

## Internal Component Panel [48]

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 long suspensions (30 days or more), reductions in pay/band/grade, and removals internally to a three or five member standing panel within the organizational component. Panel members would be agency employees and would serve on the panel as a collateral duty. Panel members would be selected by the head of the organizational element. The panel would provide final decisions on disciplinary 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 this option or under a negotiated grievance procedure/arbitration.

**NOTE: This option is very similar to the “Multiple DHS Geographic Appeals Panels (Not Selected by the Secretary)” option.**

### Key Features:

#### Internal Decision Maker

Each DHS organizational component will establish an Office of Appeals that would be responsible for managing the internal disciplinary and performance-based appeals process. Each component would have full-time administrative judges and two or four collateral duty panel members serve on the appeals panel. A cadre of qualified agency employees will be trained to serve as collateral duty panel members. Employees would serve as panel members on a rotating basis.

#### One Level of Appeal

The panel 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 to the panel.

#### Other Key Features

- No absolute right to a hearing. Panel would conduct a hearing prior to rendering a decision but the panel, at its discretion, may decide to make a ruling based upon the record after obtaining supplemental documents.
- Hearings and panel discussions could take place via teleconference or videoconference.
- 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.
- 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.

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- No further administrative appeals.
- The panel would hear mixed cases. Decisions on appeals alleging discrimination can be appealed to EEOC.
- Judicial review to Federal Circuit Court.

### Sub-options:

- If the panel does hear mixed cases, discrimination claims may only be appealed to U.S. District Court.

### 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 other options, the threshold for allowing appeals to a component appeals panel may have to be limited or expanded. 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.):

### Possible Advantages/Benefits

- The panel is comprised of agency employees who would be familiar with the mission, structure, and occupations within the component. Additionally, the panel would only hear agency cases.
- One level of review could ensure faster final decisions on disciplinary and performance-based actions. A final decision on appeal can be processed in as little as 110 days barring unforeseen circumstances.
- Allows the parties an opportunity to prove whether the disciplinary action was warranted or whether the penalty should be mitigated.
- Gives the panel flexibility to make decisions based on the written record instead of a 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 Problems/Challenges

- Employees might perceive this process as biased because the appeal is not processed by an *external*/independent body such as MSPB. Employees might perceive that the panel may “rubber stamp” management’s decision to impose discipline.
- Decisions of the board might be perceived as inconsistent if the panel does not rely on MSPB or EEOC decisions. If decisions are appealed to Federal District Court, DHS would have to justify a departure from MSPB or EEOC precedent.
- The jurisdiction to decide mixed case claims might require discussion with EEOC and the DHS Office of Civil Rights and Civil Liberties.
- Although the process would not be overly legalistic, appellants might feel 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.
- Because decisions would be non-precendential, disciplinary action could be less effective in deterring other employees from similar misconduct in the future.

### Other Implications

- Components would have to employ personnel to staff the Office of Appeals. The office would have a Director, along with attorney’s, clerks, and administrative staff to assist with processing cases.
- Each component may need a different number of panel members.
- 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

- Components would have to budget to staff the Office of Appeals. Salaries of administrative law judges should be commensurate with the salaries of the administrative law judges at the MSPB. Clerks and administrative assistants should be paid in accordance with regulations that govern their position.

### **Evaluation in Terms of Guiding/Design Principles:**

#### Mission-Centered

- This option eliminates appeals for all disciplinary actions except for long suspensions, reductions in grade/band/pay and removals, thus allowing managers to focus on the mission of their respective components.
- The decisionmakers are organizational component employees. Decisionmakers will be familiar with the mission of the agency, policies, and occupations within the organization. Their decisions should reflect a working knowledge of with the mission, policies, procedures, of the organization.
- Components would be strongly encouraged to rely on other alternative dispute resolution alternative to address other disciplinary appeals (i.e., appeals of suspensions, reprimands, etc.).

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### Performance Focused

- This option should encourage all DHS employees to maintain successful performance and integrity in their position.

### 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 external independent third-party review.

### Contemporary and Excellent

- This option reduces the timeframe for processing and deciding disciplinary appeals for removals.
- This option requires agencies to develop fair and consistent internal appeal processes, including alternative dispute resolution, for processing other disciplinary 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 encourages the use of ADR to resolve matters prior to a hearing. The appellant can elect ADR and the agency must participate in good faith.
- This option generates respect and trust in the appeals process because DHS employees are making decisions on the appeals.
- This option allows the parties to present evidence in support of their case.

### 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 or violation of the code of conduct should be corrected. If such performance is not corrected the employee will be separated from service.

### **Transition & Implementation:**

- The option could be adjusted to work with almost any adverse action option that allows for appeals of adverse actions.
- It is recommended that this option is piloted with employees in one geographic area for at least 18 months. Employees within the geographic area would have to receive training on the appeals process. For the first 18 months, consideration may be given to allowing the parties to appeal panel decisions to MSPB. If the pilot proves successful, then the entire component workforce would be educated about the new process prior to implementation agency-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 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>Each DHS component should establish an Office of Appeals that would be responsible for processing disciplinary and performance-based appeals. The office should fall under the Head of the Component.</p> <p>Each DHS component will have a standing appeals panel that would serve a fixed term. The appeals panel would consist of one full-time ALJ and two or four component employees qualified and trained to hear and decide appeals. Serving as a panel member would be a collateral duty and official time would be granted to fulfill their duties as panel members. Employees would have to meet the minimal qualifications to apply to be a member of the appeals panel. The panel should reflect the diversity of the component. After reviewing applications and conducting oral interviews, the Head of Human Resources Management will recommend a list of panel members to the Head of the Component. The Head of the Component would select panel members.</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 ALJ's. The ALJ's would be responsible for the procedures outlined in this option, along with contacting panel members for hearings.</p>
3	Review Process	<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> <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 on the basis of the written record and supplemental documents submitted by the parties.</p>

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		<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 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 calendar 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 Office of Appeals, will forward a copy of the appeal to the 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 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 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 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 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>At the completion of the hearing, the panel members, including the ALJ, will have <u>15 calendar days</u> to discuss the case and render a final decision on the disciplinary or performance-based 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</p>

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		<p>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 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 not be appealed to the U.S. Equal Employment Opportunity Commission (EEOC). Appellants may seek judicial review to the Federal Circuit Court.</p> <p><b>Sub Option:</b> Decisions may be appealed to EEOC.</p>
6	Evaluation	<p>The 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>