

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 grant the Merit Systems Protection Board exclusive jurisdiction over all adverse action appeals originating from covered DHS employees. Bargaining unit employees would no longer have the option of appealing matters either to the Board or under their negotiated grievance procedure.

Key Features:

This option would give the Board sole authority to decide all appeals under 5 USC Chapter 43 (removal or demotion) and 5 USC Chapter 75 (removal, reduction in grade or pay, suspensions of more than 14 days, and furlough).

The Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit system. The Board accomplishes its mission by:

- Adjudicating employee appeals of personnel actions over which the Board has jurisdiction, such as removals, suspensions, furloughs, and demotions;
- Adjudicating employee complaints filed under the Whistleblower Protection Act, the Uniformed Services Employment & Reemployment Rights Act (USERRA), and the Veterans Employment Opportunities Act;
- Adjudicating cases brought by the Special Counsel, principally complaints of prohibited personnel practices and Hatch Act violations;
- Adjudicating requests to review regulations of the Office of Personnel Management (OPM) that are alleged to require or result in the commission of a prohibited personnel practice or reviewing such regulations on the Board's own motion;
- Ordering compliance with final Board orders where appropriate; and
- Conducting studies of the Federal civil service and other merit systems in the Executive Branch to determine whether they are free from prohibited personnel practices.

Sub-options:

Sub-option 1. DHS could work with MSPB to develop a more streamlined adjudication process.

Sub-Option 2. DHS could use MSPB services on a cost reimbursable basis to adjudicate DHS cases in accordance with pre-established DHS regulations and legal standards.

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

- Could reduce time and resources devoted to taking adverse actions.
- Could focus agency's resources on agency mission and enhance accountability.

- Could reduce process steps and venues.
- Should provide genuine due process while also enhancing professionalism in decisions.
- Uses existing infrastructure.
- Would provide employees impartial decisions outside of DHS management.
- MSPB has experience in handling mixed EEO cases.
- Government pays for process.

Possible Problems/Challenges

- Unions might oppose any limitations on the scope of negotiated grievances procedures and an employee's right to outside arbitration.
- Bargaining unit employees might perceive MSPB as more likely to side with management than arbitrators.
- Process might strain MSPB budget.
- If employees view MSPB as unfair, might push claims to other venues such as EEO.
- The authority of the Board to hear some performance management cases could be limited if DHS adopts a performance management or pay system which excludes from the appeals process some elements of MSPB coverage (i.e. denial of within grade increases).

Other Implications

- MSPB might require additional staffing to support the new workload.
- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- This option should not result in significant increased costs.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- Outside arbitrators often lack an essential understanding of the agency's scope, mission and culture and tend to "spilt the baby" to ensure both sides come away with something. While such a system could be reasonable for appealing a short suspensions, significant adverse personnel actions within DHS will require a more thoughtful approach.

Performance Focused

- This option utilizes a proven, impartial and fully developed process to resolve appeals of adverse employment actions.

Collaborative

- This option protects an employee's right to due process. Employees retain the right to be represented during MSPB appeals by union representatives, attorneys or representatives of their choosing.

Contemporary and Excellent

- This option provides for expedited decision making and reflects a modern-day practical approach which recognizes the seriousness of the DHS mission. It is as complex as necessary and as simple as possible.

Generates Respect and Trust

- Adverse employment decisions will be adjudicated by impartial judges outside the DHS chain of command. This is a clear, well-understood process that employees should trust.

Based on Merit System Principals and Fairness

- The MSPB was established to serve as the guardian of the merit-based system of employment. Its mission is to ensure that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit systems principles, and that Federal merit systems are free of prohibited personnel practices.

Transition & Implementation:

- All existing labor contracts would have to be modified to reflect this new approach.

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

B		Appeals System
System elements:		Summary description:
1	<p>Coverage</p> <ul style="list-style-type: none"> • Employees • Actions • Trial/Probationary Period 	<p>Employees:</p> <p>This option would cover all DHS employees currently covered by negotiated agreements and eligible non bargaining unit employees.</p> <p>Excluded: Excepted appointments and all employees excluded by statute.</p> <p>Actions:</p> <ul style="list-style-type: none"> • Adjudicating employee appeals of personnel actions over which the Board has jurisdiction, such as removals, suspensions, furloughs, and demotions; • Adjudicating employee complaints filed under the Whistleblower Protection Act, the Uniformed Services Employment & Reemployment Rights Act (USERRA), and the Veterans Employment Opportunities Act; • Adjudicating cases brought by the Special Counsel, principally complaints of prohibited personnel practices and Hatch Act violations; • Adjudicating requests to review regulations of the Office of Personnel Management (OPM) that are alleged to require or result in the commission of a prohibited personnel practice or reviewing such regulations on the Board's own motion; • Ordering compliance with final Board orders where appropriate; and • Conducting studies of the Federal civil service and other merit systems in the Executive Branch to determine whether they are free from prohibited personnel practices. <p>The MSPB adjudicates employee appeals of personnel actions such as removals, suspensions, furloughs, and demotions (total of 26 kinds of cases).</p> <p>"Approx. 50% of the cases are adverse actions."</p>
2	<p>Reviewer Composition Authority</p>	<p>Administrative judges issue initial decisions which may be appealed to the full three member board.</p>

<p>3</p>	<p>Review Process</p> <p>Components Timeframes</p>	<p>Appeals can be filed in any format.</p> <p>Within 1-3 days of from the receipt of an appeal:</p> <ul style="list-style-type: none"> • Appeal acknowledged; entered into Case Tracking System; case file requested from agency; and appeal assigned to Admin. Judge. <p>Within 10-25 days from receipt of appeal:</p> <ul style="list-style-type: none"> • Agency response and case file received; discovery begins; pre-hearing conference scheduled; and notice of hearing issued. <p>Within 10-60 days from receipt of appeal:</p> <ul style="list-style-type: none"> • Pre-hearing motions filed and rulings issued; attempts to achieve settlement; discovery completed; pre-hearing conference held; witnesses identified; if no hearing close of record set. <p>Within 60-75 days from receipt of appeal:</p> <ul style="list-style-type: none"> • Hearing held (average hearing is over 4 hours); record closed. <p>Within 120 days from receipt of appeal:</p> <ul style="list-style-type: none"> • Initial decision issued. <p>Administrative Judges hear approximately 100-120 cases a year. If the MSPB were directed to hear cases in 60 days or less, then discovery could be eliminated; you could also require the agency to respond more quickly.</p>
<p>4</p>	<p>Decision</p> <p>Precedential or Not Burden of Proof Judicial Review Other</p>	<p>Full Board decisions are precedential.</p> <p>A final Board decision, whether it is an initial decision of a judge that has become final, a Board decision on a petition for review, or a final decision issued by the Board, may be appealed to the <i>United States Court of Appeals for the Federal Circuit</i>. The only exceptions are:</p> <ul style="list-style-type: none"> • Cases involving allegations of discrimination, which may be appealed to a U.S. district court or the Equal Employment Opportunity Commission, and • Hatch Act cases involving state or local government employees, which may be appealed to a U.S. district court. <p>The Director of OPM may petition the full Board for reconsideration of a final decision and may also seek judicial review of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.</p>
<p>5</p>	<p>Other Appeals Systems</p> <p>Discrimination</p>	<p>54% of cases were settled last year – settlement can occur at 4 levels:</p> <ul style="list-style-type: none"> - The Administrative Judge. - A Settlement Judge (who does not evaluate the strength of a

	<p>Prohibited Personnel Practices including whistleblower reprisal</p>	<p>case).</p> <ul style="list-style-type: none"> - Mediation Appeals Project (trained mediators who work on initial appeal). - Formal settlement efforts at stage that case is appealed to full Board. <p>Appeals of the full Boards decisions are available only through the Federal District Court.</p>
<p>6</p>	<p>Evaluation</p>	<p>Evaluations will use both qualitative and quantitative assessments. For a system to be deemed successful it must be capable of supporting DHS human resource capital needs and ultimately increase homeland security.</p> <p>Qualitatively the system must provide employees the protection of due process and fairness. It must be capable of removing poor performers, security risks or removing employees for significant conduct violations. The system must meet 3 ultimate tests; it must be fast fair and final.</p> <p>Quantitatively the system must meet deadlines, make sound legal decisions and sustain the vast majority of its decisions in any subsequent judicial proceedings.</p>