

Status Quo [42]

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 continue coverage of Department of Homeland Security (DHS) employees under existing statutory provisions (Title 5) relating to disciplinary actions and appeal rights. These systems provide two slightly different authorities under which action may be taken to remove, demote, or suspend employees based on deficiencies in conduct or performance. Under each authority, the burden is on the agency to provide due process (including 30 days advance notice) prior to taking such action and to document that the action is fully warranted. Exceptions to these procedures are extremely limited.

The current statutory appeal system provides several forums before which an employee is entitled to obtain review of such actions. The primary forum is the Merit Systems Protection Board, but depending on the allegations and the status of the employee, such actions may also be challenged under negotiated grievance procedure (leading to binding arbitration) or via the discrimination complaint process (leading to review by EEOC). Regardless of the forum, the employee is entitled to a full evidentiary hearing, a written decision by an independent 3rd party, and the right to obtain judicial review of such decision.

Key Features:

- Most employees are covered but a number of criteria determine whether and when a specific individual is covered.
- Two separate statutory authorities for taking action.
- Most employees subject to either a one or two year probation or trial period upon initial appointment
- For most actions, 30 days advance notice required.
- Employees entitled to respond to proposed action, to be represented and to receive a final written decision.
- Actions must be justified as promoting the efficiency of the service or alternatively, based on proof of unacceptable performance.
- Employees are entitled to obtain review of adverse and performance-based actions based by either filing an appeal with the MSPB, or via any applicable negotiated grievance procedure (NGP).
- MSPB review involves a right to a hearing, at which the burden is on the agency to justify its action by either preponderance of the evidence (Chapter 75) or substantial evidence (Chapter 43). MSPB decisions are made initially by administrative judges and may be appealed to a three-member panel of Presidential appointees.
- If pursued through an NGP, review is by an arbitrator jointly chosen by the agency and the employee's union. After a hearing before the arbitrator, a written award is issued.
- Both MSPB decisions and arbitration awards may be appealed to the Federal Circuit Court of Appeals.
- A variety of overlapping and intersecting avenues exist for employees subjected to adverse actions to obtain review of allegations of discrimination or other prohibited personnel practices, including reprisal for whistleblowing.

Relation to Other Options:

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 has more than 20 years of decisions/case law to guide participants. Judicial review by a single federal appeals court (U.S. Court of Appeals for the Federal Circuit) provides for decision consistency.
- The system meets the Homeland Security Act's requirements of fair treatment and due process.
- It contains an expedited process for effecting an adverse action against an employee when there is reasonable cause to believe that the employee has committed a crime for which imprisonment may be imposed.
- The system relies, in significant part, on the "preponderance of the evidence" standard, which is widely-accepted in administrative proceedings.
- It guarantees an appellant a hearing if jurisdictional requirements are met.
- The hearing is conducted by an independent third party, giving the imprimatur of neutrality.
- The system has well-developed standards with respect to discovery, evidence and witnesses.
- The MSPB relies on self-imposed timeliness standards to issue initial decisions expeditiously.
- An MSPB administrative judge can direct the attendance of a government witness.
- An appellant is entitled to a representative of his/her own choosing and may recover attorney fees.
- Final MSPB decisions are precedential, providing guideposts to participants.
- There is judicial review of MSPB decisions.

Possible Problems/Challenges

- The system can be complex and confusing (e.g., mixed-case process) and can lead to forum shopping.
- There can be delays in getting decisions from the full MSPB after the filing of a petition for review.
- The system has become legalistic and intimidating to many employees.
- Representatives have become, by necessity, specialist advocates.
- The process can be very expensive for an appellant.
- The process is based on an adversarial-type process.
- Resulting decisions (whether by administrative judges or arbitrators) are sometimes not credible to either employee or employer.
- Cases can require large expenditures of staff hours by agencies and employee representatives.
- Administrative judges may be reluctant to consider the provisions of negotiated agreements.
- Because of complex procedures and a high percentage of decisions upholding agency actions, the process is perceived by some employees as being "agency friendly."
- Agencies and employee representatives have no direct role in selecting administrative judges or the Board.
- System does not encourage ADR or early resolution of issues (pre-proposal).
- Allows for forum shopping.
- Perceived as a slow system due to budget.
- Agency and employee representatives have no role in selecting judges.
- Chapter 43 procedures for taking performance-based actions are complex and time-consuming. In

contrast to Chapter 75 procedures such actions upon appeal to MSPB are reviewed under a substantial evidence (as opposed to a preponderance of the evidence) standard and are not subject to mitigation. Having two potential procedures available might create confusion and possibly inconsistent decisions.

Other Implications

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

Cost

- Maintaining the current system would not require the expenditure of resources that would be associated with creating a new entity to hear employee appeals.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- The current system was originally designed to support the mission of nearly all Federal agencies, including those have national security related functions and with the exception of TSA, all of the various organizations that now make up DHS.
- The current system covers many if not most employees of a number of agencies regarded as having successfully achieved their missions in recent years: NSA, FBI, DOD, and Secret Service.

Performance Focused

- The current system contains provisions specifically focused on enabling agencies to address poor performance on the part of employees and when combined with either the current or a modified performance management system, can be used to hold employees accountable for performance.

Contemporary and Excellent

- While originally designed 25 years ago, the current system is sufficiently flexible to accommodate changes in the workforce and mission.
- When organizations such as GAO and FAA have been given an opportunity over the intervening time to design new adverse action and appeal systems, they have generally adopted most of the key features of the current system, particularly such key elements as cause of action, advance notice, and burden of proof.

Generate Trust and Respect

- Notwithstanding the apparent complexity in its details, the fundamental elements of the current system, including the right to advance notice, opportunity to respond, and review by an impartial adjudicator – are understood by employees and there is general acceptance that the current system is an effective guard against arbitrary, unjustified personnel action.

Based on Merit System Principles and Fairness

- The current system came into being simultaneous with the codification in statute of the merit systems principles and was designed to operate in concert with those principles
- Over the 25 years since its creation, a number of statutory amendments have been carefully crafted and enacted to strengthen perceived weaknesses in this area. Examples include the Whistleblower Protection Act, the Due Process Amendments, the OSC Reauthorization, and USERRA. Taken together with the original language, these modifications create a system which ensures consistent adherence both the statutory merit system principles as well as the fundamental concept of fairness

Status Quo [42]

Transition & Implementation:

No transition necessary

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

D		Discipline/Adverse Action System
System elements:	Summary description:	
<p>1</p> <p>Coverage</p> <ul style="list-style-type: none"> - Employees - Actions - Probationary/ trial period 	<p><i>Employee Coverage:</i> Most employees are covered but a number of criteria determine whether and when a specific individual is covered. These criteria include but are not limited to whether the employee's position is in the competitive or excepted service, whether they are entitled to veterans preference, the nature of their appointment (temporary, term, or not time limited), and whether their position is specifically excluded by separate statute or OPM regulation.</p> <p><i>Action Coverage:</i> If action is taken under authority of 5 USC Chapter 43, actions covered include removal or demotion. If action is taken under authority of 5 USC Chapter 75, actions covered include removal, any reduction in grade or pay, suspension, and furlough.</p> <p><i>Probationary/trial period:</i> With few exceptions, competitive service employees must successfully complete a one year probationary period upon initial appointment prior to being covered. Depending on whether they are entitled to veterans preference or not, employees in excepted service positions must complete one or two years of continuous service in the same or similar position prior to being covered.</p>	
<p>2</p> <p>Basic Process</p> <ul style="list-style-type: none"> - Advance notice - Reply opportunity - Rep. right - Decision - Timeframes - Cause 	<p><i>Advance notice:</i> Except for suspensions of 14 days or less, or where an agency has reasonable cause to believe a serious crime has been committed, employees are entitled to 30 days advance notice prior to an agency effecting a covered action. Such notice must be in writing and must state the specific reasons for the proposed action. In the case of actions taken under 5 USC Chapter 43 for unacceptable performance, such notice must be preceded by a period during which an employee is given an opportunity to improve their performance to an acceptable level. For suspensions of 14 days or less, employees are entitled to advance notice of unspecified length.</p> <p><i>Reply opportunity:</i> Except for suspensions of 14 days or less, employees are entitled to a reasonable time but not less than 7 days to respond orally and in writing to the above advance notice. For suspensions of 14 days or less, employees are entitled to a "reasonable time" to respond.</p> <p><i>Representation:</i> Employees are entitled to be represented by an attorney or other representative.</p> <p><i>Decision:</i> The agency must issue a written decision containing the reasons for its action prior to the effective date of such action. In the case of actions taken under Chapter 43, such decision must be concurred in by an agency official at a higher level than the official who issued the advance notice.</p> <p><i>Timeframes:</i> Actions taken under Chapter 43 must be based on performance which occurred within the year preceding the advance notice.</p> <p><i>Cause:</i> Actions taken under Chapter 75 must be "for such cause as promotes the efficiency of the service," which may include misconduct or unacceptable performance. Actions taken under Chapter 43 must be based on a determination of unacceptable performance as measured against pre-established, objective performance standards.</p>	

D		Discipline/Adverse Action System
System elements:		Summary description:
		<i>Other:</i> A separate, very rarely used provision (5 USC 7531-33) authorizes the immediate suspension and expedited removal where a determination is made that such action is in the interests of national security. Some but not most DHS positions are covered by this statutory provision.
3	Evaluation	2002 Federal Human Capital Survey data: Fewer than half of Federal employees believe that in their organization, steps are taken to deal with poor performers who can't or won't improve.

A		Appeals System
System elements:		Summary description:
1	Coverage - Employees - Actions - Probationary/trial period	<i>Employee Coverage:</i> With a few exceptions, same as above under Discipline/Adverse Action. <i>Action Coverage:</i> With the principal exception of suspensions of 14 days or less, generally same as above under Discipline/Adverse Action. <i>Probationary/trial period:</i> Employees are not covered until they complete any required probationary or trial period. Note – employees who are removed while during probation do have very limited appeal rights to MSPB under 5 CFR Part 315. <i>Other:</i> <u>All</u> Federal employees can pursue allegations of discrimination via the EEO complaint process and allegations of other prohibited personnel practices via the Office of Special Counsel. Such allegations can also be raised as affirmative defenses in an appeal of any action taken under Chapter 43 or 75.
2	Reviewer - Composition - Authority	<i>MSPB:</i> Independent Federal agency headed by three Presidential appointees ("the full Board") which employs administrative judges (AJ) to conduct initial review of appeals. MSPB has established a two-level system of review with initial AJ decisions appealable to the full Board. MSPB has authority to reverse agency actions and order the employee restored to the status, in terms of position and pay, that they would have had had no action been taken. This includes the authority to order back pay with interest. In Chapter 75 actions, MSPB also has authority to mitigate any penalty imposed. MSPB is a quasi-judicial agency whose jurisdiction is limited to review of certain personnel actions taken by Federal agencies against employees. <i>Arbitration:</i> If an employee is covered by a negotiated grievance procedure (NGP), and that procedure has not excluded Chapter 43 or Chapter 75 actions, such employee (in concert with their union) may pursue review of an action taken under Chapter 43 or 75 via the NGP which may lead to review of the action by an arbitrator. Arbitrators are not Federal employees but rather private individuals, are selected by the agency and the union in accordance with the terms of the NGP, and generally have authority similar to that described above for MSPB. By its nature, arbitration generally involves a single level of review as compared to the two levels of review under MSPB.

<p>3</p>	<p>Review Process</p> <ul style="list-style-type: none"> - Components - Timeframe 	<p><i>MSPB:</i> Employees must file appeals within 30 days of the action. Employees have a right to a full evidentiary hearing. Prior to such hearing, both the employee and the agency may engage in discovery and will under supervision of the AJ, discuss settlement and exchange witness lists. Employees have the right to be represented by an attorney at such hearings, which are conducted like judicial trials, although slightly less formal. A transcript of such hearings is kept. Upon completion of the hearing, and consideration all evidence submitted by both parties, the administrative judge will issue a written "initial decision" which, unless review by the full Board is sought by either party, becomes final 30 days after issuance. Initial decisions are nonprecedential. The majority of initial decisions are issued within 95 days of an appeal being filed. If a petition for review by the full Board is filed, such review is done on the record (no hearing). The full Board may decline to grant such petition but if and it grants such petition and issues a decision, in most cases such decision will be precedential. Full Board decisions are typically issued within 180 days of a petition being filed.</p> <p><i>Arbitration:</i> Proceedings before an arbitrator are less formal, are conducted in accordance with the procedures agreed to by the parties. While involving an evidentiary hearing, arbitration proceedings typically do not involve discovery and do not require that a transcript be kept. Arbitrators are required by law to apply the same standard of proof used by the MSPB. No central records are kept on the length of time from the filing of a grievance to issuance of an arbitration award and individual cases can involve as little as 90 days or a long as a year.</p>
<p>4</p>	<p>Decision</p> <ul style="list-style-type: none"> - Precedential? - Burden of proof - Standard of proof - Judicial review 	<p>Decisions by the full MSPB are precedential and are binding on administrative judges. Arbitration awards are non-precedential absent agreement by the parties and if so agreed, are only binding on the parties. Regardless of the forum, the burden of proof is on the agency to justify its action. In actions taken under Chapter 43, the agency must show by substantial evidence, that the employee's performance was unacceptable. In actions taken under Chapter 75, the agency must show by preponderance of the evidence that the action promotes the efficiency of the service. Except in actions involving allegations of discrimination, judicial review of MSPB decisions and arbitration awards may be sought before the U.S. Court of Appeals for the Federal Circuit. MSPB decisions and arbitration awards involving an allegation of discrimination are subject to additional review involving MSPB, EEOC, and U.S. District Court.</p>
<p>5</p>	<p>Other Appeals Systems</p> <ul style="list-style-type: none"> - Discrimination - Prohibited personnel practices 	<p>Separate avenues have established in statute to ensure review of allegations of discrimination and other prohibited personnel practices. As noted above, all Federal employees can pursue allegations of discrimination via the EEO complaint process and allegations of other prohibited personnel practices via the Office of Special Counsel. Where there is an appealable action which also involves an allegation of discrimination or other prohibited practice, these avenues can overlap and intersect. Two examples.</p> <p>(1) Mixed cases: An employee who alleges that an appealable action is based in whole or in part on prohibited discrimination may initially file under the agency's EEO complaint system. At such time as the employing agency issues a final decision on that complaint (or if 120 days has passed with no decision), the employee may then pursue the matter before the MSPB.</p>

Status Quo [42]

		<p>If dissatisfied with the final MSPB decision regarding any allegation of discrimination, he or she may seek review of the MSPB decision by the EEOC. Further review of the matter may involve a statutory Special Panel, and in any case, the employee retains the right to seek trial de novo in U.S. District Court. It is very rare for such mixed cases to involve all the potential forums.</p> <p>(2) Independent Right of Action for Whistleblower Reprisal: An employee who alleges that an appealable action is based in whole or in part on reprisal for whistleblowing may initially file a complaint with the Office of Special Counsel (OSC). That agency can pursue such complaint before the MSPB on behalf of the employee. Alternatively, the employee can raise the allegation as an affirmative defense in an appeal to the MSPB or a grievance filed under an applicable negotiated grievance procedure. While the employee can only gain individual relief before MSPB, the OSC can seek and obtain an order imposing disciplinary action against the agency officials who engaged in the reprisal.</p>
6	Evaluation	GAO, MSPB, and other organizations periodically conduct studies of the current appeals system.