AFGE

STATEMENT BY

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REGARDING

ADDRESSING THE DEPARTMENT OF HOMELAND SECURITY'S
MORALE CRISIS

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INTRODUCTION

Chairman Carney and Subcommittee Members: My name is J. David Cox, and I am the Secretary-Treasurer of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 600,000 federal employees represented by AFGE, including 60,000 who work in the Department of Homeland Security (DHS), I thank you for the opportunity to testify here today on the current serious problems at DHS, and to highlight some recent, positive developments that make us hopeful for the future of DHS workers. AFGE applauds the leadership of Committee Member Sheila Jackson Lee and members of the Committee on Homeland Security for reporting H.R. 1684 to the full House with provisions that repeal the remaining elements of the so-called MAXHR program that relate to employee appeal rights and performance management goals. This is particularly significant as DHS has recently stated its intention to implement both sections of its regulations despite the likelihood that they will be overturned in federal court. The legislation also restores statutory authority for collective bargaining rights because the DHS regulations establishing a new collective bargaining system have been overturned by the courts. AFGE believes that H.R. 1684 will greatly strengthen our nation's overall homeland security by recognizing the contribution of the men and women on the front lines and providing the resources necessary to ensure that they are the best trained, best-equipped border protection force in the world today.

HUMAN CAPITAL SURVEY OF FEDERAL AGENCIES

For the last two years the Human Capital Survey of Federal Agencies conducted by the Office of Personnel Management (OPM) has revealed profound problems with employee morale at DHS. In both years the agency came in last or close to last of all federal agencies for employee satisfaction, adequate resources, leadership, working conditions and many other categories. DHS employees arguably have the lowest morale of any group of federal employees.

This does not come as a surprise to AFGE. Bringing together 22 different federal agencies and 170,000 employees to form one new homeland security organization was a daunting task. Under the best of circumstances, forging a unified department would require good communications, a major investment in training, a respect for employees, and the time and patience to do the job right.

Instead, DHS chose to develop a new personnel system, radically different from the one employees had known for years. While the various agencies and their employees were going through the hard work and anxiety of merging their distinct cultures and identities into a new Department of Homeland Security, DHS embarked on a massive upheaval of the pay, performance, classification, labor relations, adverse actions, and appeals systems. This was a prescription guaranteed to increase the fear, suspicion, and anxiety of employees and their managers at a time when the focus should have been on increasing the dialogue and understanding among the various groups being brought together.

During AFGE's involvement in the DHS Design Team and the Senior Review Committee, our participation in the Meet and Confer process, and our subsequent interactions with the Department, we urged the Department to clearly articulate the problems it was trying to fix and how the new personnel system (called MAX^{HR}) would correct those problems. Instead, we have heard only platitudes about "flexibilities," lies about unions and collective bargaining, and a "trust us" approach to pay-for-performance.

In his recent testimony before the House Oversight and Government Reform Subcommittee on Federal Workforce, Postal Service, and the District of Columbia, Professor Jeffrey Pfeffer of Stanford University Graduate School of Business spoke about the woeful lack of reliance on evidence in management practices. Professor Pfeffer said:

> ...I want to make five points as succinctly as possible... First, organizations in both the public and private sector ought to base policies not on casual benchmarking, on ideology or belief, on what they have done in the past or what they are comfortable with doing, but instead should implement evidence-based management. Second, the mere prevalence or persistence of some management practice is *not* evidence that it works – there are numerous examples of widely diffused and quite persistent management practices, strongly advocated by practicing executives and consultants, where the systematic empirical evidence for their ineffectiveness is just overwhelming. Third, the idea that individual pay for performance will enhance organizational operations rests on a set of assumptions. Once those assumptions are spelled out and confronted with the evidence, it is clear that many – maybe all – do not hold in most organizations. Fourth, the evidence for the effectiveness of individual pay for performance is mixed, at best – not because pay systems don't motivate behavior, but more frequently, because such systems effectively motivate the *wrong* behavior. And finally, the best way to encourage performance is to build a high performance culture. We know the components of such a system, and we ought to pay attention to this research and implement its findings.

During our involvement with the Design Team phase of developing the regulations, we saw first-hand the lack of real research or attention to the evidence. We and other members of the Design Team read articles, interviewed experts, and went on site visits. There was no attempt, however, to analyze the results or prepare options for the new system based on the evidence we found. AFGE was deeply disappointed when the final DHS regulations were published because they ignored most of the work of the Design Team, most of the results of the focus groups with employees, and most of the comments the unions and over 3,500 others submitted. Instead, they reflected an ideological mindset that had predetermined the outcome.

We were gratified earlier this year when DHS informed us that it was backing away from much of its earlier plans regarding MAX^{HR} – in fact, it was no longer going to use that name – because MAX^{HR} had become associated with fear, delays, poor planning, and chastisement by the courts. The new system was to be called the Human Capital

Operational Plan (HCOP). Chief Human Capital Officer Marta Brito Perez told us that the Department was not interested in pursuing the pay initiatives at this time for most employees. Instead, DHS was going to test this with a pilot program. At the very beginning of this whole process we urged DHS not to try to implement a radical and untested system, but instead to try a pilot program first so we could all learn from what worked and what didn't and thus create a better system. We are glad they are finally coming around.

Ms. Perez told us that DHS was going to move ahead with a new performance management system and HCOP, which has five main goals:

1 Hire and Retain a Talented and Diverse Workforce

2 Create a DHS-Wide Culture of Performance

3 Create High-Quality Learning and Development Programs for DHS Employees

4 Implement DHS-Wide Integrated Leadership System

5 Be a Model of Human Capital Service Excellence

AFGE would like to believe that DHS is moving toward what sounds like a more positive agenda. We think that increasing staffing at DHS and working to keep current dedicated employees and offer them training and career development opportunities are objectives the department should have focused on from the start. We would like to help make this happen and hope that DHS is as committed as we are to developing the workforce that is so vital to carrying out the Department's mission. But we have deep concerns.

Shortly after our recent meeting with DHS, and without any advance warning, much less opportunity for discussion, we received notice of the department's intention to implement the provisions of MAX^{HR} regarding adverse actions and appeals. While DHS is saying it wants to recruit and retain, train and develop its employees, it appears to be in a rush to implement an extraordinary reduction in the basic employee protections that have been in place for decades.

The Homeland Security Act gave the Secretary and OPM Director authority to modify the appeals procedures of Title 5, but only in order "to further the fair, efficient and expeditious resolution of matters involving the employees of the Department." Instead, the final regulations virtually eliminated due process by limiting the current authority of the Merit Systems Protections Board (MSPB), arbitrators and adjudicating officials to modify agency-imposed penalties in DHS cases to situations where the penalty is "wholly without justification," a new standard for DHS employees that will rarely, if ever, be met.

DHS has claimed that it created a new personnel system that ensured collective bargaining, as required by Congress. But the Court has ruled that it has not ensured collective bargaining, but eviscerated it. DHS has claimed that its regulations are fair, as required by Congress. But the Court has ruled that they are not fair, because they would improperly prevent the MSPB from mitigating a penalty it considered to be too harsh or out of proportion to the offense.

As you know, AFGE has previously challenged these very provisions in court, and the Court agreed in no uncertain terms that the provisions were patently unfair: as Judge Collyer explained, "the Regulations put the thumbs of the Agencies down hard on the scales of justice in [the agency's] favor." The Court of Appeals did not disagree, but merely found that the issue was not yet ripe for adjudication. The Department should not take encouragement in the fact that an employee must be victimized by these unfair proposals before the Court can award a remedy, which will surely include back pay and attorney fees.

DHS has the lowest morale in the federal government, when it needs to be the highest. Deputy Secretary Jackson said the top leaders took notice and would do something about it. Chief Human Capital Officer Marta Perez was quoted by the press as saying the new human resources plan would be reassuring to employees. What part of imposing an illegal and unfair adverse action system is reassuring?

The insistence by DHS to implement a patently unfair system despite the court's warnings about its serious shortfalls makes us wary about its intentions in the other areas of its human capital plan.

DHS plans to implement a new performance management system. AFGE commented on earlier versions of the Performance Management Directive, but has not seen the final version. We found the supposedly new and improved system to be surprisingly similar to those systems currently in place in the federal and private sectors. It is not particularly modern or innovative and does not convince us that it will be more credible to employees or more able to accurately evaluate performance than the current systems.

The new system is be automated. We expressed our concerns about potential disparities between employees who have easy access to computers and can check their records and add their accomplishments whenever they wish and employees who patrol the borders or our ports and rarely have a chance to sit at a computer and deal with these issues. The same holds true for their managers, some of whom can take full advantage of a computerized system, while others are out in the field, and rarely at a desk.

In the new system, failure to meet a single expectation requires a rating of "Unacceptable," which, in turn, requires an employee to be fired, demoted or reassigned. But "expectation" in the new system is so vaguely defined that it could mean anything at all, including things that were never given to the employee in writing. For example, the Directive says that, "...all of the diverse expectations that may apply need not be communicated in writing." Creating an environment in which anything can be used to denigrate an employee's performance and in which managers are not held accountable for clearly spelling out what is expected, is hardly the answer to low morale and problems with recruiting and retaining good employees.

DHS employees, in common with other federal employees, say that favoritism and poor management are big problems in their workplaces and they don't have confidence in their agency's performance management system. The new DHS system is unlikely to change

that and can only make things worse if the department attempts make major changes in employees' pay based on it.

"ONE FACE AT THE BORDER"

Customs and Border Protection (CBP) has attempted to establish what it calls "One Face at the Border." The idea was to take the experience and skills of former Immigration and Naturalization Service, Customs and Agriculture employees and combine them into one position. In reality, this has been difficult to do – each discipline is very complex – and combining them threatens to weaken expertise in all three. In fact, we are starting to see CPB Officer positions offered with specialties in, for example, immigration law – a tacit recognition of the need for the experience and education of these legacy organizations' position descriptions.

Although on paper DHS advocates for "one face" at the border, many of its actual personnel practices continue to emphasize the differentiation between "legacy INS" and "legacy Customs" officers. Instead of raising CBP employees to the best of the various benefits they enjoyed before, DHS has created a confusing morass of procedures and policies that take away income and rights without replacing them with anything of comparable value. Although legacy agriculture, immigration and customs inspectors were promised "cross-training" when they were converted to the new CBP officer position, such training never fully materialized for most CBP officers. From the beginning, DHS training has emphasized the immigration inspection function over agriculture and customs inspection functions. A 2006 Government Accountability Office (GAO) report found that agricultural inspection has suffered greatly under "One Face at the Border" due to a decrease in agricultural inspections at points of entry leading to an increased risk of U.S. agriculture to foreign pests and disease. According to the GAO report there has been a significant decrease of as much as 20 percent at some points of entry, and a majority of agriculture inspection specialists interviewed stated that they were doing fewer inspections and that there are insufficient numbers of agriculture specialists to carry out inspections.

GAO's findings are supported by research conducted by the National Border Patrol and National Homeland Security Councils of AFGE. A clear majority (64%) of border protection personnel say they are just "somewhat" or "not really" satisfied with the tools, training, and support they need to be effective at stopping potential terrorists from entering the country and at protecting the country from terrorist threats. A majority of CBP inspectors said "One Face At the Border" has had a negative impact on their ability to do their jobs. AFGE restates its opposition to the flawed "One Face at the Border" program, which has resulted in decreased immigration inspections and agricultural inspections at points of entry, and calls for the program to be repealed.

CBP Officers have just "One Face" at the border, but they are acutely aware that they are not treated equally, nor do they share the same benefits. For example:

1 **Foreign Language Award Program (FLAP)** – AFGE recently filed two grievances on behalf of employees who are not receiving additional pay for

having foreign language skills. The Foreign Language Award Program guarantees foreign language proficiency pay for employees who use language skills on the job in languages other than English. While many officers from legacy Customs have been awarded foreign language pay, the majority of legacy INS officers have not.

2 **Administratively Uncontrollable Overtime (AUO)** – When DHS consolidated different groups of employees it re-classified former INS Senior Inspectors as CBP Officers and eliminated their right to a lump sum payment for working overtime. Although the Senior Inspectors' duties have remained the same, their pay has been drastically reduced.

These are just a couple of examples of the differences CBP employees continue to see in their workplaces, despite their being told they are "One Face on the Border." Senator Dianne Feinstein (D-CA) recently introduced S. 887, a bill to transfer the function of agricultural inspection at all U.S. entry points from the Department of Homeland Security to the U.S. Department of Agriculture (USDA). The bill recognizes the expertise of the 1,800 agriculture inspection specialists who inspect plants and animals entering at U.S. entry points for disease and insect infestation that if undetected, could place U.S. agriculture and the public at great risk. AFGE strongly supports S. 887, and calls upon Congress to pass legislation that will repeal "One Face at the Border" and transfer the remaining immigration and customs inspection functions back to their respective directorates in DHS.

TRANSPORTATION SECURITY ADMINISTRATION (TSA)

Thanks to the leadership of the House Homeland Security Committee, 45,000 Transportation Security Officers (TSOs) are quite close to achieving the rights wrongfully denied them five years ago. Following September 11, 2001, Congress passed and President Bush signed the Aviation and Transportation Security Act (ATSA) creating the TSA and federalizing the duties of screening passengers and baggage at airports. Although this was a prime opportunity to establish a highly-trained, well-paid and fully-empowered professional public workforce, TSA management instead took ATSA as a blank check to create its own management system irrespective of the widely accepted protections afforded to most workers by the rest of the federal government. Without enforcement of labor protection laws that ensure: 1) that workers are treated fairly, 2) that adequate workplace health and safety measures are in place to minimize injuries; and 3) that workers are protected from retaliation when they blow the whistle on security breaches, national security is jeopardized, not enhanced.

Through broad judicial and MSPB interpretation of ATSA, TSA was given the ability to prevent independent oversight of decisions affecting employees, leaving workers with no alternative but to seek remedies from the very management that created the problem in the first place. The power of TSA management regarding TSOs is almost totally unchecked.

A few examples of the pervasiveness and extent of these negative decisions include:

1 Refusal to honor the First Amendment right of freedom of association, resulting in screeners being fired for simply talking about the union and posting and distributing AFGE union literature during break times. Although TSA officially "permits" TSOs to join the union, the reality has been that TSOs have suffered retaliation for doing so, including termination.

2 TSA has refused to hold itself accountable to the Rehabilitation Act and has therefore not made reasonable accommodations for workers with disabilities, including diabetes and epilepsy. This results in discrimination against workers on the basis of their disability.

3 Although Congress clearly indicated that the veterans' preference honored by the rest of the federal government also applied to TSOs, the TSA has refused to apply veterans' preference in promotion and reduction-in-force decisions. Moreover, even though other federal agencies apply veterans' preference to both those who retired from the military and those who leave active duty, TSA has redefined what it means to be a veteran—only retired military personnel are awarded whatever veterans' preference TSA management chooses to give.

4 TSOs have been disciplined for using accrued sick leave benefits for documented illnesses.

5 TSOs have been paid thousands of dollars less than promised at the time of hire, because screeners do not have an employment "contract" with the government, and therefore, no contract protections.

Denials of the meaningful ability to enforce the most basic worker rights and persistent inadequate staffing have taken their toll on the TSO workforce. TSOs are subject to extensive mandatory overtime, penalties for using accrued leave and constant scheduling changes because of understaffing. Another result is that TSA has among the highest injury, illness, and lost time rates in the federal government. In fiscal year 2006, TSA employees' injury and illness rates were close to 30%, far higher than the 5% average injury and illness rate for all federal employees. The overall TSA attrition rate is more than 10 times higher than the 2.2% attrition rate for federal civilian employees and upwards of 40% at some major airports. TSO base pay did not change between 2002 and 2007, and when TSA did implement a base salary increase, close to two-thirds of TSOs did not qualify for the pay raise under TSA's "PASS" system. This continuing mistreatment of the TSO workforce hampers the ability of TSOs to do their jobs and public safety is jeopardized. After more than five years of second-class treatment despite the first-class job they perform every day protecting the flying public, it is time for the President to sign legislation passed by the Congress to grant TSOs working at our nation's airports the same collective bargaining and other labor rights enjoyed by other TSA and DHS employees.

Despite the pressing need to fully staff our nation's airports with sufficient numbers of TSOs to provide security and expedite travel, the Bush administration has set an artificial cap of the number of full-time TSOs nationwide. The current 45,000 cap has not only led to longer lines, it has also had a great adverse impact on TSOs, who face constant mandatory overtime and increased risk of injury while they try to do their jobs with too few people. With very strong bipartisan votes, during the 109th Congress the Senate twice supported legislation introduced by Senator Frank Lautenberg (D-NJ) to remove the TSO cap and allow TSA to hire the number of full-time TSOs necessary to provide air safety. The idea of hiring enough people to get the job done should not be political or ideological. It is our hope that the House of Representatives will follow the lead of the Senate and send a bill to President Bush ensuring that TSA can hire the number of TSOs necessary to keep air travel safe.

FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)

Ten years ago, if you saw the word "FEMA" in the news, it was usually something complimentary involving FEMA's rapid response to the Oklahoma City bombing or FEMA's prompt efforts to reduce the impact of hurricanes and other natural disasters. Back then, FEMA was an example of a federal government agency that worked. Now it is a different story. Since Hurricane Katrina, FEMA has become associated with mismanagement and the abuse of power and resources given it by Congress. The exemplary government agency of the 1990s has become an example of government incompetence in 2007.

One primary cause of FEMA's deterioration was its placement inside the Department of Homeland Security (DHS). In the spring of 2003, the DHS leadership began a systematic purge of FEMA, ridding the agency of some of its most highly qualified emergency management personnel and tools:

1. Long-time FEMA managers with years of experience in disaster mitigation, preparedness, response and recovery were pushed aside, and their work was reassigned to inexperienced DHS staff and to contractors.
2. Young and inexperienced political appointees were brought in and placed over highly skilled career executives throughout the agency, including at the most senior levels.
3. The Preparedness function was taken out of FEMA, breaking up the traditional partnership within FEMA of emergency preparedness, prevention, response and recovery.
4. FEMA's budget was cannibalized by DHS with much of the agency's funding provided to other DHS departments. As experienced FEMA staff retired or quit in disgust, their jobs were left unfilled as the funding for those positions were taken out of FEMA and given to DHS. By 2005, nearly one-third of FEMA's full-time jobs were vacant.

After the Katrina debacle, many experienced FEMA professionals believed that such management problems would be rectified and DHS's influence over FEMA would be decreased. Unfortunately, the exact opposite has happened: in the past year and a half, experienced FEMA personnel who did their best to salvage the situation during Katrina are being systematically replaced by the same types of minimally-experienced DHS managers who caused the Katrina management problems in the first place. In many cases, it appears that DHS is bypassing federal civil service rules to place their selected managers in key positions throughout FEMA. More and more senior positions at FEMA are being filled by outside hires and appointments, while experienced FEMA staffers are regularly passed over for promotion into those jobs. Many of the new hires seem to be private contractors with prior military or Coast Guard backgrounds. While some of them have experience within their respective fields, they do not appear to have the broad national emergency management experience necessary for the positions they have been given.

This is not the way to rebuild FEMA's emergency management capability. This is not the way to restore the morale of FEMA's experienced emergency management staff. AFGE is hopeful that the recently enacted Post-Katrina Emergency Management Reform Act of 2006 will help to revitalize FEMA. This new law establishes FEMA as a distinct entity in DHS similar to the U.S. Coast Guard and U.S. Secret Service, thereby preventing transfers of FEMA assets, authorities, personnel and funding. The new law also transfers most Preparedness functions back to FEMA, strengthening FEMA's ability to effectively prepare and respond to future disasters.

But we remain extremely concerned that, despite the new law, experienced FEMA employees will continue to be trumped by DHS political appointees and managers who clearly do not understand national-level emergency management.

LAW ENFORCEMENT RETIREMENT REFORM

AFGE is extremely gratified to see that the 110th Congress is beginning to move on an issue that has long been overlooked: law enforcement retirement coverage for CBP officers at DHS. Legislation has been included in the House Homeland Security Authorization bill that would finally offer this option to thousands of deserving, hard-working federal law enforcement officers.

At the same time, we believe that as this bill makes its way through Congress, serious consideration should be given to the other law enforcement officers of the federal government who deserve these benefits. Law enforcement officers working for the Federal Protective Service, the Department of Veterans' Affairs and a small number of other federal agencies continue to receive discriminatory treatment under the current proposed legislation. Yet they have full arrest authority, wear a federal law enforcement badge and carry a gun.

Never before has the job of federal law enforcement been more important than it is today. Maintaining a high-quality, professional workforce requires that the federal government compete with hundreds of state and local law enforcement agencies, almost all of whom provide early retirement and other benefits to police officers. It is time we recognize the contribution these men and women make on the line, every day and give them the equality of benefits they deserve.

IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

I want to bring to your attention the plight of 56 nutrition services employees at ICE detention centers in Texas, California, Arizona, and Florida. In May 2006, ICE announced an A-76 privatization review for these employees. Almost every step of these reviews violated the policies and procedures of the A-76 privatization process. The privatization review ran longer than the time allowed by OMB rules; the accuracy of the in-house bid (the only chance the employees had of keeping their jobs) is highly suspect--even according to ICE officials--and the review resulted in an award of a contract to an Alaska Native Corporation with no competitive bidding process. In other words, the privatization review process, which is billed by the Administration as a way to make efficient use of taxpayer dollars, could not possibly have met this goal at ICE.

The most repugnant part of this story is that the employees have yet to be told when they will lose their jobs, what other jobs might be available for them at ICE, or any other details that may help them prepare for their futures.

Another privatization review was announced in May 2006 for 19 facilities support employees at the same detention centers. That review was cancelled months ago, but no one in ICE management remembered to tell the employees. Until last week, those 19 employees were still coming to work each day wondering if they still had a job.

CONCLUSION

Chairman Carney, AFGE would like to thank you and the members of the Homeland Security Committee not just for your attention to matters of great concern to DHS workers, but also for the legislative action taken in the past four months to address those concerns. After years of debate, legislation granting TSOs collective bargaining and other employment rights, and repealing MAXHR and "One Face at the Border" has been reported out of the Homeland Security Committee, and in the case of TSO rights, has been passed by both Houses of Congress. Our DHS members understand the importance of their jobs, and are committed to doing all they can to keep the U.S. safe. It is little to ask that they be treated with fairness, dignity and respect as they continue to do so.

AFGE looks forward to working together with the Chair and the Committee to ensure the security of DHS workers and our country.