do this without practicing law and be a good client. I have been reliably advised, and I have actually read some of the cases, but I have been reliably advised by our counsel that they read the MSPB cases as requiring deference to managers. Our overriding concern has, and continues to be, deference to mission. And we would respectfully submit that the current case law and the current standard that MSPB has in place doesn't get us to that second critical goal, that is, deference to mission.

We happen to believe that we are just a little bit different than other Government agencies; that when employees don't show up to a duty or post, that is not the same at Homeland Security as it should be at some other agency; and that is a rationale. There are people that disagree with that, but that is how we got there. We do agree that it still needs to be an outside agency. We also have a very strong belief that in order to accomplish our mission, we need to have that mission essential fundamental principle grounded in the mitigation principle, and we don't believe it was there.

Mr. VAN HOLLEN. Well, let me just say I think part of looking at the reasonableness standard, the Board, as an independent board, can take into account what I think we all agree is the special mission of the Department of Homeland Security and make a determination within the context, within the range of reasonableness. That can be a pretty big range, given the fact that they give deference to the agency.

Anyway, I don't want to belabor the point, but I do think that concocting a whole new standard when you have a standard that is very broad here to begin with, I think is a mistake.

Let me just ask you——

Mr. SANDERS. Mr. Van Hollen——

Mr. VAN HOLLEN. Let me ask you quickly, before my time runs out, and I would be happy to hear the response.

With respect to an issue regarding the ability of employees within the Department of Homeland Security to be part of a bargaining unit, as I understand right now, there are about 1,900 employees who are currently within the combined Bureau of Customs and the Border Protection [CBP], who are currently designated as bargaining unit employees eligible for union representation, and that under the proposals you have made there has been a re-designation of those employees, and they would no longer be covered within the bargaining unit. I would appreciate—first of all, I don't know if you are aware of that issue and, second, if you are, if you could please comment.

Mr. JAMES. It is Ron James again, sir, and I am aware of that issue. I was aware that was before the FLRA. My understanding is, and I will correct this if it is wrong, as of 2 days ago, that we were in intense discussions with unions about how many of the 30,000 employees, if any, should be excluded from bargaining unit positions; and my understanding is we were down to under 2,000. That was my latest information. But my understanding also is that the discussions have not been completed and that it is a matter that will ultimately be resolved by the FLRA if the parties can't reach a consensus. And if I could supplement my comments to make sure that my status report is in fact up to date and accurate, I would appreciate that.

Mr. VAN HOLLEN. Mr. Chairman, in fact, I would appreciate it if you would supplement your comments in writing.

Let me, in closing, just on that last point. Is it your intention that employees who are currently being covered by the bargaining unit continue to be allowed to be covered by the bargaining unit?

Mr. JAMES. I am not sure how to answer that question. It is Ron James again. If we move somebody from a position that doesn't require a security clearance, and they are currently covered and they are going to get a security clearance, it would be our anticipation that—or if we were to promote them where they were actually a working supervisor or supervisor, they would in fact move outside the bargaining unit. I am not quite sure how to answer.

Mr. VAN HOLLEN. OK. Well, within the current classifications that exist.

We can pursue this later, Mr. Chairman.

Also, I would also appreciate your response in writing.

Mr. JAMES. It is Ron James again, sir, and I would be happy to followup and provide the Chair and you with information on the status and exactly what we are intending to do.

Mr. VAN HOLLEN. Thank you.

Mr. PORTER. Thank you, Mr. Van Hollen, very much.

I have an additional question regarding the pass-fail system. I know we have touched upon it a little bit this morning, but the final regs say that the entry level employees and others in extraor-

dinary situations will be placed under a pass-fail system. How is it possible that such a system can be compatible with a performance-oriented? Could you help us with that?

Mr. JAMES. It is Ron James again, and we are not absolutely committed to doing that, but we felt, and I concur, that we need the flexibility. And let me give you a couple examples. For example, if we want you to get certified, that is, to carry a gun, you either pass that or you fail that; you either go up, out, or you go back. If you are in school for 9, 9 months, and there are certain technical competencies with regard to IT, that is either pass-fail; you either match the technology or you don't. We simply wanted the flexibility to build in at more of the classroom setting or the marksman certification setting or at the IT setting where it is really a question of yes, I understand I have mastered this particular field. We would not see that as something we would use at other levels; we see it as being used on a very limited basis. In many instances some of our employees are in school for 6, 8, 9 months, and don't have a supervisor, and they are basically going to school and passing courses or failing courses.

Mr. PORTER. Thank you.

We do have a time limitation. Are there any additional questions?

Mr. DAVIS. Just one, Mr. Chairman.

Mr. PORTER. Yes, Mr. Davis.

Mr. DAVIS. Mr. James, I understand that training on the new system is going to begin this summer. If that is the case, who will be trained and who will do the training?

Mr. JAMES. It is Ron James from DHS, and let me begin with a thesis that we are really talking about paradigm change in terms of how our managers react and how our managers get evaluated, and how, if our managers fail, our system will hopefully provide consequences. We have started training already. We have $10 million this year in our budget; we would hope to have $10 million for next year, because we can't do this change management without training our labor relations specialists, our HR folks, our first-line supervisors, our managers, the managers' managers. And we also plan to work with Mr. McPhie, Chairman McPhie. We would anticipate—and I don't know if we could call it training, but some cross-training with MSPB. We also hope to have some briefing sessions with our union brothers and sisters so that we are both dealing with the same data base. And we would hope that would cascade down. We also are going to need to train our employees, because we would expect our performance management system not to be a one time a year system, but to be an inter-reactive system, that the employee and the manager would collaborate, establish goals, mutually agreed upon that a line with the unit's mission and with the departmental's missions.

So we are going to have some training all across the board. And that is again the reason why we decided to phase this in over a 3-year period. The training is absolutely, unequivocally the predicate to making this work.

Mr. DAVIS. Thank you very much, Mr. Chairman.

Mr. PORTER. Thank you.

Mr. James, Mr. Sanders, Mr. McPhie, we appreciate your being here today. Thank you very much for your testimony. Look forward to working with you.

We are going to have to vacate the room at approximately 1, so I guess that is good and bad, depending on whether the witnesses want to have a lot of questions.

So now I would like to invite our third panel of witnesses to please come forward. We will hear from Ms. Colleen Kelley, national president of National Treasury Employees Union; next hear from Mr. T.J. Bonner, president of the Border Patrol Council of the American Federation of Government Employees; and finally we will hear from Mr. Darryl Perkinson, national vice presidente of the Federal Managers Association.

Thank you all. You each will have 5 minutes. I will wait for you to get situated just a moment.

I would first like to recognize Ms. Kelley. Welcome. Thank you for being here.

STATEMENTS OF COLLEEN M. KELLEY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; T.J. BONNER, PRESIDENT, BORDER PATROL COUNCIL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; AND DARRYL PERKINSON, NATIONAL VICE PRESIDENT, FEDERAL MANAGERS ASSOCIATION

STATEMENT OF COLLEEN M. KELLEY

Ms. KELLEY. Thank you very much, Chairman Porter. It is an honor to be at your first hearing, and we appreciate it being on this important subject.

Ranking Member Davis, it is always a pleasure to be here, and I know the importance that this committee puts on issues around Federal employees and those who we represent.

I appreciate the opportunity to testify before the subcommittee on the final human resource management regulations for DHS on behalf of the 15,000 DHS employees represented by NTEU. The Homeland Security Act requires that any new human resource management system "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them."

NTEU believes that the final regulations do not meet the statutory requirement in the following ways. First, under the final regulations, the responsibility for deciding collective bargaining disputes will lie with this three-member DHS labor relations board appointed, as we heard, by the secretary with no Senate confirmation of the board members. A true system of collective bargaining demands independent third-party determination of disputes, and the final regulations do not provide for that. Second, under the final regulations, not only will management rights associated with operational matters, such as the deployment of personnel, assignment of work, and use of technology, be non-negotiable, but even the impact and the implementation of most management actions will be non-negotiable. Third, the final regulations further reduce DHS's obligation to collectively bargain over the already narrowed

scope of negotiable matters by making Department-wide regulations non-negotiable.

A real-life example of the adverse impact of the negotiability limitations on both employees and the agency will be in an area determining work shifts even when they will last for more than 60 days. The current system provides employees with a transparent and explainable system. After management determines the qualifications needed for employees to staff shifts and assignments, negotiated processes provide opportunities for employees to select shifts that take into consideration important quality of life issues of individual employees, such as child care, elder care, the ability to work nights or rotating shifts. There will be no such negotiated process under the regulations as issued. The impact of these changes will be a huge detriment to Homeland Security's recruitment and retention efforts of employees.

One of the core statutory underpinnings of the Homeland Security Act was Congress's determination that DHS employees be afforded due process in appeals they bring before the Department. We have heard a lot about that already today. But the HSA clearly states that DHS Secretary and OPM Director may modify the current appeals processes only in order to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department. Instead, what these final regulations do is to undermine the statutory provision by eliminating, as we have heard, the MSPB's current authority to modify unreasonable agency imposed penalties, and authorizing this new standard only when wholly unjustified. And this is a new standard that will be virtually impossible for DHS employees to meet.

The final regulations as they relate to changes in the current pay performance and classification systems of DHS employees remain woefully short on details. In spite of the information that was provided today, there is still very little out there for employees or the unions to work with on this matter. Currently, performance evaluations have very little credibility among the work force, but it appears that these subjective measures will become the determinant of individual pay increases under the new system. This again will lead to more recruitment and retention problems in homeland security, not less. This kind of a system will be particularly problematic for the tens of thousands of DHS employees, such as CBP officers who perform law enforcement duties where teamwork is so critical to successfully achieving the agency's goal.

To get more information from DHS front-line personnel about the new regulations, NTEU conducted an online survey. To date, over 300 responses have been received, and some of the findings of the survey are highlighted on this chart to my right. The survey shows a number of startling things that I would hope the Department would be paying attention to: 65 percent of employees did not believe that U.S. borders are more secure today than before September 11th; 65 percent of employees would not recommend a job at the Customs Bureau or Protection to friends or to family; 80 percent of employees report their morale has dropped in the last year; 88 percent of employees do not support the proposed pay system; and 88 percent of employees named better management as the top measure needed to improve homeland security.

These results are very troubling and clearly point out the need for further review of these regulations. Additionally, NTEU urges Congress not to extend them throughout the Federal Government, as proposed in the President's 2006 budget. The Homeland Security Act provided for these changes based on national security considerations. Those considerations do not apply to the rest of the Federal Government. I appreciate and agree with comments made by several members of this committee in opposition to expanding them Government-wide in that this would be premature and irresponsible at this point. I look forward to continuing to work with this committee to help the Department of Homeland Security to meet its critical mission and to help the employees who want to successfully deliver on that mission. And I look forward to any questions you would have. Thank you.

[The prepared statement of Ms. Kelley follows:]

National Treasury Employees Union

TESTIMONY OF NTEU NATIONAL PRESIDENT
COLLEEN M. KELLEY

ON

"THE COUNTDOWN TO COMPLETION:
IMPLEMENTING THE NEW DEPARTMENT OF
HOMELAND SECURITY PERSONNEL SYSTEM

BEFORE THE

THE HOUSE GOVERNMENT REFORM COMMITTEE
SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND
AGENCY ORGANIZATION

WEDNESDAY, MARCH 2, 2005, 10 A.M.
2247 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C.

Chairman Porter, Ranking Member Davis, I would like to thank the subcommittee for the opportunity to testify on the final human resources management regulations for the Department of Homeland Security (DHS) that were published on February 1 in the Federal Register.

As President of the National Treasury Employees Union (NTEU), I have the honor of representing over 150,000 federal employees, 15,000 of whom are part of the Department of Homeland Security (DHS). I was also pleased to have served as the representative of NTEU on the DHS Senior Review Committee (SRC) that was tasked with presenting to DHS Secretary Tom Ridge and OPM Director Kay Coles James, options for a new human resources (HR) system for all DHS employees. NTEU was also a part of the statutorily mandated "meet and confer" process with DHS and OPM from June through August 2004.

It is unfortunate that after two years of "collaborating" with DHS and OPM on a new personnel system for DHS employees that I come before the subcommittee unable to support the final regulations. While some positive changes were made because of the collaboration between the federal employee representatives and DHS and OPM during the meet and confer process, NTEU is extremely disappointed that the final regulations fall woefully short on a number of the Homeland Security Act's (HSA) statutory mandates. The most important being the mandates that DHS employees may, "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them,"(5 U.S.C. 9701 (b)(4)) as well as the mandate that any

changes to the current adverse action procedures must "further the fair, efficient and expeditious resolutions of matters involving the employees of the Department." (5 U.S.C. 9701 (f)(2)(C)).

Because the final personnel regulations failed to meet the statutory requirements of the HSA in the areas of collective bargaining, and appeal rights, NTEU, along with fellow federal employee unions AFGE, NFFE and NAAE has filed a lawsuit in Federal court. The lawsuit seeks to prevent DHS and OPM from implementing the final regulations related to these areas and would order DHS and OPM to withdraw the regulations and issue new regulations, after appropriate collaboration with the unions, that fully comply with the relevant statutes.

NTEU and other employee unions put in countless hours over the last two years offering numerous common sense proposals in the areas of collective bargaining, streamlining employee appeals and modernizing the current GS pay system, aimed at giving DHS the flexibility it believes it needs to fulfill its new missions while preserving the rights of employees. NTEU believes there was a unique opportunity lost by the decision of DHS and Office of Personnel Management (OPM) officials to reject these common sense proposals that would have preserved employees' rights and enabled DHS to act swiftly in order to protect homeland security. Instead, the final personnel regulations will create an environment of mistrust and uncertainty for the over 110,000 DHS employees that the regulations will cover.

As the subcommittee is aware, the HSA allowed the DHS Secretary and the OPM Director to make changes in certain sections of Title 5 that have governed the employment rights of federal employees for over 20 years. I will focus my comments on three areas of the final personnel regulations that fall short of protecting federal employees' rights: labor relations/collective bargaining, due process rights, and the pay for performance system.

LABOR RELATIONS

The Homeland Security Act requires that any new human resource management system "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." NTEU believes that the final regulations do not meet this statutory requirement in the following ways.

No Independent Third Party Review of Collective Bargaining Disputes

Under the final personnel regulations, the responsibility for deciding collective bargaining disputes will lie with a three-member DHS Labor Relations Board appointed by the Secretary of the Department of Homeland Security. Senate confirmation will not be required, nor is political diversity required among the Board members. Currently, throughout the federal government, collective bargaining disputes are decided by the Federal Labor Relations Authority (FLRA), an independent body appointed by the President and confirmed by the Senate. A true system of collective bargaining demands independent third party determination of disputes. The final regulations do not provide

for that, instead creating an internal system in which people appointed by the Secretary will be charged with deciding matters directly impacting the Secretary's actions.

Drastic Reductions in Negotiability Rights

Under the final regulations, not only will management rights associated with operational matters (subjects that include deployment of personnel, assignment of work, and the use of technology) be non-negotiable, but even the impact and implementation of most management actions will be non-negotiable. In other words, employee representatives will no longer be able to bargain on behalf of employees concerning the procedures that will be followed when DHS management changes basic conditions of work, such as employees' rotation between different shifts or posts of duty, or scheduling of days off.

Non-Negotiability Over Department-Wide Regulations

The final regulations further reduce DHS' obligation to collectively bargain over the already narrowed scope of negotiable matters by making department-wide regulations non-negotiable. Bargaining is currently precluded only over government-wide regulations and agency regulations for which a "compelling need" exists. The new DHS personnel system would allow management to void existing collective bargaining agreements, and render matters non-negotiable, simply by issuing a department-wide regulation.

A real life example of the adverse effect of the negotiability limitations on both employees and the agency will be in the area of determining work shifts. Currently, the agency has the ability to determine what the shift hours will be at a particular port of entry, the number of people on the shift, and the job qualifications of the personnel on that shift. The union representing the employees has the ability to negotiate with the agency, once the shift specifications are determined, as to which eligible employees will work which shift. This can be determined by such criteria as seniority, expertise, volunteers, or a number of other factors.

CBP Officers around the country have overwhelmingly supported this method for determining their work schedules for a number of reasons. One, it provides employees with a transparent and credible system for determining how they will be chosen for a shift. They may not like management's decision that they have to work the midnight shift but the process is credible and both sides can agree to its implementation. Two, it takes into consideration lifestyle issues of individual officers, such as single parents with day care needs, employees taking care of sick family members or officers who prefer to work night shifts. The new personnel system's elimination of employee input into this type of routine workplace decision-making will have a negative impact on morale.

Based on the elimination of independent third party review of disputes described above, coupled with the drastic limitations to collective bargaining rights, NTEU does not believe these proposed regulations meet the statutory requirement that any new human resource management system "ensure that employees may organize, bargain collectively,

and participate through labor organizations of their own choosing in decisions which affect them," which is why NTEU strongly opposes the final regulations and urges Congress to make changes to ensure that the statutory directives of the HSA are met.

MSPB APPEALS PROCESS DRASTICALLY CHANGED

One of the core statutory underpinnings of the HSA was Congress' determination that DHS employees be afforded due process and that they be treated in a fair manner in appeals they bring before the agency. In fact, the HSA clearly states that the DHS Secretary and OPM Director may modify the current appeals procedures of Title 5, Chapter 77, only in order to, "further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." (5U.S.C. 9701 (f)(2)(C)). Instead the final regulations undermine this statutory provision in a number of ways.

The final regulations undercut the fairness of the appeals process for DHS employees by eliminating the Merit Systems Protection Board's (MSPB) current authority to modify agency-imposed penalties. The result is that DHS employees will no longer be able to challenge the reasonableness of penalties imposed against them, and the MSPB will now only be authorized to modify agency-imposed penalties under very limited circumstances where the penalty is "wholly unjustified," a standard that will be virtually impossible for DHS employees to meet.

FLRA AND MSPB GIVEN NEW AUTHORITY NOT AUTHORIZED BY LAW

The final regulations exceed the authority given in the HSA to the Secretary and OPM Director, by giving the FLRA and the MSPB new duties and rules of operation not set by statute.

The FLRA and the MSPB are independent agencies, and DHS and OPM are not authorized to impose obligations on either independent agency, or dictate how they will exercise their jurisdiction over collective bargaining and other personnel matters. In the final regulations, the FLRA is assigned new duties to act as an adjudicator of disputes that arise under the new labor relations system and the regulations also dictate which disputes the FLRA will address and how they will address them.

In addition, the final regulations conscript the Merit System Protection Board as an appellate body to review, on a deferential basis, findings of the new Mandatory Removal Panel (MRP). Chapter 12 of Title 5, which sets out MSPB's jurisdiction, does not authorize this kind of action by the Board and the DHS Secretary and OPM Director are not empowered to authorize it through regulation. A similar appellate role is given to the FLRA. It is tasked with reviewing decisions of the Homeland Security Labor Relations Board (HSLRB) on a deferential basis. There is no authority for assigning such a role to the FLRA.

ADDITIONAL PROBLEMS WITH FINAL REGULATIONS

Mandatory Removal Offenses

The final regulations provide the Secretary with unfettered discretion to create a list of Mandatory Removal Offenses (MRO) that will only be appealable on the merits to an internal DHS Mandatory Removal Panel (MRP) appointed by the Secretary.

The final regulations include a preliminary list of seven potential mandatory removal offenses but are not the exclusive list of offenses. The final regulations also

provide that the Secretary can add or subtract MRO's by the use of the Department's implementing directive mechanism and that the Secretary has the sole, exclusive, and unreviewable discretion to mitigate a removal penalty.

The President's FY 2006 budget again includes a proposal to drop the mandatory removal provisions known as the "10 deadly sins" applicable to IRS employees. This similar provision should also be dropped.

By going far beyond the statutory parameters of the HSA, and drastically altering the collective bargaining, due process and appeal rights of DHS personnel, these regulations will leave employees with little or no confidence that they will be treated fairly by the agency, which is why NTEU strongly opposes the final regulations and urges Congress to make changes to protect the rights of federal employees in DHS.

Pay:

While not a part of the lawsuit filed by NTEU and other federal employee representatives, the final regulations as they relate to changes in the current pay, performance and classification systems of DHS employees must be brought to the attention of this subcommittee. While the final regulations lay out the general concepts of the new base pay system, they remain woefully short on details. While NTEU was heartened to see that employee representatives will be able to provide minimal "consultation" as part of the agency's Compensation Committee that will formulate the

implementing pay directives, we believe that there is a greater role for employee representatives to play in the areas of pay, classification and performance appraisals.

Too many of the key features of the new system have yet to be determined. The final regulations make clear that the agency will be fleshing out the system's details in management-issued implementing directives while using an expensive outside contractor that will cost the agency tens of millions of dollars that could be used for additional front line personnel. Among the important features yet to be determined by the agency are the grouping of jobs into occupational clusters, the establishment of pay bands for each cluster, the establishment of how market surveys will be used to set pay bands, how locality pay will be set for each locality and occupation, and how different rates of performance-based pay will be determined for the varying levels of performance.

As part of the design and meet and confer processes, DHS conducted a number of town hall and focus group meetings around the country to obtain input from employees on their views of any problems with the current HR management systems and changes they would like to see made. DHS employees were overwhelmingly opposed to changing the General Schedule (GS) system. In addition, when the proposed regulations were released in early 2004, over 3,800 comments were submitted in response to the proposed pay for performance system and the vast majority strongly urged the Department not to abandon the GS basic pay system.

NTEU is especially mindful of the fact that the more radical the change, the greater the potential for disruption and loss of mission focus, at a time when the country can ill-afford DHS and its employees being distracted from protecting the security of our homeland. However, before any changes are made to tie employees' pay to performance ratings, DHS must implement, evaluate, and possibly modify a fair and effective performance system. The linking of basic pay increases to annual performance ratings will be particularly problematic for the tens of thousands of DHS employees who perform law enforcement duties. To date, no information has ever been produced to show that the new "pay band" system will enhance the efficiency of the department's operations particularly in a law enforcement setting.

Finally, any new pay for performance system must be adequately funded. Performance based pay and other types of new pay supplements described in the final regulations must not be funded with money that would have been used to provide GS increases for all DHS employees. By not properly funding any new pay for performance system, Congress in conjunction with DHS, runs the very real risk of rewarding a select few, based on the new pay system, at the expense of the majority of employees who do a solid job, thereby creating an atmosphere of distrust among the workforce.

NTEU Survey of DHS Employees:

To get more information from DHS front-line border protection personnel about the new regulations, NTEU conducted an online survey at our DHS website. While this was not a scientifically structured survey over 300 responses were recorded. The results from this survey

raise serious questions about the impact of these new regulations on the department's ability to recruit and retain the top notch personnel necessary to accomplish the critical missions that keep our country safe.

Some of the more telling highlights from those employees who responded to the survey include the following:

- 65% of employees do not believe U.S. borders are more secure than before September 11th
- 65% of employees would not recommend a job at CBP to friends or family
- 80% of employees report their morale has dropped in the last year
- 88% of employees do not support the proposed new pay system
- 88% of employees named better management as the top measure needed to improve homeland security

In addition, respondents to the survey were able to leave comments in their own words. I would like to share a sampling of them with the committee:

- "Only the "good old boys" will get pay increases."
- "Favoritism is not A-OK. Work assignments, locations, hours. TDY's training etc… are all completely up to management. If you're in favor, you get the goodies. If you are out of favor, you get nothing. There is a reason the union came to be: workers needed protection from unfair, abusive management practices."

- "We will not be protected. We can be hired, fired, transferred, demoted at will. That kind of insecurity will destroy the Service."
- "Employees are very intimidated and feel they will be fired without recourse."

If the agency's goal is to build a workforce that feels both valued and respected, the results from NTEU's survey clearly show that the agency needs to make major changes before it fully implements the final personnel regulations. For employees to successfully accomplish their homeland security missions they need to believe that the personnel system they are under is fair, credible and transparent; the final DHS personnel regulations do not meet these standards.

Conclusion

While NTEU would have preferred to be able to support the final regulations, we will continue to fully support the mission and personnel of the Department of Homeland Security. NTEU was pleased to have a voice at the table during the public dialogue concerning the new HR system for DHS employees. Clearly, we are very disappointed with the results. It is unfortunate that the final regulations place excessive limits on employees' collective bargaining rights, drastically alter the appeals process for DHS employees, and provide too few details for a major overhaul of employee pay, performance and classification systems. Again, NTEU strongly believes that changes are needed in these regulations if the agency's goal is to build a DHS workforce that feels both valued and respected. NTEU looks forward to continuing to work with Congress and the Administration to achieve this goal.

NTEU would also like to strongly caution both Congress and the Administration against extending throughout the federal government, the new DHS personnel regulations. Congress approved the creation of the Homeland Security Act under the principle that a new human resources system was required for the Department of Homeland Security because of its national security missions. While we disagree with that proposition, it simply does not apply to the rest of the federal government. To extend the provisions of the DHS personnel system that severely curtails employees' collective bargaining rights, denies employees fair treatment in their appeals, and moves hundreds of thousands of employees from the GS schedule to an unproven and undefined pay, performance and classification system would be ill-advised, and NTEU will vigorously oppose any efforts by the Administration to do so.

Again, I would like to thank the committee for the opportunity to be here today on behalf of the 150,000 employees represented by NTEU to discuss these extremely important federal employee issues as part of the final DHS regulations.

Mr. PORTER. Thank you, Ms. Kelley. Appreciate it.
Mr. Bonner.

STATEMENT OF T.J. BONNER

Mr. BONNER. Thank you, Chairman Porter, Ranking Member Davis, for the opportunity to come before this subcommittee and talk about something that is very important. I have been a Border Patrol agent for the past 27 years and am very proud to have served with thousands of dedicated and patriotic Board Patrol agents and other Federal employees who do a tremendous job of protecting our Nation. Recently we were folded into the Department of Homeland Security, and I am proud to be a member of that Department because it has one of the most important charges of any Federal agency in this Government, protecting the homeland.

A lot of the debate has seemed to lose the focus in talking about union rights, employee rights. But they created this Department to protect this country. And who protects this country? It is not systems; it is not technology; it is good people. And to the extent that this system drives away those good people, it has failed, and that is my biggest fear. The system that is being proposed now affects people negatively, affects the ability of our Government to attract the best and the brightest, and to hang on to those people.

I am very concerned because now I see people that I have worked with for years, as soon as they are eligible for retirement, they are putting their papers in. I see younger agents putting applications in for other departments outside of the Federal Government, State and local law enforcement departments, because they don't like the changes that are coming down the road, not because they feel that some union right is being taken away from them, but their basic sense of fairness is offended. When they see their pay at the mercy of their boss, and when they see their job at the mercy of their job, and when they see the playing field just turned upside down, they become very concerned.

They harken back to an incident that happened right after September 11th, when the standard company line was that we had enough Border Patrol agents on the northern border. Well, in fact, we had 283 to patrol 4,000 miles of border. Two very courageous Border Patrol agents spoke out and said we need help up here. As a result of that disclosure, as a direct result of that disclosure, the Congress authorized within the USA Patriot Act, a tripling of not just the Border Patrol, but of Immigration and Customs resources along the northern border. As thanks for that patriotic action, these employees were proposed termination by their bosses for speaking out and bucking the company line.

Under this new proposed personnel system, it would be quite simple for their pay to just go stagnant. They have made a guarantee to these employees that their pay won't be reduced as long as their performance remains acceptable. Well, had they made that promise to me when I came into the Federal Government 27 years ago, I could still be making less than $10,000 a year, and they would have honored that promise. That is not enough to hang on to the best and the brightest. We have to treat these people fairly. These new personnel regulations are not fair.

I would urge you to reexamine these, make sure that fairness is incorporated into them. The sand is running out of this hourglass. Once these changes take effect, people are going to be heading for the exit doors in record numbers, and they won't come back. You can change the system back and make it fair and try and hire new people, but the only way you can replace that officer with 15 or 20 years of experience is to hire someone new under a better system and then wait 15 or 20 years, and we simply don't even have 15 or 20 second; the threat of terrorism is too real. This is a matter of national security. We need the best and the brightest, and we have to ensure that this personnel system attracts them and hangs on to them, and as it is currently structured, it simply doesn't do that.

Thank you for your time.

[The prepared statement of Mr. Bonner follows:]

STATEMENT BY

T.J. BONNER
PRESIDENT
NATIONAL BORDER PATROL COUNCIL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT REFORM

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

REGARDING

THE COUNTDOWN TO COMPLETION: IMPLEMENTING THE NEW DEPARTMENT OF HOMELAND SECURITY PERSONNEL SYSTEM

MARCH 2, 2005

Mr. Chairman and Members of the Subcommittee: My name is T.J. Bonner and I am the President of the National Border Patrol Council of the American Federation of Government Employees (AFGE), AFL-CIO. On behalf of the more than 55,000 federal employees in the Department of Homeland Security represented by AFGE, I thank you for the opportunity to testify today.

Members of the Committee may be aware that AFGE has filed suit in U.S. District Court to block implementation of the "final" regulations DHS has issued regarding its new personnel system. There is no question that these rules go far beyond the authorities Congress gave the DHS Secretary to design a personnel system that would grant "flexibility" to DHS management to meet unique domestic security contingencies that the agency might face. Indeed, there is nothing in the new personnel system explicitly linked to domestic security concerns. On the contrary, the expansion in management power and corresponding reduction in employee rights and protections are put forth in the context of management jargon completely removed and apart from domestic security triggers.

It would be a grave mistake to view the new Department of Homeland Security human resources system regulations simply as an arcane set of rules governing such mundane issues as pay rates and collective bargaining rights for employees. To do so greatly diminishes the import of these changes on the readiness of the Nation to prevent another terrorist attack. Unlike most other Federal agencies, the core mission of the Department of Homeland Security is the safety of

the American public, and any fundamental changes to its personnel regulations must be viewed through that prism.

Without a doubt, dedicated and experienced personnel are America's most invaluable resource in the war on terror. No technology can replace their perseverance, expertise, and ingenuity. Keeping these employees motivated to remain in the service of our country is not simply a matter of fairness to them, but is also absolutely essential to the protection of our Nation against the threat of terrorism. To the extent that the new Department of Homeland Security human resources system fails to achieve that goal, it must be modified in the interest of homeland security.

The proponents of the new personnel regulations argue that they are necessary in order to provide the flexibility and speed necessary to respond to immediate and long-term terrorist threats. At no time during the debate on the Homeland Security Act or since has anyone been able to point to a single concrete example of where collective bargaining or employee rights in any way hampered the Government's ability to immediately respond to any potential threat. In fact, they have actually made significant contributions to the efficiency of our Government and the safety of our Nation:

- In the aftermath of the September 11, 2001 terrorist attacks, I&NS managers engaged in a campaign of deception to lull the public and Congress into a false sense of well-being about the security of our northern border. Two

courageous front-line Border Patrol agents from Detroit, Michigan, Mark Hall and Robert Lindemann, spoke out and provided a truthful assessment of our vulnerabilities. As a direct result of these disclosures, Congress authorized and funded a tripling of the number of Border Patrol agents, Immigration Inspectors, and Customs personnel along the northern border. The I&NS attempted to fire these two employees, and it took the intervention of their union and the Congress to stop this retaliatory action.

- In 2003, the Bureau of Customs and Border Protection implemented a program to train all employees in the detection of terrorist weapons by distributing a computer disk to all employees. The union expressed concerns about the inadequacy of that approach, and proposed a more comprehensive curriculum utilizing classroom instruction. After private and public urging, the Bureau eventually adopted the union's suggestion.

- In 1998, the Border Patrol proposed that all of its agents wear body armor at all times while on duty. Through collective bargaining, the union was able to convince management that such a policy would have resulted in numerous agents falling prey to heat stroke in the harsh desert climate of the southwestern United States, and jointly developed a much more sensible policy.

- In 1997, the I&NS unilaterally implemented a policy that prohibited its law enforcement employees from asking any detainee to remove any article of clothing, including hats and coats, unless they had supervisory approval and filled out cumbersome reports to justify the action. This policy totally compromised public and officer safety, as Border Patrol agents routinely encounter large groups of illegal aliens wearing multiple layers of clothing that render pat-down searches completely unreliable in the discovery of hidden weapons. The union filed an unfair labor practice charge and forced management to rescind the policy until the parties bargained over a more reasonable replacement.

- In 1993, five Border Patrol agents in San Diego, California were wrongfully accused of violating the civil rights of an illegal alien. The Border Patrol proposed terminating the employment of all five employees. An impartial

arbitrator ruled that the agents were not guilty of the alleged misconduct and that the agency failed to conduct a full and proper investigation. All five employees were ordered reinstated.

Distressingly, the outcome of all the aforementioned examples would have been the exact opposite under the provisions of the new human resources system.

The Union Proposals DHS Ignored

None of this was necessary or inevitable. The unions representing DHS employees have not questioned the fact that the unique homeland security responsibilities of the agency would from time to time require management to act unilaterally, without regard to the provisions of a collective bargaining agreement. We put forth detailed proposals that gave management extraordinary flexibility to achieve its stated goal of being able to act unilaterally when security considerations justified it.

Our proposal was as follows: Whenever management determined that it had a need to act quickly to protect homeland security, it could do so. If any "pre-implementation procedure" or "appropriate arrangement bargaining" or even the application of the provisions of an existing collective bargaining might impede the ability to act, these impediments could be ignored for up to ten days. The agency, a component, or even a single bureau would have, at its sole discretion, the right to deploy, reassign, or transfer employees for up to ten days without either bargaining

or observing the provisions of a collective bargaining agreement.

The unions only asked that these management determinations be "good faith" exercises of judgement. We did not ask to be able to come back afterward and question the judgements' validity. We asked only that the assignments be based upon reasonable assessments of factors known at the time, including reasonable determinations that any pre-implementation bargaining or the application of a collective bargaining agreement, would somehow adversely affect the accomplishment of the action.

Only after implementation of the unilateral action, that is, only after 10 days had elapsed following the assignments would management be asked to come back and talk to the union about arrangements for workers who might have been adversely affected by the assignment (for example, if an employee were deployed at the last minute and incurred parking expenses at the airport, arrangements would be made after-the-fact for reimbursement). Our proposal was that this "post-implementation" bargaining should occur as soon as was practical, with plenty of leeway for management to decide when it could occur.

The goal of the post-implementation bargaining was not to prevent similar unilateral decisions in the future or to constrain management's prerogatives regarding its judgements of when a homeland security situation justified the exercise of discretion. DHS clearly understood this. Indeed, the only goal was to make sure

that employees who incurred reasonable out-of-pocket expenses or other harm as a result of the deployment, reassignment, or transfer would be reimbursed or recognized in some way.

Incredibly, this proposal was ignored in its entirety. In essence, the regulations say that even though Congress granted DHS the authority to act unilaterally because of the unique exigencies of protecting the homeland, the Department intends to act unilaterally at all times, the Department will at all times refuse to engage in collective bargaining on routine workplace issues, and the Department will permanently void any provisions of collective bargaining agreements at will. AFGE knows that this was not the intent of Congress when it granted DHS the authority to "modernize" its personnel system. After all, there is nothing at all modern or new about management by fiat, management refusal to bargain, or management by fear and intimidation, and if Congress had intended to have such a system imposed upon DHS, it would have written the law in that fashion.

The New DHS Regulations

The regulations that set forth the new DHS personnel system strip the agency's employees of longstanding statutory rights involving the scope of collective bargaining. In place of those rights, the DHS regulations impose a regime of unilateral management decree over almost every meaningful condition of

employment. No longer will DHS employees who have elected union representation and have enjoyed a voice in decisions affecting their work lives be able to negotiate over even the impact or implementation of most of management's unilateral changes in conditions of employment. What this means in practice is that under the new regulations, neither DHS management nor the union representing DHS workers will be permitted to bargain over the procedures to be followed when management makes changes in key conditions of employment, including the assignment or location of work. This is true even if both management and the union agree that a negotiated agreement would improve or ease the impact and implementation of the new rules. For example, if DHS decided it needed to transfer an agent from Florida to Montana and it had several qualified volunteers, the agency could still decide to send a single head of household, or someone with a chronic illness or condition that cannot be treated in Montana.

In addition, under the new regulations, top agency management is authorized, without limitation, to issue agency-wide directives to prohibit collective bargaining on the few matters that remain negotiable. They have also given themselves the right to invalidate provisions of existing collective bargaining agreements. To further undermine the integrity of collective bargaining, the regulations establish an internal DHS board appointed solely by the Secretary with the authority to adjudicate any and all claims by employees and unions that management has violated the meager bargaining obligations that the new regulations permit to continue. Another extremely problematic aspect of the DHS

regulations has to do with the agency's attempt to dictate to the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board (MSPB) which DHS labor relations and employee disputes they will address and exactly how they should address them.

In essence, the regulations tell both the FLRA and the MSPB to rubber-stamp decisions of the internal DHS "kangaroo court" (the Homeland Security Labor Relations Board). Indeed, MSPB is instructed to uphold the internal board's decisions on penalties even if they are unreasonable and disproportionate to the alleged offense; the only time the MSPB would be permitted to alter a penalty is if the employee were able to show that it is "wholly without justification" – a high legal standard no one is likely to ever meet. In particular, these new regulations will, for all practical purposes, render the "Douglas Factors" null and void. The Douglas Factors, first enunciated by the MSPB in 1981, are:

> 1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> 2. the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> 3. the employee's past disciplinary record;

4. the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability:

5. the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. consistency of the penalty with the applicable agency table of penalties; (The Board mused in footnotes that these tables are not to be applied mechanically so that other factors are ignored. A penalty may be excessive in a particular case even if within the range permitted by statute or regulation. A penalty grossly exceeding that provided by an agency's standard table of penalties may for that reason alone be arbitrary and capricious, even though a table provides only suggested guidelines.)

8. the notoriety of the offense or its impact upon the reputation of the agency;

9. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10. potential for employee's rehabilitation:

11. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The DHS regulations also curtail the MSPB's jurisdiction by shortening the time a DHS employee has to file appeals, limiting ~~his~~ discovery, and providing for summary adjudication of an employee challenge to adverse actions. These limitations effectively deprive DHS employees of their day in court, a right which all other federal employees enjoy as provided in the MSPB's own regulations.

What follow are some of the most egregious examples of the ways the new DHS rules violate Congress' intent that the new DHS system "ensure that employees may exercise the right to organize, bargain collectively, and participate through their exclusive bargaining representatives in decisions which affect them subject to any exclusion from coverage or limitation on negotiability established by law." 5 U.S.C. § 9701 (b) (4).

Negotiation Over Department-Wide Regulations

Under current law and regulation, a federal agency has a duty to bargain over otherwise negotiable changes in conditions of employment that are promulgated through department-wide regulations. Only by demonstrating a "compelling need" can an agency legitimately evade its duty to bargain. Over the years, the FLRA has set a high standard for finding that a compelling need does indeed exist. As a result, there are very few cases in which agencies have been able to avoid bargaining over a change in conditions of employment solely because it was issued department-wide. Under the DHS regulations, however, DHS will not be required to

show any reason, let alone a compelling need, to avoid dealing with the exclusive representatives of its employees concerning department-wide changes in conditions of employment. DHS has told us this would be true even if a regulation were not department-wide, but merely covered more than one component, such as Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE).

There is a range of matters that employees, through their unions, negotiate to ensure fair and equitable treatment, protection from favoritism or reprisal, mitigation of adverse impact, etc. Under the proposed regulations, DHS can avoid dealing with its employees' concerns by issuing the changes department-wide. These could include such items as alternative work schedules, methods for choosing who will work overtime or be sent on a detail, issues regarding uniforms or dress codes, health and safety, travel arrangements, and many other matters. Unions play a valuable role in helping to develop the details and protections that make these changes work better for the agency and the employees. DHS has apparently decided that "modern" management means eliminating these types of negotiations that have proven mutually beneficial in the past.

Negotiating Procedures and Appropriate Arrangements

Federal agency managers have always had a wide range of changes they can make in the workplace without union consent. These include the agency budget, the organizational structure, the assignment of work, the direction of employees,

internal security, and other issues. Under current law, if unions make a request to bargain, agencies must negotiate over items such as the procedures that will be used and appropriate arrangements for employees who are adversely affected by the management action. This is an important safeguard that promotes workplace harmony and efficiency, and restrains abusive workplace practices.

For example, an agency may decide to deploy workers from their usual duty station to another location. The new location may be in the same general commuting area or hundreds of miles away. It may be for a day or for weeks or months. Under current rules, the agency is free to select only from those employees who have the knowledge, skills and abilities it determines are necessary to do the job. But the employees and their union have an important interest in ensuring that the procedures used are fair and respect the personal and family responsibilities of the workforce.

It is common for negotiated agreements to include procedures for setting up rosters or other processes that help to fairly distribute the assignments among qualified employees. This helps prevent managers from giving coveted assignments to their cronies and denying opportunities to other workers who may be even more proficient. It also helps prevent managers from giving unpopular assignments as reprisals or because of their animosity toward the race, gender, religion, or political party of the employee. Unions and managers also frequently negotiate procedures that call for as much notice as possible before employees have their regular duty

station changed so that they and their families can prepare for the change. If the assignment will require the employee to travel and be away from his or her family for some time, there are other important procedures and arrangements that unions and managers commonly negotiate. These include such things as travel procedures that keep employees from having to go into their own pockets for work-related expenses and arrangements that allow them to call home regularly and travel home for visits during long assignments. If the assignment is closer to home, but not at the employee's regular duty station, these negotiated matters could include such things as covering extra commuting fees if an employee is detailed to a location where parking costs more than the regular duty station or where the employee has to use a different mode of transportation than is available at the regular duty station. These are just reasonable and rational workplace transactions that current law requires of federal managers and federal union representatives to keep their agencies running smoothly.

Before fair shift and overtime rotations were negotiated, for example, employee morale suffered and numerous grievances were constantly being filed. Negotiating these matters has led to higher morale, stability, and almost no litigation. But DHS apparently has forgotten history and wants to turn back the clock. Its final rules preclude bargaining over procedures for most changes and greatly reduce the obligation to bargain over appropriate arrangements for employees who are adversely affected by a management action (for example, DHS will not have to bargain over harm done to its employees unless it was as the result of a

management action that lasted 60 or more days). This is true even if a hardship exists for a particular employee and qualified volunteers are willing to be deployed. Under DHS' new scheme, lacking union involvement, single heads of households or women with pregnancy complications or employees with serious illnesses could be deployed for periods of up to 59 days despite willing and qualified volunteers being available. Under current law, the union can protect employees from hardship and safety concerns. DHS has chosen to severely limit its use of a vital mechanism to help make effective workplace changes that respect the needs of its workers, even though the federal unions agreed to a radical change from past practice that would have allowed DHS, in any and all cases, to act first and negotiate later in situations that could not wait for even expedited negotiations.

Bargaining Limited to Changes that Have a "Foreseeable, Substantial, and Significant Impact" Affecting Multiple Employees in the Bargaining Unit

In addition to limiting bargaining over changes in conditions of employment and restricting bargaining over procedures and appropriate arrangements, the final regulations remove management's duty to bargain over *any* proposal unless it would have a "foreseeable, substantial, and significant impact" on multiple employees in the bargaining unit. The phrase, "foreseeable, substantial, and significant impact" is not defined and is certain to lead to disputes and litigation. Will each management official be able to decide for him or herself what has a foreseeable, substantial, and

significant impact on the employees?

There are many ideas and concerns that bargaining unit employees will want to share that might not be either momentous or urgent, but that, nevertheless, could make a management initiative work better and enhance, rather than harm, productivity and workplace harmony. But DHS regulations prohibit interaction of this nature with employees. The treatment of issues that may affect a single worker is also problematic under the DHS regulations. Why should "foreseeable, substantial, and significant" harm to one employee in a workplace be labeled either unimportant or justifiable? This exclusion from bargaining is a license to pick on, harass, discriminate, and take reprisals against individual employees. Further, as an organization that not only must recruit members on an individual-by-individual basis but that also has a legal duty to represent each individual in a bargaining unit, our union finds the "individuals don't count" approach unfair and confusing. Finally, it is clear that although actions with indisputably foreseeable, substantial and significant harm cannot be imposed on groups in one fell swoop without negotiation, management will be able to accomplish the same goal by taking the same action separately against individual after individual, and in spite of our legal – and moral – responsibility to represent each member of our bargaining unit, we will be prevented from doing so. The principle that is at the heart of unionism – "an injury to one is an injury to all," is a principle that the DHS regulations forbid our union to uphold in the context of collective bargaining. At the current historical moment, when American have let it be known that safeguarding domestic security is one of their highest

priorities, we cannot understand why DHS policy should be to undermine the federal employees charged with that vital task by removing their voice in the workplace. Why tell them, in effect, to shut up and follow instructions from above? And if DHS makes a change that it unilaterally believes will have a less than substantial or significant effect on them, they don't deserve to be able to speak up about their own interests in the workplace.

Loss of Managers' Right to Bargain Formerly Permissive Subjects

The Civil Service Reform Act of 1978 codified the federal labor relations procedures, and divided issues into three major categories. The categories described issues from the perspective of how agency managers should proceed in the context of collective bargaining when federal employees had elected union representation. The categories were: a) issues over which managers were forbidden to bargain, b) issues over which managers were permitted, but not required, to bargain, and c) issues over which managers were required to bargain. The new regulations eliminate the flexibility of DHS managers to bargain over "permissible, but not required" subjects of bargaining. These issues include the numbers, types and grades of employees performing a specific job, and the methods, means and technology used to accomplish the task. Not only has DHS told its frontline employees that they don't matter, but its new regulations tell its managers that they and their judgment don't matter either. No longer will managers at a border facility or DHS office be able to decide for themselves that it is in the interest of their

Directorate or the Department to work out and customize some of these details of getting the job done at their facility with their workers and their union. The new regulations forbid them from doing so. The Homeland Security Act required flexible and contemporary new systems. DHS' action here is just the opposite.

Loss of Neutral, External Board for Bargaining Disputes

Under current law, negotiability disputes, unfair labor practice charges and bargaining impasses are heard and decided by independent boards and authorities whose charge is to be neutral, and which are external to the agencies and unions involved. DHS' regulations allow the agency to exempt itself from these standards. Instead of being held accountable by an external, independent, and neutral body, DHS will set up its own Homeland Security Labor Relations Board (HSLRB), which will be internal to the Department and made up of members selected solely and unilaterally by the Secretary. The HSLRB will replace the FLRA in deciding negotiability disputes and unfair labor practice charges and the Federal Services Impasses Panel (FSIP) in resolving bargaining impasses. The requirement to go to a "Company Board" instead of a neutral body makes a mockery of Congress' intent.

Pay and Performance Management

Under the new regulations, DHS employees will lose their current market-

based pay system that affords fairness, objectivity, predictability, credibility, and most importantly, Congressional oversight. Base pay and pay adjustments now are determined by the Executive and Legislative branches of government, which offers employees checks and balances. Under these new DHS regulations, the Executive Branch alone will determine pay.

DHS lists a number of factors that should guide pay increases such as recruitment and retention needs, budgets, performance, local labor market conditions, and even the availability of Department funds. Read together, DHS can choose from among any of these factors to justify whatever it does. DHS can, and likely will, use these factors variously to justify inconsistent decisions by region or occupation, and, of course, by individual. For example, DHS may deny a pay raise in San Diego, despite high performance, a tight labor market, and adequate budget authority by citing stable recruitment. At the same time, it could lavish high salary adjustments on those working in Brownsville, Texas despite lower performance and retention difficulties. And no one will be able to challenge the decision. Will politics affect these allocation decisions? Will favoritism and animus affect these allocation decisions? There is every reason to believe that such unbridled discretion will lead to chaos, inconsistency, and a huge morale problem. It also promises to lead to enormous increases in EEO filings and other litigation, since other avenues to voice dissent or bring forth evidence of wrongdoing have been eliminated. Employees will have no faith or respect for a system that exposes them to random variations in pay, and subjects them to the whims of supervisors or higher-ranking political appointees.

Since DHS has made it impossible for an employee's union to address problems through collective bargaining, litigation and complaining to members of Congress will be the order of the day. Finally, it is inescapable that for pay-for-performance to have any opportunity to have any positive impact on DHS, it must be adequately funded. A zero-sum reallocation of salaries and salary adjustments will guarantee failure. The President's budget gave no indication that the Administration intends to provide the necessary level of funding to avoid a ruinous competition within DHS where anyone's gain will be someone else's loss. I urge the Congress to recognize how crucial adequate funding is to any hope of success for the DHS pay scheme.

Conclusion

In conclusion, AFGE strongly urges the Committee to pass legislation to:

- Restore the scope of collective bargaining to its current state. The new restrictions are wholly unjustified, and will jeopardize public safety by allowing unsound decisions to be implemented without checks and balances.

- Ensure that the new pay system keeps DHS employees at least on par with the rest of the Federal workforce. Otherwise, the Department will be unable to attract and keep employees in its critical occupations.

- Restore mitigation power to neutral adjudicators. Without this important check and balance mechanism, managers will be encouraged to act arbitrarily and capriciously, discouraging dedicated from people serving in the Department.

- Eliminate Mandatory Removal Offenses from the disciplinary system. This concept has failed miserably in every agency where it has been utilized, and there is no reason to believe that DHS will be any different.

- Eliminate the internal Labor Relations Board or revise it so that it truly has credibility with employees and their representatives.

It is not too late to change the human resources system now. Once it is implemented and experienced employees start heading for the exit doors, however, it will be impossible to replace their expertise. Even if the necessary corrections are made at that point, it would take years to regain the lost levels of experience. The employees of the Department of Homeland Security will not engage in public demonstrations, Quietly, one by one, they will leave to pursue careers in other agencies that will treat them with the dignity and fairness that they deserve. The real losers in this ill-advised experiment will be the citizens of this country who are looking to their Government for protection. The Department of Homeland Security has already let them down by issuing personnel regulations that will chase away the best and the brightest employees. It is now up to Congress to step up and force the Department to modify the regulations to conform to the spirit of the Homeland Security Act calling for a modern personnel system that treats employees fairly and values their expertise.

This concludes my statement. I would be happy to answer any questions the Members of the Subcommittee may have.

Mr. PORTER. Thank you very much.
Mr. Perkinson.

STATEMENT OF DARRYL PERKINSON

Mr. PERKINSON. Chairman Porter, Congressman Davis, distinguished members of the subcommittee, as the National Vice President of the Federal Managers Association, let me begin by thanking you for allowing me this opportunity to express FMA's views regarding the final personnel regulations of DHS. I look forward to more opportunities in the future to engage in this dialog about the best way of governing the most efficient and effective work force to protect American soil.

Managers and supervisors are in a unique position under the final regulations. Not only will they be held responsible for implementation of the new personnel system, they will also be subjected to its requirements. As such, managers and supervisors are a pivotal part to ensuring the success of the new system. We at FMA recognize that the change will not happen overnight. We remain cautiously optimistic that the new personnel system may help bring together the mission and goals of the Department with the on-the-ground functions of the Homeland Security work force.

Two of the most important components to implementing a successful new personnel system are training and funding. Managers and employees need to see leadership from the secretary on down that supports a collaborative training program and budget proposals that make room to do so. We also need the consistent oversight and the appropriation of proper funding levels from Congress to ensure that both employees and managers receive sufficient training in order to do their jobs most effectively.

As any Federal employee can tell you, the first item to get cut when budgets are squeezed is training. Mr. Chairman, it is crucial that this not happen in the implementation of these regulations. Training of managers and employees on their rights, responsibilities, and expectations through a collaborative and transparent process will help to allay concerns and create an environment focused on the mission at hand.

Managers have also been given additional authorities under the final regulations in the areas of performance review and pay-for-performance. We must keep in mind that managers will also be reviewed on their performance, and hopefully compensated accordingly. As a consequence, if there is not a proper training system in place, and budgets that allow for adequate funding, the system is doomed to failure from the start. Toward this end, we at FMA support including a separate line item on training in agency budgets to allow Congress to better identify the allocation of training funds each year, especially as similar personnel systems are considered for other agencies and departments.

Our message is this: As managers and supervisors, we cannot do this alone. Collaboration between manager and employee must be encouraged in order to debunk myths and create the performance and results-oriented culture that is so desired by these final regulations.

Managers have also been given greater authorities in the performance review process that more directly links employees' pay to

their performance. We believe that transparency leads to transportability, as inter-department job transfers could be complicated by a lack of a consistent and uniform methodology for performance reviews. FMA supports an open and fair labor relations process that protects the rights of the employees and creates a work environment that allows employees and managers to do their jobs without fear of retaliation or abuse.

The new system has relegated authority for determining collective bargaining to the secretary. Recognition of management organizations such as FMA is a fundamental part of maintaining that collaborative and inclusive work environment. Title V of C.F.R. 251–252 allows FMA, as an example, to come to the table with DHS leadership and discuss issues that affect managers and supervisors. While this process is not binding arbitration, the ability for managers and supervisors to have a voice in policy development within the Department is crucial to its long-term vitality.

There is also a commitment on the part of OPM, DHS, and DOD to hold close the merit system principles, and we cannot stress adherence to these timely standards enough. However, we also believe that there needs to be additional guiding principles that allow and link all organizations of the Federal Government within the framework of a unique and single Civil Service. OPM should take the current systems being implemented at DHS and create a set of public principles that can guide future agencies in their efforts to develop new systems, systems that parallel one another to allow for cross-agency mobility in evaluation, instead of disjointed ones that become runaway trains.

We at FMA are cautiously optimistic that the new personnel system at DHS will be as dynamic, flexible, and responsive to modern threats as it needs to be. While we remain concerned with some areas at the dawn of the system's rollout, the willingness of OPM and DHS to reach out to employee organizations is a positive indicator of collaboration and transparency. We look forward to continuing to work closely with the Department and official agencies.

Thank you again, Mr. Chairman, for this opportunity to share FMA's views on these significant Civil Service reforms.

[The prepared statement of Mr. Perkinson follows:]

Testimony
Before the United States House of Representatives
House Committee on Government Reform
Subcommittee on the Federal Workforce and Agency Organization
Wednesday, March 2, 2005

The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System

Department of Homeland Security Final Personnel Regulations: Managers' Cautious Optimism

Statement of
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Chairman Porter, Ranking Member Lewis and Members of the House Subcommittee on the Federal Workforce and Agency Organization:

My name is Darryl Perkinson and I am the National Vice President of the Federal Managers Association (FMA). I am presently a Supervisory Training Specialist at Norfolk Naval Shipyard in Portsmouth, VA., where I have been in management for nearly 20 years. On behalf of the nearly 200,000 managers, supervisors, and executives in the Federal Government whose interests are represented by FMA, I would like to thank you for allowing us to express our views regarding the final personnel regulations that have been released for the Department of Homeland Security (DHS).

Established in 1913, FMA is the largest and oldest Association of managers and supervisors in the Federal Government. FMA has representation in some 35 different Federal departments and agencies. We are a non-profit advocacy organization dedicated to promoting excellence in government. As those who will be responsible for the implementation of the Department's new personnel system and subjected to its changes, managers and supervisors are pivotal to ensuring its success. I am here today to speak on behalf of those managers with respect to the rollout of the new system.

The Department of Homeland Security is still facing many challenges as it continues to coalesce the 22 disparate agencies under one parent department. As the Government Accountability Office (GAO) has explained in a number of recent reports[1], there are barriers from the standpoints of both creating a new culture and delineating the different responsibilities of each agency. As we move towards the implementation phase, we already know that there will be:

- no jobs eliminated as a result of the transition to the new system;
- no reduction in current pay or benefits for employees as a result of the transition to the new system;
- no changes in the rules regarding retirement, health or life insurance benefits, or leave entitlements;
- no changes in current overtime policies and practices; and
- merit principles will be maintained, preventing prohibited personnel practices, and honoring and promoting veterans' preference.

[1] Government Accountability Office Report GAO-04-790, Human Capital: DHS Faces Challenges In Implementing Its New Personnel System, June 18, 2004

We at FMA recognize that change does not happen overnight. However, we are optimistic that the new personnel system known as MAX^{HR} may help bring together the mission and goals of the Department with the on-the-ground functions of the homeland security workforce.

TRAINING AND FUNDING

Two key components to the successful implementation of MAX^{HR} and any other major personnel system reforms across the Federal government will be the proper development and funding for training of managers and employees, as well as overall funding of the new system. As any Federal employee knows, the first item to get cut when budgets are tightened is training. Mr. Chairman, you have been stalwart in your efforts to highlight the importance of training across government. It is crucial that this not happen in the implementation of MAX^{HR}. Training of managers and employees on their rights, responsibilities and expectations through a collaborative and transparent process will help to allay concerns and create an environment focused on the mission at hand.

Managers have been given additional authorities under the final regulations in the areas of performance review and "pay-for-performance". We must keep in mind that managers will also be reviewed on their performance, and hopefully compensated accordingly. A manager or supervisor cannot effectively assign duties to an employee, track, review and rate performance, and then designate compensation for that employee without proper training. As a corollary, if there is not a proper training system in place and budgets that allow for adequate training, the system is doomed for failure from the start. The better we equip managers to supervise their workforce, the more likely we are to ensure the accountability of the new system – and the stronger the likelihood that managers will be able to carry out their non-supervisory responsibilities in support of the Department's mission.

For employees, they will now be subject in a much more direct way to their manager's objective determination of their performance. Employees would be justified in having concerns about their manager's perception of their work product in any performance review if they felt that the manager was not adequately trained. Conversely, if employees have not been properly trained on their rights, responsibilities and expectations under the new human resources requirements, they are more apt to misunderstand the appraisal process.

Our message is this: As managers and supervisors, we cannot do this alone. Collaboration between manager and employee must be encouraged in order to debunk myths and create the performance and results oriented culture that is so desired by the final regulations. Training is the first step in opening the door to such a deliberate and massive change in the way the government manages its human capital assets. We need the support of the Department's leadership, from the Secretary on down, in stressing that training across the board is a top priority. We also need the consistent oversight and input of Congress to ensure that both employees and managers are receiving the proper levels of training in order to do their jobs most effectively.

The Secretary and Congress must also play a role in proposing and appropriating budgets that reflect these priorities. The President's fiscal year 2006 budget proposal includes a line that money has been set aside for "training supervisory personnel to administer a performance-based pay system and to create the information technology framework for the new system."[2] A similar item was included in the fiscal year 2005 budget proposal.[3] However, the final funding levels for the implementation of the new system were well below the proposed figure. This precedent, as we prepare for even larger budget deficits that the President hopes to cut into by holding discretionary spending below the level of inflation, presents a major hurdle to the overall success of MAX^{HR} and any future personnel reform efforts at other departments and agencies.

Agencies must also be prepared to invest in their employees by offering skill training throughout their career. This prudent commitment, however, will also necessitate significant technological upgrades. OPM has already developed pilot Individual Learning Account (ILA) programs. An ILA is a specified amount of resources such as dollars, hours, learning technology tools, or a combination of the three, that is established for an individual employee to use for his/her learning and development. The ILA is an excellent tool that agencies can utilize to enhance the skills and career development of their employees.

We'd also like to inform Congress of our own efforts to promote managerial development. FMA recently joined with Management Concepts to offer *The Federal Managers Practicum* — a targeted certificate program for Federal managers. As the official development program for FMA, *The Federal*

[2] The White House Office of Management and Budget, Budget of the United States Government, Fiscal Year 2006
[3] The White House Office of Management and Budget, Budget of the United States Government, Fiscal Year 2005

Managers Practicum helps FMA members develop critical skills to meet new workplace demands and enhance their managerial capabilities.

FMA has long recognized the need to prepare career-minded Federal employees to manage the demands of the 21st century workplace through its establishment of The Federal Management Institute, FMA's educational arm, which sponsors valuable professional development seminars and workshops. *The Federal Managers Practicum* is a unique, integrated development program that links professional training and higher education – specifically created for the Federal career professional. Developed and taught by management experts, this comprehensive practicum integrates core program management skills including planning, analysis, budgeting, communication, evaluation, and leadership with functional skills and knowledge – providing a balance between theory and practice. We at FMA believe that the practicum will pave the way for the creation of much-needed development programs for Federal employees.

Clearly agency budgets should allow for the appropriate funding of the ILA as an example. However, history has shown that training dollars have been a low priority for many agency budgets. In fact, in the rare event that training funds are available, they are quickly usurped to pay for other agency "priorities." Toward this end, we at FMA support including a separate line item on training in agency budgets to allow Congress to better identify the allocation of training funds each year.

Neither the Office of Management and Budget (OMB) nor OPM collects information on agency training budgets and activities. This has only served to further diminish the minimal and almost cursory attention on training matters. Many agencies do not even have dedicated employee "training" budgets. Training funds are often dispersed through other accounts. It is no surprise that budget cuts inevitably target training funds, which is why FMA continues to advocate for the establishment of a training officer position within each Federal agency. This would allow for better management and recognition of training needs and resources, in addition to placing increased emphasis on critical training concerns.

The Federal government must, once and for all, take the issue of continuous learning seriously. FMA advocated for the existing Chief Human Capital Officers Council, which was finally brought about as part of the Homeland Security Act of 2002. While we applaud the Council's creation of two needed subcommittees to examine performance management as well as leadership development and succession planning, we would urge the Council to add another subcommittee to evaluate training programs across

government. Without proper training, and funding for training, we cannot hope to effectuate expansive human resources changes and fully achieve them.

PAY FOR PERFORMANCE

There has been much discussion about the creation of a pay-for-performance system at DHS. We believe that a deliberate process that takes into account both an internal and independent review mechanism for the implementation of a pay-for-performance system is crucial to its success at DHS and elsewhere in the Federal government.

The replacement of the standard General Schedule pay system with a proposed pay banding system creates a devastating problem should insufficient funds be appropriated by Congress. As it stands, the regulations will have employees competing with one another for the same pool of money, all of which is based on their performance review. If this pool of money is inadequate, the performance of some deserving Federal employees will go unrecognized, causing the new system to fail in meeting its objective, in addition to creating dissension in the workplace. In short, the integrity of "pay-for-performance" will be severely hindered if ALL high performers are not rewarded accordingly. We believe that DHS should continue to allocate at least the annual average pay raise that is authorized and appropriated by Congress for General Schedule employees to DHS employees who are "fully successful" (or the equivalent rating), in addition to other rewards based on "outstanding" performance (or equivalent rating).

The performance appraisal process is key to this new personnel system. The review determines the employee's pay raise, promotion, demotion or dismissal in a far more uninhibited way than is currently established in the General Schedule. We support the premise of holding Federal employees accountable for performing their jobs effectively and efficiently. More specifically, the removal of a pass/fail performance rating system is a step in the right direction.

We are concerned, however, that within any review system there must be a uniform approach that takes into account the clear goals and expectations of an employee and a system that accurately measures the performance of that employee, with as little subjectivity on the manager's part as possible. As such, it is essential that within the review process, the methodology for assessment is unmistakable and objective in order to reduce the negative effects of an overly critical or overly lenient manager. The most important component in ensuring a uniform and accepted approach is proper training, and funding

thereof, that will generate performance reviews reflective of employee performance. We would like to submit the following necessary elements for executing a pay-for-performance system that has a chance to succeed:

- adequate funding of "performance funds" for managers to appropriately reward employees based on performance;
- development of a performance rating system that reflects the mission of the agency, the overall goals of the agency, and the individual goals of the employee, while removing as much bias from the review process as possible;
- a transparent process that holds both the employee being reviewed and the manager making the decision accountable for performance as well as pay linked to that performance;
- a well-conceived training program that is funded properly and reviewed by an independent body (we recommend the Government Accountability Office as an auditor) which clearly lays out the expectations and guidelines for both managers and employees regarding the performance appraisal process.

We believe that *transparency* leads to *transportability*, as intra-Department job transfers could be complicated by the lack of a consistent and uniform methodology for performance reviews. While we need training and training dollars, we should allocate those funds towards a program that takes into account all 22 disparate agencies within DHS. If we are to empower managers with the responsibility and accountability of making challenging performance-based decisions, we must arm them with the tools to do so successfully. Without proper funding of "performance funds" and training, we will be back where we started – with a fiscally restricted HR system that handcuffs managers and encourages them to distribute limited dollars in an equitable fashion.

COLLECTIVE BARGAINING AND LABOR RELATIONS

FMA supports an open and fair labor-relations process that protects the rights of employees and creates a work environment that allows employees and managers to do their jobs without fear of retaliation or abuse.

Under the new system, various components of the collective bargaining process are no longer subject to the same rules. There is also a move away from the Federal Labor Relations Authority (FLRA) as an independent negotiating body to an internal labor relations board made up of members appointed by the Department's Secretary. This immediately calls into question the integrity, objectivity and accountability of such an important entity. Impartiality is key to this process, and it is derived from independence in the adjudication process. The workforce must feel assured that such decisions are made free of bias and politics.

The appointments for the new Homeland Security Labor Relations Board (HSLRB) are made solely by the Secretary, with nominations and input allowed by employee organizations for two of the three positions. Submitting nominations from employee groups to the Secretary on whom we believe to be qualified candidates for this internal board must not be taken as perfunctory. They should be given serious consideration by the Department and where appropriate appointed to the board.

We are pleased to see in the final regulations that there are some checks and balances in regards to our concerns with the HSLRB. For instance, there will still be an appeals process available for employees to go to the FLRA and Federal court if necessary on certain collective bargaining issues. However, we would like to see defined guidelines or criteria on who may be appointed to the board, as opposed to just term limits.

The new system has relegated the authority for determining collective bargaining rights to the Secretary. Towards this end, the recognition of management organizations such as FMA is a fundamental part of maintaining a collaborative and congenial work environment. Of the provisions in Title 5 that have been waived under the new Department of Homeland Security personnel system, the modification of collective bargaining rights that gives the Secretary sole discretion on when to recognize the unions places into question such recognition of the Federal Managers Association by DHS.
Title 5 CFR 251/252 grants non-union employee groups the formal recognition of the Department by ensuring a regular dialogue between agency leadership and management organizations. Specifically, these provisions stipulate that:

- such organizations can provide information, views, and services which will contribute to improved agency operations, personnel management, and employee effectiveness;

- as part of agency management, supervisors and managers should be included in the decision-making process and notified of executive-level decisions on a timely basis;
- each agency must establish and maintain a system for intra-management communication and consultation with its supervisors and managers;
- agencies must establish consultative relationships with associations whose membership is primarily composed of Federal supervisory and/or managerial personnel, provided that such associations are not affiliated with any labor organization and that they have sufficient agency membership to assure a worthwhile dialogue with executive management; and
- an agency may provide support services to an organization when the agency determines that such action would benefit the agency's programs or would be warranted as a service to employees who are members of the organization and complies with applicable statutes and regulations.

In summary, Title 5 CFR 251/252 allows FMA, as an example, to come to the table with DHS leadership and discuss issues that affect managers, supervisors, and executives. While this process is not binding arbitration, the ability for managers and supervisors to have a voice in the policy development within the Department is crucial to its long-term vitality. Such consultation should be supported by all agencies and departments, thus we strongly urge the inclusion of CFR 251/252 into the final regulations in order to maintain the strong tradition of a collaborative work environment that values the input of Federal managers.

In fact, we strongly encourage the Department to make good on its call for "continuing collaboration" with management and employee groups during the implementation process by inserting language mirroring 5 CFR 251/252 in its regulations. Currently "continuing collaboration" is not more narrowly defined in the regulations, rather a blanket statement that the Department intends to do so. We would ask that the Secretary and DHS leadership set up regular meetings (monthly or bi-monthly), depending on the status of the implementation, in order to ensure this important dialogue that has been so critical to the design process continues.

ADVERSE ACTIONS AND APPEALS

As managers, we take comfort in knowing that there is an independent appeals process for employees to dispute adverse actions. We are concerned that within the new system the internal process that will be established might again call into question the integrity and accountability of the appeals process. As the Department of Homeland Security and the Office of Personnel Management felt it ultimately necessary to bypass the Merit Systems Protection Board (MSPB), we are pleased that there is still the ability for employees to ultimately appeal to the MSPB.

The MSPB system was established twenty-five years ago to allow Federal employees to appeal adverse agency actions to a third-party, independent review board. Since its inception, the MSPB has maintained a reputation of efficiency and fairness. MSPB decisions uphold agency disciplinary actions 75 to 80 percent of the time, which is evidence of the Board's broad support of agency adverse action decisions. In performance cases, the percentage is even higher in support of agency management. Decisions are also typically reached in 90 days or fewer.

Moreover, the current model has been successful because it is a uniform system for the entire Federal government. Establishing disparate appeals processes might create unnecessary confusion for the Federal workforce, which will lengthen, instead of streamline, the process while potentially making the system more prone to abuse. While we recognize the desire to streamline the appeals process, we believe that implementing an internal review board as proposed could create a lack of trust that will pervade the system, which will likely serve to lengthen and complicate the process.

In fact, in 1995, Congress took away Federal Aviation Administration (FAA) employees' MSPB appeals rights as part of a personnel reform effort that freed the FAA from most government-wide personnel rules. The FAA subsequently replaced the MSPB appeals process with an internal system – as is being proposed in the House version of the Defense Authorization bill – called the "Guarantee Fair Treatment" program consisting of a three-person review panel. Critics complained that the Guaranteed Fair Treatment program did not give employees access to an independent administrative review body. After numerous incidents and reports of abuse, Congress in 2000 reinstated full MSPB appeal rights to FAA employees as part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).

Based on its track record of fairness and credibility within the Federal community, we support incorporating the Merit Systems Protection Board in the appeals process. Given the MSPB's strong

reputation for swiftness and fairness in the eyes of agency management and employees – as well as the FAA's failed experiment with utilizing an internal appeals process – we at FMA believe that not doing so would create more problems than it solves.

The mission of the Department of Homeland Security demands high performance and the utmost integrity from its employees. As the adage goes, one bad apple can spoil the rest. DHS does not have that luxury. So, it is understandable that certain egregious offenses should never be tolerated, and therefore result in immediate and decisive action.

The Mandatory Removal Offenses (MRO) authority that has been given to the Secretary is a good way to aid in creating a culture that adheres to the sensitive nature of the work being done by the Department, and reminds employees that they must be on top of their game at all times. Certain acts such as leaking classified materials, deliberately abetting a terrorist, or committing serious fraud certainly warrant the removal of an employee. These along with a few other offenses could be justified in the creation of a MRO list.

We are nevertheless concerned that Pandora's Box could be opened, and caution restraint on the part of the Secretary in establishing specific MRO's. As was seen within the "10 Deadly Sins" at the Internal Revenue Service, overwhelming fear of violating an MRO slowed the actions of employees and impeded their work. This could be a serious detriment to an agency that needs as much creativity in battling 21st century terrorists who will use any means in any context to attack our homeland. Managers and employees working in DHS are fully aware of the sensitivity of their position and mission, so we urge the Department to exercise this authority with great care for potential side-effects.

PAY BANDING, COMPENSATION AND JOB CLASSIFICATION

Pay banding is not a new concept to the private and public sector industries. It is currently underway in a few government agencies, notably in the Federal Aviation Administration as well as in the Internal Revenue Service – where FMA has a large number of members. The job classification and pay system was developed in the late 1980s, and has seen varying levels of success across private industry and in the public sector.

Under the final regulations for DHS MAX^{HR}, applicable employees will no longer be governed by the traditional General Schedule (GS) pay system, which is made up of 15 levels and within level steps. The GS system is based on the premise that an employee who commits themselves to public service will be rewarded for longevity of service and tenure in the system through regular pay raises and promotions as long as the employee is "fully performing" the duties assigned. Under the pay banding system within pay for performance, the employee will be lumped into one of 12-15 job clusters that combine like job functions, and then placed in one of four pay bands: Entry Level, Full Performance, Senior Expert, and Supervisory (with the potential for more senior-level management bands).

While the exact determination of the pay range for each pay band has yet to be determined, it is our understanding that the GS salary structure will act as the baseline for moving an employee into the new band as well as act as a guide for determining the low and high ends of each band. Furthermore, we also have received assurances that current employees will not see any reduction in their current pay, and in fact qualified employees could receive higher salaries from this transition. We at FMA believe that this is a sound move on the part of DHS and OPM. The GS system is familiar to Federal managers and employees, and moving into a new pay banding system in and of itself creates some consternation. Using the GS system as the foundation will allay concerns that pay rates will be significantly reduced.

Pay bands also offer a number of benefits to the employee and manager that should be examined. The General Schedule places its emphasis on longevity, and the new system will place more emphasis on job performance than duration of employment. Pay bands provide the opportunity to have accelerated salary progression for top performers. As in the IRS pay-band system, managers are eligible for a performance bonus each year. Those managers with "Outstanding" summary ratings will receive a mandatory performance bonus. Managers with "Exceeded" summary ratings are eligible for performance bonuses.

In the area of job classification, determinations are made which place positions in different pay categories where the distinctions that led to the classification are small. Pay-banding provides the opportunity to place greater weight on performance and personal contributions.

Pay bands can also be designed to provide a longer look at performance beyond a one-year snapshot. Many occupations have tasks that take considerable lengths of time. Pay bands can be designed to recognize performance beyond one year. Arbitrary grade classifications in the GS system inhibit non-competitive reassignments. Broader bands allow non-competitive reassignments. This enhances management flexibility and developmental opportunities.

Of course, there remain challenges with any proposed pay-band system for that matter. First, pay-for-performance systems are only as good as the appraisal systems they use. Since performance is the determining factor in pay-band movement, if there is no confidence in the appraisal system, there will be no confidence in the pay system.

Moreover, pay-for-performance systems can be problematic where there is an aging workforce. Experienced employees tend to converge towards the top of the pay band. This provides them little room for growth. This is particularly true for those employees whose GS grade is the highest grade in the new band. (Example: Grade 13 employee placed in an 11-13 band. S/he will be towards the top and now will need the higher grades to continue to move ahead. Previously s/he only needed time in grade and a "fully successful" rating to progress).

Finally, pay-band performance requirements can discourage non-banded employees from applying for banded positions. If the employee is converted in the upper range of a band s/he may not have confidence s/he can achieve the higher ratings requirements.

Compounding the critical mission of DHS and its new personnel system are the myriad of problems associated with the recruitment and retention of Federal employees. One piece in particular is the significant pay gap between the public and private sectors. According to a survey of college graduates, Federal and non-Federal employees conducted by the Partnership for Public Service[4], the Federal government is not considered an employer of choice for the majority of graduating college seniors. In the survey, nearly 90 percent said that offering salaries more competitive with those paid by the private sector would be an "effective" way to improve Federal recruitment. Eighty-one percent of college graduates said higher pay would be "very effective" in getting people to seek Federal employment. When Federal employees were asked to rank the effectiveness of 20 proposals for attracting talented people to government, the second-most popular choice was offering more competitive

[4] Survey conducted by Hart-Teeter for the Partnership for Public Service and the Council for Excellence in Government, Oct. 23, 2001, p. 1-3.

salaries (92 percent). The public sector simply has not been able to compete with private companies to secure the talents of top-notch workers because of cash-strapped agency budgets and an unwillingness to address pay comparability issues.

Closing the pay gap between public and private-sector salaries is critical if we are to successfully recruit and retain the "best and brightest." In this regard, we are pleased to see a shift in the determination of "locality" pay from strictly geographical to occupational. Locality pay adjustments based on regions across the country did not take into account the technical skills needed for a given occupation. The new regulations allow for a look nationwide at a given occupation within the labor market that more accurately ties the rate of pay to job function, which could overcome geographic impediments in the past in closing the gap between public- and private-sector salaries.

GOVERNMENT-WIDE STANDARDS

The passage of the Department of Homeland Security Act of 2002 (P.L. 107-296) marked the first step in what has led to the largest civil service reform effort in over a quarter-of-a-century. Included in the legislation that modified the way we approach protecting our homeland, it authorized major changes to the pay, labor relations, collective bargaining, adverse actions, appeals process and performance review systems governed by Title 5 of the U.S. Code. The justification was made based on the critical and urgent need to have a flexible and dynamic human resources system that would allow the 22 disparate agencies of the new Department to prevent any threats to our national security and react quickly if need be. While this justification has come under fire, we agree that the needs of national security and protecting America's infrastructure and citizens may require greater latitude within the personnel systems of appropriate Federal agencies. But striking the right balance is what we collectively should be aiming to accomplish with respect to the implementation of the new MAX^{HR} human resources transformation at the Department of Homeland Security (DHS) and the new National Security Personnel System (NSPS) at the Department of Defense (DOD.

The White House has recently announced that it will be pushing forward an initiative to adopt similar civil service reform efforts across the Federal government and allow each agency to create its own personnel reforms that reflect the mission and needs of the agency. It is clear that the with so many changes in the Federal government over the past few decades – significantly reduced workforce size, changes to retirement systems, higher attrition rates, and increased external factors such as terrorism and

the issue of trust in government and its relationship to recruitment and retention – a modernization movement in personnel systems is justifiable. While we support the general effort to modernize and transform the civil service to reflect the current needs and resources of each agency, hastiness and the absence of an overarching government-wide framework for these reforms could create a Balkanization of the Federal government that diminishes the uniqueness of the Civil Service.

MAX^{HR} and the NSPS are still in their infancy. Outside of a few demonstration projects that sample much smaller workforce numbers, there is no significant track record of the effectiveness and success of such large-scale reforms. It makes little sense to create massive personnel changes across the Federal government without first seeing the successes, and failures, of the new systems at DHS and DOD.

There has also been a commitment on the part of the Office of Personnel Management, DHS and DOD to hold close the Merit System Principles, and we cannot stress adherence to these timely standards enough. However, we also believe that there needs to be even further guiding principles that maintain a system of integrity, transparency and accountability for managers and supervisors. The Office of Personnel Management should take the current systems being implemented at DHS and create a set of public principles that can guide future agencies in their efforts to develop new systems.

CONCLUSION

The final regulations on the new personnel system being issued by the Department of Homeland Security and the Office of Personnel Management are the first in what is expected to be a broader effort to transform the Civil Service as we know it. There is great hope that within these precedent-setting regulations lies the understanding that managers and employees can work together in creating an efficient and effective Federal workforce that meets the missions of each agency. We at FMA share in this hope, but it is our responsibility – and that of all the stakeholders – to do what we can in eliminating the seeds that will reap setbacks or disasters.

A shift in the culture of any organization cannot come without an integral training process that brings together the managers responsible for implementing the new personnel system and the employees they supervise. The leadership of DHS must work in tandem with Congress, managers and employees in creating a training program that is properly funded and leaves little question in the minds of those it affects of their rights, responsibilities and expectations.

A total overhaul of the GS pay system to reflect a more modern approach to performance-based pay must be funded properly in order for it to succeed. As we have explained, the lack of proper funding for "pay for performance" will work contrary to its intended results. The mission of the agency is too critical to America to create a system that is hamstrung from the start.

Furthermore, employee morale is also crucial to the successful implementation of MAX^{HR}. Ensuring that employees feel their rights are protected and safeguards are in place to prevent abuse or adverse actions derives in part from independent and effective collective bargaining, labor relations, and appeals processes. The Secretary and the HSLRB should do all in their power to create an open and fair working environment. At the same time, DHS must continue to engage in the important consultative relationship with management organizations such as FMA.

There are additional challenges that face a new pay-banding system. We are confident that the Department, in conjunction with OPM, is looking to the current GS system as a baseline for the job clusters and pay bands. This will go a long way towards easing some concerns for current managers and employees that their pay will be unfairly compromised.

We at FMA cannot stress enough the need to take a cautious and deliberate path for implementing the new regulations. It appears that DHS and OPM are committed to this approach. We recommend continued collaboration with management and employee groups as well as independent review and auditing by the Government Accountability Office, with the oversight of Congress. Through these checks and balances, we are hopeful that a set of guiding principles will emerge to assist other agencies in their expected personnel reform efforts.

We at FMA are cautiously optimistic that the new personnel system will be as dynamic, flexible and responsive to modern threats as it needs to be. While we remain concerned with some areas at the dawn of the system's rollout, the willingness of the Office of Personnel Management and the Department of Homeland Security to reach out to employee organizations such as FMA is a positive indicator of collaboration and transparency. We look forward to continuing to work closely with Department and Agency officials.

Thank you again, Mr. Chairman, for the opportunity to testify before your committee and for your time and attention to this important matter. Should you need any additional feedback or questions, we would be glad to offer our assistance.

Mr. PORTER. Thank you very much for your testimony.

First, a comment. Having represented an area for over 20 years with substantial public employees and more intense in the community where we live—we have National Park Service, Bureau of Reclamation [BLM], Fish and Game; we can go on and on—I have spent many, many years, and some of them are my very close friends. But let me give you a little additional perspective; not necessarily different, but additional from some of your comments today.

This is what I have heard for years: Many Federal employees aren't really sure of their expectations. They are not really sure about the current reward system, other than they know that they have 10 years left to retire or they have 8 years left to retire. Many of these employees are not really sure what their role is, and it changes so frequently sometimes they have trouble tracking exactly what is expected.

Again, I am not here to disagree with your comments, I am adding additional perspective.

To many of them it isn't about pay and benefits, because they are very pleased with what they are receiving, and certainly would like to have increases and would love to work for that. But I have found from my experience not only with Federal employees, but the private sector, that the pay and benefits aren't everything. They really want to know that they belong. And they really want to know what is expected and they really want to accomplish those goals, because they feel good about doing something exciting, that is positive, and they have a direct reflection, especially those in law enforcement. They get really frustrated sitting out there for hours and hours and hours, protecting our Nation. They get very frustrated.

And I am sure we can probably agree or disagree; you may hear this, you may not. But there are a lot of those folks out there that are looking for something other than an automatic increase; they are looking for something, and this may or may not be the answer. But I just want to add that from the perspective of knowing many, many Federal employees that are personal friends of mine that want to have some pay performance measures available to them, because when they excel, they want to know that they have excelled.

So that puts a lot of pressure on you, Mr. Perkinson. Management is so critical, and we have to make sure that your management is funded properly and you have the proper training, because especially management, you are to blame, whatever happens. You seldom will get credit, but you will always be blamed. But your comments are very well taken. Actually, all three of you. I appreciate what you are saying.

But I really wanted to add that part for the record for those folks out there that really want to have some measure of their success other than an automatic increase. There are so many Federal employees that are counting the days to retire because they are not sure what their worth is. And to all those I applaud them for what they are doing also.

And I am not asking questions. Another comment.

I can put Federal employees up against any corporate employee any time, any place. We have some of the finest Federal employees.

Corporate America can be a bigger bureaucracy than the Federal Government, and there are corporate employees out there that are struggling to find exactly what their mission is. But know that my principles as chairman is to make sure that we provide efficient, solid, strong service to the taxpayers.

But what I hear from constituents, and I think probably the panel and other members could agree, when it comes to Federal employees, the bulk of what we do as Members of Congress is try to open the door for a constituent, to try to get to the right person within the Federal system. They are frustrated because they may have gone to the Social Security Administration because they didn't get their check or it was lost, or it is a member of the military that didn't receive his pay or lost his benefits, or it is a senior citizen that hasn't received their Social Security check, or it is a single mom that is frustrated because she is not getting the services. So I am looking at this from both sides, and I want to make sure that we have the best, the brightest, the best trained, best compensated, most efficient work force. And when I call an agency, I want to make sure I can help this constituent, because people are frustrated with the Federal Government at times because they can't get help, or their paperwork is sitting on a desk someplace.

So I am hoping as we evolve this process and have continued discussions, that you will keep those in mind as my principles as chairman, that your points are well taken. And I have numerous questions that I am going to submit to you for some other time because of our time constraints, but know that I appreciate your comments. Thank you.

So that is the end of my questions.

Mr. Davis.

Mr. DAVIS. Thank you very much, Mr. Chairman.

Let me just say that I appreciate the testimony of each one of the witnesses. Each one of you expressed some level of a lack of confidence in the new proposed system. If you were able to give two concrete suggestions or recommendations to the secretary as to what should be changed in the proposal that would make you feel that the system was going to be more fair and would increase your level of comfortability relative to it netting what people are hoping to get out of it.

Why don't I start with you, Ms. Kelley?

Ms. KELLEY. In the pay area, Mr. Davis, in particular?

Mr. DAVIS. Yes.

Ms. KELLEY. I think, first and foremost, employees do want to know what is expected of them. That is true under today's system, and it will be under any future system. There is no belief that they will know what it is the goals are, when they accomplish it, and if they do accomplish them, they will be appropriately rewarded or recognized for that. So having clear expectations that—surely this issue about them not being in writing. I mean, why anyone would want to even set up that dynamic I just don't understand. It is not good for the managers or for the front-line employees who are the recipients of the evaluation. So I would say that clear goals in writing and, using your words, a system that is fair, credible, and transparent. Employees need to be able to see that they were given these four goals—it has to be clearly defined also for them how to

meet those goals and how to excel. And managers should be able to explain that to employees so they know what they are striving for. And then at the end of that there has to be a fair expectation that they will be appropriately recognized and rewarded.

One of the biggest potential failures for this system is the lack of funding. There will be no additional funding provided to the Department to implement this new pay system, and that means one of two things: either the dollars come from some employees to others, or there will be very little recognition or reward at the end of the year when employees do strive for and accomplish what it is they want.

Just as a side note, many have said to me, well, Federal employees don't want pay-for-performance, they like this current system. Well, if this current system was working the way it was supposed to, we wouldn't have to be talking about a new system. The failure is not with the system, it is with the implementation of it. And the failure of a new system will be with the implementation.

I have to tell you I was very surprised to hear Ron Sanders testify earlier that, in today's system, when an employee takes risks and excels at their job, all a manager can do is pat them on the head. I would say shame on that manager if that is all they think they can do, and shame on that agency who hasn't supported the manager to let them know what else they can do. They have the opportunity to provide quality step increases; they have discretional awards in a managers' awards pool they can distribute. They have a lot of ways to recognize employees above a pat on the head. So that is a perfect example to me that this is not—the current system isn't broken, it's the implementation of the system that is broken. And that will be exacerbated with the new system if not clearly defined, and that is what employees are afraid of. And based on today's experiences, that is why they don't trust what will happen tomorrow.

Mr. DAVIS. Mr. Bonner.

Mr. BONNER. Thank you. T.J. Bonner.

Mr. Chairman, just building on what you said, most of the complaints that I get are from employees who say, they won't let me do my job; I know what my job is, but they won't give me the resources or support to let me do my job. And their other big complaint is they don't treat me fairly. And that gets to the ranking member's question.

The recommendations I would have is in the arena of discipline, give the flexibility for mitigation back to the neutral adjudicators; eliminate mandatory removal offenses. In the arena of collective bargaining, expand it back out to what it is now. They are robbing employees of the ability to have fair systems for such things as where they are assigned. I had a young Border Patrol agent in San Diego call me last week, told me they gave me 72 hours to pack up my things and my family and move to Artesia, NM, to be a law instructor for 4 months, and I really don't want to go. And I have had these discussions with managers. Why would you want to force that person to go who is going to have an attitude about that, and that is going to rub off on all of those young impressionable trainees there?

Fairness is key in all of these areas. And with regard to pay, I think that you need to have a floor for the pay that is pegged to something that Congress controls, rather than having it at the whim of the agency. I have a number of our agents transfer to the Air Marshal Service. For the first 2 years of that agency they said you guys are doing a great job, but we don't have the budget for raises this year, so you are not getting one. And that is simply not fair, because the cost of living keeps going up for all of us, and nobody gets a little piece of paper that says please exempt this person from the higher cost of gas or the higher cost of housing out there because we don't have it in our budget. Everybody has to absorb that in their own personal finances, and it is simply not fair to those employees. If we want to keep the best and the brightest, we have to treat them fairly.

Mr. DAVIS. Mr. Perkinson.

Mr. PERKINSON. Darryl Perkinson. In this issue, I think there definitely needs, for management and employees, to be a performance blueprint. We have to have a blueprint of what the expectations are for the employees and also give a guideline to the managers on what they are being assessed on during a year. The training piece that we talked about in our testimony is key to that. We need to have a clear understanding of those guidelines that are going to face an employee and face a manager in how that person is going to be rated. It has to be transparent; it has to be clear; it has to be concise.

Additionally, another concern for me, and one thing that I clearly want to recommend, is we have to have the budgetary allowance to execute. I have heard all the talk about we are not going to have a forced distribution or a quota system, but in times when budgets are tight, I think a lot of times we get driven to that. So there has to be an assurance, as we implement this system, that budget doesn't become key, because it will and it will create forced distribution, and it will affect the quota system. And for a manager's perspective, the understanding is management is not the enemy; we are going to be included in this process too, and be judged on it just as well as the employees that are going to be affected.

Mr. DAVIS. Thank you very much, Mr. Chairman.

Mr. PORTER. Thank you. Thank you very much.

Congresswoman.

Ms. NORTON. Thank you, Mr. Chairman.

First, I would like to say to all of you, you have certainly made some headway, and I want to congratulate you for having sat down and gotten as much movement as you have. I know it was tough, and I know you expected more and, frankly, I think you have seen by the questions on both sides here, we expect more as well, if only because we expect at least the best practices in the private sector will be followed. There is a lot of precedent for how to move folks wholly from one system to another, and we don't have a lot of it in the Federal Government, and I can tell you from having served on the board of three Fortune 500 companies that nobody in the private sector who has a bottom line and who expects to meet it and make it grow would think of making a wholesale change with their employees, union or not union, without the kind of consulta-

tion that would guarantee that they would not be kicked back by reaction from their employees when they are in place.

I don't want to use the analogy of consent of the governed, the way we do things in a democracy, but there is something to be said about that, because people are willing to obey laws they don't agree with when they have had just the kind of give and take that says, well, I had my chance, but I lost. It is very important, it seems to me, that we be able to show that has occurred here.

I don't take it at all as an idle threat about retirement and early retirement. This is something that on this committee and in the Senate we have even had joint hearings on. We are so concerned that the Federal Government's record of getting and keeping the best and the brightest is in great jeopardy not just because of what we do, but because, frankly, the private sector has become so attractive, so sexy compared to Government employment, and we are so far behind in trying to keep up with them. So the last thing we want to do is to make that any worse, because it has been awfully bad for the last several years.

I have some particular questions of Mr. Perkinson, but I would like to ask Mr. Bonner—and Ms. Kelley, I would like to have her respond to this as well. You said, when you came to the Federal Service, that your pay would have been reduced, they could have kept you where you were then. I wonder if you would spell out how you think this system would work. Do you really expect that most employees will not in fact get annual increases? What number do you expect not to get increases? How do you think this will play out in practice?

Ms. KELLEY. So much of the system has been undesigned that we really can only speculate. For example, when there was discussion this morning about this formula, the math formula, one of the things that isn't clear to us is if you are an employee who is rated acceptable, exceeds, or outstanding, what is the value of the points attached to each of those. If it is 1 point for acceptable and 10 points for outstanding, then that means that probably an awful lot of employees will be rated acceptable and receive a very small amount of compensation added on each year. If the points are closer together, then it could mean that the ratings would be distributed differently.

We just have no sense right now of what they intend to do. They could also decide that of the dollars—you heard DHS and OPM say they would decide how much money would be used for the performance system. So they could decide that 50 percent of it will be used for locality pay in areas that they have identified as perhaps difficult to hire, and that 50 percent will be used for performance. Or they could decide that 90 percent will be for performance. We just don't know much about it.

During the meet and confer process, we were hoping to develop an awful lot of these details jointly. We were hoping to work through them. And they made very clear during that process they did not want to do the compensation building, the building of the system during meet and confer; and that is one of the reasons the details are so sketchy in the regulations. Now, they talk about the compensation committee and the ongoing work that they are going to do with us, and we have just started, we just had one meeting,

and they have committed to meet with us regularly now, because, of course, they have hired a contractor to build this compensation system. So we have——

Ms. NORTON. Is the contractor meeting with you too?

Ms. KELLEY. We have never met with him yet. We have a commitment from 2 weeks ago that we will be briefed by the contractor and have an opportunity to start sharing our views with him, but to date we have not.

But they also talk about the compensation system and how there will be four seats for the two largest unions. Just to make clear, there are 14 seats on this compensation committee, and during meet and confer, what we had argued for was to have half of those seats be union representatives so that there really could be a true discussion and hopefully a meeting of the minds so that we could roll these details out together. But as you see in the final regs, there will be 4 of the 14 seats will be union representatives. And I have no doubt that we will get to say what it is we want to say; I think time will tell whether or not those four seats result in our opinions and our suggestions being adopted, much like they were or were not during the meet and confer to date.

Ms. NORTON. And since the final decision would be with the secretary anyway, wouldn't it?

Ms. KELLEY. In the end, of course.

Ms. NORTON. What in the world is to be lost, since there are so many different agencies with so many different missions and so many different backgrounds, in having a fair number of both sides, since you can nullify what they say? This is the kind of thing I mean when I say you invite people to believe they haven't been given a fair shake and, therefore, they don't think there is anything they should in fact carry out as promised.

I have already said that I think that there is a dangerous confluence here when you are—if they go to put pay reform, this pay banding across the board in place while eliminating traditional projections at the same time, this is a perfect storm. And I got some comfort from the prior panel about implementation with the employee expectations and the competencies in place first, and I have to believe that is going to happen, since it seems to me one would have to be a mad man to rush forward without that.

I was particularly interested in Mr. Perkinson's testimony, frankly, because in a real sense, Mr. Perkinson, you are on the hot seat here. You talk about training, but you all are really on the hot seat.

Mr. PERKINSON. Yes, ma'am.

Ms. NORTON. The unions will continue to do what they have always done, to represent the rank and file employee, but it seems to me that the committee has to take very seriously your admonitions here. First of all, you are understanding you are getting, in some cases, entirely new responsibilities. You always, of course, evaluated people and you know what adverse actions are, and you know you win 80 percent of them anyway. But in your testimony you say, for example, collaboration between managers and employees must be encouraged in order to debunk myths and create a performance and results oriented culture. You talk about the change in the Federal Labor Relations Authority—and here I am quoting

you now—"as an independent negotiating body to what is now proposed and independent labor relations board made up of members appointed by the secretary." "This immediately," you say, "calls into question the integrity, objectivity, and accountability of such an important body." It seems to me you have to listen to the on-the-line managers who are saying, hey, the secretary isn't on the hot seat, it is your line manager who may, according to what we have heard today, decide better to leave the Federal service, where, by the way, these employees are in high demand, we having trained them and invested in them. They won't have any trouble, particularly in this region, getting employment with contractors and others.

You call, Mr. Perkinson, in your testimony, for—you talk about, "continuing collaboration" and that not being made more specific. You ask for that to be spelled out rather than a blanket statement that the Department intends to do so. And you actually say that DHS should set up regular meetings—this sounds like it comes from the unions. This comes from a manager who has worked with employees. Says set up regular meetings, monthly or bimonthly, depending on the status of implementation, in order to ensure this important dialog takes place. You talk about adverse actions, concerned that the new system and internal processes that might again call into question—these are very important words—the integrity and accountability of the appeals process.

Here we are hearing from managers, Mr. Chairman, who people are taking appeals from, saying this to us. You know, some of this testimony in the law would be considered against interest, which is to say coming from a party who might not benefit from what he is saying. But it seems to me this committee has to benefit from what you are saying.

And I would like you, particularly given the number of caveats to the present system, you describe in your testimony to indicate what it is you think now needs to be done so that some of these problems will not fall on the back of the managers whom you represent if the system goes into place forthwith.

Mr. PERKINSON. Yes, ma'am. Darryl Perkinson. I will try to respond for the time constraint.

Ms. Norton, one of the key fundamental issues of implementing any cultural change that we are trying to implement with this new personnel system is that we have to have communication and collaboration between those that have to apply the system and those that are going to be affected by the system. That is why, in our testimony, we do encourage the regular meetings, the oversight to make sure as we implement this thing—and we heard in previous panels' testimony that we wanted to make sure when we did this, we did it right, that it goes out the right way; it is not helter-skelter, it doesn't come out in a form that builds mistrust.

My personal experience in Government has been, over the last decade and a half, that we did make great strides in labor management relationships, and I do have a concern that if we go helter-skelter into a new system, that it could build mistrust and it could take us back to a day that we don't want to go back to, where we don't communicate, where we don't do things daily. When I supervise my people, I supervise a great number of people that do a

great job for this great country. And in the Department of Homeland Security we have a fundamental issue that we are protecting the borders of our country, and that mission has to be carried out for the American people. And we have a great deal of civil servants that every day do that, and we owe it to them that if we are going to convert a pay system, we need to do it in a fair, transparent manner, where discussion and changes are made as necessary.

Ms. NORTON. Mr. Chairman, I appreciate your indulgence, and I want to just say that I think in a real sense the testimony of this witness is extremely enlightening to me. Obviously, the unions have to do what they have to do. I find their testimony compelling. But in a real sense I am not sure I would like to be a manager in the Federal Government, who is told, OK, there you go, let us see what you can do.

And it is interesting that you testified, Mr. Perkinson, that you are going to be evaluated on how you carry out this system. Good luck, brother.

Mr. PERKINSON. Thank you.

Mr. PORTER. Thank you.

Due to time constraints, I have numerous questions that we are going to be sending you regarding the Labor Relations Board, collective bargaining questions, the adverse action and appeals process, and some specific pay questions.

Also, again, Mr. Perkinson, you are certainly pivotal to the future as it is being laid—not that you weren't in the past, but even higher expectations, so I will have some questions for you.

I think there has been some very thoughtful comments made by all the panelists, and I certainly believe by the committee today, asking as to your insights. You can depend upon having additional questions as we move along.

As I mentioned earlier, I know that employees and management prefer to have rules and guidelines, whatever that is, whether they haven't been implemented, as I think said very well by Ms. Kelley, is something that we have to look at. And my principles, I have said a couple of times, whether you are a maintenance worker or in management, or a CPA or a chemist or a scientist, we need to make sure everyone is treated fairly, that they have opportunities, and that they treat every taxpayer, every customer fairly.

Again, I know that we cannot rush to change. It is a massive undertaking, and I know that, as the Congresswoman mentioned, this is a massive undertaking whether it be in the private sector or the Government, this is a major change, so know that we will be anxious to hear your insights as it evolves.

At this time, I would like to adjourn the meeting. Thank you all for being here.

[Whereupon, at 1:05 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

"The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System"
Subcommittee on the Federal Workforce and Agency Organization
Chairman Jon C. Porter
Questions Submitted For The Record
March 2, 2005

Panel 1: David M. Walker, Comptroller General, Government Accountability Office

Pay-for-Performance

- In your written statement, you indicate that pass/fail ratings for employees in an "Entry/Developmental" band do not provide for meaningful differentiation in performance.
  - Are there any situations where you would agree that pass/fail ratings are appropriate?
- Our understanding of DHS' position is that pass/fail ratings are appropriate when an employee must demonstrate proficiency by passing an objective test, such as firearms qualifications, or during training periods, where an employee must satisfactorily complete coursework.
  - Is a pass/fail rating system appropriate in these situations?
  - If not, why not?
- You have stated that with the elimination of Performance Review Boards, the effective implementation of the Compensation Committee is important to assuring that the predecisional internal safeguards exist in the performance management process.
  - Specifically, what measures should the Compensation Committee implement to provide sufficient safeguards?
- Should DHS issue guidance to clarify when a manager should provide a performance improvement period when employee receives an unacceptable rating?

Labor-Management Relations

- With regard to the Homeland Security Labor Relations Board, if members of the board were to serve for longer terms, would that improve the independence of the panel?
- Besides the qualification standards that are set out in the regulations for members of the Homeland Security Labor Relations Board, how could the independence of the board be enhanced without impacting the DHS' mission requirements?

Chief Operating Officer

- In your testimony you have called for DHS to establish a Chief Operating/Chief Management Officer to guide the transition from the General Schedule to the new personnel system.

- How would this position be different from the newly created Chief Human Capital Officer (CHCO)?
- Should this responsibly reasonably lie with the CHCO?

Strategic Plan

- At previous Subcommittee hearings, the issue has been raised that DHS was proceeding with designing a personnel system without a strategic plan in place. Quite obviously, it should be the personnel system that supports the Department's mission and not the other way around.
  - To the best of your knowledge, how well has DHS integrated the personnel system into its strategic planning?

Panel 2: **The Honorable Ronald L. James, Chief Human Capital Officer, Department of Homeland Security; Dr. Ronald P. Sanders, Associate Director for Strategic Human Resources Policy, Office of Personnel Management; and The Honorable Neil A. G. McPhie, Chairman, U.S. Merit Systems Protection Board.**

Mr. James and Dr. Sanders

Merit-Systems Principles

- When the Department was created, it was given the authority in the Homeland Security Act to establish a modern, flexible personnel system to enhance its ability to perform the critical mission entrusted to it by the American people. The Act also requires the new system to conform to the core values of civil service law, that is, the system must honor the merit system principles laid out in title 5 and must protect employees from any of the law's prohibited personnel practices.
  - How do the new regulations protect the Merit Systems Principles?

Performance Management

- In his written statement, the Comptroller General has repeated his concern that the DHS performance management system merely allows, rather than requires, core competencies to be communicated in writing.
  - Are you considering an amendment to the regulations to provide that core competencies must be communicated in writing?
  - Are you considering issuing guidance to managers that would require that core competencies be communicated in writing?
- Are you considering increasing the number of summary rating levels from three to four?

Mr. James

Pay

- The Comptroller General has indicated that with the elimination of Performance Review Boards the effective implementation of the Compensation Committee is important to assuring that the predecisional internal safeguards exist in the performance management process.
  - Can you assure the Subcommittee that the Compensation Committee will implement sufficient safeguards in the performance management process?

Labor Relations Board

- Labor organizations also have expressed reservations regarding the independence of the Homeland Security Labor Relations Board (HSLRB) because the Secretary appoints the members of the HSLRB.

- Since the Secretary appoints the members of the HSLRB, what will the Department do to achieve such fairness and impartiality?

- The final regulations provide that members of the Mandatory Removal Panel will serve three-year terms.
  - If members of the panel were to serve for longer terms, would that improve the independence of the panel?
  - Besides the qualification standards that are set out in the regulations for panel members, how could the independence of the panel be enhanced without impacting DHS' mission requirements?

Mandatory Removal Offenses

- Regarding the adverse action provisions, have you made any progress toward issuing a final list of Mandatory Removal Offenses (MROs)?

Next Steps

- Please explain the role employees and their representatives will have as the Department moves forward on issuing implementing directives?

Strategic Plan

- The GAO has identified several key practices for effective organizational transformations. The last time this Subcommittee held hearings on the DHS personnel system there was some concern over the DHS's strategic plan for transformation.
  - Do you believe that you have a well thought out strategic plan in place for your transformation to the new personnel system?

Communications with Employees

- What steps are you taking to ensure that employees receive meaningful information concerning the development of the new DHS personnel system?

- Have you considered establishing a web page where DHS, employees, and labor organizations can interact and exchange views in an open forum?

Dr. Sanders

Collective Bargaining

- The regulations state that DHS must bargain over conditions of employment that were "foreseeable, substantial and significant."
  - Could you provide a few examples, then, of when DHS would have to engage in collective bargaining?

Adverse Actions and Appeals

- In adverse action cases, the final regulations do not allow reduction of a penalty handed down by DHS except where MSPB, or an arbitrator, decides that the penalty is "wholly without justification." Apparently, this standard is more limited than the mitigation authority MSPB has used until now.
  - Why did you select the "wholly without justification" mitigation standard?
- Chairman McPhie's written statement indicates that the MSPB participated in a consultative process with DHS and OPM over the provisions of the final regulations. However, in his statement he raises various objections with regard to shortened timeframes, mitigation of penalties, summary judgment, settlement, discovery, case suspensions, OPM reconsideration requests, mandatory removal appeals, and other matters.
  - Why were these concerns not addressed in the supplementary information published with the final regulations?
- How does OPM's right to intervene in administrative litigation differ from its right under current law?

Role of OPM

- With the finalization of the new DHS personnel system, and the system at the Department of Defense nearing completion, do you see the mission or role of OPM changing in future years?
  - If so, in what way?

Chairman McPhie

Appeals

- The supplementary material published with the final regulations indicates that DHS, OPM, and the MSPB worked together to arrive at the appeal procedures set out in the regulations.
  - Are you satisfied that appeals process provides due process for employees?
- In your written statement, you indicate that the MSPB participated in a consultative process with DHS and OPM over the provisions of the final regulations. However, in your statement, you raise various objections with regard to shortened timeframes, mitigation of penalties, summary judgment, settlement, discovery, case suspensions, OPM reconsideration requests, mandatory removal appeals, and other matters.
  - Did you raise these concerns during the consultative process?
  - If not, why not?

Shortened Timeframes

- You have expressed concerns that the processing times of non-DHS adverse actions may suffer because DHS cases may receive priority.
  - What actions are you taking to maintain the current average processing time on non-DHS cases at 141 days?
  - Do you need additional resources to maintain the current average processing time for non-DHS appeals?
  - If additional resources are required, what assistance would you require?
  - If the Board is unable to maintain the current processing times of non-DHS appeals, due to the procedural time limit on DHS appeals, could DHS reduce the burden on the Board by establishing an internal review process, without the necessity of Board review?

Mitigation

- Under subsection 9701.706(k)(6), the DHS final regulations provide that the Board must sustain the penalty imposed by the agency unless it "is so disproportionate to the basis for the action as to be wholly without justification." Further, under the DHS regulations if mitigation is found to be appropriate, the "maximum justifiable penalty" must be imposed, rather than merely the "maximum reasonable penalty." The Department has stated that it needs the new mitigation standard to improve employee efficiency and discipline.
  - Do you agree that the mitigation standard based on reasonableness is less definite and less useful for enforcing employee discipline than the more rigorous mitigation standard set out in the regulations?

- Isn't your position regarding mitigation of penalties essentially a value judgment concerning what is the best policy to achieve efficiency and discipline in the DHS workforce?

- Do you agree that the Secretary should make this policy choice, since the Secretary is ultimately accountable for the efficiency and discipline of the DHS workforce?

Summary Judgment

- The DHS regulations provide that summary judgment must be rendered "[w]hen there are no material facts in dispute..."

  - Why should an appellant have the right to a hearing when no material fact is in dispute and the only matter at issue is the application or interpretation of law or regulation?

  - Courts have provided summary judgment procedures for years, why sould this procedure be controversial in the context of administrative litigation?

OPM Intervention

- How many times did OPM intervene in cases under 5 U.S.C. § 7701(d), 5 C.F.R. §1201.34(b) and 5 C.F.R. § 1201.114(g) during FY 2002, 2003, and 2004?

- What was the average processing time for cases in which OPM intervened?

- What was the average processing time for cases in which OPM did not intervene?

- Is OPM intervention actually a burden on the Board's workload?

Settlement

- Why is the Board concerned about its authority to initiate settlement negotiations in cases in which the parties engaged in litigation cannot even agree to enter into settlement negotiations?

- Regarding staff resources, could a judge conduct settlement negotiations and delegate the drafting of a settlement to a staff member who is not a judge?

  - Could such a procedure be an efficient use of Board staff?

Disqualification of Employee and Agency Representatives During Appeals

- Regarding the provisions of the DHS concerning disqualification of an employee or an agency representative during an adverse action appeal, you note that the regulations provide no standard for disqualification.

  - Could the Board impose its own standard by decision?

- If motions for disqualifications can be disruptive in the context of DHS appeals, are they equally disruptive in non-DHS appeals?
- How often are motions for the disqualification of a representative actually filed?

Discovery

- You note that subsection 9701.706(k)(3) limits the number of discovery requests that a party may file from the amount provided by 5 C.F.R. § 1201.73(c)(1). According to your written statement, this limitation makes it "more likely that the administrative judge will have greater involvement in the discovery process."
  - How does a limitation on the number of discovery requests result in the increased involvement of an administrative judge?

OPM Reconsideration Requests

OPM may file a petition for reconsideration request in cases in which the Director of OPM determines that the case would have a substantial impact on civil service law or regulation.

- How many petitions for reconsideration were filed by OPM in fiscal year 2004?
- How many times has the Board not issued a fully explanatory Order and Opinion in cases in which the Director of OPM has filed a petition for reconsideration?
- If the Board issues a summary dismissal of an OPM petition for reconsideration without a full written decision on the merits, can that summary dismissal form the basis for further appeal by OPM to the U.S. Court of Appeals for the Federal Circuit?
- Could OPM's opportunity for judicial review of a significant precedent-setting case be frustrated if its petition for reconsideration is summarily denied without a fully explanatory Order and Opinion?
- If a case would have a significant impact, why is it objectionable for OPM to receive a fully explanatory Order and Opinion each time it files a petition for review?

Mandatory Removal Offenses

- In your written statement you note that subsection 9701.707(c)(4) is not consistent with law.
  - Did you voice your opinion on this matter during your consultations with DHS and OPM?
  - If not, why not?

Panel 3: **T.J. Bonner, President, Border Patrol Council, American Federation of Government Employees; Colleen Kelley, National President, National Treasury Employees Union; and Darryl Perkinson, National Vice President, Federal Managers Association.**

Ms. Kelley and Mr. Bonner

Labor-Relations Board

- You have been critical of the three-member DHS Labor Relations Board because all members are to be appointed by the Secretary of DHS, which you believe will lead to unfair favoritism of the agency management when making its decisions.
  - How do you plan, then, on working with the Secretary to assist in the selection of members to the DHS Labor-Relations Board that will be fair and impartial?
- The regulations provide that decisions of the DHS Labor Relations Board may be appealed to the Federal Labor Relations Authority (FLRA).
  - Does the involvement of the FLRA ensure impartial review of DHS Labor Relations Board decisions?

Collective Bargaining

- The final regulations provide DHS with the authority to make operational decisions without engaging in collective bargaining.
  - Why shouldn't DHS have the authority to proactively confront threats to homeland security without first conducting a collective bargaining process?
- It has been suggested that post-implementation bargaining over operational decisions would be a better approach than barring collective bargaining over these matters, as provided by the final regulations.
  - Why would post implementation bargaining over operational decisions be a better approach when in many cases the emergency that forced the action may have come and gone?

Adverse Actions and Appeals

- Under the new appeals system, MSPB will not be able to mitigate (reduce) a performance-based adverse action unless the action taken by the manager against an employee is deemed "wholly unjustified." Outside of DHS, MSPB has no power to mitigate penalties in such cases, although it does have that power in conduct-based cases.
  - In your opinion, would you rather have this new high standard, which allows MSPB mitigation for performance-based adverse actions, or the previous rules in which no mitigation was allowed?

Pay

- Currently, General Schedule employees are paid according to a Congressionally mandated one-size-fits all pay increase at the beginning of every January. The new plan at DHS would allow for much more targeted increases for employees in jobs varying by locality and type.
  - Do you believe that the Compensation Committee will help safeguard the new pay system from creating inequalities in pay?
- Do you think it is possible that employees can be better off under the new pay system?

Mr. Perkinson

- What is your overall impression of the new personnel system in regards to the increasingly important role of managers at DHS?
- What are your specific concerns?

Labor-Relations Board

- Concerns have been raised over the independence of the new DHS Labor Relations Board.
  - Do you share the concerns of those who fear that the Board will not be truly independent but rather will favor either management or employees?

Performance Evaluations

- Employee groups and others have characterized Federal managers as lacking the necessary skills and training to implement a performance management system in which employees are evaluated fairly.
  - Do you think that the provisions of the regulations requiring new supervisors to meet certain assessment and certification points as part of a formal training program will prepare managers for their new responsibilities?
- What kind of training will managers most need to be successful under the new system?
- Do you believe that adequate funding will be available to conduct the necessary training for managers in the new system?

Federal Workforce and Agency Organization Hearing
on
The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System

Wednesday, March 2, 2005

Questions for the Record

OPM and DHS

1) The term "implementing directives" is used throughout the final regulations, e.g., §9701.212 on pay bands states that the definitions for each pay band will be documented in implementing directives.

a. How soon will the implementing directives be issued and what will be the process for amending those directives, as necessary? What input might DHS employees have in crafting the implementing directives?

2) §9701.107 provides for *evaluation* of the implementation of the regulations by DHS.

a. Please detail how the program evaluation will be accomplished
and whether an independent evaluation will be provided by an outside entity, such as the National Academy of Public Administration. What oversight role will the Office of Personnel Management (OPM) have?

3) §9701.313 provides for a Homeland Security Compensation Committee. Please detail about how the committee will operate. For example, how frequently will the committee meet, will individual DHS employees have an opportunity to present their views before the committee, and will the committee make public the various data examined in making its recommendations? Will the committee operate similar to the Federal Salary Council?

4) §9701.332 on locality rate supplements appears to open the door to locality rate supplements for employees *outside* the 48 contiguous States, i.e., "and adjust new locality pay areas outside the 48 contiguous States." Federal civilian employees in Alaska and Hawaii are excluded from the locality-based comparability payments that cover other federal civilian employees because they receive 25% "nonforeign" cost of living (COLA) adjustments.

a. Please provide details on locality rate supplements for
the department's employees in Alaska and Hawaii, and how they compare with the "nonforeign" COLA.

5) §9701.342 on performance pay increases describes pay pools, performance ratings, and payouts.

a. How will DHS measure whether the performance pay system is understood by all employees, administered fairly, and provides meaningful performance adjustments, especially in the climate of budget neutrality?

6) §9701.346 discusses the assessment or certification of new supervisors in considering their pay adjustments for performance.

a. What about the assessment or recertification of experienced supervisors?
b. Please detail how managers and supervisors will be trained in the department.
c. What will be the focuses of the training and will it be continuous at various intervals?
d. Will OPM or an independent entity periodically evaluate the performance of DHS supervisors?

7) §9701.362 authorizes "special assignment" payments for employees in positions "placing significantly greater demands" on them.

a. Please provide details on these payments. What types of positions might be designated as special assignments and what would be the size of such payments.

8) §9701.406 discusses setting and communicating performance expectations.

a. Please provide specific details on how its performance management system(s) will be aligned with the department's mission and strategic goals, i.e., what are the DHS strategic goals and how will their accomplishment be reflected in the performance management system?

9) §9701.409 on rating performance states that DHS may not impose a forced distribution or quota on any rating levels.

a. What will be the nature of oversight to ensure that this prohibition is met?
b. On the other hand, how will DHS ensure that the ratings meaningfully distinguish between employee performance?

10) Please explain in detail its FY2006 budget request for implementing the new personnel system.

11) As part of the new personnel regulations, the responsibility for deciding collective bargaining disputes will lie with a three-member internal DHS Labor Relations Board appointed by the Secretary. Currently, throughout the federal government, collective bargaining disputes are decided by the Federal Labor Relations Authority (FLRA), an independent body appointed by the President and confirmed by the Senate.

a. How does DHS/OPM believe that the internal labor relations board meets the statutory mandate of the Homeland Security Act that DHS employees may, "organize, bargain

collectively, and participate through labor organizations of their own choosing in decisions which affect them"?

12) The final personnel regulations greatly reduce the circumstances where collective bargaining will occur for CBP employees.

a. Please tell the subcommittee why the regulations prohibit collective bargaining over basic conditions of work, such as employees' rotation between different shifts or posts of duty, or scheduling of days off, including even post-implementation expedited bargaining? It appears the current procedures for bargaining over basic workplace matters such as scheduling have not hampered the agency's homeland security missions in any way.

13) The final regulations provide the Secretary with unfettered discretion to create a list of Mandatory Removal Offenses (MRO) that will only be appealable on the merits to an internal DHS Mandatory Removal Panel (MRP) appointed by the Secretary. In addition, the regulations provide the Secretary with the sole discretion to mitigate a removal penalty.

a. Again, how can the agency expect front line employees to have any confidence in a personnel system where the most serious matters are charged and adjudicated by the Secretary and his appointed "Removal Panel"?

14) What particular statutory authority enabled the final regulations to give the FLRA and the MSPB new duties and rules of operation? The FLRA and the MSPB are independent agencies, and it appears that DHS and OPM are not authorized to impose obligations on either independent agency, or dictate how they will exercise their jurisdiction over collective bargaining and other personnel matters.

15) One of the continuing concerns surrounding the final DHS personnel regulations is the fact that many personnel decisions, especially pay, will now be based on more arbitrary factors under the control of local port supervisors and port directors.

a. How does DHS plan to address the concerns of front line officers that supervisors, who will be granted a tremendous amount of pay and performance evaluation discretion under the new personnel regulations, will be properly trained to ensure transparency and fairness for all front-line personnel?

16) As you know, DHS employees' pay will be shifting from the current GS-scale pay system to a pay-for-performance system under the new DHS personnel regulations.

a. How can a credible pay-for-performance pay system work in an agency, such as DHS, that requires a tremendous amount of teamwork to successfully accomplish agency missions? Is the Department aware of any large scale pay-for-performance system that has been successfully implemented in a law-enforcement environment?

David Walker, Comptroller General

1. Ron Sanders, testified that the DHS regulations provide for a balanced human resources system that will hold managers accountable and for provide for due process. Mr. Saunders also

states that "there is no danger whatsoever that the pay of individual DHS employees will become politicized."

a) Given what has been outlined in the regulations, do you concur with Mr. Sanders' assessment of the system? Please explain.

2. You have consistently testified that human resources systems have to be transparent and credible. You have also testified that employees have to have confidence and believe on the fairness of the system.

a) How do orally communicated employee expectations meet the standards for credibility and fairness? What problems can you envision might arise from not having employee expectations put in writing?

b) How do internal DHS review boards that are appointed solely by the Secretary and may not have union representation meet the standards for transparency and confidence in the system?

3. In you opinion, does DHS have the infrastructure in place to effectively implement these regulations?

4. Given your knowledge and expertise, what changes would you make to the regulations to ensure the Mandatory Removal Panel and the Homeland Security Labor Relations Board operated independently of DHS?

5. GAO recently modernized its human resources system. What features, policies or procedures of the GAO system would you recommend DHS adopt in its system?

Ron James, Department of Homeland Security

1. What appropriations will DHS seek to support (1) the pay system and (2) the performance management system?

2. Under the new system, you stated, "pay may be adjusted differently by job type in each market."

a) What does this mean and how would such pay adjustments be determined? Would attorneys, customs and border patrol agents, and program administrators, for example, receive different pay adjustments, and what would they be base on? (survey, data)

3. You state that employee representatives will have a "meaningful role in the design of further details in the pay-for-performance system" through "continuing collaboration." What does the term "continuing collaboration" mean? Will it be an opportunity to comment on *proposed* DHS implementing regulations or a "hands-on" role in *writing* the implementing regulations?

4. I understand that training on the new personnel system will commence this summer. What kinds of training will be provided and to whom?

a) Will training be provided by DHS staff or contract staff? Will it be on- or off-site? Will it include hands on practicum's, book learning, a mix or both or something else?

b) A significant portion of the training for managers is expected to focus on learning to critically appraise performance. How will a manager's successful completion of the training and application of what was learned be measured? Will managers be certified in various aspects of the new system?

5. The now combined Bureau of Customs and Border Protection (CBP), has identified over 1,900 employees who are currently designated as Bargaining Unit employees to be redesignated as Non-Bargaining Unit employees. Are you aware of this redesignation? If yes… Please provide a response in writing as to why CBP employees will lose there write to having union representation?

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

April 11, 2005

The Honorable Jon Porter
Chairman
Subcommittee on the Federal Workforce and Agency Organization
Committee on Government Reform
House of Representatives

Subject: *Posthearing Questions Related to the Department of Homeland Security's New Human Capital System*

Dear Mr. Chairman:

On March 2, I testified before your subcommittee at a hearing entitled "The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System."[1] This letter responds to your request that I provide answers to follow-up questions from the hearing. The questions, along with my responses, follow.

Pay for Performance

1. In your written statement, you indicate that pass/fail ratings for employees in an "Entry/Developmental" band do not provide for meaningful differentiation in performance. Are there any situations where you would agree that pass/fail ratings are appropriate?

The only circumstance when pass/fail overall performance appraisal systems should be used is for limited developmental periods where all employees who pass are granted equivalent performance rewards.

2. Our understanding of the Department of Homeland Security's (DHS) position is that pass/fail ratings are appropriate when an employee must demonstrate proficiency by passing an objective test, such as firearms qualifications, or during training periods, where an employee must satisfactorily complete course work. Is pass/fail appropriate in these situations? If not, why not?

[1]GAO, *Human Capital: Observations on Final DHS Human Capital Regulations*, GAO-05-391T (Washington, D.C.: Mar. 2, 2005). See also GAO, *Human Capital: Preliminary Observations on Final Department of Homeland Security Human Capital Regulations*, GAO-05-320T (Washington, D.C.: Feb. 10, 2005).

Yes, with regard to the results of the test but not necessarily with regards to a person's overall job performance. While objective tests can help inform managers' assessments concerning individual performance, in a knowledge-based environment, validated core competencies provide a fuller assessment of performance. Competencies define the skills and supporting behaviors that individuals are expected to demonstrate to carry out their work effectively. Applied organizationwide, core competencies can provide a consistent message to employees about how they are expected to achieve desired organizational results.

3. You have stated that with the elimination of Performance Review Boards, the effective implementation of the Compensation Committee is important to assuring that the predecisional internal safeguards exist in the performance management process. Specifically, what measures should the Compensation Committee implement to provide sufficient safeguards?

In order to provide sufficient safeguards, the Compensation Committee could implement the following measures. First, DHS could publish internally the overall results of the performance management and pay decisions while protecting individual confidentiality. Second, DHS could report periodically on internal assessments and employee survey results relating to the performance management system.

We found that several of the Office of Personnel Management's personnel demonstration projects implemented safeguards.[2] For example, the demonstration projects publish information for employees on internal Web sites that include the overall results of performance appraisal and pay decisions, such as the average performance rating, the average pay increase, and the average award for the organization and for each individual unit. Publishing this information can provide employees with the information they need to better understand the performance management system and to generally compare their individual performance with that of their peers.

4. Should DHS issue guidance to clarify when a manager should provide a performance improvement period when an employee receives an unacceptable rating?

Yes, any related guidance should clarify both manager and employee roles and responsibilities. This guidance should reinforce that a key objective of an effective performance management system is to provide candid and constructive feedback to help individuals maximize their contribution and potential in understanding and realizing the goals and objectives of the organization. Effective performance management systems are not merely used for once or twice yearly individual expectation setting and rating processes. These systems facilitate two-way communication throughout the year so that discussions about individual and organizational performance are integrated and ongoing.

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[2]GAO, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, D.C.: Jan. 23, 2004).

Labor-Management Relations

1. With regard to the Homeland Security Labor Relations Board, if members of the board were to serve for longer terms, would that improve the independence of the panel?

Increasing the initial term for board members beyond 3 years could potentially bolster the actual or perceived independence of the board, but such an action must be weighed against the willingness of prospective members to commit to long-term service on the board and the need for board member accountability. Nevertheless, the DHS regulations provide for other means to foster independence and impartiality of the board including staggered term appointments for members and some limited conditions on the removal of a member. For example, appointments of the initial board members will be for terms of 2, 3, and 4 years, respectively. The Secretary may however, reappoint a board member for an additional term.

2. Besides the qualification standards that are set out in the regulations for members of the Homeland Security Labor Relations Board, how could the independence of the board be enhanced without impacting DHS's mission requirements?

The labor relations board can strengthen its independence and impartiality through a commitment to transparency, reporting, and evaluation, which can be critical processes in ongoing human capital reform efforts.[3] Through regular and public reporting on its activities and the results of its adjudications, the board can demonstrate to DHS's employees, labor organizations, and others that it is carrying out its duties in a fair and impartial manner. This reporting would likewise aid in promoting and facilitating formal oversight and evaluations of the board's activities as well as DHS's overall human capital management system.

DHS could further enhance the independence and impartiality of the board through strengthening the appointment and removal processes of board members. This could include such areas as (1) a nomination panel that reflects input from appropriate parties and a reasonable degree of balance among differing views and interests in the composition of the board to ensure credibility, (2) stringent standards for removal, and (3) appropriate notification to interested parties in the event that a board member is removed.

Chief Operating Officer

1. In your testimony you have called for DHS to establish a Chief Operating/Chief Management Officer (COO/CMO) to guide the transition from the General Schedule to the new personnel system. How would this position be different from the newly created Chief Human Capital Officer (CHCO)? Should this responsibility reasonably lie with the CHCO?

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[3]GAO and the National Commission on the Public Service Implementation Initiative, *Highlights of a Forum: Human Capital: Principles, Criteria, and Processes for Governmentwide Federal Human Capital Reform*, GAO-05-69SP (Washington, D.C.: Dec. 1, 2004).

A COO/CMO can effectively provide the continuing, focused attention essential to successfully completing the implementation of DHS's overall merger and business transformation efforts. Specifically, such a position would serve to elevate attention that is essential to overcome an organization's resistance to change, integrate the human capital system with various other key management functions so they are no longer "stovepiped," and institutionalize accountability so that implementation of this critical human capital and other key business transformation efforts can be sustained.

By their very nature, the problems and challenges facing federal agencies are crosscutting and require coordinated and integrated solutions. The COO/CMO concept would provide DHS with a single organizational focus for the key management functions involved in the business transformation of the department, such as human capital, financial management, information technology, acquisition management, and performance management, as well as for other organizational transformation initiatives.[4] While the role of the CHCO includes aligning DHS's human capital policies and programs with its mission, strategic goals, and performance outcomes, the risk is that this management responsibility will be stovepiped and may not be implemented in a comprehensive, ongoing, and integrated manner.[5] The presence of a COO/CMO can help provide DHS with the elevated perspective to help address the trade-offs and prioritization at the departmental level that may be needed to effectively implement the new human capital regulations.

The specific implementation of a COO/CMO position must be determined within the context of the particular facts, circumstances, challenges, and opportunities of each individual agency. As it is currently structured, the roles and responsibilities of the Under Secretary for Management contain some of the characteristics of a COO/CMO for the department. Under the Homeland Security Act, the Under Secretary for Management is responsible for the management and administration of the department in such functional areas as human resources and personnel, among others. The CHCO currently reports to the Under Secretary for Management.

Strategic Plan

1. At previous subcommittee hearings, the issue has been raised that DHS was proceeding with designing a personnel system without a strategic plan in place. Quite obviously, it should be the personnel system that supports the department's mission and not the other way around. To the best of your knowledge, how well has DHS integrated the personnel system into its strategic planning?

While it is difficult to ascertain the extent to which the new personnel system is factored into strategic planning at the component level, at the department level, DHS addresses the need for a robust personnel system in both its overall Strategic Plan (issued February 2004) and its 2004-2008 Human Capital Strategic Plan (issued

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[4]GAO, *The Chief Operating Officer Concept and its Potential Use as a Strategy to Improve Management at the Department of Homeland Security*, GAO-04-876R (Washington, D.C.: June 28, 2004).
[5]GAO, *Human Capital: Observations on Agencies' Implementation of the Chief Human Capital Officers Act*, GAO-04-800T (Washington, D.C.: May 18, 2004).

October 2004). As part of an objective within the strategic goal "Organizational Excellence," the overall Strategic Plan notes that "We (DHS) will create a personnel system that is flexible and contemporary while preserving basic civil service principles and merit concepts." In the Human Capital Strategic Plan, DHS specifically notes that implementing its new human capital system will have a significant and profound effect on DHS culture and personnel. The Human Capital Strategic Plan goes on to outline the basic tenets of the personnel system and discuss strategies for implementation. Some of these strategies include the development of a prototype of a new market-based compensation system and the need to conduct a communications and training program.

Additional Questions

1. Ron Sanders testified that the DHS regulations provide for a balanced human resources system that will hold managers accountable and provide for due process. Mr. Sanders also states that "there is no danger whatsoever that the pay of individual DHS employees will become politicized." Given what has been outlined in the regulations, do you concur with Mr. Sanders's assessment of the system? Please explain.

DHS, like all organizations, will need to constantly and fully assure that pay decisions do not become politicized. To help assure that expanding pay for performance in the federal government is done in a fair, effective, and credible manner, we developed a list of possible safeguards based on our extensive body of work looking at the performance management practices used by leading public sector organizations both in the United States and in other countries as well as our own experiences at GAO in implementing a modern performance management system for our own staff.[6] While DHS's regulations provide for some of these safeguards, such as involving employees and their representatives, we believe that the following could guide DHS in continuing to develop a set of safeguards in connection with its human capital system:

- Assure that the agency's performance management systems (1) link to the agency's strategic plan, related goals, and desired outcomes and (2) result in meaningful distinctions in individual employee performance. This should include consideration of critical competencies and achievement of concrete results.

- Involve employees, their representatives, and other stakeholders in the design of the system, including having employees directly involved in validating any related competencies, as appropriate.

- Assure that certain predecisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoliticization of the performance management process (e.g., independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system, as well as reviews of performance rating decisions, pay

[6]GAO, *Defense Transformation: Preliminary Observations on DOD's Proposed Civilian Personnel Reforms*, GAO-03-717T (Washington, D.C.: Apr. 29, 2003).

determinations, and promotion actions before they are finalized to ensure that they are merit-based; internal grievance processes to address employee complaints; and pay panels whose membership predominately consists of career officials who would consider the results of the performance appraisal process and other information in connection with final pay decisions).

- Assure reasonable transparency and appropriate accountability mechanisms in connection with the results of the performance management process (e.g., publish overall results of performance management and pay decisions while protecting individual confidentiality and report periodically on internal assessments and employee survey results).

2. You have consistently testified that human resources systems have to be transparent and credible. You have also testified that employees have to have confidence and believe on the fairness of the systems.

a. How do orally communicated employee expectations meet the standards for credibility and fairness? What problems can you envision might arise from not having employee expectation put in writing?

To help enhance credibility and fairness and avoid any problems, some sort of written documentation of performance expectations is appropriate, in addition to orally communicating performance expectations. However, the means can vary. For example, at GAO, we have developed, and periodically reassessed and revised, a set of core competencies that have been validated by the employees and are clearly linked to our organizational values and goals. These competencies address achieving results, communicating orally and in writing, leading others, and developing people, among others. For each competency, we also have detailed performance standards that describe the behaviors required to merit a rating of "meets expectations" or "role model." Each competency and its standards are documented in writing. Such documentation helps to ensure transparency, consistency, and clarity in communicating performance expectations to the analyst community. Supervisors are to refer to these competencies and standards when setting performance expectations for each of their staff members, and employees are responsible for seeking any clarification. In addition, each employee is to be provided specific information on the employee's role and the engagement's objective, scope and method, anticipated product, and time frame, and is responsible for seeking clarification for any of these matters.

For GAO, the level of detail appropriate for an expectation-setting discussion will depend on the employee's prior knowledge related to the work and his or her experience level, as well as the nature and timing of the engagement. Initial expectations are to be amplified and clarified as needed. Supplemental written expectations are encouraged but not required, and the date the expectations were set and communicated to the employee is recorded. Likewise, at least at the midpoint and end of a rating year, designated performance managers are to formally provide employees feedback on how well they are meeting expectations, standards, and competencies. In addition, supervisors are encouraged to provide such feedback

throughout the year. This communication further provides for transparency and clarity.

b. How do internal DHS review boards that are appointed solely by the Secretary and may not have union representation meet the standards for transparency and confidence in the system?

As discussed earlier, the review boards can demonstrate to the employees, labor organizations, and others that they are carrying out their duties in a fair and impartial manner through regular and public reporting on the activities and the results of their adjudications. DHS could further enhance the independence and impartiality of review boards through the appointment and removal processes of board members. This could include such areas as (1) a nomination panel that reflects input from appropriate parties and a reasonable degree of balance among differing views and interests in the composition of the boards to ensure credibility, (2) stringent standards for removal, and (3) appropriate notification to interested parties in the event that a board member is removed.

3. In your opinion, does DHS have the infrastructure in place to effectively implement these regulations?

Last year, we reported that DHS was in the early stages of developing the infrastructure needed for implementing its new system.[7] This institutional infrastructure includes, at a minimum, a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program goals, mission, and desired outcomes; the capabilities to effectively develop and implement a new human capital system; and importantly, the existence of a modern, effective, credible, integrated, and validated performance management system that provides for a clear linkage between institutional, unit, and individual performance-oriented outcomes and includes adequate safeguards to ensure fair, effective, nondiscriminatory, and credible implementation of the new human capital system. In addition, as appropriate, the infrastructure should consider the institutional core values and other aspects of the organization that should remain constant over time.

Going forward, DHS must ensure it has the institutional infrastructure in place to make effective use of its new authorities. However, many of the design and implementation details of DHS's system are to be determined through implementing directives. These details do matter and they need to be disclosed and analyzed in order to fully assess DHS's proposed reforms and whether or not DHS has the supporting infrastructure in place to operationalize its human capital flexibilities.

4. Given your knowledge and expertise, what changes would you make to the regulations to ensure the Mandatory Removal Panel and the Homeland Security Labor Relations Board operate independently of DHS?

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[7]GAO, *Human Capital: DHS Faces Challenges in Implementing Its New Personnel System*, GAO-04-790 (Washington, D.C.: June 18, 2004).

In our previous testimonies on the proposed and final DHS regulations, we stressed the importance of the actual and perceived independence and impartiality of such boards.[8] Members of these types of boards should be, and appear to be, free from interference in the legitimate performance of their duties and should adjudicate cases in an impartial manner, free from initial bias and conflicts of interest. As we previously stated, the boards can strengthen their independence and impartiality through a commitment to transparency, reporting, and evaluation, which can be critical processes in ongoing human capital reform efforts. Through regular and public reporting activities and the results of adjudications, the boards can demonstrate to DHS's employees, labor organizations, and others that they are carrying out their duties in a fair and impartial manner. This reporting would likewise aid in promoting and facilitating formal oversight and evaluations of the boards' activities as well as DHS's overall human capital management system.

The changes in labor-management relations under the DHS regulations have not been without controversy. Four federal employee unions have filed suit alleging that DHS has exceeded its authority under the statute establishing the DHS system. That suit discusses bargaining and negotiability practices, adverse action procedures, and the roles of the Federal Labor Relations Authority and the Merit Systems Protection Board under the DHS regulations. Since the issues are currently pending in federal court, I do not believe it would be appropriate to comment further at this time on possible changes to the regulations and the role of these review boards.

5. GAO recently modernized its human resources system. What features, policies, or procedures of the GAO system would you recommend DHS adopt in its system?

Given our human capital infrastructure and our unique role in leading by example in major management areas, including human capital management, we believe that the federal government will benefit from GAO's experience with human capital reforms. DHS's regulations contain many of the basic principles that are consistent with proven approaches to strategic human capital management and parallel the tools and flexibilities GAO has used to modernize its human capital system. For example, the final regulations provide for (1) a flexible, contemporary, performance-oriented, and market-based compensation system, including occupational clusters and pay bands; (2) continued involvement of employees and union officials throughout the implementation process; and (3) periodic evaluations of the implementation of DHS's system.

However, as I stated in my testimony, there are areas of concern that deserve attention from DHS senior leadership. We encourage DHS to consider adopting these areas based on GAO's experience.

- Establishing a documented set of core competencies to help provide reasonable consistency and clearly communicate to employees what is expected of them. Also, having employees validate the competencies could help to gain their acceptance and credibility and minimize adverse actions.

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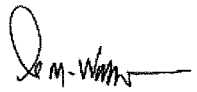
[8]GAO, *Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations*, GAO-04-479T (Washington, D.C.: Feb. 15, 2004), and GAO-05-320T.

- Ensuring an effective and ongoing two-way consultation and communication strategy that creates shared expectations among managers, employees, customers, and stakeholders about, and reports related progress on, the implementation of the new system. This involvement needs to be meaningful and not just pro forma.
- Implementing a performance management system with at least four summary rating levels to allow for meaningful distinctions in employees' performance, which can help DHS recognize and reward employee contributions and achieve the highest levels of individual performance.
- Providing adequate training prior to implementing the new system can help make employees aware of the new approach and periodically after implementation can help refresh employees' familiarity with the system.
- Continuing to build safeguards into the performance management system as DHS develops its implementing directives. Using safeguards, such as having an independent body to conduct reasonableness reviews of performance management decisions, can help to allay employees' concerns about the supervisors' ability to assess performance fairly and build a fair, credible, and transparent system.

For additional information on our work on strategic human capital management, please contact me at 512-5500 or Eileen Larence, Director, Strategic Issues, at 512-6806 or larencee@gao.gov.



David M. Walker
Comptroller General
of the United States

(450401)

U.S. MERIT SYSTEMS PROTECTION BOARD

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Chairman

April 6, 2005

The Honorable Jon Porter, Chairman
Subcommittee on the Federal Workforce
and Agency Organization
Committee on Government Reform
U. S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Porter:

As Chairman of the Merit Systems Protection Board (MSPB or the Board), I am pleased to have the opportunity to provide additional information about the Board's role in implementing the regulations issued by the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) that govern the DHS employee appeals system. Enclosed please find the responses to the questions you asked as a follow up to my testimony during your subcommittee hearing that was held on March 2, 2005, regarding the new Department of Homeland Security personnel system. As I stated during the hearing, we appreciated the opportunity to consult with DHS and OPM during the development of these regulations and to provide testimony regarding this important development in Federal human capital reform.

If you need additional information or assistance, please do not hesitate to contact me. Your staff may contact Rosalyn L. Wilcots, Legislative Counsel at (202) 653-6772, Ext. 1278. Her email address is rosalyn.wilcots@mspb.gov.

Sincerely,

Neil A. G. McPhie

The Countdown to Completion:
Implementing the New Department of Homeland Security
Personnel System
Subcommittee on the Federal Workforce and Agency Organization
U. S. House of Representatives
Jon C. Porter, Chairman
March 2, 2005

Responses to Questions for the Record
Submitted by
Neil A. G. McPhie, Chairman
U. S. Merit Systems Protection Board

Appeals

Question #1: The supplementary material published with the final regulations indicates that DHS, OPM, and the MSPB worked together to arrive at the appeal procedures set out in the regulations. Are you satisfied that [the] appeals process provides due process for employees?

Response: As I stated during my oral testimony at the hearing on March 2, 2005, I believe that the DHS system provides due process to its employees.

Question #2: In your written statement, you indicate that the MSPB participated in a consultative process with DHS and OPM over the provisions of the final regulations. However, in your statement, you raise various objections with regard to shortened timeframes, mitigation of penalties, summary judgment, settlement, discovery, case suspensions, OPM reconsideration requests, mandatory removal appeals, and other matters. Did you raise these concerns during the consultative process? If not, why not?

Response: Yes, members of my staff raised these concerns with OPM and DHS representatives during the consultative process with participation in meetings and through written comments.

Shortened Timeframes

Question #3a: You have expressed concerns that the processing times of non-DHS adverse actions may suffer because DHS cases may receive priority. What actions are you taking to maintain the current average processing time on non-DHS cases at 141 days?

Response: The average age of pending cases at Board headquarters was 141 days at the end of FY 2004 (September 30, 2004). This was a significant improvement over the same figure from the previous year (164 days at the end of FY 2003). I hope to report continued improvement at the end of the current fiscal year.

One reason for the recent positive trend is the hiring of additional career attorneys at headquarters. Further, I have asked the Board's Office of Policy & Evaluation – a group of management analysts, statisticians, and psychologists – to study how the legal side of the Board operates and to recommend process improvements so that the time it takes for the Board to decide a case can be decreased further. The simple reality, however, is that the Board must undertake a serious program to reduce the case backlog that grew under the two previous Board chairmen. We are currently taking steps to develop case backlog reduction strategies.

Question #3b: Do you need additional resources to maintain the current average processing time for non-DHS appeals?

Response: The Board's goal is to treat all cases equally. As a result, the Board will need additional resources to reduce the average processing times for all cases. It is anticipated that all aspects of the Board's operations will be affected by the new DHS procedures. The requirement that DHS appeals be processed within compressed timeframes at both the regional and headquarters levels and other requirements (*e.g.*, separate settlement judges) may prove difficult to meet with the Board's current resources. Additionally, while the new DHS system requires the Board to expedite the adjudication of adverse action appeals and process those appeals under regulations that differ in significant respects from the Board's current regulations, the Board will still be adjudicating appeals from DHS and DoD employees under several laws (*e.g.*, the Whistleblower Protection Act, Uniformed Services Employment and Reemployment Rights Act and Veterans Employment Opportunities Act) under the Board's current procedures.

For these reasons, we have requested an additional $750,000 as part of our budget request for fiscal year 2006 to enable the Board to hire six additional administrative judges and attorneys. These additional resources will enable the Merit Systems Protection Board to adjudicate DHS and DoD employee appeals[1] within the required timeframes while continuing to provide efficient and timely adjudicatory services to all other client agencies.

Question #3c: If additional resources are required, what assistance would you require?

Response: Please see response to immediately preceding question.

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[1] DoD expects that its new employee appeals system, which retains MSPB appeal rights, will be operational by fiscal year 2006.

Question 3d: If the Board is unable to maintain the current processing times of non-DHS appeals, due to the procedural time limit on DHS appeals, could DHS reduce the burden on the Board by establishing an internal review process, without the necessity of Board review?

Response: DHS could certainly reverse its decision to utilize the Board and develop its own internal review process. Such a decision would be regrettable. The decision by DHS officials to retain the Board to adjudicate adverse action appeals, rather than to set up its own internal review process, was the result of lengthy, thoughtful deliberations among officials from DHS, OPM, the Board, and employee groups. The consensus reached was that involvement by the MSPB was not only more effective but was critical to establishing the credibility of the DHS system. Such speculation seems premature, as the first case under the new DHS system has not yet been filed, and as a result, the precise impact of the DHS deadlines on non-DHS cases cannot be gauged. The Board is prepared to take whatever steps may be necessary to meet the DHS deadlines and to provide timely adjudication in non-DHS cases, and is considering many options.

Mitigation

Question #4a: Under subsection 9701.706(k)(6), the DHS final regulations provide that the Board must sustain the penalty imposed by the agency unless it "is so disproportionate to the basis for the action as to be wholly without justification." Further under the DHS regulations if mitigation is found to be appropriate, the "maximum justifiable penalty" must be imposed, rather than merely the "maximum reasonable penalty." The Department has stated that it needs the new mitigation standard to improve employee efficiency and discipline. Do you agree that the mitigation standard based on reasonableness is

less definite and less useful for enforcing employee discipline than the more rigorous mitigation standard set out in the regulations?

Response: I do not have any comparison or other empirical data on which to formulate an opinion on this issue.

Question #4b: Isn't your position regarding mitigation of penalties essentially a value judgment concerning what is the best policy to achieve efficiency and discipline in the DHS workforce?

Response: The Board accepts the fact that the Secretary has the authority to issue policy determinations for the Department. The Board's discussion of *Douglas* was not intended to second guess the Secretary's prerogatives. Rather, the Board simply intended to point out that under current standards, the Board considers the importance of the agency's mission. Of course, the Board will apply the standard that the Secretary has chosen.

Question #4c: Do you agree that the Secretary should make this policy choice, since the Secretary is ultimately accountable for the efficiency and discipline of the DHS workforce?

Response: I agree that the Secretary should make policy choices for the DHS system and that the Board has to accept whatever policy choices the Secretary makes. The Board has kept this distinction in mind throughout its consultation on due process.

Summary Judgment

Question #5a: The DHS regulations provide that summary judgment must be rendered "[w]hen there are no material facts in dispute . . . ."

Why should an appellant have the right to a hearing when no material fact is in dispute and the only matter at issue is the application or interpretation of law or regulation?

Response: An appellant should not have the right to an evidentiary hearing under the circumstances described in the question. As I noted in my written statement to the subcommittee, the summary judgment authority granted by the DHS regulations will be helpful in expediting the adjudication of cases. I wholeheartedly support the use of summary judgment.

Question 5b: Courts have provided summary judgment procedures for years. Why should this procedure be controversial in the context of administrative litigation?

Response: For lawyers and others who are experienced in litigation, the DHS summary judgment rule should not be controversial. Some employees, however, might not view their own cases as part of a system of "administrative litigation:" they may simply feel that they are not being given a full opportunity to tell their side of the story if they do not receive a hearing. Nevertheless, as stated above, I wholeheartedly support the use of summary judgment, and I hope that my prediction about how some may react to summary judgment proves to be wrong.

OPM Intervention

Question #6a: How many times did OPM intervene in cases under 5 USC § 7701(d), 5 CFR § 12-1.34(b) and 5 CFR § 1201.114(g) during FY 2002, 2003, and 2004?

Response: OPM has intervened in 11 cases at the regional level and in 4 cases at the headquarters level during fiscal years 2002, 2003, and 2004.

Question #6b: What is the average processing time for cases in which OPM intervened?

Response: The average case processing time for cases in which OPM intervened at the regional level was 158 days and for those in headquarters, the average case processing time was 699 days.

Question #6c: What is the average processing time for cases in which OPM did not intervene?

Response: Because of the very small number of cases in which OPM intervened, the overall cases processing times were not affected.

Question #6d: Is OPM intervention actually a burden on the Board's workload?

Response: No, OPM intervention is not a burden on the Board's workload.

Settlement

Question 7a: Why is the Board concerned about its authority to initiate settlement negotiations in cases in which the parties engaged in litigation cannot even agree to enter into settlement negotiations?

Response: The Board has expressed no concern about its authority to initiate settlement discussions. I support the use of settlement negotiations as a means of expediting the resolution of appeals brought before the Board.

Question 7b: Regarding staff resources, could a judge conduct settlement negotiations and delegate the drafting of a settlement to a staff member who is not a judge? Could such a procedure be an efficient use of Board staff?

Response: The DHS process mandates that settlement negotiations be conducted by a settlement judge who will not hear and decide the case. I support this approach. In my hearing statement, I advised the hearing panel that the requirement of a settlement judge will require the allotment of additional staff resources. I still am of that view. I did not comment on the allocation of an additional staff member who is not a judge because the DHS process does not require it. Under existing practice, the parties draft the settlement agreement which the judge, upon the parties' motion, enters into the record for enforcement purposes after reviewing it to determine that it is lawful, entered into freely by the parties and understood by the parties.

Disqualification of Employee and Agency Representatives During Appeals

Question #8a: Regarding the provisions of the DHS concerning disqualification of an employee or an agency representative during an adverse action appeal, you note that the regulations provide no standard for disqualification. Could the Board impose its own standard by decision?

Response: Yes, because the DHS regulations do not address this issue, the Board may apply the standard contained in its appeals regulations found at 5 CFR §1201.31(b). Under this provision, one or more parties may challenge an opposing party's designation of a representative on the grounds of conflict of interest or conflict of position.

Question #8b: If motions for disqualification can be disruptive in the context of DHS appeals, are they equally disruptive in non-DHS appeals?

Response: In my written statement, I advised the hearing panel that (unlike the Board's 15 day limitation), the absence of a limitation on the time for

filing a challenge to a party's representative in the DHS regulations may delay the proceedings.

Question #8c: How often are motions for the disqualification of a representative actually filed?

Response: We do not keep statistics on this issue.

Discovery

Question #9: You note that subsection 9701.706(k)(3) limits the number of discovery requests that a party may file from the amount provided by 5 CFR § 1201.73(c)(1). According to your written statement, this limitation makes it "more likely that the administrative judge will have greater involvement in the discovery process." How does a limitation on the number of discovery requests result in the increased involvement of an administrative judge?

Response: The DHS regulations on discovery significantly limit parties to filing only one set each of 25 interrogatories, requests for production, and requests for admissions. 5 C.F.R. § 9701.706(k)(3)(ii). Under existing procedures, parties occasionally make requests for additional discovery. It is anticipated that parties will continue to make such requests under the new procedures. In that case, they are required to file a motion with the AJ requesting additional discovery. The AJ will thus become more involved in the discovery process and must determine whether the party has shown "necessity and good cause" to warrant such additional discovery. 5 C.F.R. § 9701.706(k)(3)(iii).

The Board's regulations provide that parties are expected to start and complete discovery with a minimum of Board intervention, 5 C.F.R. § 1201.71, although there are limitations on the number of discovery requests a party may make, 5 C.F.R. § 1201.73(e), and the AJ may limit the frequency or the extent of use of discovery methods, 5 C.F.R. § 1201.72(d). It has been our experience that,

when parties undertake discovery freely on their own, without AJ involvement, they tend to weed out extraneous matters and are better able to focus on the main issues in the appeal, all of which leads to a smoother and more efficient adjudicatory process.

OPM Reconsideration Requests

Question #10a: OPM may file a petition for reconsideration request in cases in which the Director of OPM determines that the case would have a substantial impact on civil service law or regulation. How many petitions for reconsideration were filed by OPM in fiscal year 2004?

Response: Our records show that OPM filed no requests for reconsideration in fiscal year 2004.

Question #10b: How many times has the Board not issued a fully explanatory Order and Opinion in cases in which the Director of OPM has filed a petition for reconsideration?

Response: This was not an issue in fiscal year 2004 since OPM filed no requests for reconsideration during that period.

Question #10c: If the Board issues a summary dismissal of an OPM petition for reconsideration without a full written decision on the merits, can that summary dismissal form the basis for further appeal by OPM in the U.S. Court of Appeals for the Federal Circuit?

Response: Yes.

Question #10d: Could OPM's opportunity for judicial review of a significant precedent-setting case be frustrated if its petition for reconsideration is summarily denied without a fully explanatory Order and Opinion?

Response: No, OPM may rely on the Board's rationale as articulated in the decision for which it seeks reconsideration.

Question #10e: If a case would have significant impact, why is it objectionable for OPM to receive a fully explanatory Order and Opinion each time it files a petition for review?

Response: This question refers to a "petition for review," which is not synonymous with a "request for reconsideration." OPM may participate in the adjudication of a case in one of three ways: 1) OPM may be an original party to a case; 2) OPM may intervene in a case; or 3) OPM may request reconsideration of a final decision issued by the full Board (not an administrative judge) in a case in which it was not a party. Where OPM participates in the adjudication of a case as an original party or an intervener, it may file a petition for review of the administrative judge's decision.

As I advised the hearing panel in my written statement, the Board has almost always issued a fully explanatory Order & Opinion in cases where OPM files a request for reconsideration. However, not all OPM requests for reconsideration present new arguments. In many instances, the arguments proffered by OPM in support for its request for reconsideration were already brought by the parties and addressed by the Board in its decision. In those cases, to require the Board to repeat the rationale already set forth in its earlier decision could result in an unnecessary expenditure of staff resources and a delay in the issuance of the reconsideration decision.

Mandatory Removal Offenses

Question #11: In your written statement, you note that subsection 9701.707(c)(4) is not consistent with law. Did you voice your opinion on this matter during your consultations with DHS and OPM? If not, why not?

Response: Yes, during the consultative period, I advised DHS and OPM representatives of my concerns regarding this provision.

Questions for the Record
House Government Reform Committee
"The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System"
March 2, 2005
Chief Human Capital Officer Ronald James

Panel 2: The Honorable Ronald L. James, Chief Human Capital Officer, Department of Homeland Security; Dr. Ronald P. Sanders, Associate Director for Strategic Human Resources Policy, OPM; and The Honorable Neil A. G. McPhie, Chairman, U.S. Merit Systems Protection Board.

Questions for Mr. James (DHS) and Dr. Sanders (OPM)
Submitted by Chairman Jon C. Porter

Merit-Systems Principles

- When the Department was created, it was given the authority in the Homeland Security Act to establish a modern, flexible personnel system to enhance its ability to perform the critical mission entrusted to it by the American people. The Act also requires the new system to conform to the core values of civil service law, that is, the system must honor the merit system principles laid out in title 5 and must protect employees from any of the law's prohibited personnel practices.

  - **Q02350:** How do the new regulations protect the Merit Systems Principles?

  The Homeland Security Act requires that any human resources management system established at DHS shall, among other things, not waive, modify or otherwise affect the public employment principles of hiring based on merit and fair treatment set forth in 5 USC 2301. The DHS regulations are based on the principles of merit and fairness embodied in the statutory merit system principles and do not disturb them in any manner. Protections against statutorily prohibited personnel practices, such as whistleblower protection, remain the same. Fair and equitable treatment of employees is preserved by providing due process in adverse actions. Employees will continue to receive advance notice, and an opportunity to reply, a final decision, and they will have the right to appeal the final decision to a third-party. The streamlined adverse action and appeal procedures preserve the expectation of high standards for employee integrity and conduct, efficient and effective management (of employee performance and conduct), and the separation of employees for poor performance or misconduct.

Performance Management

- In his written statement, the Comptroller General has repeated his concern that the DHS performance management system merely allows, rather than requires, core competencies to be communicated in writing.

- **Q02351:** Are you considering an amendment to the regulations to provide that core competencies must be communicated in writing? **Q02352:** Are you considering issuing guidance to managers that would require that core competencies be communicated in writing?

We are not considering amending the regulations to provide that core competencies be communicated in writing. During the meet-and-confer process, the participating labor organizations agreed that performance expectations (including core competencies) need not be in writing. The regulations clearly specify our intent that performance expectations, including those that may affect an employee's retention

in the job, must be communicated to the employee prior to holding the employee accountable for them. The regulations also state that notwithstanding this requirement, employees are always expected to demonstrate appropriate standards of conduct, behavior, and professionalism, such as civility and respect for others. Implementing directives will include procedures for setting and communicating performance expectations.

Q02353: Are you considering increasing the number of summary rating levels from three to four?

The regulations require that we establish a performance management system with at least three levels (unacceptable, fully successful (or equivalent), and at least one level above fully successful. We are currently in the design stages of the DHS-wide performance management system and are considering four summary rating levels.

Questions for Dr. Sanders (OPM)
Submitted by Chairman Jon C. Porter

Collective Bargaining

12. The regulations state that DHS must bargain over conditions of employment that were "foreseeable, substantial and significant."

Could you provide a few examples, then, of when DHS would have to engage in collective bargaining?

DHS and its employee unions will continue to bargain over procedures and appropriate arrangements for employees adversely affected by the exercise of certain non-core operational management rights, if the change is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit or those employees in that part of the bargaining unit affected by the change. These non-operational management rights include the right to lay off and retain employees; to suspend, remove, reduce in grade, band or pay or take other disciplinary action against such employees; or with respect to filling positions, to make selections for appointment from properly ranked and certified candidates for promotion or from any other appropriate source. Therefore, if a management budget decision were to result in the need to conduct a reduction-in-force (RIF), for example, management would bargain, as they did under chapter 71, over procedures and appropriate arrangements. Procedures could include the manner in which RIF notices are provided to employees, procedures for employees to review the accuracy of their records or their standing on retention rosters. Appropriate arrangements could include outplacement assistance, retirement and financial planning seminars, and counseling.

Another example of a bargaining obligation under the proposed system could include bargaining over appropriate arrangements and procedures with regard to a policy on announcing, or posting, job openings. DHS and its employee unions might well negotiate procedures for employees who were unable to respond to job announcements for reasons beyond their control, e.g. military duty, as well as the amount of time allowed for employees to respond to the announcement, and the manner in which the announcement is distributed, e.g. email, bulletin boards, agency newsletters, websites, etc. Other examples of this type of bargaining might relate to retention of employees, suspension, removal, or reduction in grade, band, or pay, or other disciplinary action.

Questions for the Record
House Government Reform Committee
"The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System"
March 2, 2005
Chief Human Capital Officer Ronald James

For certain other core operational rights, management will not bargain over procedures but is required to negotiate over appropriate arrangements for employees adversely affected by the exercise of a management right, if the change is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit or those employees in that part of the bargaining unit affected by the action or event, and are expected to exceed, or have exceeded 60 days. Thus, management would be required to bargain over appropriate arrangements regarding a deployment expected to last 60 days or more. Management would be required to bargain, as they did under chapter 71, appropriate arrangements. Such bargaining could include authorizing employees to use government telephone systems to contact family members during their deployment, providing access to the internet and computers so that employees can continue college courses remotely, reimbursing expenses incurred by the employee related to the deployment, and providing periodic trips home.

Another example of bargaining over these core operational rights could include bargaining over appropriate arrangements with regard to the introduction of new technology. DHS and its employee unions might well negotiate appropriate arrangements for employees when management requires the use of new portable radiation detection equipment, e.g., arrangements for transitioning from the old to the new equipment, to ensure employees have appropriate field instruction manuals, to provide assistance for resolving operational problems, for not adversely evaluating employees due to equipment problems, to provide appropriate protective gear, and to provide optional equipment that will permit employees to transport and use the equipment without physical strain.

Adverse Actions and Appeals

13. In adverse action cases, the final regulations do not allow reduction of a penalty handed down by DHS except where MSPB, or an arbitrator, decides that the penalty is "wholly without justification." Apparently, this standard is more limited than the mitigation authority MSPB has used until now.

Why did you select the "wholly without justification" mitigation standard?

The Department bears full accountability for accomplishing the homeland security mission, and the Department must be given deference in determining the appropriate penalty for employees who engage in misconduct or poor performance which negatively affects its mission. There is a presumption that DHS officials will exercise that judgment in good faith. If they do not, however, providing MSPB (and private arbitrators) with limited authority to mitigate is a significant check on the Department's imposition of penalties.

14. Chairman McPhie's written statement indicates that the MSPB participated in a consultative process with DHS and OPM over the provisions of the final regulations. However, in his statement he raises various objections with regard to shortened timeframes, mitigation of penalties, summary judgment, settlement, discovery, case suspensions, OPM reconsideration requests, mandatory removal appeals, and other matters.

Why were these concerns not addressed in the supplementary information published with the final regulations?

We received over 3,800 comments during the public comment period from the general public, the Federal community, employee union organizations, and Congress. The concerns Chairman McPhie raised in his testimony are concerns raised to some degree by either MSPB itself or other commenters during the comment period. We provided detailed responses to the comments received and are confident that we

have fully addressed the concerns in the supplementary information of the final regulations. We did not identify the author of a comment, except when the comment was submitted by Congress; and we organized our responses by major comments, and specific comments for each section of the regulations.

15. How does OPM's right to intervene in administrative litigation differ from its right under current law?

Under current law, the Director of OPM may intervene in an MSPB proceeding or petition MSPB for review of a decision if the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, or regulation under OPM's jurisdiction. Under DHS, the Director may intervene when he or she believes that an erroneous decision will have a substantial impact on civil service law, rule, regulation or policy directive.

16. With the finalization of the new DHS personnel system, and the system at the Department of Defense nearing completion, do you see the mission or role of OPM changing in future years? If so, in what way?

The role of OPM continues to evolve both as a result of recent civil service modernization efforts and as a prerequisite to modernizing the civil service in the rest of Government. The civil service has gone through various modernization phases and with each phase the role of the central human resources management agency has changed. The first great change was from a spoils system to a merit system in which the primary role of the then Civil Service Commission was to enforce compliance with civil service rules. With modernization under the Civil Service Reform Act of 1978, OPM took on a more consultative role in assisting agencies with demonstration projects and performance management systems. With greater technological change, OPM took on the role of business partner in leveraging the economies of scale in Federal benefit programs and in automating human resources management processes. With the focus on President George W. Bush's Management Agenda, the prior consultative role included a much larger measure of assessment to determine if agencies were achieving results through the strategic management of human capital. With the enactment of new human resources management systems in the Departments of Homeland Security and Defense, OPM has become a true strategic partner in maximizing those flexibilities while ensuring that core civil service principles are preserved. However, in implementing those systems, an additional role has emerged for OPM – that of change management leader to ensure transparency, fairness, and fidelity to core principles in developing a truly modernized civil service. This process leader role serves to ensure collaboration with stakeholders, attention to core principles and prohibitions, and coordination of agency implementing guidance.

Questions for Mr. James (DHS) and Dr. Sanders (OPM)
Submitted by Minority

1) The term "implementing directives" is used throughout the final regulations, e.g., §9701.212 on pay bands states that the definitions for each pay band will be documented in implementing directives.

- a. **Q02363:** How soon will the implementing directives be issued and what will be the process for amending those directives, as necessary? The draft implementing directive for pay is scheduled in the June 2005 timeframe with a final implementing directive to be issued in the August 2005

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timeframe. **Q02364:** What input might DHS employees have in crafting the implementing directives? *(The following response is taken directly from DHS question/response #Q02359, as modified by DOJ recommendation. "Please explain the role employees and their representatives will have as the Department moves forward on issuing implementing directive.")* We will work with all stakeholders and employee representatives as required in 9701(e). The regulations provide for continuing collaboration with employee representatives and we are reaching out to them on issues which affect their constituency. Specifically, the regulations require that DHS provide employee representatives with an opportunity to discuss their views and concerns during our drafting of Implementing Directives that will set forth details of the program design. Employee representatives' comments will be taken into consideration before any final decisions are made. There will also be opportunities for employees to serve on focus groups, some of which are already underway, which will discuss design concepts related to performance management, occupational clusters and pay banding. Finally, DHS regulations provide for employee representative participation in the evaluative aspects of the new program.

2) §9701.107 provides for evaluation of the implementation of the regulations by DHS.

a. **Q02365:** Please detail how the program evaluation will be accomplished and whether an independent evaluation will be provided by an outside entity, such as the National Academy of Public Administration. Q02366: What oversight role will the Office of Personnel Management (OPM) have?

The DHS human capital staff has created a strategy for program evaluation that links directly to the overall DHS Strategic Plan and the DHS Human Capital Strategic Plan. The evaluation of MAX^{HR} programs and processes are included in this strategy. Both qualitative and quantitative data will be gathered on each human resource product or service and it will be evaluated from the perspectives of customer satisfaction, financial efficiency, innovation and learning and internal business processes. An independent review and evaluation of our programs will occur via an Independent Verification and Validation (IV&V) process. This analysis is currently proposed to be performed by an entity outside DHS.

OPM will serve in a technical consultation capacity to DHS in designing and conducting an evaluation of the implementation of the regulations. In addition, OPM will conduct a separate study targeted to evaluate the pay-for-performance system against statutory performance management criteria.

3) §9701.313 provides for a Homeland Security Compensation Committee. **Q02366:** Please detail about how the committee will operate. For example, how frequently will the committee meet, will individual DHS employees have an opportunity to present their views before the committee, and will the committee make public the various data examined in making its recommendations? Will the committee operate similar to the Federal Salary Council?

The purpose of the Compensation Committee is to provide options and/or recommendations to the Secretary on the administration of the DHS classification and pay systems, including setting and adjusting rate ranges for various occupational clusters, bands, and localities, and to review summary data regarding annual performance payouts. A detailed charter which will include the frequency of meetings as well as

specific roles and responsibilities of the members and stakeholders is currently being developed. The Compensation Committee will include a total of 14 members. Four "seats" will be reserved for DHS labor organizations granted national consultation rights. OPM will serve as an ex officio member. It will be chaired by DHS's Undersecretary for Management, who will select a facilitator from a list of nominees developed jointly by representatives of DHS and the labor organizations. DHS employees, through the labor organizations that represent them, will have a voice in the ongoing administration of the system. This involvement is intended to enhance the credibility and acceptance of the system. The Compensation Committee is modeled after the Federal Salary Council, which advises the President's Pay Agent (The Secretary of Labor and the Directors of the Office of Management and Budget and the Office of Personnel Management) on the ongoing administration of the locality pay program for GS employees.

4) §9701.332 on locality rate supplements appears to open the door to locality rate supplements for employees outside the 48 contiguous States, i.e., "and adjust new locality pay areas outside the 48 contiguous States." Federal civilian employees in Alaska and Hawaii are excluded from the locality-based comparability payments that cover other federal civilian employees because they receive 25% "nonforeign" cost of living (COLA) adjustments.

a. **Q02367:** Please provide details on locality rate supplements for the department's employees in Alaska and Hawaii, and how they compare with the "nonforeign" COLA.

The COLA rates in Alaska and Hawaii currently range from 16.5 to 25.0 percent. DHS is not authorized to modify or repeal these allowances. DHS employees who work in the nonforeign cost-of-living allowance (COLA) areas established by OPM under 5 U.S.C. 5941 will continue to receive the allowances to which they are entitled under current law and OPM regulations, and those allowances will continue to be calculated and paid as a percentage of a DHS employee's rate of basic pay.

The regulations provide that employees stationed in locations outside the 48 contiguous States will be covered by the same basic pay range as other employees in that band who are stationed within the 48 States. Employees stationed in locations outside the 48 contiguous States also will continue to be entitled to nonforeign cost-of-living allowances. In addition, and after coordination with OPM, DHS may establish locality rate supplements for those employees stationed outside the 48 contiguous States. Specific details on the administration of the new pay system are currently being developed.

DHS has not yet determined whether it will establish locality rate supplements for employees outside the 48 contiguous States.

5) §9701.342 on performance pay increases describes pay pools, performance ratings, and payouts.

a. **Q02368:** How will DHS measure whether the performance pay system is understood by all employees, administered fairly, and provides meaningful performance adjustments, especially in the climate of budget neutrality?

Employee understanding of the pay system will be measured through periodic employee attitude surveys that measure satisfaction with all the major factors that comprise their workplace

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environment. Fair administration and meaningful performance adjustments will be gauged both by these surveys and by periodic quantitative analyses of pay adjustment data (ratings given by managers and amounts of increases throughout the department) accessed through the Human Resources Information System as well as review of pay out information by the DHS Compensation Committee.

6) §9701.346 discusses the assessment or certification of new supervisors in considering their pay adjustments for performance.

a. **Q02369:** What about the assessment or recertification of experienced supervisors?

DHS will emphasize training for new and experienced supervisors and hold them accountable through regular performance reviews and, if necessary, take specific management action. Supervisory accountability will be a critical aspect of supervisory performance evaluations for both new and experienced supervisors and will be a part of their overall performance assessment that will lead to a performance rating that is used in determining performance pay increases.

b. **Q02370:** Please detail how managers and supervisors will be trained in the department.

Our objective is to ensure that all managers and supervisors learn and practice skills designed to promote a fair and equitable human resources program at DHS – both in understanding the requirements (to include new as well as changed processes/practices) of MAX^{HR} and the day-to-day skills of effective supervision. We will provide performance management training for managers and supervisors via instructor-led courses and e-learning modules beginning in spring 2005 and continuing in a regular and recurring manner. We realize that many of the processes/practices of the new HRM program will be new to them, and we are committed to provide effective training, tools and resources—to develop the supervisory competence necessary for a successful transition.

c. **Q02371:** What will be the focuses of the training and will it be continuous at various intervals?

Managers and supervisors will serve as champions of the new human resources management program and, under the new performance management system, will have a critical responsibility in evaluating employee performance and making pay decisions. Managers and supervisors will participate in a comprehensive training curriculum across all elements of the new human resources program, to assure a successful launch of the new performance management system, beginning in October 2005. Pay for performance will be implemented in phases. As such, training for managers and supervisors will mirror implementation with "just in time" refresher modules.

During May and June 2005, all managers and supervisors will participate in Labor Relations/Employee Relations Briefings where they will receive an introduction to DHS' revised labor relations and employee relations policies. Also beginning in May and continuing through October 2005, managers and supervisors will receive performance management training through which they will learn and practice new skills in the fundamentals of performance management, implementing the new e-performance process and tool, maximizing interpersonal effectiveness and pay-for-performance administration.

Managers and supervisors will receive end-of-cycle performance management process training based on a just-in-time approach. This training includes a pay-for-performance refresher and pay administration training. The phased approach will ensure that managers and supervisors learn critical

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skills in a timely manner so that they feel confident to make appropriate performance evaluations and pay decisions at the end of the performance cycle.

d. **Q02372:** Will OPM or an independent entity periodically evaluate the performance of DHS supervisors?

Please refer to responses provided for question #s 2365 and 2368. Also see below:

(The following response is taken directly from DHS question/response #Q02354, "Can you assure the Subcommittee that the Compensation Committee will implement sufficient safeguards in the performance management process?") DHS plans to build multiple safeguards into the performance management system to ensure it is administered in a fair, credible, and transparent manner. The Compensation Committee is one facet of the process we are designing. Committee membership will include a chair, ten management representatives, and four union officials from unions having national consultation rights. In addition to making recommendations to the Secretary on strategic compensation matters, the Committee also will review summary data regarding annual performance payouts. We are considering additional safeguards (besides the Compensation Committee) which include: an automated performance management system; training for employees, supervisors and managers; increased emphasis on employee/supervisor interaction; multi-rater feedback; clearly defined performance standards to guide ratings; and including performance management as a critical aspect of supervisory and managerial performance evaluations.

7) §9701.362 authorizes "special assignment" payments for employees in positions "placing significantly greater demands" on them.

a. **Q02373:** Please provide details on these payments. **Q02374:** What types of positions might be designated as special assignments and what would be the size of such payments.

Special assignment payments are additional payments for employees serving on special assignments in positions placing significantly greater demands on the employee than other assignments within the employee's band. Specific details for special payment provisions as authorized in the new regulations are currently being considered during the design process.

8) §9701.406 discusses setting and communicating performance expectations.

a. **Q02375:** Please provide specific details on how its performance management system(s) will be aligned with the department's mission and strategic goals, i.e., what are the DHS strategic goals and how will their accomplishment be reflected in the performance management system?

The DHS strategic goals are:

Awareness: Identify and understand threats, assess vulnerabilities, determine potential impacts and disseminate timely information to our homeland security partners and the American public.
Prevention: Detect, deter and mitigate threats to our homeland.

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Protection: Safeguard our people and their freedoms, critical infrastructure, property and the economy of our nation from acts of terrorism, natural disasters, or other emergencies.
Response: Lead, manage and coordinate the national response to acts of terrorism, natural disasters, or other emergencies.
Recovery: Lead national, state, local and private sector efforts to restore services and rebuild communities after acts of terrorism, natural disasters, or other emergencies.
Service: Serve the public effectively by facilitating lawful trade, travel and immigration.
Organizational Excellence: Value our most important resource, our people. Create a culture that promotes a common identity, innovation, mutual respect, accountability and teamwork to achieve efficiencies, effectiveness and operational synergies.

The new performance management system will be very different from today's program. We will emphasize a greater role for Departmental leaders in ensuring mission and individual goal alignment and holding individual employees accountable for results and ensuring that compensation decisions are driven by performance. The process will take on much more of a strategic focus as employees along with their supervisor will work together to align their individual goals with the larger goals of the Department. By setting specific milestones and creating a direct line of sight between individual jobs and mission-achievement there will be a clear picture of what is expected during the performance cycle. This will ensure employees' responsibilities are properly aligned with mission goals and that employees are held accountable for meeting those goals.

9) §9701.409 on rating performance states that DHS may not impose a forced distribution or quota on any rating levels.

a. **Q02376:** What will be the nature of oversight to ensure that this prohibition is met?

DHS will conduct ongoing evaluations of the new HR management program, which includes the new performance management program. Employee representatives will be involved in developing such evaluations. Implementing directives are currently being developed to identify the scope, objectives, and methodology to be used in the program evaluation and review draft findings and recommendations. Additionally, DHS will deploy an automated performance management system. The system will include a reporting feature that will provide the capability to produce standard reports that will identify trends and detect patterns in distribution that indicate forced distribution curves. Supervisory training modules on the new performance management system will also emphasize that forced ratings are prohibited under the DHS system.

b. **Q02377:** On the other hand, how will DHS ensure that the ratings meaningfully distinguish between employee performances?

Clearly defined performance expectations that include goals and objectives to be achieved as well as job competencies and associated behaviors will provide a solid basis for differentiating between employees who are performing more or less effectively than others. Competencies will also define different levels of responsibility, complexity and difficulty that characterize employees' jobs (for example, entry-level, full performance, etc.). Clearly defining performance expectations will help employees understand what is expected of them and provide uniform standards that managers and supervisors can apply in evaluating employees, thereby increasing consistency, transparency and fairness.

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10) **Q02378:** Please explain in detail its FY2006 budget request for implementing the new personnel system.

$10,000,000 will be used for training and communication, with special emphasis on SES and managerial leadership development and employee training on the new performance management system. $18,000,000 will be expended on detailed system design and implementation related to the performance management system, competency development and assessment, pay for performance integration (guidelines/procedures), and market-based pay research. $10,000,000 will be used to pay for the one-time cost of moving employees in Headquarters, FLETC, and EP&R into the new pay bands. $6,000,000 will be used to fund the Homeland Security Labor Relations Board. $9,000,000 is for program management costs related to contract administration and contractor support, risk management, program evaluation, cost and schedule control, return on investment analysis, and collection and evaluation of data.

11) As part of the new personnel regulations, the responsibility for deciding collective bargaining disputes will lie with a three-member internal DHS Labor Relations Board appointed by the Secretary. Currently, throughout the federal government, collective bargaining disputes are decided by the Federal Labor Relations Authority (FLRA), an independent body appointed by the President and confirmed by the Senate.

a. **Q02379:** How does DHS/OPM believe that the internal labor relations board meets the statutory mandate of the Homeland Security Act that DHS employees may, "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them"?

The Homeland Security Labor Relations Board, an independent Board, will adjudicate certain DHS labor relations disputes, others will be heard directly by the FLRA. While the Secretary has the authority to appoint the members of the HSLRB, he must consider any nominees submitted by the DHS labor organizations. And those selected must be independent citizens who are known for their integrity and impartiality in addition to having expertise in labor relations, law enforcement, or national/homeland or other related security matters. Furthermore, HSLRB's decisions will be reviewable by the FLRA pursuant to sections 9701.508-510 of the new regulations and those FLRA decisions will be subject to judicial review.

12) The final personnel regulations greatly reduce the circumstances where collective bargaining will occur for CBP employees.

a. **Q02380:** Please tell the subcommittee why the regulations prohibit collective bargaining over basic conditions of work, such as employees' rotation between different shifts or posts of duty, or scheduling of days off, including even post-implementation expedited bargaining? It appears the current procedures for bargaining over basic workplace matters such as scheduling have not hampered the agency's homeland security missions in any way.

The Department must have the flexibility to carry out its vital mission of protecting homeland security. Chapter 71, of title 5, United States Code, requires pre-implementation bargaining over procedures the agency will observe in exercising its reserved management rights. These procedures, contained in many of our collective bargaining agreements, have hindered DHS in its day-to-day operations. For example, when deploying personnel from a seaport to an airport to meet an unexpected operational need, port directors must draw from a pre-established pool of volunteers even if in so

doing they under-staff other critical line functions. In the war on terrorism, supervisors and managers must be able to make day-to-day decisions that deviate from established or negotiated procedures, and the regulations have accommodated that need while permitting collective bargaining.

Post-implementation bargaining would allow management to implement without bargaining in advance over impact and appropriate arrangements for employees adversely affected by the exercise of a management right but required immediate post-implementation negotiations and third-party impasse resolution over such matters. The reality of DHS' operational environment, however, is that change is constant, and as a consequence so too would be post-implementation negotiations, with the prospect of continuous third-party involvement. These negotiations would be required even in cases where the change has come and gone and/or where its impact was insignificant or insubstantial. The demand on DHS' frontline managers and supervisors to engage in constant post-implementation negotiations would divert them and other critical resources from accomplishing the mission.

Nevertheless, the final regulations allow for management to confer with a union to consider its views and recommendations with regard to procedures managers and supervisors will follow in the exercise of management rights that deal directly with operational matters, to meet for up to 30 days to attempt to reach agreement on such procedures, with the possibility of extensions and third-party assistance, and to deviate from those procedures, as necessary. The final regulations also require post-implementation negotiations over appropriate arrangements for employees adversely affected by the exercise of a management right when the action has a significant and substantial impact on the bargaining unit and allow for pre-implementation notice and bargaining on arrangements when operational circumstances permit. These revisions meet DHS' mission needs and are consistent with the Homeland Security Act's promise to preserve collective bargaining rights.

13) The final regulations provide the Secretary with unfettered discretion to create a list of Mandatory Removal Offenses (MRO) that will only be appealable on the merits to an internal DHS Mandatory Removal Panel (MRP) appointed by the Secretary. In addition, the regulations provide the Secretary with the sole discretion to mitigate a removal penalty.

> a. **Q02381:** Again, how can the agency expect front line employees to have any confidence in a personnel system where the most serious matters are charged and adjudicated by the Secretary and his appointed "Removal Panel"?
>
> DHS labor organizations were provided an opportunity to submit nominees to serve as members of the new Homeland Security Labor Relations Board and will also be provided the opportunity to submit nominees to serve as members of the Mandatory Removal Panel. In addition, MRP decisions are reviewable by the MSPB under the new regulations.

14) **Q02382:** What particular statutory authority enabled the final regulations to give the FLRA and the MSPB new duties and rules of operation?

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Section 9701 of the Homeland Security Act authorizes the Secretary of DHS and the Director of OPM to establish a human resources management system for the Department notwithstanding the provisions of 5 U.S.C. Chapter 71.

Section 841(a) of the Homeland Security Act (5 U.S.C. 9701(a)) permits the Secretary to establish a flexible and contemporary human resources management system notwithstanding any other provision in Part 3 of Title 5, which includes Chapter 71 (relating to labor management relations and proceedings before the FLRA), and Chapters 75 and 77 (relating to adverse actions and proceedings before the MSPB). In addition, section 9701(f) of the statute contains standards for regulations relating to appeals, as well as specific provisions addressing regulations modifying the procedures under Chapter 77. The Secretary used this authority to modify the procedures applicable to DHS cases brought before the MSPB and the FLRA.

15) One of the continuing concerns surrounding the final DHS personnel regulations is the fact that many personnel decisions, especially pay, will now be based on more arbitrary factors under the control of local port supervisors and port directors.

a. **Q02383:** How does DHS plan to address the concerns of front line officers that supervisors, who will be granted a tremendous amount of pay and performance evaluation discretion under the new personnel regulations, will be properly trained to ensure transparency and fairness for all front-line personnel?

A comprehensive training program will be undertaken to train supervisors and managers to be able to make meaningful distinctions in performance and, just as important, to be able to articulate clear performance expectations which will be used to track performance. Using an automated system will make the process easier to administer on an ongoing basis, it will also provide greater transparency which is essential for holding supervisors accountable for administering the system in a fair and equitable manner. However, we recognize that training alone is not adequate insurance that the system will be free of abuse. It is recognized that features such as multi-source input into ratings and independent third party oversight need to be considered for incorporation into the process to contribute to ensuring fairness. These concepts are currently receiving serious consideration.

16) As you know, DHS employees' pay will be shifting from the current GS-scale pay system to a pay-for-performance system under the new DHS personnel regulations.

a. **Q02384:** How can a credible pay-for-performance pay system work in an agency, such as DHS, that requires a tremendous amount of teamwork to successfully accomplish agency missions?

In a teamwork approach to work, such as in many areas within DHS, the focus of performance management will be on the accomplishments of the team as well as the individual's contributions to those accomplishments. Research indicates that when the performance management process recognizes individual performance instead of team performance, the incentives work in favor of individual accomplishment alone, which can result in competitiveness at the expense of the team interests. Team effectiveness is improved when both team and individual performance are recognized. The DHS pay-for-

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performance program will include both team and individual performance as significant aspects of the performance management process.

b. **Q02385:** Is the Department aware of any large scale pay-for-performance system that has been successfully implemented in a law-enforcement environment?

We are not aware of any large scale pay-for-performance systems in a law-enforcement environment. However, many state law enforcement agencies are converting or considering converting to a pay for performance system such as King County, Washington; State of Florida, and Fairfax County, Virginia. In our research and design efforts, we will continue to query such approaches and give appropriate consideration to any findings.

Labor-Relations Board

Question 1: How do you plan, then, on working with the Secretary to assist in the selection of members to the DHS Labor-Relations Board that will be fair and impartial?

Answer 1: In accordance with 5 C.F.R. 9701.508(c), NTEU and AFGE jointly submitted a list of recommended Homeland Security Labor Relations Board (HSLRB) nominees to DHS. 5 C.F.R. 9701.508(c)(2) permits the Secretary to provide additional consultation about a recommended nominee. NTEU would welcome the chance to engage in such consultation.

Question 2: Does the involvement of the Federal Labor Relations Authority (FLRA) ensure impartial review of DHS Labor Relations Board decisions?

Answer 2: No. As designed, the DHS system requires the FLRA to defer to the decisions of the HSLRB. 5 C.F.R. 9701.508(h). The HSLRB is appointed by the Secretary. 5 C.F.R. 9701.508(a). Accordingly, under this system, the FLRA must defer to decisions resolving labor-management disputes issued by a management-selected board. This arrangement cannot provide for impartial review of the labor-management disputes underlying the HSLRB's decisions.

Moreover, the Secretary and the Director of the Office of Personnel Management purport to define the FLRA's DHS-related functions in 5 C.F.R. Subpart E. If it is to retain these functions, the FLRA will naturally be disinclined to act in a manner that displeases its purported enablers. This plain conflict of interest calls FLRA's impartiality into question.

Collective Bargaining

Question 1: Why shouldn't DHS have the authority to proactively confront threats to homeland security without first conducting a collective bargaining process?

Answer 1: NTEU would not object to a system that allows DHS to make immediate operational changes when the changes are necessary to protect homeland security and time is of the essence. Under the guise of protecting homeland security, however, the new DHS system precludes bargaining

over the impact and implementation of virtually all operational decisions, including routine matters such as shift assignments, the selection of days off, and overtime assignment procedures. In the vast majority of circumstances, there is simply no operational necessity justifying immediate changes to these types of routine matters. This needless overreaching disrupts the balance between DHS' management rights and the right of employees, protected by the Homeland Security Act (HSA), to bargain collectively over decisions that affect them.

Question 2: Why would post implementation bargaining over operational decisions be a better approach when in many cases the emergency that forced the action may have come and gone.

Answer 2: Note that, under the labor statute applicable generally to federal employees, there is no obligation to bargain, either pre-or post-implementation, over actions necessary to carry out the agency mission during emergencies. 5 U.S.C. 7106(b)(2)(D). Accordingly, that system need not be changed to allow management to act swiftly and decisively in the event of emergencies.

In situations other than emergencies, post-implementation bargaining over an operational decision provides the following significant advantages:

1) Bargaining addresses the adverse effects of the decision on employees, which can persist even after the event precipitating the change has passed.

2) Negotiated agreements can be applied prospectively. Having a template in place should facilitate the agency's ability to respond to similar situations in the future.

3) Bargaining is consistent with the HSA's requirement that any new system preserve the right of employees to bargain collectively.

4) Allowing employees to have a voice in workplace decisions affecting them enhances morale, thereby making it easier for agencies to attract and retain employees.

Adverse Actions and Appeals

Question: In your opinion, would you rather have this new high standard, which allows MSPB mitigation for performance-based adverse actions, or the previous rules in which no mitigation was allowed.

Answer: NTEU prefers the rules generally applicable to the federal workforce, which allow MSPB mitigation in cases arising from agency actions taken under Chapter 75, including performance-based actions. Note that, in such cases, the MSPB does not simply substitute its judgment for the agency, but, instead, defers to the agency's penalty unless it exceeds the bounds of reasonableness. Indeed, MSPB Annual Reports for FY 2001-2003 showed that the MSPB mitigates penalties in only 3% of cases adjudicated on the merits. Because the MSPB uses its mitigation authority so infrequently, there is no basis for modifying it.

No mitigation is currently permitted in actions taken under Chapter 43 for unacceptable performance. Chapter 43 actions, however, must be preceded by a performance improvement period ("PIP"). Although it would not oppose mitigation in Chapter 43 actions, NTEU does not contest Congress' decision, when in enacted the CSRA, to preclude mitigation when employees have been reduced in grade or removed after being afforded a PIP and other required procedural protections.

Finally, MSPB Annual Reports for FY 2001-2003 show that only 2% of appeals decided were performance cases. On the other hand, adverse actions, for which mitigation is permitted, comprised 47% of appeals decided over the same 3 year period. Accordingly, any overall advantage alleged to result from the application of some type of mitigation standard in unacceptable performance cases rings false. The net effect of the new mitigation standard is actually a dramatic reduction in the ability of employees to have unreasonable adverse action penalties mitigated in the vast majority of cases.

Pay

Question 1: Do you believe that the Compensation Committee will help safeguard the new pay system from creating inequalities in pay?

Answer 1: The regulations charge the Compensation Committee, on which some union representatives will serve, with making recommendations concerning strategic compensation issues to the Secretary. Having union representatives on a committee with this function is certainly preferable to having strategic compensation decisions made solely by management officials. The Committee would, however, be much more effective in safeguarding against inequalities if the following changes were made:

1) There should be an equal balance of labor and management representatives on the Committee and the Committee should be co-chaired by labor and management officials. The regulations currently permit union representatives to fill only 4 of the Committee's 14 seats and reserve the chair for the DHS Undersecretary for Management exclusively.

2) Disputes between labor and management concerning strategic compensation matters should be submitted to a qualified, impartial third party for consideration. Ideally, all members of the Committee, labor and management alike, will agree on recommendations. It is reasonable to expect, however, that there will be good faith disagreements between labor and management members. When that happens, the dispute should be referred to a third party for a formal non-binding recommendation that would be submitted to the Secretary. The objective views of a qualified third party are especially important because DHS has indicated that it plans to make drastic changes in the way employees are compensated.

Question 2: Do you think it is possible that employees can be better off under the new pay system?

Answer 2: Because the details of the new pay system are not yet known, NTEU can only offer its speculation in

answer to this question. NTEU has serious doubts that the new system, which will include novel performance and market based pay adjustments, will ever be properly funded. In the absence of proper funding, it is reasonable to expect that the performance and market based pay adjustments for some employees will be made at the expense of other equally deserving employees.

It is also evident that the new pay system, however it is ultimately configured, is intended to be infinitely adjustable. Employees will be unable to predict how their pay will be set or adjusted and will have no way to contest the Secretary's strategic compensation decisions.

A portion of employees' pay adjustment will be determined by performance ratings issued by supervisors. NTEU is concerned that favoritism, cronyism, budget constraints, and other factors unrelated to merit will drive the appraisal process.

To date, DHS has revealed no information about how it plans to conduct market analyses and set rate ranges for its employees. NTEU cannot be sure that DHS' market-related decisions will be credible and, in this era of budget restrictions, amount to anything other than a tool for reducing the base pay of DHS employees.

Under this type of system, NTEU cannot reasonably project that employees will be "better off."

NATIONAL BORDER PATROL COUNCIL

of the

American Federation of Government Employees

Affiliated with AFL-CIO

April 8, 2005

The Honorable Jon Porter
Chairman
Subcommittee on the Federal Workforce and Agency Organization
Committee on Government Reform
United States House of Representatives
B-373A Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Porter,

Attached are my responses to the follow-up questions from March 2, 2005 hearing entitled "The Countdown to Completion: Implementing the New Department of Homeland Security Personnel System."

Feel free to contact me if you need clarification or have any further questions.

Sincerely,

T.J. Bonner
President
National Border Patrol Council
AFGE, AFL-CIO
P.O. Box 678
Campo, CA 91906

Labor-Relations Board

- You have been critical of the three-member DHS Labor Relations Board because all members are to be appointed by the Secretary of DHS, which you believe will lead to unfair favoritism of the agency management when making its decisions.

  - How do you plan, then, on working with the Secretary to assist in the selection of members to the DHS Labor-Relations Board that will be fair and impartial?

Since the Secretary has absolute power to unilaterally select the members of the DHS Labor Relations Board, the unions have no ability whatsoever to influence the process in a manner that would yield fair and impartial appointees. If the Congress is truly interested in such a result, it needs to modify the Homeland Security Act accordingly.

- The regulations provide that decisions of the DHS Labor Relations Board may be appealed to the Federal Labor Relations Authority (FLRA).

  - Does the involvement of the FLRA ensure impartial review of DHS Labor Relations Board decisions?

Inasmuch as the regulations require the FLRA to adjudicate all cases within 30 days (extendable for a maximum of an additional 15 days), and to defer to the DHS Labor Relations Board's findings of fact and interpretations of its regulations, the FLRA's involvement is little more than a perfunctory step in the march toward judicial review. Whether the Department of Homeland Security's regulations can legally confer jurisdiction upon the courts through this mechanism is unsettled at this point. Even assuming, *arguendo*, that they can, it does not appear that the involvement of the appellate courts would ensure that the decisions of the DHS Labor Relations Board would be fair and impartial, as the role of the courts is merely to ensure conformance with the law. The only way to ensure impartial review of the internal labor board's decisions would be to amend the Homeland Security Act.

Collective Bargaining

- The final regulations provide DHS with the authority to make operational decisions without engaging in collective bargaining.

  - Why shouldn't DHS have the authority to proactively confront threats to homeland security without first conducting a collective bargaining process?

It is noteworthy that even the current system of labor-management relations gives agencies broad latitude to make many operational decisions without first engaging in collective bargaining. For example, management has the unfettered authority "to determine the mission, budget, organization, number of employees, and internal security practices of the agency."[1] Furthermore, management has

[1] 5 U.S.C. § 7106(a)(1).

the authority, "in accordance with applicable laws, to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; with respect to filling positions, to make selections for appointments from among properly ranked and certified candidates for promotion or any other appropriate source; and to take whatever actions may be necessary to carry out the agency mission during emergencies."[2] Bargaining over both of the aforementioned categories of management rights is limited to the "procedures which management officials of the agency will observe in exercising any authority under [them]" and "appropriate arrangements for employees adversely affected by the exercise of any authority under [them] by such management officials."[3]

Thus, it is obvious that the Homeland Security Act's provisions are not so much an expansion of management's ability to act in furtherance of the agency's mission without completing bargaining, but more of a restriction on management's ability to obtain the input of rank-and-file employees at some point in time. Ignoring this invaluable source of wisdom is imprudent, and will lead to unsound policy decisions as well as lowered employee morale.

- It has been suggested that post-implementation bargaining over operational decisions would be a better approach than barring collective bargaining over these matters, as provided by the final regulations.

  - Why would post implementation bargaining over operational decisions be a better approach when in many cases the emergency that forced the action may have come and gone?

Although a specific emergency or situation may have passed, post-implementation bargaining makes sense for two reasons: to address any adverse effects that may have resulted from the unilateral action and to establish procedures that can be followed in similar situations that occur in the future. As wisely noted by a biblical sage more than two millennia ago: "What has been will be again, what has been done will be done again; there is nothing new under the sun."[4]

Adverse Actions and Appeals

- Under the new appeals system, MSPB will not be able to mitigate (reduce) a performance-based adverse action unless the action taken by the manager against an employee is deemed "wholly unjustified." Outside of DHS, MSPB has no power to mitigate penalties in such cases, although it does have that power in conduct-based cases.

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[2] 5 U.S.C. § 7106(a)(2).

[3] 5 U.S.C. § 7106(b)(2)-(3).

[4] Ecclesiastes 1:9.

- In your opinion, would you rather have this new high standard, which allows MSPB mitigation for performance-based adverse actions, or the previous rules in which no mitigation was allowed?

Under existing civil service rules, there are two types of procedures that agencies may utilize to address poor employee performance – those outlined in Chapter 43 of Title 5 of the U.S. Code relating to employee performance or those outlined in Chapter 75 of Title 5 of the U.S. Code relating to adverse actions. As noted, mitigation is an option under the Chapter 75 procedures, which are the ones most commonly utilized by agencies. The *quid pro quo* for the lack of mitigation (as well as a lower burden of agency proof) in Chapter 43 procedures is the compulsory performance improvement period wherein an employee is placed on notice of his or her deficiencies and provided a reasonable period in which to correct them. That requirement does not exist under the new regulations.

Under the new personnel regulations, **all** adverse actions, whether taken for performance or conduct reasons, will be subject to the new standard that requires the penalty to be upheld unless it is "wholly without justification." In other words, if an employee is found to have actually committed the offense with which they were charged, the adjudicator will have to uphold the penalty unless there is also a finding that the selection of penalty was so outrageous as to be "wholly without justification." It is quite probable that few, if any, cases will meet the new high standard.

There is no question that the previous standards for adverse actions and performance-based actions are more fair and far preferable to the new standards.

Pay

- Currently, General Schedule employees are paid according to a Congressionally mandated one-size-fits all pay increase at the beginning of every January. The new plan at DHS would allow for much more targeted increases for employees in jobs varying by locality and type.

Before responding to the following questions, the inaccuracies in the preceding statement need to be addressed. First, the General Schedule pay system does not provide a "one-size-fits-all" annual pay increase. Since the passage of the Federal Employees Pay Comparability Act of 1990, the Congressionally-mandated increases under that system have been divided between a cost-of-living increase and a locality increase. Second, the current General Schedule system already sets the basic pay of employees according to the complexity of the duties that they perform. Moreover, that system also allows managers to reward superior performance through a variety of means, including the issuance of unlimited cash awards or time-off from duty in any amount without loss of pay or charge to leave.[5]

[5] 5 U.S.C. § 4502. (An agency may pay cash awards of up to $10,000 without approval, up to $25,000 with the approval of the Office of Personnel Management, and an unlimited amount with the approval of the President of the United States.)

Managers may also grant employees rating-based cash awards of up to 20%[6] and provide an additional, permanent salary step increase for top performers once a year.[7] The primary reason that these authorities are exercised so infrequently is a lack of funding. It is noteworthy that the Department is not seeking additional funding for the purpose of rewarding high-performing employees.

- Do you believe that the Compensation Committee will help safeguard the new pay system from creating inequalities in pay?

Since the Compensation Committee's role is merely advisory, it cannot possibly ensure against inequalities in pay. Moreover, the imbalanced composition of the committee further diminishes its ability to influence the outcome of any pay decisions. (Out of thirteen total members, only four will be appointed by the unions.)

- Do you think it is possible that employees can be better off under the new pay system?

While about ten percent of the workforce will fare better under the new pay system, it will be at the expense of the rest of the workforce. Since this favored minority cannot begin to accomplish the agency's mission by itself, it behooves the Congress to intervene and mandate a pay system that is transparent and fair before too many of the agency's solid performers are encouraged by the inequities of the new pay system to find employment elsewhere.

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[6] 5 U.S.C. §§ 4302, 4503, 4505a; 5 C.F.R. 451.104.

[7] 5 U.S.C. § 5336; 5 C.F.R. Part 531, Subpart E.

Questions for the Record
Before the United States House of Representatives
Committee on Government Reform
Subcommittee on the Federal Workforce and Agency Organization
Friday April 8, 2005

Unlocking the Potential within Homeland Security: the New Human Resources System

Department of Homeland Security Final Personnel Regulations: Managers' Cautious Optimism

Questions for the Record by
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Q: What is your overall impression of the new personnel system in regards to the increasingly important role of managers at DHS?

A: Managers duties and responsibilities to link employees' pay to their expectations, performance, and appraisal increases considerably under the final regulations for the Department of Homeland Security (DHS) personnel system. Where as before, managers and supervisors conducted performance reviews that affected impacted bonuses and promotions for employees, an employee's pay raise is no longer the matter for a congressional appropriation, but based on the available pool of money in a pay-for-performance fund and the rating an employee receives from their manager or supervisor. While managers have been charged with oversight and review of employees in the past, they are clearly being given more direct authorities under the new regulations.

To this end, it is important that both managers and employees are given the proper training to properly communicate the expectations of the duties and responsibilities of an employee, conduct accurate performance appraisals, and rate employees objectively on their performance as it relates to those expectations. Managers and supervisors are up to the challenge of the added responsibilities and ready to dispel the myths and concerns about their ability to do so. No doubt it will take some adjustment on the part of both the employee and manager in his or her changing roles. However, it is important as we move forward to maintain management and employee protections to ensure that as bumps in the road arise, neither manager nor employee will find themselves stuck in a position of unjust retaliation.

Q: What are your specific concerns?

A: Our dominant concern with the new system is that the strained budget cuts – impressed upon by the soaring deficits – will force the new system to be underfunded in both the necessary implementation of training and rewards for performance. For training, a manager or supervisor cannot effectively assign duties to an employee, track, review and rate performance, and then designate compensation for that employee without proper training. As a corollary, if there is not a proper training system in place and budgets that fence funds for adequate training, the system is doomed to failure from the start. The better we equip managers to supervise their workforce, the more likely we are to ensure the accountability of the new system – and the stronger the likelihood that managers will be able to carry out their non-supervisory responsibilities in support of the Department's mission.

Funding for the new system is also critical. Training must be prioritized in budgets and appropriations. Managers cannot reward their employees properly for high performance if the funds are not there to do so. Further, if employees are not confident that their performance will be properly rewarded, their work product will suffer and the critical mission at the DHS will suffer as well. It is essential that in the roll out of the new system these two pieces of training and funding are properly addressed.

Another critical attribute for the new system lies in its transparency and communication value. The manager or supervisor must be given ample opportunity to set measurable standards with their employees that detail the result upon achievement. Time must be provided for one-on-one discussions throughout the year – perhaps quarterly – to assess progress toward meeting those goals. I see no way this can be accomplished other than written assessments of the meetings being held to highlight both the occurrence of such a meeting and its discussion content.

Q: Concerns have been raised over the independence of the new DHS Labor Relations Board.

Do you share the concerns of those who fear that the Board will not be truly independent but rather will favor either management or employees?

A: In any culture change within an organization, it is up to the leadership to dispel myths and educate the organization managers and employees on the positives and potential negatives of the paradigm shift. Change can mean very good things, but maintaining a productive staff that is committed to conducting the highest quality work that meets the mission of the agency must come through proper inclusion of all employees at all levels. We cannot expect change to occur unless people are fully aware of the goals and expectations of a new system.

The creation of a new internal Labor Relations Board made up of members appointed at the sole discretion of the Secretary, where employee groups have the opportunity to offer suggestions on possible appointees, as opposed to an external third party independent system calls into question the integrity of the Board. I do not believe that the objectivity of the Labor Relations Board members is at question rather, the systemic design of bringing those members under the Department removes a degree of independence and separation that would provide comfort to any manager or employee who may have a case pending before or decision rendered by the Board.

As managers, we are concerned with maintaining a high morale and ensuring the best possible product from our employees. The relationship developed between labor and management must not be tainted by a question of the integrity of an independent appeals body. This is a critical element to the change in the overall human resources system and must be part of a concerted effort by the Department's leadership to build the trust that will be essential for success of this Board. The composition of its membership will be a major factor in determining how the stakeholders view its authority. If our employees do not believe that they have an independent appellate body bring grievances before, they are less likely to feel secure in their positions and less likely to be as productive and meet the critical mission of DHS.

Employee groups and others have characterized Federal Managers as lacking the necessary skills and training to implement a performance management system in which employees are evaluated fairly.

Q: Do you think that the provisions of the regulations requiring new supervisors to meet certain assessment and certification points as part of a formal training program will prepare managers for their new responsibilities?

A: As we have articulated in our testimony, managers are not only going to be implementing the new personnel system, but they will be subjected to its requirements as well. We are under intense pressure and scrutiny to do well by the new system, and genuinely hope that it succeeds in reshaping the culture of the agency to a more results and performance oriented organization. For far too long federal employees have had a negative image as lazy and unproductive. We are hopeful that the shift in focus of the new human resources system will begin to dispel those myths.

Within any training program, there needs to be proper assessment of the effectiveness of the training, and that is reflected through review of the results of the training. The certification points may help in the formal training to prepare managers as long as the points are not used as a barometer of the effectiveness of the manager. Providing adequate resources to the manager and the training programs would go a long way to ensuring the points system is used consistently and effectively.

Q: What kind of training will managers need to be successful under the new system?

A: There are two primary areas in which we see the need for Performance Management training. Operations training is required in order for managers to understand the nuts and bolts of the new system - their responsibilities and authorities; and the rights and responsibilities of their employees and their supervisors.

Of equal or more importance is the training required to enable managers at all levels to understand how to translate organizational goals into performance standards. The process begins with an organization understanding its goals and objectives and making them clear to members of the organization. Goals and objectives are transmitted down through the organization, translated into executable plans, then to the performance elements and standards of employees on the ground floor. Theoretically, since organizational goals are the result of a desire to meet customer requirements, this is how performance management directly links employee success to organizational success.

Q: Do you believe that adequate funding will be available to conduct the necessary training for managers in the new system?

A: With the soaring budget deficits and a proposed overall reduction in discretionary spending, we are not confident that the system will be adequately funded. Last year, it was proposed that $87 million would be needed for the successful implementation of the new system. However, that number was pared down to $54 million in the appropriations process. We see this as a good indicator of what is to come, and lack considerable faith that the implementation of the new personnel system will have adequate resources.

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