

Labor Relations options overview

| Scope of Bargaining | Duty to Bargain | Administration |
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| <ul style="list-style-type: none"> ▶ 2 options expand the range of subjects over which management and the union must negotiate to include wages and hours of work ▶ 4 options narrow the range of subjects for negotiations (e.g., no bargaining over agency regulations; no bargaining if DHS regulations narrow the scope) ▶ The status quo option would retain the current scope of bargaining under chapter 71 | <ul style="list-style-type: none"> ▶ 6 options narrow management's obligation to bargain with the union under certain conditions (e.g., no bargaining over DHS regulations; no mid-term bargaining unless management agrees; post-implementation bargaining permitted for national security reasons) ▶ The status quo option would retain the current obligation to bargain | <ul style="list-style-type: none"> ▶ 6 options replace the Federal Labor Relations Authority (FLRA) and the Federal Service Impasses Panel (FSIP) with an internal DHS labor relations panel or administrator that would assume some or all of the functions performed by the FLRA and FSIP (e.g., negotiability determinations; bargaining impasses; unfair labor practice cases; arbitration appeals; bargaining unit determinations) ▶ 2 of these options give Secretary authority to appoint panel members and 4 would allow labor and management to jointly appoint panel members ▶ The status quo option retains the FLRA and FSIP |

| National Security | Time Limits on Bargaining | Collaborative Initiatives |
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| <ul style="list-style-type: none"> ▶ 6 options permit management to act immediately for national security reasons and/or to meet serious operational needs notwithstanding bargaining obligations and labor contracts ▶ 2 of these options allow a third party to order make whole relief or other remedies for employees injured by the Department's exercise of this authority ▶ The status quo option would, under chapter 71, generally require management to complete bargaining before taking action except in emergencies | <ul style="list-style-type: none"> ▶ 4 options place limits on the amount of time that labor and management can negotiate term and mid-term agreements (e.g., term bargaining limited to 60 days; mid-term bargaining limited to 20 days) ▶ 3 options, including the status quo, place no time limits on bargaining | <ul style="list-style-type: none"> ▶ 4 options require labor-management councils at the national, regional, or local levels ▶ 3 options, including the status quo, permit but do not require such councils |

There are 7 Labor Relations options

| Options | Index # | Key Features |
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| Increased Management Rights | 28 | <ul style="list-style-type: none"> ▶ Collective bargaining is time-limited; management able to make workplace changes if bargaining not completed within mandatory time frames ▶ Secretary has final, unreviewable authority to suspend contracts when necessary for national security or mission needs ▶ Mid-term bargaining not required unless proposed change in working conditions has <i>significant</i> impact upon <i>substantial portion</i> of bargaining unit ▶ Establishes labor-management council to discuss workplace issues at highest levels to balance increase in management authority ▶ Internal labor relations panel or administrator replaces Federal Labor Relations Authority (FLRA) and Federal Service Impasses Panel (FSIP); Secretary can set aside panel decisions for national security or mission reasons ▶ Bargaining units defined more narrowly on basis of “most appropriate unit” ▶ Upon vote of 60% of bargaining unit, union may impose mandatory service fee on all represented employees with reduction in official time |
| Variable Duty to Bargain | 29 | <ul style="list-style-type: none"> ▶ Management’s duty to bargain linked directly to mission needs; as need to act rises in response to national security threats and/or operational needs, duty to bargain diminishes ▶ For example, no duty to bargain at all in face of serious threat to mission/national security; for less serious threat, management could act now and bargain later; under ordinary conditions, management must fulfill bargaining obligations before acting ▶ Agency regulations non-negotiable but unions given role in developing agency regulations and policies; agreements between agency and unions bind local bargaining units ▶ Three-member internal labor relations panel, jointly selected by labor and management, replaces FLRA and FSIP; Secretary can set aside impasse decisions for national security or mission reasons ▶ Bargaining units defined more narrowly on basis of “most appropriate unit” |
| Bargaining Set by Regulation | 30 | <ul style="list-style-type: none"> ▶ Conditions of employment and scope of bargaining defined by Secretary through regulations issued under notice and collaboration provisions of Homeland Security Act ▶ Unions can bargain over impact and implementation of management actions only if matters not already covered by DHS regulations establishing conditions of employment ▶ Management determines whether negotiations take place before or after it makes workplace changes based on unreviewable determination of mission needs ▶ Internal Ombudsman’s office replaces FLRA and FSIP; decisions subject to review by Secretary |

Labor Relations options (continued)

| Options | Index # | Key Features |
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| National-level Bargaining | 31 | <ul style="list-style-type: none"> ▶ Collective bargaining occurs only at national level; generally no local bargaining over impact and implementation unless both parties agree ▶ Other union/management exchanges are informal and collaborative (e.g., through labor-management councils) without the legality and enforcement tools associated with collective bargaining ▶ Internal labor panel replaces FLRA and FSIP; Secretary can set aside decisions on rare occasions for national security reasons ▶ Upon vote of 60% of bargaining unit, union may impose mandatory service fee on all represented employees with reduction in official time |
| Status Quo | 32 | <ul style="list-style-type: none"> ▶ The right of employees to organize, bargain collectively & participate in labor organizations was found by Congress to safeguard the public interest, contribute to the effective conduct of public business, and facilitate settlement of disputes ▶ Bargaining not required over specified management rights, government-wide regulations, or agency regulations supported by a “compelling need” ▶ Management must negotiate over procedures used to exercise management rights and appropriate arrangements for employees adversely affected by exercise of those rights ▶ Bargaining generally must be completed <i>before</i> management acts ▶ The FLRA administers the labor relations program; it investigates and adjudicates unfair labor practice claims, determines bargaining units and conducts elections; makes negotiability determinations; resolves exceptions to certain arbitration awards; the FLRA may take any remedial action it deems appropriate to carry out policies of chapter 71 ▶ The FSIP resolves bargaining impasses if voluntary efforts fail; the FSIP’s final ruling binds the parties |
| Full Union Representation with National Security Safeguards | 33 | <ul style="list-style-type: none"> ▶ All non-management DHS employees have right to bargain collectively and participate through labor organizations in workplace decisions ▶ Management can suspend bargaining obligations and override labor contracts for national security reasons or to meet non-emergency mission needs, subject to safeguards (e.g., managers’ statements on the need to act on emergency basis made under penalty of perjury) ▶ Secretary can suspend bargaining obligations and contract requirements for national security reasons; he must explain each suspension to the appropriate Senate and House oversight committees ▶ System could be modified as needed to support national security interests, including specific provisions for particular subdivisions or employees with sensitive national security responsibilities ▶ All labor contracts would have alternative dispute resolution (ADR) processes jointly funded by unions and agency ▶ An internal labor relations panel, jointly selected by labor and management, replaces the FLRA and FSIP |

Labor Relations options (continued)

| Options | Index # | Key Features |
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| Expanded Scope of Bargaining With National Security Safeguards | 34 | <ul style="list-style-type: none"> ▶ Scope of bargaining expanded to include negotiations over wages, hours of work and other conditions of employment; grievance rights expanded to include disputes over pay, examinations, certification, appointments & position classification ▶ A three-member labor relations board, jointly selected by labor and management, replaces FLRA and FSIP for certain issues; FLRA retains any functions not transferred to board (e.g., elections and unit determinations); board decisions subject to judicial review ▶ Provides a definition of national security that would govern the agency's authority to deviate from ordinary bargaining obligations and labor relations rules in national security situations ▶ Management can suspend bargaining obligations and act immediately if necessary to protect national security (as defined) and if "clear conflict" exists between bargaining and national security. Management may re-negotiate contract provisions if necessary to protect national security and "clear conflict" exists between contract and national security; arbitrators or DHS labor board could order make-whole relief if it finds no genuine conflict between bargaining and national security or between an existing agreement and national security ▶ Labor-management committees required at the national, regional & local levels to discuss mission needs |

Adverse Actions options overview

| Employees Covered | Actions Covered |
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| <ul style="list-style-type: none"> ▶ 5 options provide adverse action protections (i.e., advance notice, right to respond, written decision notice) to more employees than are covered today (e.g., all DHS employees including probationers; all employees after 1 year of Federal service) ▶ 4 options provide adverse action protections to fewer employees than are covered today (e.g., coverage only for preference-eligibles or for employees with 2 or 5 years of Federal service) ▶ The status quo option would retain the employee coverage under chapter 75 | <ul style="list-style-type: none"> ▶ 4 options apply adverse action protections to more disciplinary and performance-related actions than are covered today (e.g., notice and right to reply for any action that involves loss of pay; any negative action at all, including reprimands and performance appraisals) ▶ 2 options apply protections to fewer actions than are covered today (e.g., notice and right to reply for removals but not suspensions) ▶ 4 options, including the status quo, apply protections to actions covered under chapter 75 |

| Time Limits on Actions | Dual Track for Poor Performance and Misconduct |
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| <ul style="list-style-type: none"> ▶ 6 options reduce the time for taking disciplinary and performance-based actions (e.g., shorter advance notice period; less time for employee to reply) ▶ 3 options increase the time for taking disciplinary and performance-based actions (e.g., longer advance notice; right to hearing before final action) ▶ The status quo option would apply the timeframes under chapters 75 and 77 | <ul style="list-style-type: none"> ▶ 9 options combine the two statutory processes for handling misconduct and poor performance (chapters 43 and 75) into a single process ▶ The status quo option would retain the dual tracks under chapters 43 and 75 |

Appeals options overview

| Employees Covered | Actions Covered | Adjudicator |
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| <ul style="list-style-type: none"> ▶ 7 options provide appeal rights to fewer employees than have them today (e.g., only permanent employees with 3 years of service) ▶ 4 options provide appeal rights to more employees (e.g., all DHS employees, including probationers) ▶ 1 option did not specifically address employee coverage ▶ The status quo option would provide appeal rights to employees covered today under chapter 75 | <ul style="list-style-type: none"> ▶ 7 options provide appeal rights for fewer disciplinary and performance-based actions (e.g., appeals for removals only; no appeals for certain "strict liability" offenses) ▶ 4 options provide appeal rights from more disciplinary and performance-based actions (e.g., appeals from any action that reduces pay; appeals from performance ratings) ▶ 1 option did not specifically address actions covered ▶ The status quo option would provide appeal rights for actions covered today under chapter 77 | <ul style="list-style-type: none"> ▶ 7 options replace MSPB with a DHS panel that would hear adverse action appeals (e.g., internal panels appointed by Secretary; external panels comprised of independent arbitrators/ mediators; panels jointly selected by labor and management) ▶ 4 options would retain MSPB but use modified rules for DHS appeals (e.g., shorter timeframes; right to hearing; broader remedial authority) ▶ 1 option provides either for MSPB or an internal panel ▶ The status quo option would retain MSPB |

| Appellate Process | Proving the Case |
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| <ul style="list-style-type: none"> ▶ 8 options make the process for adjudicating appeals quicker and less formal (e.g., no right to discovery; mandatory timeframes; decisions on the written record) ▶ 4 options, including the status quo, apply the same procedures established under chapter 77 and MSPB regulations ▶ 1 option provides either for retaining MSPB and its rules for handling appeals or creating an internal panel with expedited procedures | <ul style="list-style-type: none"> ▶ 6 options revise the burden and/or standard of proof needed to win an appeal in favor of employees (e.g., management must justify action by clear and convincing evidence) ▶ 5 options revise in favor of management the burden and/or standard of proof needed to win an appeal (e.g., sufficient evidence vs. preponderance of evidence; burden of proof shifted from agency to employee; no reduction of penalties on appeal) ▶ 2 options, including the status quo, retain the burden and standard of proof established under chapter 77 and MSPB case decisions |

There are 4 Adverse Action options

| Options | Index # | Key Features |
|-------------------|---------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Minimal Coverage | 35 | <ul style="list-style-type: none"> ▶ Adverse action procedures cover only permanent preference eligibles, including bargaining unit employees ▶ Covers suspensions of 30 days or longer, demotions, and removals based on misconduct or poor performance that have no national security implications ▶ Does not require advance notice for suspensions or demotions; only a decision notice needed ▶ Requires short advance notice and reply period for removals ▶ Suspensions and demotions are decided by DHS official appointed by Secretary; removals are decided by three-member internal DHS panel composed of supervisor, manager & ADR representative ▶ Removal actions are appealable, other actions are final; removal actions that violate national security are appealable only in Federal court ▶ Extends probationary/trial periods to 3 years |
| Narrow Coverage | 36 | <ul style="list-style-type: none"> ▶ Adverse action procedures cover permanent competitive service employees with at least 5 years of service, including preference eligibles and bargaining unit employees ▶ Covers suspensions of 30 days or longer, demotions, and removals based on misconduct or poor performance that have no national security implications ▶ Does not require advance notice for suspensions or demotions; only a decision notice needed ▶ Requires a short advance notice and reply period for removals ▶ Suspensions and demotions are decided by DHS official appointed by Secretary; removals are decided by three-member internal DHS panel composed of supervisor, manager & ADR representative ▶ Removal actions are appealable, other actions are final; removal actions that violate national security are appealable only in Federal court ▶ Requires 1 year probationary/trial period |
| Expanded Coverage | 37 | <ul style="list-style-type: none"> ▶ Adverse action procedures cover all DHS employees with 1 year of Federal service; abolishes distinctions between competitive/excepted service and preference/non-preference eligibles ▶ Covers any action involving a reduction in pay ▶ Employee has right to reply to proposing official, then head of the employee's DHS component, then Secretary for final decision ▶ Requires 90-day advance notice of proposed action to accommodate higher level DHS review and permit full use of ADR techniques |

Adverse Action options (continued)

| Options | Index # | Key Features |
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| Maximum Coverage | 38 | <ul style="list-style-type: none"> ▶ Adverse action procedures cover all employees, including probationary; and cover all “negative” actions, including reprimands and performance appraisal ratings ▶ A maximum 1-year probationary period; employees serve shorter probationary periods when promoted or reassigned to a position with greater pay or pay potential ▶ Agency may propose adverse actions up to 45 days after learning of misconduct or poor performance; actions can not be taken past this deadline ▶ Employees have right to a pre-decision hearing before geographic or centralized panels or directorate or division heads who were not involved in the proposed action ▶ Bargaining unit employees may appeal through arbitration or to Federal Court; non-bargaining unit employees may appeal only to Federal Court |

There are 6 Adverse Action and Appeal options

| Options | Index # | Key Features |
|-----------------------------------------------------|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Internal Panel External Adjudicator | 39 | <ul style="list-style-type: none"> ▶ Adverse action procedures cover all permanent employees and all suspensions, demotions, and removals ▶ Establishes regional, three-member panels comprised of an employee representative, a supervisor, and a high-level manager who conduct hearings and make adverse action decisions ▶ Only demotions or removals are further appealable to an external adjudicator; employees may choose an arbitrator, an MSPB administrative judge, or an MSPB Board Member to adjudicate the case; the adjudicator has discretion to conduct hearings, issue bench decisions, or issue summary judgment ▶ Both the internal panel process and the external appeal process are intended to be quick and informal with no discovery, mandatory timeframes, a lower burden of proof (appropriate progressive discipline) and a lower standard of proof (sufficient evidence) ▶ Employees must submit discrimination appeals and "mixed-cases" to the EEOC only |
| Ombudsman Office | 40 | <ul style="list-style-type: none"> ▶ An independent Ombudsman's Office will be established regionally within DHS and consist of a cadre of fact-finders who preside over all complaints and appeals, including adverse actions ▶ Either party can appeal the Ombudsman decision to Secretary, who will accord considerable deference to the fact finder's decision; Secretary will issue a final decision from which there is no additional administrative or judicial review ▶ All permanent DHS employees covered after completing 2 years of Federal employment ▶ Advance notice period is reduced from 30 days to 5 ▶ Covers all types of appeals including low performance ratings; does not cover EEO or prohibited personnel practice complaints ▶ Shifts burden of proof from agency to employee, who must show that agency's action is arbitrary or capricious |
| Streamlined Process and Strict Liability Violations | 41 | <ul style="list-style-type: none"> ▶ Establishes a single, streamlined process for taking both adverse actions and unacceptable performance actions; actions could be taken as soon as 6 days after a proposal is issued ▶ Covered actions are suspensions, reductions in grade/band/pay, and removals ▶ Certain "strict liability" charges carry a mandatory removal penalty unless mitigated by Secretary (e.g., misconduct that seriously disrupts the mission or compromises national security) ▶ A DHS Review Board established by Secretary would review and make recommendations on whether removal or a lesser penalty should be imposed for "strict liability" cases; Secretary's final decision is not appealable ▶ For other removal cases or serious disciplinary matters that are appealed, the initial review is done by an arbitrator and a second level of review by a panel of MSPB judges; mitigation is not permitted ▶ Probationary periods can be extended to 2 years for certain occupations ▶ Employees must serve a 1-year trial period when placed in a higher grade/band/pay position or a supervisory position |

Adverse Action and Appeal options (continued)

| Options | Index # | Key Features |
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| Status Quo | 42 | <ul style="list-style-type: none"> ▶ Two statutory authorities for taking action to remove, demote, or suspend employees for deficiencies in conduct (chapter 75) or performance (chapter 43) ▶ Under chapter 75, agency must prove by preponderance of evidence that disciplinary action “promotes the efficiency of the service” ▶ Under chapter 43, agency must prove by substantial evidence that an employee’s performance was unacceptable after given a reasonable opportunity to improve ▶ Employees serve 1 or 2 year probationary periods upon initial appointment ▶ Employees entitled to 30-day advance notice, right to respond to charges, and a final written decision ▶ Outside review involves evidentiary hearing and decision by either MSPB or arbitrator with right of judicial review ▶ Review may involve EEOC when allegations of discrimination involved |
| Status Quo Streamlined | 43 | <ul style="list-style-type: none"> ▶ Eliminates chapter 43 process for taking actions; agency must prove misconduct or poor performance by a single standard of “substantial evidence” ▶ Covers any action resulting in a reduction in base pay exceeding equivalent of 2 weeks pay, reduction in grade/band, or removal ▶ Advance notice period reduced from 30 days to 5 ▶ Eliminates review of adverse actions by arbitrators and review of “mixed cases” by EEOC ▶ Establishes substantially shorter timeframes under which MSPB would adjudicate appeals and eliminates requirement for a hearing ▶ All permanent DHS employees covered after completing 2 years of Federal employment ▶ Establishes 2-year “in-service” trial period upon initial assignment to a supervisory position or to any position above the journey level |
| Status Quo Enhanced | 44 | <ul style="list-style-type: none"> ▶ Conduct-based actions and performance-based actions combined into a single process; agency must prove case by preponderance of evidence ▶ Continues requirement for performance improvement period (PIP) but agency may rely on subsequent instances of unacceptable performance for up to 2 years if employee had previously been on PIP for poor performance in the same critical element ▶ Retain MSPB or use 3-member DHS board to hear appeals; decisions would be subject to judicial review ▶ Employees have right to a pre-decisional hearing or to have proposed actions mediated ▶ Employees suspended for less than 15 days eligible for alternative discipline (e.g. counseling, training, community service) in lieu of unpaid time off ▶ The “mixed-case” process would be eliminated; employees with appealable actions involving discrimination select from among the EEOC process, MSPB or DHS board, or negotiated grievance procedure |

There are 6 Appeals options

| Options | Index # | Key Features |
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| Limited Internal Appeal | 45 | <ul style="list-style-type: none"> ▶ Secretary would appoint an official or standing panel that would decide removal actions only; all other conduct or performance-based actions would be final with <i>no</i> right of appeal ▶ The deciding official or panel members are 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 ▶ The scope of review for management's adverse action decision limited to whether decision is "arbitrary or capricious" ▶ Only permanent non-probationary employees with at least 3 years of service would be able to appeal removal actions to the panel or official |
| Expanded External Appeal | 46 | <ul style="list-style-type: none"> ▶ All DHS employees have right to appeal any action that effects their employment status, including reassignment, failure to receive a pay increase, or receipt of an unfavorable appraisal ▶ Burden would be on the agency to justify such actions by clear and convincing evidence ▶ Initial review, including a hearing, would be conducted either by an MSPB judge or an arbitrator, whose decisions would be automatically reviewed by the full MSPB ▶ The full MSPB would have the authority not only to reverse agency actions and mitigate penalties, but also to order punitive damages and direct that agency officials be disciplined, subject to judicial review |
| Geographic Panel | 47 | <ul style="list-style-type: none"> ▶ DHS would create an office of appeals to establish and manage 3-5 member panels in geographic areas across the country ▶ Cases assigned to the panel closest to the appellant; panel members are administrative law judges employed by DHS ▶ Only permanent non-probationary employees may appeal disciplinary and performance-based suspensions, reductions in pay/band/grade and removals ▶ Bargaining unit employees may use this system or the negotiated grievance procedure ▶ Panels would have discretion to hold hearings or decide cases on the written record ▶ Panel decisions are appealable to the Federal Circuit Court |
| Internal Component Panel | 48 | <ul style="list-style-type: none"> ▶ This option is very similar to Option 47; the chief difference is that it would establish panels in each <i>organizational component</i>, rather than geographically ▶ Only permanent non-probationary employees may appeal disciplinary and performance-based suspensions, reductions in pay/band/grade and removals ▶ Bargaining unit employees may use this system or the negotiated grievance procedure ▶ Panels would have discretion to hold hearings or decide cases on the written record ▶ Panel decisions are appealable to the Federal Circuit Court |

Appeals options (continued)

| Options | Index # | Key Features |
|------------------------------|---------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Joint Labor Management Panel | 49 | <ul style="list-style-type: none"> ▶ Tri-partite panel (1 management, 1 labor, 1 jointly appointed by labor and management) replaces MSPB for all adverse action appeals ▶ Private sector arbitrators appointed by panel replace and assume role of MSPB administrative judges ▶ Arbitration costs are shared; half paid by union for bargaining unit employees; non-unit employees pay half directly ▶ Agency required to show by clear and convincing evidence that adverse action promotes efficiency of the service ▶ The panel can mitigate penalties and its decisions would be precedential and subject to judicial review |
| MSPB Exclusive | 50 | <ul style="list-style-type: none"> ▶ The right to appeal adverse actions through the negotiated grievance procedure would be eliminated ▶ MSPB would have sole authority to hear all adverse action appeals filed by DHS employees |

There are two plug & play options

| Options | Index # | Key Features |
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| Bargaining Impasse Standard | 51 | <ul style="list-style-type: none"> ▶ Specific criteria are established which third-parties must rely upon to resolve bargaining impasses between DHS and its unions ▶ Among other things, the standards would take into account management rights, fair and equitable treatment of employees, employee morale, the effective and efficient operation of the Department's mission, including maintaining the security of the homeland, and the conditions and contracts of employees performing similar work |

| Options | Index # | Key Features |
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| Alternative Dispute Resolution | 52 | <ul style="list-style-type: none"> ▶ One ADR program for each component covering all employees except those involved in national security issues ▶ Voluntary mediation available during proposal and appeal phase of a disciplinary or performance-based action ▶ Mandatory management participation when ADR is requested by an employee ▶ Settlement agreements are binding; where there is no settlement the action proceeds under the Department's applicable procedures |