

Geographic Panels [47]

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 have eligible employees appeal disciplinary and performance-based actions internally to a new Department of Homeland Security Office of Appeals. The Office of Appeals would assign the case to a three or five member standing panel in the geographic location closest to the appellant. Panel members would be DHS component employees. The panels would provide final decisions on disciplinary and performance-based appeals.

This option contemplates minimal coverage of employees. For example, only permanent non-probationary employees would be able to appeal disciplinary and performance-based suspensions, reductions in pay/band/grade and removals. Bargaining unit employees will have the option of appealing disciplinary and performance-based actions through the Office of Appeals or under a negotiated grievance procedure/arbitration.

NOTE: This option is very similar to the "Internal Organizational Component Appeals Panel" option.

Key Features:

DHS Decision Maker

DHS would establish an Office of Appeals that would be responsible for managing the DHS internal disciplinary and performance-based appeals process. The Office of Appeals would establish panels in strategic geographic locations throughout the U.S. For example, panels could be located in the following geographic areas: Northeast, Mid-Atlantic, Southeast, Southwest, North Pacific, Mid-Pacific, and Central states. The panels would be made up of one full-time DHS administrative law judge (employed by the DHS Office of Appeals) and two or four designated collateral duty panel members from DHS organizational components. Collateral duty panel members would serve for a fixed term and on a rotating basis.

One Level of Appeal

The panels would issue final agency decisions concerning disciplinary and performance-based actions. The process is not intended to be legally burdensome. Appellants may pursue an appeal pro se.

Restrictions on Who Can File Appeals

Employees found to have violated national security would not have appeal rights.

Other Key Features

- There is no absolute right to a hearing. Panels could conduct hearings prior to rendering a decision but, at its discretion, may decide to make a ruling based upon the written record.
- The DHS administrative law judges would be primarily responsible for ruling on motions, establishing hearing dates and times, and conducting hearings along with other DHS collateral duty panel members. Decisions would be by majority. The administrative law judge would be responsible for reviewing the panel's decision for legal sufficiency and issuing the order.
- Hearings and panel sessions could take place via teleconference or videoconference.
- The appellant can elect to use alternative dispute resolution (ADR) to resolve the complaint early in

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<p>the appeals process. The agency must participate in good faith.</p> <ul style="list-style-type: none">• Bargaining unit employees have the option of appealing disciplinary and performance-based actions through the negotiated grievance procedure.• Panel may mitigate penalties but not increase them.• Decisions are not precedential.• Standard of review would be preponderance of the evidence.• There would be no further administrative appeals.• The panel would hear mixed cases. Decisions on appeals alleging discrimination can be appealed to EEOC.• Judicial review to the Federal Circuit Court.
<p>Sub-options:</p> <ul style="list-style-type: none">• Decisions on appeals alleging discrimination may not be appealed to the EEOC, but to a U.S. District Court.
<p>Relation to Other Options:</p> <ul style="list-style-type: none">• This option should work with any adverse actions option that allows for appeals of disciplinary and/or performance based actions. To work with other options, the types of appealable actions may have to be restricted or expanded. This could be done with no significant impact on the appeals process outlined below.
<p>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.):</p> <p><u>Possible Advantages/Benefits</u></p> <ul style="list-style-type: none">• The panel members are familiar with the mission, policies, structure, and occupations within DHS. Additionally, the panel would only hear DHS cases.• One level of review could ensure faster processing of appeals. Time for processing and rendering decisions on removal appeals is reduced. A case could be processed in as little as 110 days barring unforeseen circumstances.• Gives the panel flexibility to render a decision based on the written record with no hearing, further speeding the decision-making process.• Allows for an administrative law judge with expertise in adjudicating appeals to conduct hearings, rule on motions, and review decisions for legal sufficiency. At the same time, the process is not overly legalistic; appellants may appear pro se and other panel members do not need a law degree or legal training.• Parties may engage in ADR to resolve disputes very early in the appeals process. ADR might promote withdrawal of claims or possible resolution/mitigation of disciplinary or performance-based actions.• Bargaining unit employees retain the right to appeal using the negotiated grievance procedure/arbitration.

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Possible Disadvantages/Challenges

- Employees might perceive this process as biased because the appeal is not processed by an outside independent appeals body.
- Decisions of the board might be perceived as inconsistent if the panels refuse to rely on MSPB or EEOC decisions. If decisions are appealed to the Federal District Court, DHS would have to justify a departure from MSPB or EEOC precedent.
- Although the process would not be overly legalistic, appellants might feel that they need legal representation during the hearing.
- Arbitrator decisions resulting from bargaining unit appeals might be inconsistent with panel decisions.
- There may be due process concerns raised by not guaranteeing a hearing.

Other Implications

- DHS would have to establish an Office of Appeals and employ personnel (administrative law judges, attorneys, clerks, and administrative staff) to assist with processing appeal cases.
- Would need to institute a system to measure effectiveness and a process to track cases for consistency.
- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- DHS would have to budget to staff the Office of Appeals. Salaries for the DHS ALJs should be commensurate with the salaries of MSPB ALJs. Attorneys, clerks, and administrative assistants should be paid in accordance with regulations that govern their positions.

Evaluation in Terms of Guiding/Design Principles:

Mission-Centered

- This option eliminates appeals for all disciplinary and performance-based actions except for long suspensions (15 or more days), reductions in grade/band/pay, and removals. This allows managers and employees to focus on the mission of their respective components.
- The decisionmakers are DHS employees. Decisionmakers will be familiar with the mission, components, policies, and occupations within DHS. Decisions would reflect a working knowledge of with the mission, policies, procedures, of the organization.
- DHS components would have to rely on other alternative dispute resolution alternatives to address other disciplinary appeals (i.e., appeals of suspensions, reprimands, 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 occupations. Appeals of performance-based actions are restricted to long-suspensions and removals.

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 there is no guarantee of a hearing on the claim and the decision does not come from an independent third-party.

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Contemporary and Excellent

- 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.
- Several states utilize appeal processes whereby decisions on disciplinary actions are heard by a three to five member commission, panel or board.

Generates Respect and Trust

- This option generates respect and trust in the appeals process because DHS employees are making decisions on the appeals.
- This option allows employees and agency to submit evidence in support of their case. Also, the Official or Panel can, at its discretion, have a hearing or allow the parties to make brief statement in their interest.
- This option allows appellant an opportunity to appeal to a third party outside of their agency.

Based on Merit System Principles and Fairness

- This option ensures that employees are retained on the basis of adequacy of performance and that inadequate performance is corrected and that violations of the code of conduct are addressed through discipline.

Transition & Implementation:

- The option could be easily adjusted to work along with any adverse action option.
- It is recommended that this option be piloted in one geographic area, preferable the Mid-Atlantic region, because it is close to DHS headquarters and can be easily monitored by the Office of Appeals. The pilot should last at least 18 months. Employees and managers in the Mid-Atlantic region would have to receive extensive training on this new system. For the first 18 months, consideration may be given to allowing the parties to appeal the panel decisions to MSPB during the pilot only. If the pilot proves successful, then the DHS workforce should be educated about the new process and it should be implemented in stages to incorporate the other regions.

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

B		Appeals
System elements:		Summary description:
1	Coverage	Only permanent non-probationary employees may appeal disciplinary and performance-based actions that result in long suspensions (suspensions of 30 days or more), reductions in grade/band/pay, and removals. Employees found to have violated national security do not have appeal rights. Bargaining unit employees would be allowed to pursue appeals through the negotiated grievance procedure/arbitration <u>or</u> this process.
2	Reviewer	<p>DHS would establish an Office of Appeals. DHS would establish wide standing panels in strategic geographic locations throughout the U.S. For example, panels would be located in the following geographic areas: Northeast, Mid-Atlantic, Southeast, Southwest, North Pacific, Mid-Pacific, and Central states. These panels would be composed of a full-time administrative law judge (ALJ) and two to four members selected from a cadre of qualified DHS employees from each organizational component. Serving as a panel member would be a collateral duty and official time would be granted to fulfill panel duties.</p> <p>Employees would have to meet the minimal qualifications to apply to be a member of the appeals panel. The DHS Office of Appeals would ensure the members reflect the diversity within DHS. After reviewing applications and conducting oral interviews, the Director, Office of Appeals will select employees from organizational components to serve on the geographic panels.</p> <p>The ALJ's role would be akin to a "chief judge" – conducting the hearing and ensuring hearing procedures are followed by the parties. The ALJ would not be responsible for writing the decision, but would be responsible for reviewing the decision for legal sufficiency and issuing the order. The decision would have to be signed by the majority of the panel.</p> <p>The Office of Appeals within each component would have to employ a cadre of full-time ALJs. The ALJs would be responsible for the procedures outlined in this option, along with contacting panel members for hearings.</p>
3	Review Process	<p>The Review Process outlined below is very similar to the "Review Process" outlined in option Internal Organizational Component Appeals Panel option. The only significant difference is that the DHS Office of Appeals processes appeals. All differences are bolded.</p> <p>The panels will have the authority to sustain, reverse, or mitigate disciplinary or performance-based actions. Additionally, the panel could recommend to the Secretary, DHS, that an employee be permanently or temporarily barred from employment within DHS.</p>

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		<p>Final decisions on employee discipline will be made based on a review of the case file and a hearing before the panel. Appellants do not have a right to a hearing; the panel, at its discretion, may opt to make a final decision based upon the record and supplemental documents submitted by the parties.</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> <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>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 ALJ will schedule and notify the parties and panel members of a hearing date not later than <u>15 calendar days</u> prior to the hearing. Either party may file a motion for postponement of a hearing. Postponement will be granted only with a showing of good cause. The ALJ will rule on all motions prior and during the hearing. Parties will follow the guidance for filing motions outlined in 5 CFR part 1201.55.</p> <p>The agency will be responsible for securing hearing space. The DHS Office of Appeals may opt for a telephone hearing or hearing by videoconference. The hearing will be conducted in the same format as a Merit Systems Protection Board hearing. MSPB regulations concerning representatives, official time, and transcripts will be followed.</p>
4	Decision	<p>This section is very similar to the "Decision" section outlined in the Internal Organizational Component Appeals Panel option. The only significant difference is that the DHS Office of Appeals will process appeals. All differences are bolded.</p>

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		<p>At the completion of the hearing, the panel members, including the ALJ, will have <u>15 calendar days</u> to confer and render a final decision on the disciplinary action. The decision will be the majority decision of the panel. If there is disagreement as to the penalty, the panel members are to work diligently to resolve any issues, seeking the advice of general counsel and other subject matter experts if necessary. If there is a dissenting member, the panel member may write a separate dissenting opinion.</p> <p>All decisions will be in writing. Decisions will be written by a panel member. The ALJ is responsible to ensuring legal sufficiency of the document. The majority panel members must sign the decision. The ALJ is responsible to issuing the decision to the parties.</p> <p>The burden of proof is on the agency. The standard of review would be preponderance of the evidence.</p> <p>Panel decisions would not be precedential. The DHS Office of Appeals will have to implement a process to ensure fairness and consistency of penalties.</p> <p>The appellant may seek judicial review to the Federal Circuit Court.</p>
5	Other Appeals Systems	<p>The panel may make final decisions on mixed cases. These cases may be appealed to the U.S. Equal Employment Opportunity Commission (EEOC).</p> <p><u>Sub Option:</u> Decisions may be not appealed to EEOC, but to U.S. District Court.</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>