

Full Union Representation With National Security Safeguards [33]

NOTE: The content of this document has not been reviewed by legal counsel, nor does it represent a consensus view of the Design Team or indicate any kind of preference among options presented to the Senior Review Committee.

Summary Description:

This option facilitates mission accomplishment while maximizing employee participation in workplace decisions affecting them.

Key Features:

- Single disputes resolution standing panel, jointly selected by labor and management, to administer labor relations program in a way credible to everyone (replaces FLRA and FSIP); panel empowered to adjudicate unfair labor practice claims, bargaining impasses, negotiability cases, unit determinations [note sub-option to have FLRA continue jurisdiction in unit cases] .
- No delays caused by midterm bargaining over impact and implementation:
 - Panel processes ensure that neither party has the ability to stall negotiations.
 - Panel can, in the public interest, authorize pre-bargaining action by management, subject to controls against abuse.
 - Express authority, subject to controls against abuse, for management to act unilaterally in order to protect life, property or national security, without regard to contract provisions or bargaining obligations.
- Express authority for Secretary to suspend bargaining obligations or contract requirements to protect national security, subject to controls against abuse.
- System to be modified as needed to ensure that it can be operated consistent with national security interests, including specific provisions to apply only to particular subdivisions or particular types of employees with unusual national security responsibilities.
- Management's right to bargain or refrain from bargaining over numerous issues is guaranteed; panel cannot impose provisions over which management has no obligation to bargain.
- Procedures and incentives to ensure that bargaining is done in a way that maximizes employee participation.
- Eliminates inefficient unfair labor practice complaint procedure; swift and direct enforcement of rights under the regulation.
- Contracts must have alternative dispute resolution system, jointly funded by unions and agency; must result in credible, binding decisions quickly rendered.
- Contracts must ensure timely action by management on cases subject to discipline, and swift, binding, impartial decisions in such.
- Review and enforcement of panel decisions under the Administrative Procedure Act; continued review of adverse action and performance actions in the Federal Circuit.

Sub-Options:

- Retain FLRA for unit determination and certification cases.
- Use more than one panel, or use sub-panels, to accommodate different missions or different regions of the country.
- Eliminate distinction between professionals and non-professionals for unit determination purposes.

Relation to Other Options:

Allows the basic regulations in pay, performance, classification, adverse actions, and appeals to establish minimum standards and to focus on details as they relate to employees who do not participate, through collective bargaining, in decisions affecting their working conditions; for employees who do participate, their working conditions can be tailored precisely to optimize morale and mission performance.

Implications (This section contains "possible advantages/benefits" and "possible problems/challenges" and "other implications" suggested by design team members. The views expressed in these "implications" represent the opinions of one or more members of the design team and therefore reflect sometimes opposing points of view. These opinions do not reflect the collective judgment of the entire design team on any of the issues addressed, nor have they been reviewed by legal counsel.):

Possible Advantages/Benefits

- Complies with Homeland Security Act mandate to have employees participate in decisions affecting them.
- Could eliminate problems which have led to exclusion of some employees from the statutory labor relations system.
- Collective bargaining responsibilities should not impede mission accomplishment.
- Should reduce official time costs.
- Should retain local level communication and decision-making.
- Might reduce time and resources devoted to labor-management issues.
- Protects employees' right to collectively bargain.
- Should enhance communication with employees.
- Should result in greater employee contributions and participation.
- Should eliminate processes which have stalled problem-solving under the labor relations statute.
- Should enhance accountability.
- Should enhance management bargaining authority and flexibility.

Possible Problems/Challenges

- Both parties would have to conduct labor-management relations in a new way; representatives on both sides will have to learn – and be trained -- to operate in an environment that does not allow stalling and delay.
- To the extent this option would provide collective bargaining rights for employees of the United States Secret Service, it could result in an adverse impact on national security. Labor relations obligations could require disclosure to unions of information that is either classified or law enforcement sensitive, which could result in operational security concerns.
- Managers might oppose the requirement that they swear under penalty of perjury that they were acting in accordance with a genuine emergency; it also may not be enforceable without specific legislation.
- Significant expansion of collective bargaining coverage and scope could require a redirection of operational resources from the field to administer the labor relations program.

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- Extending to all DHS employees the right to organize and collectively bargain might be inconsistent with the Homeland Security Act, which lists specific circumstances under which the Secretary can limit coverage; it might limit the longstanding authority of the President to limit coverage as well.
- The requirement for a "special process" that would allow management to act before completion of bargaining is not clearly spelled out and invites judicial construction.
- Requiring the Office of Inspector General to investigate cases where management acts before completing bargaining unadvisedly involves the IG in labor relations issues that should be handled through the labor program; might be seen as a strategy to intimidate management.
- Provision for "specific exceptions and procedures for emergencies and national security factors" with respect to negotiations is not clear and invites judicial construction.
- Appears to broaden current "unfair labor practice" provisions and allow anyone who believes that his/her rights have been violated to file a complaint with the labor relations panel; might swamp the panel to the point where it could not render timely decisions.
- Requirement that all complaints be covered by dispute resolution procedures that produce a binding impartial decision within 90 days might be a difficult deadline to meet.

Other Implications

- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- The disputes resolution panel could be very costly.
- There could be savings associated with eliminating the waste caused by the current statutory labor relations system.
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Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- At all points, ensures that labor relations are conducted in a manner consistent with DHS's mission.
- Eliminates restrictions on management's right to bargain over various subjects.
- Recognizing the profound and serious nature of the DHS mission, the agency must have a system in place capable of making rapid decisions without denying employees' their right to participate in making those decisions. The expedited resolution of scope of bargaining, impasse, unit clarifications and union grievances is a critical element of this option.
- Management will have the flexibility to quickly implement needed workplace changes in support of the mission. Managers and employees will have a clear and understandable contractual framework from which to base workplace decisions and disputes over the scope of bargaining will be greatly reduced.
- Managers will no longer be able to blame the union for delays in making or implementing decisions affecting working conditions.

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Performance Focused

- Recognizes employee interest in an effective agency.
- Employee participation in decisions affecting them leads to improved agency performance.
- Eliminate wastes of time caused by inefficient or bad faith bargaining.

Contemporary and Excellent

- This option is a significant departure from deep-rooted tradition. It provides for expedited decision making and flexibility; it reflects a modern, practical approach that recognizes the seriousness of the DHS mission but allows for innovative structures for improving performance and resolving workplace disputes.

Generate Trust and Respect

- Maximum trust and respect from employees and managers because third parties will be credible and will issue credible decisions.

Based on Merit System Principles and Fairness

- Maximum fairness to employees.

Transition & Implementation:

- Creating and staffing disputes resolution panel.
- Training union representatives, management representatives, and neutrals on effective operation of the system.
- Determining initial units and recognitions under new system.

**Detailed Description
By System Component and System Element**

L		Labor Relations System
System elements:		Summary description:
1	Administration	<ul style="list-style-type: none"> • Single disputes resolution standing panel, jointly selected by labor and management, to administer labor relations program in a way credible to everyone. The panel would be empowered to adjudicate unfair labor practice claims, bargaining impasses, negotiability cases, unit determinations [note sub-option to have FLRA continue jurisdiction in unit cases]. • Panel replaces FLRA and FSIP
	Coverage	<ul style="list-style-type: none"> • No employees will be deprived of the right to participate, through organizations of their choice, in decisions affecting them. • All conflicts between collective bargaining and mission performance, as identified by management, whether in TSA, Secret Service, or elsewhere, must be resolved.
2	Employee Rights	<ul style="list-style-type: none"> • All non-management employees have the right to participate in decisions affecting them, or to refrain from participating. • No exceptions to the constitutional right of employees to join, or refrain from joining, unions, or to represent or not represent the union. • Weingarten right continues to apply.
3	Union Rights and Obligations	<ul style="list-style-type: none"> • Union would bargain in good faith on behalf of all the employees in the bargaining unit, and otherwise fairly and competently represent them. • No exceptions to right of exclusive representation. • No exceptions to duty of fair representation.
4	Management Rights	<ul style="list-style-type: none"> • In general, management could refrain from bargaining over the same subjects that are non-mandatory under the current law. • In general, management would be authorized to bargain over numerous subjects that it is forbidden to bargain over under current law. • Management's obligation to act in emergencies without respect to bargaining obligations or contract provisions would be spelled out, together with procedures to guard against abuse. • Special process created to allow management to act before completion of bargaining even in non-emergencies.
	Ability to Act Before Completion of Bargaining	<ul style="list-style-type: none"> • Special process created to allow management to act before completion of bargaining even in non-emergencies or where the need to act immediately was caused by management's own errors.

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	Authority to Act in Emergencies	<ul style="list-style-type: none"> • In order to protect life, property, or the national security, managers can act without regard to bargaining obligations or contract terms; remedies provided for any injuries caused by this.
	National Security	<ul style="list-style-type: none"> • Continuation of current law allowing suspension of bargaining obligation or contract provision as necessary to protect national security, but DHS secretary must make those decisions and report them and the reasons behind them to the Senate and House Homeland Security committees as soon as possible.
	Protections Against Abuse	<ul style="list-style-type: none"> • Managers' statements on the need to act on emergency basis will be made under penalties of perjury; perjurers will be discharged and will be criminally prosecuted. • Inspector General investigation of each case in which management is allowed to act before completion of bargaining as a result of management's own errors.
5	Bargaining Unit	<ul style="list-style-type: none"> • Panel will determine initial configuration of bargaining units and recognitions, based on appropriate criteria [sub-option: FLRA continues jurisdiction over unit cases]. • Voluntary recognition (i.e., no need for panel certification) of union that demonstrates majority support in the unit. • Successorship recognition of two or more unions in merged entity where they jointly represent a majority of the employees. • [sub-option: eliminate distinction between professionals and non-professionals]
6	Negotiations	<ul style="list-style-type: none"> • General, mutual, obligation to bargain in good faith over all matters affecting working conditions. • No obligation to bargain over proposals that cannot be legally implemented. • No obligation to bargain over proposals which cannot be imposed by disputes resolution panel, including those which outside the mandatory scope of bargaining under current system. • Specific exceptions and procedures for emergencies and national security factors. • Any agreements reached in partnership-type discussions are binding upon both parties for whatever term of time specified in the agreement, and cannot be reopened by either party, on any level, except as provided in the agreement.
	Impasse Resolution	<ul style="list-style-type: none"> • Impasses resolved by the dispute resolution panel. • All questions of obligation to bargain in general or over a particular proposal are decided as part of the impasse. • All questions of whether bargaining has been in good faith (e.g., whether parties have met frequently enough, or have shared information, or have actually attempted to reach agreement) are decided as part of the

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		<p>impasse.</p> <ul style="list-style-type: none"> • Neither party can delay impasse resolution. • Panel cannot impose provisions that would keep management from acting on subjects like deciding the agency's budget, hiring or firing, and so forth. • Party seeking change in the status quo has the burden of proving the desirability of change; union ordinarily will have to demonstrate extent of membership interest in the issue. • Provisions must provide for fair and equitable treatment of employees; maintain high employee morale; provide for the effective and efficient operation of the Agency's mission, including maintaining national security. • Proposals will be compared with conditions and contract provisions of employees performing similar duties and must be appropriate for an enterprise engaged in governance.
7	Unfair Labor Practices	<ul style="list-style-type: none"> • No general concept of unfair labor practices; anyone who believes rights under regulation have been violated files directly with the disputes resolution panel, which will investigate and, where appropriate, order remedy or punishment. • Panel will have sufficient resources to allow speedy, fair, hearings where facts are in dispute. • Attorney fees for prevailing employees or union, regardless of whether back pay is awarded.
8	Grievances -- Arbitration	<ul style="list-style-type: none"> • Every contract with a termination date must contain a dispute resolution procedure. • Arbitrators, including those for adverse actions, will have security clearances and would be jointly trained on DHS practices and missions (waivable for retired DHS employees). • Except as specified in the contract, dispute resolution procedure covers all complaints. • Dispute resolution procedure must result in binding impartial decisions within 90 days of the initiating complaint being filed.
	Adverse Action and Appeals	<ul style="list-style-type: none"> • Adverse actions must be initiated within 30 days of management becoming aware of the problem. • Adverse actions must be decided by management within 15 days of the employee's response to charges. • Dispute resolution procedure in adverse action cases must result in binding impartial decision within 45 days of the management decision. • Continued court of appeals judicial review of adverse action (whether performance or conduct-based) decisions.
9	Dues Allotments	<ul style="list-style-type: none"> • Mandatory; details negotiated by the parties.
10	Official Time	<ul style="list-style-type: none"> • Mandatory; details negotiated by the parties.

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	Enforcement	<ul style="list-style-type: none"> • Review and enforcement of panel decisions under the Administrative Procedures Act. • Continued court of appeals judicial review of adverse action (whether performance or conduct-based) decisions.
11	Evaluation	<ul style="list-style-type: none"> • The participation of employees in decisions that affect them, including: <ol style="list-style-type: none"> 1. the number of employees responding to union surveys of needs and opinions; 2. the number of employees voting on union demands and on acceptance or rejection of agreements; and, 3. the number of employees performing representational functions in the union. • Cost/cost savings, or other efficiencies realized through employee participation decisions affecting them. • Agreements reached/disputes settled. • Number of national security suspensions of contract terms or bargaining obligations. • Comparison of morale and efficiency in union-represented units in contrast to units without union representation.