

## Maximum Coverage [38]

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 provides broader coverage and is more employee-centered than the current system. It provides adverse action protections for all employees and covers all adverse and negative actions, reduces initial probationary periods, abolishes other probationary periods, expands appeal rights and levels of review, and moves reviews outside the agency.

### Key Features:

#### Adverse Actions –

- Broader time limits, including:
  - 45 or fewer days to propose action after management becomes aware of misconduct.
  - 30 or more days advance notice for all actions.
  - 30 or more days for investigatory activities (included within the 45 days to propose action).
  - 30 or more days for employees to respond to advance notices.
  - Agency officials must issue decisions within 60 days after the close of a hearing.
- Broader employee rights, including:
  - Right to a hearing before a decision on a proposed adverse or negative action is taken or the action is implemented.
  - Right to make an oral and written response if the employee waives the right to a hearing.
  - Entitled to representative of their choice.
- Hearings will be held before decisions are made or before adverse actions are implemented (pre-decisional).
- Advance notice will include all information that supports adverse or negative actions or that would exonerate the employee.
- Only geographic or centralized panels or heads of directorates or divisions (e.g., Border & Transportation Security, Bureau of Citizenship & Immigration Services, Coast Guard, Secret Service, Chief Information Officer, etc.) may propose adverse actions.
- Hearing will be conducted by centralized panels or heads of directorates or divisions (e.g., Border & Transportation Security, Bureau of Citizenship & Immigration Services, Coast Guard, Secret Service, Chief Information Officer, etc.) that were not involved in proposing the action.

#### Appeals –

- Trial or probationary periods do not affect appeal rights.
- Appeals heard by Federal Courts.
- Those covered by negotiated grievance procedures would have the option of asking the exclusive representative to invoke arbitration. If the exclusive representative declined to go to arbitration, the employee could still bring the appeal into court.
- Avenues of review will be outside agency.
- Penalties selected by agency may be mitigated.
- Reviewers will be authorized to:
  - Reverse agency action,
  - Compel return of employee to status quo ante,

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- Enforce decision, and
- Provide interim relief pending final review.

### Sub-Options:

- Agency officials issue decisions prior to granting a hearing, but any adverse or negative action would be stayed pending a decision by a third-party reviewer (i.e., MSPB, EEOC, or arbitrator.) Under this sub-option, the jurisdiction of the MSPB would be expanded, i.e., probationary employees would be considered "employees" who could appeal actions, and reprimands and pay decisions would be considered "adverse actions."
- Expedited, informal hearings on less severe actions, with more formal hearings on more severe actions.
- Managers could waive the requirements for advance notice and pre-decisional hearing when it is necessary for safety, national security, or compliance with other laws or government-wide regulations. In such cases, employees are entitled to expedited post-decision hearings.

### Relation to Other Options:

- This option makes any discretionary pay or performance management decision subject to the adverse/negative action procedures and appeals. This includes decisions on where to place an employee within a pay band or the amount of a discretionary pay increase.

**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

- Might not require extensive information to provide employees with an understanding of the system.
- Might not require extensive training for supervisors and managers.
- Broader coverage might increase the accountability of managers by making decisions to take adverse or negative actions against employees subject to review.
- Broader coverage might encourage supervisors and managers to resolve workplace issues that affect or might affect mission accomplishment.
- Broader coverage might encourage supervisors and managers to help employees avoid conduct or performance problems.
- Employees might have greater ability to ensure fair and equitable treatment from supervisors and managers.
- Including probationary coverage could help eliminate "bad faith" removals of these employees.

#### Possible Problems/Challenges

- Broader coverage might require more time than the current system to resolve adverse or negative actions and appeals.
- Might increase the numbers and types of appealable actions.
- Appears to be more complex and less flexible than the current system.

- Some employee misconduct could go unpunished because management violates due process or misses “statutes of limitations.”
- Without the opportunity for an outside independent hearing on these issues, the process could be viewed with skepticism by employees.
- Requiring high level DHS officials (component heads) to propose all adverse actions would be very time consuming, and detract from their ability to carry out their assigned missions. And placing proposing/deciding authority at a panel or division/directorate head level may diminish accountability among line supervisors.
- Management might be reluctant to take actions against probationers.
- Might push many issues into the appeals process.
- Might give false hope to employees if management has no authority to give remedy.
- Might impede or compromise an investigation, if it cannot be completed within time limits.
- By eliminating a probationary period for new supervisors/managers, this could result in employees not well suited to supervisory or managerial positions being retained in those positions.
- By imposing time limits on investigations and proposing action, this option could result in the most serious and complex incidents of misconduct being unpunished. For example, in most cases, when an employee engages in criminal conduct that is being investigated by a non-Federal police agency, the Department will have no control over the length of time of the investigation, and will not be able to investigate the conduct independently without interfering with the criminal investigation.
- The purpose of the probationary or trial period is to ensure that employees are fit for public service. Many employees in DHS serve probationary periods beyond one year because the time needed to train new employees in these positions makes it impracticable to determine their fitness for the position in one year (e.g. Secret Service employees assigned to protect the President of the United States). Shortening or effectively eliminating this trial period by providing extended appeal rights could limit management's ability to deal effectively with new employees who are not well suited to these types of positions.
- Requiring discussion and agreement between labor and management prior to modifying the process because of national security concerns might compromise national security.
- Requiring additional steps and changing the standard of proof to preponderance (from substantial) with respect to taking performance actions might discourage supervisors from addressing poor performance issues.
- Lacks of clarity regarding what “negative actions” are covered and what can be appealed might lead to confusion among the workforce and coverage disputes.
- Providing a broad avenue of appeal for all employees to the Federal Court might lead to increased (legalistic) litigation.

#### Other Implications

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

#### Cost

- Broader coverage might be more time consuming and more expensive than the current system.
- Minimize the number of adverse actions and appeals through improved workforce supervision and management to might lower time and cost factors.
- Might increase cost of keeping employees in a pay status for a longer period of time, effectively through the administrative appeal process.

**Evaluation in Terms of Guiding/Design Principles:**

Mission Centered

- More employee centered than mission centered.
- More complex and less flexible than the current system.

Performance Focused

- Increased accountability could improve supervisory and managerial performance.
- Information could be linked to accountability for supervisory and managerial duties and responsibilities including motivating and holding subordinates accountable; making distinctions in subordinates' performance and appropriately recognizing, rewarding, and reinforcing desired performance.

Contemporary and Excellent

- Increases accountability of managers and supervisors for their decisions to provide greater rewards for superior workers, and supports attracting, retaining, and motivating the workforce of today and tomorrow.
- Adverse actions and appeals could be linked to automation to monitor and oversee supervisors' and managers' individual performance and performance of all DHS sectors in achieving mission goals.
- Supports pay for performance decisions by providing increased accountability.
- Supports performance expectations for individuals and teams.

Generate Trust and Respect

- Increased accountability will contribute to credibility and building high levels of respect and trust.

Based on Merit System Principles and Fairness

- Increased accountability and employee involvement will contribute to credibility and building high levels of respect and trust.

**Transition & Implementation:**

- Choosing and training individuals to conduct pre-decisional hearings.
- In regard to pay matters, decisions on employee pay increases are not final until after the hearing. Employees will receive proposed increases in the interim, subject to back pay orders if the hearing awards a higher pay increase.

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

<b>D</b>		<b>Discipline/Adverse Action System</b>
System elements:	Summary description:	
<p>1</p> <p><b>Coverage</b></p> <ul style="list-style-type: none"> <li>- Employees</li> <li>- Actions</li> <li>- Probationary/ trial period</li> </ul>	<ul style="list-style-type: none"> <li>▪ Single system will be developed for all categories of employees, e.g., bargaining unit, non-bargaining unit, intelligence, law enforcement, etc.</li> <li>▪ Includes all employees, e.g., temporary, permanent, probationary, non-probationary, competitive service, excepted, service, etc.</li> <li>▪ Covers all adverse and negative actions, e.g., pay reductions, failure to grant all or part of pay increases, demotions, removals, reprimand, performance ratings, etc.</li> <li>▪ Changes concept of probationary period. Probationary employees will receive closer supervision and developmental guidance, but will enjoy full procedural due process and appeal rights. Probationary period will be a maximum of one year but will end sooner if during the first year the employee is promoted or reassigned to a position with greater pay or pay potential including those promoted or reassigned to supervisory positions.</li> <li>▪ Abolishes probationary period when employees are promoted or reassigned to position with greater pay or pay potential including those promoted or reassigned to supervisory positions.</li> </ul>	
<p>2</p> <p><b>Basic Process</b></p> <ul style="list-style-type: none"> <li>• Advance notice</li> <li>• Reply opportunity</li> <li>• Rep. right</li> <li>• Decision</li> <li>• Timeframes</li> <li>• Cause</li> </ul>	<ul style="list-style-type: none"> <li>▪ Advance notice, 30 or more days, is mandatory for all actions.</li> <li>▪ The investigatory time limit is 30 days.</li> <li>▪ Action must be proposed within 45 days after management becomes aware of misconduct (investigation must be completed within this period.) If management misses the deadline, action cannot be proposed against the employee for that alleged incident.</li> <li>▪ Mandatory pre-decisional hearings before decisions are made or before adverse or negative actions are implemented.</li> <li>▪ All information that supports an adverse or negative action or that exonerates the employee must be contained in or provided with the advance notice.</li> <li>▪ Authorization to propose adverse actions is limited to geographic or centralized panels and heads of directorates or divisions.</li> <li>▪ Employees have 30 days to request a hearing on the charges.</li> <li>▪ Employees may waive their right to a hearing. In lieu of a hearing, employees have a right to provide an oral and/or written response.</li> <li>▪ Agency will keep a written record of all advance notices, replies, and decisions.</li> <li>▪ Employees are entitled to representation of their choice.</li> <li>▪ Adverse action decisions are made by geographic or centralized panels and heads of directorates or divisions.</li> <li>▪ Full information must be contained in or provided with any decision notice.</li> <li>▪ Decisions must be issued within 60 days after the close of a hearing or after the employee makes a response if a hearing is waived. If management misses the deadline, then the employee is presumed to be found innocent, and the proposed action cannot be implemented.</li> </ul>	

<b>D Discipline/Adverse Action System</b>		
System elements:		Summary description:
		<ul style="list-style-type: none"> <li>▪ Actions taken based on poor performance will have the following elements:                             <ul style="list-style-type: none"> <li>○ Opportunity to improve;</li> <li>○ Use of multiple sources (360 degree appraisal/feedback, or information from co-workers, supervisors, customers, etc.) to determine performance level and identify areas of performance that need to be improved; and</li> <li>○ Unlimited time to improve performance. Action cannot be taken against employee so long as actual improvement in performance occurs.</li> </ul> </li> <li>▪ When national security concerns are implicated, the normal process may be modified after labor and management have discussed and agreed upon modifications needed and implementation procedures.</li> </ul>
3	<b>Evaluation</b>	<ul style="list-style-type: none"> <li>▪ Internal measures are used that show how the system:                             <ul style="list-style-type: none"> <li>○ Supports agency's mission.</li> <li>○ Contributes to a high performing 21<sup>st</sup> century workforce.</li> <li>○ Sustains a contemporary HR system.</li> <li>○ Maintains simplicity.</li> <li>○ Improves credibility.</li> <li>○ Defends public service core values.</li> </ul> </li> </ul>

<b>A Appeals System</b>		
System elements:		Summary description:
1	<b>Coverage</b> - Employees - Actions - Probationary/ trial period	<ul style="list-style-type: none"> <li>▪ The appeal system will cover all employees.</li> <li>▪ The appeal system will mirror the unlimited coverage provisions of the DHS adverse action and performance-based action system.</li> <li>▪ Trial or probationary periods will not affect employees appeal rights.</li> </ul>
2	<b>Reviewer Composition Authority</b>	<ul style="list-style-type: none"> <li>▪ Decisions will be reviewed in Federal Court. Precise jurisdiction must be determined.</li> <li>▪ Reviewers will be authorized to:                             <ul style="list-style-type: none"> <li>○ Reverse, sustain, or mitigate agency action;</li> <li>○ Compel return of employee to status quo ante;</li> <li>○ Enforce decision; and</li> <li>○ Provide interim relief pending final review.</li> </ul> </li> <li>▪ Employees covered by negotiated grievance procedures may choose to ask exclusive representative to invoke arbitration over the decision. If the exclusive representative declines to invoke arbitration, the employee could still appeal the decision to Federal Court. Arbitrators would have the same authority as Federal Courts.</li> <li>▪ Arbitration awards will be reviewed by Federal Courts under the same procedures applied by Federal Courts to arbitration awards in private sector labor-management relations.</li> </ul>

<b>A</b>		<b>Appeals System</b>
System elements:		Summary description:
3	<b>Review Process</b> Components Timeframe	<ul style="list-style-type: none"> <li>▪ Federal Court rules apply.</li> <li>▪ Procedures established in collective bargaining agreements apply to arbitrators.</li> </ul>
4	<b>Decision</b> - Precedential? - Burden of proof - Standard of proof - Judicial review	<ul style="list-style-type: none"> <li>▪ Courts or arbitrators will not be bound by but may refer to published Merit System Protection Board cases or existing case law.</li> <li>▪ Burden is on agency to provide a preponderance of evidence that shows its action promotes the efficiency of the service.</li> </ul>
5	<b>Other Appeals Systems</b> Discrimination Prohibited personnel practices	<ul style="list-style-type: none"> <li>▪ Right to appeal allegations of discrimination to EEOC or prohibited personnel practices to OSC would remain in effect.</li> </ul>
6	<b>Evaluation</b>	<ul style="list-style-type: none"> <li>▪ Internal measures are used that show how the system:                             <ul style="list-style-type: none"> <li>○ Supports agency's mission.</li> <li>○ Contributes to a high performing 21<sup>st</sup> century workforce.</li> <li>○ Sustains a contemporary HR system.</li> <li>○ Maintains simplicity.</li> <li>○ Improves credibility.</li> </ul> </li> </ul>