

## Limited Internal Appeal [45]

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 authorize the Secretary to appoint a single official or three or five member standing panel to render appellate decisions on removal actions. All other disciplinary or performance-based actions (e.g., short and long suspensions, reductions in pay/band/grade, etc.) would be final. The deciding official or panel members will be selected from DHS employees; they can be selected from those outside the charged employee's chain of command or from senior management officials within that chain.

This option contemplates very narrow coverage of employees. For example, only permanent non-probationary employees with three years of service would be able to appeal removal actions to the appointed official or panel. Additionally, this option contemplates that the appointed official or panel would be the only avenue to appeal removal actions. In other words, all employees, including bargaining unit employees, would have to appeal removal actions to the appointed official or panel.

### Key Features (provides details about the option in bullet statements by system):

#### Internal Decision Maker

The Secretary will appoint a single decision maker or a three or five member panel to decide disciplinary appeals. Panel members would serve a fixed term of years.

The deciding official and panel members could be appointed from DHS employees outside the charged employee's chain of command or from senior management officials within that chain.

#### One Level of Appeal

The appointed official or panel makes final decisions on disciplinary and performance-based actions. The process is not intended to be legally burdensome. Appellants may represent themselves pro se.

#### Other Key Features

- Decisions would be based on the documents, evidence, exhibits, and affidavits contained in the record. Parties will have an opportunity to supplement the record. Parties may be allowed to make a brief oral statement in their interest prior to the decision.
- The appellant can elect to use alternative dispute resolution (ADR) to resolve the complaint early in the appeals process. The agency must participate in good faith.
- The appointed official or panel reserves the right to mitigate or increase penalties.
- Decisions are not precedential.
- Standard of review would be arbitrary and capricious (i.e., the decision was made without reasonable grounds or adequate consideration of the circumstances).
- No further administrative appeals.
- Decisions on mixed cases would not be appealed to EEOC but to U.S. District Court.
- Judicial review to Federal Circuit Court.
- Employees found to have violated national security would not have appeal rights.

**Sub-options:**

- The Secretary could appoint a cadre of panel members from DHS organizational components. This cadre of employees would be paneled, on a rotating basis, to render decisions on appeal. Serving as a panel member would be a collateral duty.
- The appointed official or panel, at its discretion, could opt for a formal hearing on the matter.
- The appointed official or panel could recommend an employee be permanently or temporarily barred from employment within DHS.
- Decisions on appeals alleging discrimination may be appealed to the EEOC.

**Relation to Other Options:**

- This option should work with any adverse actions option that allows for appeals of disciplinary and/or performance based actions. To work with any option, the types of actions that are appealable would have to be modified. This could be done with no significant impact on the appeals process outlined below.

**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.):

Potential Advantages/Benefits

- Since the appointed official or panel comes from within DHS, they should have increased familiarity with the mission, structure, components, and occupations within DHS. Additionally, the appointed official or panel would only hear DHS cases.
- Should promote fairness and consistency of removal decisions.
- One level of review could ensure faster processing of appeals. Time for processing and rendering decisions on removal appeals is reduced. A case can be processed in as little as 110 days barring unforeseen circumstances. This option could be faster than having appellants appeal to MSPB, which can be a two-level process.
- This process is not overly legalistic and employees can appeal pro se.
- Parties may engage in ADR to resolve claims very early in the appeals process. ADR might promote withdrawal of most claims or possible resolution/mitigation of disciplinary and performance-based actions.

Possible Disadvantages/Challenges

- Employees might perceive this process as biased because an outside independent body such as MSPB will not process the appeal. Employees might perceive that the internal decisionmaker, selected by the Secretary, would merely "rubber stamp" the agency's decision.
- Prevents DHS employees from appealing other disciplinary and performance-based actions such as suspensions, demotions, reductions in pay/band/grade, etc. Components, at their discretion, may develop systems to ensure fairness and consistency of other disciplinary and performance-based actions. Also, components may wish to establish internal appeal procedures for other disciplinary and performance-based actions.
- Decisions of the board might be perceived as inconsistent if MSPB or EEOC precedent is not followed.

## Limited Internal Appeal [45]

If decisions are appealed to Federal Circuit Court or the U.S. District Court, DHS would have to justify a departure from MSPB or EEOC precedent.

- Any decision to disallow appellants to appeal their mixed case claims to EEOC might have to be discussed with EEOC and the DHS Office of Civil Rights and Civil Liberties prior to implementation of this option.
- Allowing appeals only for employees with three years of service might not be viewed as fair.
- With only removals appealable, management might have less incentive to properly administer the HR system involving lesser disciplinary actions.
- Since this option does not allow for external appeals of adverse actions, it could result in an increase in the number of complaints filed through the EEO process.

### Other Implications

- DHS would have to establish an Office of Appeals and employ not only the appointed official or panel members, but other personnel (attorney's, clerks, and administrative staff) to assist with processing appeal cases.
- Does not provide for appeal of removal for national security grounds.
- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

### Cost

- DHS would have to budget for the Office of Appeals and salaries for the appointed official or panel and staff members. All salaries should be commensurate with the salaries of employees in similar positions at MSPB.

## Evaluation in Terms of Guiding/Design Principles:

### Mission-Centered

- This option eliminates appeals for all disciplinary and performance-based actions except for removals, thus allowing managers and employees to focus on the mission of the component.
- The decisionmakers are DHS employees. Decisionmakers will be familiar with the mission, components, policies, and occupations within DHS.
- DHS components would have to rely heavily on alternative dispute resolution options to address other disciplinary and performance-based appeals (i.e., appeals of suspensions, reprimands, reductions in pay/band/pay, etc.).

### Performance Focused

- This option should encourage all DHS employees to conduct themselves in a professional manner and maintain successful performance and integrity in their positions.

### Collaborative

- This option supports the notion that employees, managers, and HR professionals want a faster and more efficient appeals process. There may be some employees and union officials that oppose this internal restricted appeals process because appellants do not have a right to a hearing and decisions do not come from an independent third-party. Notwithstanding, this option provides for due process which is required by the Homeland Security Act.

### Contemporary and Excellent

- Several states utilize appeal processes whereby decisions on disciplinary actions are heard by a three

## Limited Internal Appeal [45]

or five member commission, panel or board.

- This option reduces the timeframe for processing and deciding disciplinary and performance-based appeals for removals.
- This option requires agencies to develop fair and consistent internal appeal processes, including alternative dispute resolution, for processing other disciplinary and performance-based appeals.

### Generates Respect and Trust

- This option generates respect and trust in the appeals process because DHS employees are making decisions on appeals.
- This option allows both parties to submit evidence in support of their case. Also, the appointed official or panel can, at its discretion, have a hearing or allow the parties to brief statements in their interest.
- This option allows the appellant to appeal to a board outside of their agency.

### Based on Merit System Principles and Fairness

- This option ensures that employees are retained on the basis of their successful performance and that unacceptable performance or violations of the code of conduct are appropriately addressed.

### **Transition & Implementation:**

- The success of this option, specifically the review process, would not be entirely dependent upon the restrictions that are placed on appealable actions. The types of actions covered could be expanded and this option could still be successful.
- It is recommended that this option be piloted for at least 18 months in one geographic area with possibly three participating components. During the pilot, consideration may be given to allowing the parties to appeal decisions of the appointed official or panel to MSPB. If the pilot proves successful, then the workforce should be educated about the new process and it should be implemented DHS-wide.

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

<b>B</b>		<b>Appeals</b>
System elements:		Summary description:
1	Coverage	Only permanent non-probationary employees with three years of service are eligible to file appeals on removal actions. All employees, including bargaining unit employees, would have to appeal removal actions to the appointed official or panel. Employees found to have violated national security will not have appeal rights.
2	Reviewer	<p>An official appointed by the Secretary, DHS, has the final authority to decide disciplinary appeals. Alternatively, a three to five member DHS standing panel, appointed by the Secretary, DHS, has the final authority to decide disciplinary appeals. The deciding official and panel members could be appointed from DHS employees outside the charged employee's chain of command or from senior management officials within that chain.</p> <p><u>Sub-option:</u> There could be a standing panel made up of members (employees) from each DHS component. Three or five members would be called upon, on a rotating basis, to sit on a panel and render a decision on an appeal. The Secretary, DHS, would select members (employees) from each DHS component.</p>
3	Review Process	<p>The appointed official or panel has the authority to sustain, reverse, or mitigate a removal action by any DHS component. The appointed official or panel, at its discretion, could recommend an employee be permanently or temporarily barred from employment within DHS. The DHS Office of Appeals is primarily responsible for administering the appeals process, while the appointed official or panel members conduct a review the case and render final decisions on removal actions.</p> <p>Final decisions on employee removals will be based on a review of the case file and supplemental documents, affidavits, exhibits, and interrogatories, submitted by the parties.</p> <p><u>Sub-option:</u> The appointed official or panel could, at its discretion, have a hearing on the matter.</p> <p>The appellant has <u>10 calendar days</u> from receipt of the decision notice to file a "Notice of Appeal" (hereinafter "appeal") to the DHS Office of Appeals within the component. The appeal must be in writing. The appeal will grant the appellant an opportunity elect alternative dispute resolution (ADR) to resolve the claim. If the appellant chooses to use ADR, then the agency must participate. Both parties must agree, in writing, to participate in good faith. ADR will take place no more than <u>15 calendars days</u> from the receipt of the appeal by the Office of Appeals. All timeframes during the appeals process will be tolled for ADR. If ADR does not resolve the claim, the parties may continue the process within the specified timeframes.</p>

Limited Internal Appeal [45]

		<p>If ADR is unsuccessful, or if the appellant does not use ADR, the DHS Office of Appeals, will forward a copy of the appeal to the employee's agency. The agency will be asked to respond to appellant's appeal and submit a copy of the complete disciplinary or performance-based record to the DHS Office of Appeals. The agency will have <u>15 calendar days</u> to submit a response to the allegation and comply with the record request.</p> <p>Upon receipt of both the agency's response and record, the parties will have <u>45 calendar days</u> to serve and respond to pleadings and discovery requests. Parties are expected to be cooperative. Extensions must be submitted, in writing, to DHS Office of Appeals at least <u>10 calendar days</u> prior to end of the <u>45 calendar day</u> timeframe. Extensions will only be granted with a showing of good cause.</p> <p>Upon receipt of the written record and/or after completion of ADR, the parties will have <u>45 calendar days</u> to supplement the written record on the disciplinary action. Parties may submit affidavits, depositions, exhibits, and other evidence that is pertinent to the appellant's case. Parties may also submit interrogatories to be completed within the <u>45 day timeframe</u>. Parties are expected to be cooperative. Extensions must be submitted, in writing, to the DHS Office of Appeals at least <u>15 calendar days</u> prior to end of the <u>45 calendar day</u> timeframe.</p> <p>At the end of the <u>45 calendar day timeframe</u>, the DHS Office of Appeals will not receive additional documents, unless special circumstances exist. The DHS Office of Appeals will forward a copy of the case file and supplementary documents to the appointed official or panel file for a review and decision of the case on the merits.</p>
4	Decision	<p>The appointed official or panel committee will have <u>15 calendar days</u> render a final decision on the removal action. The appointed official or panel, at its discretion, may allow the parties to make brief statements in their interest. The appointed official or panel, at their discretion, may arrange to question the parties at any time during the appeal. The panel may arrange to have a teleconference or videoconference to discuss the case before the panel members reach a decision.</p> <p>The burden of proof is on the agency. The standard of review would be arbitrary and capricious (i.e., the decision was made without reasonable grounds or adequate consideration of the circumstances).</p> <p>Decisions of the appointed official or panel would not be precedential. The Office of Appeals will implement a process to ensure uniformity and consistency of penalties. All decisions will be in writing.</p> <p>Note: The decision of the panel would be the majority decision. If there is a dissenting member, the panel member may write a separate dissenting opinion.</p> <p>The appellant may seek judicial review to the Federal Circuit Court.</p>

## Limited Internal Appeal [45]

5	Other Appeals Systems	<p>The appointed official or panel may make final decisions on mixed cases. These cases may not be appealed to the EEOC. Appellants may seek judicial review to the Federal Circuit Court.</p> <p><u>Sub Option:</u> Decisions may be appealed to EEOC.</p>
6	Evaluation	<p>The DHS Office of Appeals would be responsible for evaluating the effectiveness and efficiency of this appeals option in an annual report. The annual report should include: an overview of the regulations governing the appeals process, biographies of the official or panel members, the number of appeals filed and the disposition of those appeals, number of appeals to federal court, and the average number of days to process a case at each stage. The annual report should also include noteworthy accomplishments, goals, and objectives for the next fiscal year.</p> <p>Efforts should be made to capture and monitor employee and manager satisfaction with the process.</p>