

Ombudsman Office [40]

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 would create an Ombudsman's Office within the Department of Homeland Security. This office, which would report directly to the Secretary, would hear and decide all appeals (including those resulting from adverse or disciplinary actions), and would be independent of DHS's components and management structure.

Key Features:

- An independent Ombudsman's Office will be established within DHS to hear all appeals, including those arising out of adverse or disciplinary actions.
- A sufficient number of magistrates/judges [hereinafter referred to as "factfinders"] will be appointed to the Ombudsman's Office, and there will be offices in different geographical regions to ensure that appeals are adjudicated quickly and efficiently.
- The appeals process will be a dynamic one run by the factfinder. When a complaint or appeal is filed, the factfinder will conduct a thorough investigation that will, in most cases, include an interview with the complaining employee as well as interviews with all other witnesses with testimony that the factfinder deems relevant. To ensure that the factfinder is not impeded in conducting this investigation, he/she will have the authority to compel testimony under oath and to subpoena relevant documents.
- At any point in the complaint/appeal process, the factfinder will have the authority to bring the parties together to determine if they can find common ground or a mutual resolution.
- Absent a resolution or withdrawal of the complaint or appeal, the factfinder will make factual findings and issue a written decision on the complaint/appeal.
- Because there is a presumption of good faith that surrounds governmental action, the burden of proof rests with the employee, not the agency, in prevailing on any appeal or complaint filed, including appeals of agency-imposed disciplinary actions.
- Either party can appeal the factfinder's decision to the Office of the Secretary. The Office of the Secretary, however, will accord considerable deference to the factfinder's factual and legal determinations. There is no additional administrative review of the agency's decision.
- There is no judicial review of the agency's (or factfinder's) decision.

Sub-Options:

- The scope of coverage (*i.e.*, who can appeal) may be adjusted as the Secretary and the Director see fit. [See *Detailed Description* section for scope of coverage].
- The availability of the internal appeals process could be eliminated.

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

- The process is simple. It should avoid the technicalities that often complicate the MSPB process.
- The factfinder has the authority to collect evidence and there is less likelihood for procedural delays which often hamper the MSPB process (e.g., due to discovery). As a result, the factfinder should be able to issue a decision more quickly than MSPB AJs can.
- The process should be less adversarial than the process currently employed by MSPB. Consequently, disputes should be resolved with less acrimony, which will better enable DHS to accomplish its mission.
- The process is flexible. It allows for OPM oversight and adjustments, as necessary.
- The process should protect an employee's right to appeal from an agency action that an employee deems to be arbitrary or capricious.
- Employees might view the system as credible, because of the cadre of trained reviewers who know DHS operations.

Possible Problems/Challenges

- A cadre of qualified factfinders will need to be hired and trained. Because the factfinders will be asked to do more than a typical arbitrator or administrative judge, locating and training qualified individuals to perform this function might prove to be a time-consuming process.
- Employees might view the system as not credible, because of the strict internal process/lack of independent decision making. A lack of credibility might result in increased EEO complaints.
- Switching the burden of proof from management to employees raises legal concerns for some and could lead to legal challenges.
- Might compel managers to remove employees that management would prefer to keep.
- Prohibiting outside review of any adverse action decisions raises concerns about meeting constitutional requirements for due process as defined by the Supreme Court.
- To the extent that an ombudsman would be responsible for both mediating a solution to a dispute and adjudicating the same dispute, he/she might have a conflict of interest.
- Since appeals under this option cover a broad range of topics, including those currently covered under administrative grievance systems, certain matters could take longer to resolve.
- Might lead to more EEO complaints if employees do not find system credible.

Other Implications

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

Cost

- There will be an initial start-up cost to establish the Ombudsman's Office and to hire the number of factfinders necessary to handle the appeals that will be filed.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- This option is simple and efficient, and thereby supports the primary mission of DHS, as set forth in the Homeland Security Act.
- This option is designed to produce quick decisions with a minimum amount of acrimony between managers and employees. This permits all DHS employees to focus on the mission at hand.

Performance Focused

- This option holds DHS employees accountable for their performance. Employees who do not perform well will be subject to disciplinary or performance-based action.

Contemporary and Excellent

- This option takes into account the unique mission of DHS and, because of its flexibility and simplicity, may serve as an example for the rest of the Federal government.

Generate Trust and Respect

- This option is as transparent and simple as possible – the technicalities and procedures that sometimes accompany other appeals procedures have been eliminated.
- The process is designed to foster trust and respect between managers and employees. An impartial factfinder will fully and actively investigate each complaint/appeal, not merely wait for other parties to bring him or her the facts. The process will include an interview with the complainant/appellant and the alleged responsible management official. Both sides will have an opportunity to set forth their case, and to provide the factfinder with evidence supporting their respective positions.

Based on Merit System Principles and Fairness

- The process upholds public employment principles of merit and fitness. It serves as a “check” to ensure that actions taken by agencies are not arbitrary or capricious.
- At the same time, it allows managers to take actions that are appropriate.

Transition & Implementation:

- Qualified factfinders must be hired and trained.
- If a system is adopted in which the factfinder’s decision can be appealed internally, that system must be developed and established.

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

D Discipline/Adverse Action System		
	System elements:	Summary description:
1	Coverage - Employees - Actions - Probationary/ trial period	<ul style="list-style-type: none"> • Single system will be developed for all categories of employees. • Includes only those employees who have served in the same or similar position to the one they currently occupy for 2 years or more (much like current definition of "employee" in 5 USC 7511(a)(1)(C)(ii)). • Covers all types of appeals (adverse and disciplinary actions, low performance ratings, reductions in pay, etc.).
2	Basic Process - Advance notice - Reply opportunity - Rep. right - Decision - Timeframes - Cause	<ul style="list-style-type: none"> • Advance notice of five business days is mandatory for all actions. • Employees will have an opportunity to respond orally and/or in writing to proposed notice. • Employees will have a right to be represented during proposal stage, but time deadlines will not be extended to allow for employees to seek representation. • There is no time limit for the agency to issue the final decision. • The action can be affected immediately upon issuance of agency decision. • The level at which proposals can be made, and decisions issued, is left to DHS discretion. The deciding official, however, must be at a higher level than the proposing official. • There is no statute of limitations for agency action. • Charge will be upheld unless the employee demonstrates that the agency action was arbitrary or capricious.
3	Evaluation	<ul style="list-style-type: none"> • Once decisions are issued and cases are closed, the cases will be forwarded to OPM for policy and legal oversight on how the system is working. Should OPM determine that the system needs some adjustments, OPM will suggest making such adjustments.

A Appeals System		
	System elements:	Summary description:
1	Coverage - Employees - Actions - Probationary/ trial period	<ul style="list-style-type: none"> • The scope of coverage of the appeals system will be identical to that of the adverse action system. • This system will serve as the exclusive avenue for appeals, except EEO complaints (e.g., such actions are excluded from coverage of any agency grievance procedure, negotiated or otherwise).
2	Reviewer - Composition - Authority	<ul style="list-style-type: none"> • An Ombudsman's office will be established within DHS. • The Ombudsman's office will consist of a cadre of factfinders, who will preside over complaints and appeals. • Each factfinder will have the authority to investigate the complaint, including taking testimony under oath and subpoenaing relevant documentation. The factfinder will also be responsible for issuing a written decision.

A Appeals System	
System elements:	Summary description:
	<ul style="list-style-type: none"> • Either the agency or the employee can appeal the decision to the Office of the Secretary. Substantial deference, however, would be given to the factfinder's determinations. Remand would only be appropriate if the record was inadequate or if the investigation was so procedurally defective that it prevented full and fair adjudication of the issues.
<p>3 Review Process</p> <ul style="list-style-type: none"> - Components - Timeframe 	<ul style="list-style-type: none"> • An employee that wishes to appeal an agency's decision must do so within 10 working days of the issuance of the decision. • The Ombudsman's office will then investigate the complaint/appeal, and strive to issue a decision within 30 working days of the filing of the appeal. Unless explicitly directed by the factfinder, there will be no adversarial hearing conducted. • The time limit for appealing from the factfinder's written decision will be 10 working days. Any written response to that appeal will be due 10 working days from receipt of the appeal. • The Office of the Secretary will issue a final decision as soon as possible, but no time limit for this to occur will be established.
<p>4 Decision</p> <ul style="list-style-type: none"> - Precedential? - Burden of proof - Standard of proof - Judicial review 	<ul style="list-style-type: none"> • The decision of the factfinder must be in writing and must set forth the reasons on which the decision was based. • The factfinder will uphold the decision of the agency unless the employee demonstrates that the agency's action was arbitrary or capricious. • If the factfinder's decision is appealed, the Office of the Secretary will remand the factfinder's decision only if the record is inadequate or if the investigation was so procedurally defective as to prevent a full and fair adjudication of the issues. • There is no further administrative review of the agency's decision. • There is no judicial review of the agency's decision.
<p>5 Other Appeals Systems</p> <ul style="list-style-type: none"> - Discrimination - Prohibited personnel practices 	<ul style="list-style-type: none"> • Employees will still be permitted to pursue EEO complaints before the EEOC on an agency action, but they cannot also appeal such an action through the DHS process. • The current system for handling allegations of prohibited personnel practices, including allegations of whistleblowing, will remain unchanged.
<p>6 Evaluation</p>	<ul style="list-style-type: none"> • See <i>Evaluation</i> section in Adverse Actions section.