

Expanded External Appeal [46]

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 retains the current external review process involving arbitrators or MSPB but significantly expands both the jurisdiction and the remedial authority of the external 3rd party; it also raises the standard of proof which the agency must meet to have its action sustained.

Key Features:

- All DHS employees have the right to appeal any action which adversely affects their employment, including reassignment, failure to receive a scheduled pay increase, and unfavorable performance appraisal.
- Initial review, involving a full evidentiary hearing, would be conducted by an MSPB administrative judge or, in the case of employees covered by a negotiated grievance procedure, an arbitrator.
- All initial decisions by administrative judges or arbitrators would be automatically reviewed by the full MSPB.
- Third-party adjudicators could reverse the appealed action, mitigate any penalty (including those actions taken under Chapter 43 for unacceptable performance), order punitive damages, and direct that agency officials be disciplined, subject to judicial review.
- The burden would be on the agency to show by clear and convincing evidence that the covered action promotes the efficiency of the service.

Sub-Options:

- MSPB could be replaced by a new independent, external agency which would only handle appeals from DHS staff. Creation of such an agency could facilitate handling the differences between normal MSPB procedures and the new procedures/authorities contained in this option. Agency action could be held in abeyance until the full MSPB issues a final decision.
- This option could allow bargaining unit and non-bargaining unit employees the right to choose arbitration or MSPB.
- Further expand remedial authority to include right to *enhance* the agency's penalty, thus empowering the official/panel with a full range of remedies.
- Provide for automatic review of initial decision by a member of the Board rather than the full Board, thereby minimizing possible bottlenecks of appeals and maximizing overall efficiency.

Relation to Other Options:

- To fully implement the features of this option, any Labor Relations option would need to provide for a broad negotiated grievance procedure which included all of the actions appealable under this system.
- This option would work well with an adverse action system with the same employee and action coverage, so that the agency has the first right of redress and correction of potentially erroneous adverse actions.

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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

- Ensures that employees have a right to a full hearing and external review of matters having a significant impact on their employment.
- Might enhance recruitment opportunities for DHS as an employee-friendly workplace/the employer of choice.
- Might allow for minimum internal due process due to maximum external due process, thereby allowing management to focus more on operations.
- Addresses current concerns regarding multiple forums for discrimination related appeals.
- Provides appeal rights for some employees who do not currently have such rights.

Possible Problems/Challenges

- Might mean an increase in appeals.
- Possible increase in litigation since more actions may be appealed, the remedial authority of the 3rd party would be increased, and there is no case law/established precedent regarding every possible adverse action that may be appealed under this option.
- Might discourage supervisors from exercising their discretion --for example, addressing and resolving poor performance --since much of that discretion would be subject to review by an outside party and adjudicated under a higher standard of proof.
- Expanding the Board's jurisdiction this broadly might strain the Board's resources and lead to greater delays.
- Certain employees of DHS occupy positions that require mobility as a condition of employment. It could impair the ability of DHS to carry out its mission if such actions were appealable.

Other Implications

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

Cost

- Possible significant increase in costs in terms of time and money spent defending new category of actions being challenged and also in meeting new standard of proof.
- Associated costs from likely increase in MSPB workload due to broad jurisdiction and automatic Board review; and resulting increase in the number of AJs and Board members needed to handle the additional workload.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- Since the external review will ultimately be based on the extent to which an action promotes accomplishment of DHS' mission, management will routinely consider whether such actions are mission related.

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Performance Focused

- Ensures that agency actions are based on sound and defensible reasons related to promoting the efficiency of the service which in turn promotes improved individual and organizational performance.

Contemporary and Excellent

- Recognizes that actions such as performance appraisal or reassignment have a impact on an employee which is almost as great as traditional disciplinary actions (those involving formal reduction in pay or termination of employment).

Generate Trust and Respect

- The extension of external review to the new category of personnel actions, along with the higher standard of proof, will enhance the confidence of all parties in the appropriateness of agency actions.

Based on Merit System Principles and Fairness

- The expanded external review will reinforce the importance of the merit system principles and enhance both the perception and reality of fairness.

Transition & Implementation:

- There would need to be a period of transition as MSPB implemented the new authorities and standards in their operating procedures, including training administrative judges.
- The parties to an arbitration of an adverse action (as defined in this option) would need to fully brief the arbitrator on the extent of his or her authority and the fact that the resulting award would be subject to review by the MSPB.

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

A		Appeals System
System elements:		Summary description:
1	Coverage <ul style="list-style-type: none"> • Employees • Actions • Probationary/ trial period 	<ul style="list-style-type: none"> • Covered employees include all permanent DHS employees not serving a trial period. • Covered actions include any personnel action having an adverse impact on the covered employee's employment status (in addition to removal, loss of pay or grade, and suspensions), such actions as reassignment, failure to receive a scheduled pay increase (WIGI or COLA), or receipt of an unfavorable performance appraisal.
2	Reviewer <ul style="list-style-type: none"> • Composition • Authority 	<ul style="list-style-type: none"> • Very similar to current system involving arbitrators and MSPB administrative conducting full evidentiary hearing and issuing initial decision followed by second level review on the record by MSPB. • Third-party (AJ, arbitrator, full MSPB) authorized to reverse the appealed action and return the employee to status quo ante, and also authorized to mitigate any penalty (including those actions taken under Chapter 43 for unacceptable performance), order punitive damages, and direct that agency officials be disciplined.
3	Review Process <ul style="list-style-type: none"> • Components • Timeframe 	<ul style="list-style-type: none"> • Similar to current system.
4	Decision <ul style="list-style-type: none"> - Precedential? - Burden of proof - Standard of proof - Judicial review 	<ul style="list-style-type: none"> • All decisions of the full MSPB would be precedential. • The burden would be on the agency to show by clear and convincing evidence that the action promotes the efficiency of the service. Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than "preponderance of the evidence." • All final MSPB decisions, including those involving allegations of discrimination, would be subject to judicial review by the Federal Circuit.
5	Other Appeals Systems <ul style="list-style-type: none"> - Discrimination - Prohibited personnel practices 	<ul style="list-style-type: none"> • Similar to current system except that employees would be required to elect to pursue any allegations of discrimination either via the above process or via an EEO complaint process leading to possible review by EEOC and District Court. • Allegations involving prohibited personnel practices other than discrimination could (as under the current system) be raised before the administrative judge or arbitrator. If the 3rd party found that a prohibited personnel practice had been committed, they would have the increased authority granted under this option to provide full relief.
6	Evaluation	<ul style="list-style-type: none"> • Response of employees, supervisors, and managers to annual survey which includes such questions as: <ul style="list-style-type: none"> ○ "The new system appropriately provides a fair process for employee to challenge adverse actions." • Cost of taking adverse actions, including cost of resolving any challenge to such action.