NTEU

The National Treasury Employees Union

TESTIMONY OF NTEU NATIONAL PRESIDENT COLLEEN M. KELLEY

ON

ADDRESSING THE DEPARTMENT OF HOMELAND SECURITY'S MORALE CRISIS

BEFORE

THE HOUSE HOMELAND SECURITY COMMITTEE SUBCOMMITTEE ON MANAGEMENT, INTEGRATION AND OVERSIGHT

311 CANNON HOUSE OFFICE BUILDING
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Chairman Carney, Ranking Member Rogers, I would like to thank the subcommittee for the opportunity to testify on the ongoing employee morale crisis at the Department of Homeland Security (DHS).

As President of the National Treasury Employees Union (NTEU), I have the honor of representing over 150,000 federal employees, 15,000 of whom are Customs and Border Protection (CBP) employees at the Department of Homeland Security. I am also pleased to have served as the representative of NTEU on the DHS Senior Review Committee that was tasked with presenting to then-DHS Secretary Tom Ridge and then-Office of Personnel Management (OPM) Director Kay Coles James, options for a new human resources (HR) system for all DHS employees. NTEU was also a part of the statutorily mandated "meet and confer" process with DHS and OPM from June through August 2004.

It was unfortunate that after two years of "collaborating" with DHS and OPM on a new personnel system for DHS employees that NTEU was unable to support the final regulations when they were announced in 2004. While some positive changes were made because of the collaboration between the federal employee representatives and DHS and OPM during the meet and confer process, NTEU was extremely disappointed that the final regulations fell woefully short on a number of the Homeland Security Act's (HSA) statutory mandates. The most important being the mandates that DHS employees may, "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them," (5 U.S.C. 9701(b)(4)) as well as the mandate that any changes to the current adverse action procedures must "further the fair, efficient and expeditious resolutions of matters involving the employees of the Department." (5 U.S.C. 9701(f)(2)(C)).

Because the final personnel regulations failed to meet the statutory requirements of the HSA in the areas of collective bargaining, due process and appeal rights, NTEU, along with other federal employee unions, filed a lawsuit in Federal court. On August 12, 2005, the federal district court ruled the labor-management relations and appeals portions of the DHS final personnel regulations illegal and enjoined their implementation by DHS. The court found that the regulations did not provide for collective bargaining or fair treatment of employees as required by the Act. DHS appealed the district court's decision to the U.S. Court of Appeals for the District of Columbia Circuit. In June 2006, the Appellate Court upheld the lower court decision and DHS declined to appeal the ruling to the Supreme Court.

DHS PERSONNEL REGULATIONS ISSUES

The Homeland Security Act requires that any new human resource management system "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them."

In a number of critical ways, the personnel system established by the Homeland Security Act and the subsequent regulations issued by the Department of Homeland Security (DHS) have been a litany of failure because the law and the regulations effectively gut employee due process rights and put in serious jeopardy the agency's ability to recruit and retain a workforce capable of accomplishing its critical missions.

When Congress passed the Homeland Security Act in 2002 (HSA), it granted the new department very broad discretion to create new personnel rules. It basically said that DHS could come up with new systems as long as employees were treated fairly and continued to be able to organize and bargain collectively.

The regulations DHS came up with were subsequently found by the Courts to not even comply with these two very minimal and basic requirements. Much to NTEU's consternation, on March 7, 2007, DHS announced that it will put into effect portions of its compromised personnel system. Just a few weeks earlier, DHS outlined plans to move slower on its controversial personnel overhaul, formerly known as MaxHR, but now called the Human Capital Operations Plan. The President's FY 2008 budget calls for only $15 million to fund the renamed MaxHR personnel plan.

In February of this year, DHS received the lowest scores of any federal agency on a federal survey for job satisfaction, leadership and workplace performance. Of the 36 agencies surveyed, DHS ranked 36th on job satisfaction, 35th on leadership and knowledge management, 36th on results-oriented performance culture, and 33rd on talent management. As I have stated previously widespread dissatisfaction with DHS management and leadership creates a morale problem that affects the safety of this nation.

It should be clear to the Committee that the Department of Homeland Security has learned little from these Court losses and repeated survey results and will continue to overreach in its attempts to implement the personnel provisions included in the Homeland Security Act of 2002.

With the abysmal morale and extensive recruitment and retention challenges at DHS, implementing these personnel changes now will only further undermine the agency's employees and mission. From the beginning of discussions over personnel regulations with DHS more than four years ago, it was clear that the only system that would work in this agency is one that is fair, credible and transparent. These regulations promulgated under the statute fail miserably to provide any of those critical elements. It is time to end this flawed personnel experiment.

On March 28, the House Homeland Security Committee acted. The Committee approved an amendment to the FY 2008 DHS Authorization bill that repeals the DHS Human Resources Management System and subsequently approved H.R. 1684, the DHS Authorization legislation, by a vote of 26-0.

Despite Congress' clear intent to stop implementation of the failed DHS Human Resources Management System, DHS continues to persist in implementing these compromised personnel regulations.

NTEU objects to the regulations on the following grounds.

Labor Relations/Collective Bargaining

Under the final personnel regulations, the responsibility for deciding collective bargaining disputes will lie with a three-member DHS Labor Relations Board appointed by the Secretary of the Department of Homeland Security. Senate confirmation will not be required, nor is political diversity required among the Board members. Currently, throughout the federal government, collective bargaining disputes are decided by the Federal Labor Relations Authority (FLRA), an independent body appointed by the President and confirmed by the Senate. A true system of collective bargaining demands independent third party determination of disputes. The final regulations do not provide for that, instead creating an internal system in which people appointed by the Secretary will be charged with deciding matters directly impacting the Secretary's actions. The district court ruled this section of the regulations illegal.

Under the final regulations, not only will management rights associated with operational matters (subjects that include deployment of personnel, assignment of work, and the use of technology) be non-negotiable, but even the impact and implementation of most management actions will be non-negotiable. In other words, employee representatives will no longer be able to bargain on behalf of employees concerning the procedures that will be followed when DHS management changes basic conditions of work, such as employees' rotation between different shifts or posts of duty, or scheduling of days off.

The final regulations further reduce DHS' obligation to collectively bargain over the already narrow scope of negotiable matters by making department-wide regulations non-negotiable. Bargaining is currently precluded only over government-wide regulations and agency regulations for which a "compelling need" exists. The new DHS personnel system would also allow management to void existing collective bargaining agreements, and render matters non-negotiable, simply by issuing a department-wide regulation. The district court ruled this section of the regulations illegal.

A real life example of the adverse effect of the negotiability limitations on both employees and the agency will be in the area of determining work shifts. Currently, the agency has the ability to determine what the shift hours will be at a particular port of entry, the number of people on the shift, and the job qualifications of the personnel on that shift. The union representing the employees has the ability to negotiate with the agency, once the shift specifications are determined, as to which eligible employees will work which shift. This can be determined by such criteria as seniority, expertise, volunteers, or a number of other factors.

CBP Officers around the country have overwhelmingly supported this method for determining their work schedules for a number of reasons. One, it provides employees with a transparent and credible system for determining how they will be chosen for a shift. They may not like management's decision that they have to work the midnight shift but the process is credible and both sides can agree to its implementation. Two, it takes into consideration lifestyle issues of individual officers, such as single parents with day care needs, employees taking care of sick family members or officers who prefer to work night shifts. The new personnel system's elimination of employee input into this type of routine workplace decision-making has had a negative impact on morale.

Due Process and Appeal Rights

One of the core statutory underpinnings of the HSA was Congress' determination that DHS employees be afforded due process and that they are treated in a fair manner in appeals they bring before the agency. In fact, the HSA clearly states that the DHS Secretary and OPM Director may modify the current appeals procedures of Title 5, Chapter 77, only in order to, "further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." (5U.S.C. 9701 (f) (2) (C)). Instead the final regulations undermine this statutory provision in a number of ways.

The final regulations undercut the fairness of the appeals process for DHS employees by eliminating the Merit Systems Protection Board's (MSPB) current authority to modify agency-imposed penalties. The result is that DHS employees will no longer be able to challenge the reasonableness of penalties imposed against them, and the MSPB will now only be authorized to modify agency-imposed penalties under very limited circumstances where the penalty is "wholly unjustified," a standard that will be virtually impossible for DHS employees to meet.

The final regulations exceed the authority given in the HSA to the Secretary and OPM Director, by giving the Federal Labor Relations Authority (FLRA) and the MSPB new duties and rules of operation not set by statute. The FLRA and the MSPB are independent agencies, and DHS and OPM are not authorized to impose obligations on either independent agency, or dictate how they will exercise their jurisdiction over collective bargaining and other personnel matters.

In the final regulations, the FLRA is assigned new duties to act as an adjudicator of disputes that arise under the new labor relations system and the regulations also dictate which disputes the FLRA will address and how they will address them.

By going far beyond the statutory parameters of the HSA, and drastically altering the collective bargaining, due process and appeal rights of DHS personnel, the district court ruled these sections of the proposed regulations illegal. The overreaching by DHS in formulating these personnel regulation and the subsequent court ruling leaves CBP employees with little or no confidence that they will be treated fairly by the agency with respect to labor-management relations, appeals or pay by the department.

These regulations include permitting the Secretary with unfettered discretion to create a list of Mandatory Removal Offenses (MRO) that will only be appealable on the merits to an internal DHS Mandatory Removal Panel (MRP) appointed by the Secretary.

They also allow the Secretary to designate a preliminary list of seven potential mandatory removal offenses but are not the exclusive list of offenses. The final regulations also provide that the Secretary can add or subtract MRO's by the use of the Department's implementing directive mechanism and that the Secretary has the sole, exclusive, and unreviewable discretion to mitigate a removal penalty and restricts the Merit System Protection Board (MSPB), to act as an appellate body to review, on a deferential basis, findings of the new Mandatory Removal Panel (MRP). Chapter 12 of Title 5, which sets out MSPB's jurisdiction, does not authorize this

kind of action by the Board and the DHS Secretary and OPM Director are not empowered to authorize it through regulation.

The MSPB Chairman in March 2, 2005 testimony before the Subcommittee on the Federal Workforce and Agency Organization of the House Committee on Government Reform stated, "We believe that this mitigation limitation is based on a perception that the Board's practice is to second guess the reasonableness of an agency's penalty decision without giving deference to the agency's mission or the manager's discretion. In fact, the Board considers a number of relevant factors in determining whether a penalty should be sustained, including whether it is within the range of penalties allowed for the offense in the agency's table of penalties. **The MSPB only mitigates a penalty if it finds that the penalty clearly exceeds the maximum reasonable penalty."**

These adverse action and appeals provisions were ruled illegal and a stay was imposed on the rule in 2005 by U.S. District Judge Rosemary Collyer, who said "the regulations put the thumbs of the agencies down hard on the scales of justice in [the agencies'] favor." The appeals court, however, said the planned changes in adverse action and appeal rights were not yet ripe for a decision since no one has been subject to discipline under them. Still, the appeals court agreed with Collyer's basic conclusion regarding the lack of fairness. Should DHS put these compromised regulations into place, NTEU can file another court case as soon as an employee is harmed by the new adverse actions and appeals procedures.

Despite the Court rulings, DHS announced on March 7, 2007 that they intend to implement provisions of the regulations not specifically struck down by the Courts including these provisions limiting due process and appeal rights.

MaxHR Pay-for-Performance Proposal

While not a part of the lawsuit filed by NTEU and other federal employee representatives, the final regulations as they relate to changes in the current pay, performance and classification systems of DHS employees must be brought to the attention of this subcommittee. While the final regulations lay out the general concepts of a new pay system, they remain woefully short on details.

Too many of the key features of the new system have yet to be determined. The final regulations make clear that the agency will be fleshing out the system's details in management-issued implementing directives while using an expensive outside contractor that will cost the agency tens of millions of dollars that could be used for additional front line personnel. Among the important features yet to be determined by the agency are the grouping of jobs into occupational clusters, the establishment of pay bands for each cluster, the establishment of how market surveys will be used to set pay bands, how locality pay will be set for each locality and occupation, and how different rates of performance-based pay will be determined for the varying levels of performance.

The House and Senate Appropriations Committees have been extremely thoughtful and deliberative in allocating funds for implementing MaxHR in the FY 2006 and FY 2007 DHS Appropriations bill and the Continuing Resolution for FY 2007. Acknowledging that NTEU-initiated litigation had stalled implementation of portions of MaxHR and in response to NTEU's request to redirect scarce federal dollars for DHS staffing and programs that benefit the nation's security, the Committee allocated $29.4 million in FY 2006, $25 million in FY 2007 and then reallocated $5 million of that $25 million to other programs in the FY 2007 Continuing Resolution legislation. These appropriations were well below the President's FY 2006 and FY 2007 budget request.

Because of Congress' actions, DHS outlined plans to move slower on its controversial personnel overhaul and even renamed the discredited MaxHR program to now be called the Human Capital Operations Plan (HCOP). And the President's FY 2008 budget calls for only $15 million to fund the renamed HCOP personnel plan.

NTEU is especially mindful of the fact that the more radical the change, the greater the potential for disruption and loss of mission focus, at a time when the country can ill-afford DHS and its employees being distracted from protecting the security of our homeland. However, before any changes are made to tie employees' pay to performance ratings, DHS must come up with a fair and effective performance system.

CBP employees got a preview of this in 2005 and 2006 as to how DHS will administer a new pay-for-performance program when it unlawfully terminated the negotiated Awards and Recognition procedures and unilaterally imposed its own awards system. At the conclusion of the FY 2005 awards process, CBP, contrary to the parties' seven year practice of publicizing the names and accomplishments of award recipients as determined by a joint union-management committee, embarked on a policy of refusing to reveal the results of its awards decisions, the amount of the awards, and the accomplishments that resulted in the granting of the award so that employees in the future could emulate these accomplishments and too win an award.

Not only were the unilaterally decided award results not publicized, but NTEU Chapters report that some employees were specifically told not to reveal that they had received an award. CBP has refused to provide NTEU at the national level with the results of its awards decisions. NTEU has informed DHS that CBP's strenuous efforts to hide its awards decisions make a mockery of DHS's promise that any pay-for-performance system it implements will be transparent and trusted by its employees.

NTEU has received a favorable arbitration decision concluding that CBP unlawfully terminated the joint union-management Awards and Recognition program and unilaterally imposed its own awards system. The arbitrator ordered CBP to return to the prior joint awards process and to rerun the fiscal year 2005 awards process using the negotiated procedure. CBP has delayed the ultimate resolution of this issue by appealing the arbitrator's decision to the FLRA asking the Authority to overturn the arbitrator's decision "in order to improve employee morale." And DHS utilized the outlawed unilateral Awards process again this year.

Transportation Security Administration Personnel System

The Aviation and Transportation Security Act (ATSA), enacted in November 2001, removed screening responsibility from air carriers and the private sector contractors who conducted screening for them and placed this responsibility with the Transportation Security Administration (TSA). As a result, TSA hired and deployed about 55,000 federal passenger and baggage Transportation Security Officers (TSO)—formerly known as screeners—to more than 400 airports nationwide based largely on the number of screeners the air carrier contractors had employed. Since August 2002, TSA has been prohibited by statute from exceeding 45,000 full-time equivalent positions available for screening.

Congress' intention in federalizing the screening workforce was to replace a poorly trained, minimum-wage private contract screening workforce with professional, highly trained security screening officers. Congress, however, included in ATSA, Section 111(d) that codified as a note to 49 U.S.C 44935, the following:

"Notwithstanding any other provision of the law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening function of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed."

This section permitted the establishment of a federal personnel management system that is unique to TSOs. The Federal Labor Relations Authority construed Section 111(d) as granting unfettered discretion to TSA to determine the terms and conditions of employment for federal screener personnel. Accordingly, a directive issued by then Under Secretary James Loy on January 8, 2003 barred screeners from engaging in collective bargaining.

The goal of providing screeners with adequate pay, benefits and training and thereby creating a professional and dedicated TSO workforce has been undermined by capricious and arbitrary management and the denial of the most basic workplace rights.

To date, TSA's basic management programs have been massive failures. The training and certification program, performance appraisal system, and health and safety programs all lack accountability and therefore lack credibility with employees. This lack of oversight and accountability has resulted in one of the highest voluntary attrition rates in the entire federal government as well as the highest workplace injury rates.

For example, the TSA Performance Accountability and Standards System (PASS) remains one of the largest concerns for TSA employees. Let us consider the implementation of the Agency's pay for performance system at JFK International Airport

in 2006 as an example. Under the PASS system, employees are rated at four (4) levels - Role Model, exceeds expectations, meets expectations or did not meet expectations. Employees could receive merit raises if they attained ratings at the two higher levels. Only 1% to 2% of all TSO's at JFK received ratings at the highest level and only about 20% of the total number of JFK TSOs received any merit raise at all. In other words, 80% of the screener workforce at JFK received no merit raise in 2006.

Furthermore, allegations of favoritism and cronyism surround the system because there is no meaningful way for employees to challenge their ratings. They fear that if they speak up they will be fired -- and they have been. If they were to challenge their dismissal before the Agency's Disciplinary Board, they know they have a statistically insignificant chance of winning- perhaps one in twenty. The lack of Agency accountability in its personnel systems fosters a culture of employee fear that in turn leads to unreported management incompetence. This culture of fear threatens the security of our country.

The 110th Congress has recognized the failings of the TSA personnel system that prohibits collective bargaining and the House of Representatives in H.R. 1 and the Senate in S. 4 voted to repeal Section 111(d) of ATSA. Reversing this unequal treatment of TSOs will help restore morale and strengthen mission and personnel dedication at the Department of Homeland Security.

Both MaxHR and PASS pay systems lack the transparency and objectivity of the General Schedule. If the proposed system is implemented, employees will have no basis to accurately predict their salaries from year to year. They will have no way of knowing how much of an annual increase they will receive, or whether they will receive any annual increase at all, despite having met or exceeded all performance expectations identified by the Department. The "pay-for-performance" element of the proposal will pit employees against each other for performance-based increases. Making DHS employees compete against each other for pay increases will undermine the spirit of cooperation and teamwork needed to keep our country safe from terrorists, smugglers, and others who wish to do America harm.

One thing is clear. The proposed pay systems will be extremely complex and costly to administer. A new bureaucracy will have to be created, and it will be dedicated to making the myriad, and yet-to-be identified, pay-related decisions that the new system would require. That is a concern for taxpayers. New management systems cost money – the Pentagon has spent $65 million so far on the new National Security Personnel System – and most experts say such systems succeed only when employees perceive them as fair and credible. Fortunately, taxpayer exposure for the discredited MaxHR system has been limited because Congress responded to the Court's action and limited appropriations for the discredited MaxHR program. Now it is time for Congress to repeal the entire DHS personnel program and cut all funding.

IMPEDIMENTS TO MISSION ACCOMPLISHMENT

The second part of my testimony addresses DHS staffing and personnel policies that have deleteriously affected CBP employee morale and threaten the agency's ability to successfully meet its critical missions.

OPM 2004 and 2006 Federal Human Capital Survey Results

In 2004, the OPM survey of federal employees revealed that employees rated DHS 29th out of 30 agencies considered as a good place to work. On key areas covered by the survey, employees' attitudes in most categories were less positive and more negative than those registered by employees in other federal agencies. Employee answers on specific questions revealed that 44% of DHS employees believe their supervisors are doing a fair to a very poor job; less than 20% believe that personnel decisions are based on merit; only 28% are satisfied with the practices and policies of senior leaders; 29% believe grievances are resolved fairly; 27% would not recommend DHS as a place to work; 62% believe DHS is an average or below average place to work; only 33% believe that arbitrary action, favoritism, and partisan political action are not tolerated; over 40% are not satisfied with their involvement in decisions that affect their work; 52% do not feel that promotions are based on merit; and over 50% believe their leaders do not generate high levels of motivation and commitment. On the other hand, most employees feel there is a sense of cooperation among their coworkers to get the job done.

The 2006 Federal Human Capital Survey ratings were released in January 2007 and not much has changed. Nearly 10,400 Homeland Security employees participated in the survey and gave the department rock-bottom scores in key job satisfaction, leadership and management areas in relation to 35 other agencies in the survey. Of the 36 agencies surveyed, DHS ranked 36th on job satisfaction, 35th on leadership and knowledge management, 36th on results-oriented performance culture, and 33rd on talent management.

The results of this OPM survey raise serious questions about the department's ability to recruit and retain the top notch personnel necessary to accomplish the critical missions that keep our country safe. According to OPM, 44 percent of all federal workers and 42 percent of non-supervisory workers will become eligible to retire within the next five years. If the agency's goal is to build a workforce that feels both valued and respected, the results from the OPM survey clearly show that the agency needs to make major changes in its treatment of employees. And widespread dissatisfaction with DHS management and leadership creates a morale problem that affects the safety of this nation.

Staffing Shortages at the Ports of Entry

One of the most significant reasons for low morale at CBP is the continuing shortage of staff at the 317 POEs. The President's FY 2008 budget proposal requests $647.8 million to fund the hiring of 3000 Border Patrol agents. But, for salaries and expenses for Border Security, Inspection and Trade Facilitation at the 317 Ports of Entry (POEs), funding is woefully inadequate.

The President's FY 2008 budget calls for an increase of only $8.24 million, for annualization of 450 CBPOs appropriated in the FY 2007 DHS Appropriations Conference Report. NTEU is extremely grateful that the Appropriations Conference

Report included funding for an additional 450 CBPOs in the FY 2007 DHS Appropriations bill. In that bill, the House and Senate Appropriations Conferees agreed to "provide $181,800,000 for an additional 450 CBP officers and critical non-intrusive inspection equipment and fully fund the budget request for all cargo security and trade facilitation programs within CBP."

On March 15, 2007, the House Appropriations Committee approved an Emergency Supplemental Appropriations bill for fiscal year ending September 30, 2007, that among other things, "recommends an additional $100,000,000 to improve significantly the ability of CBP to target and analyze US-bound cargo containers, achieve a capacity to screen 100 percent of such cargo overseas, and double the number of containers that are subject to physical inspections. The funding would support hiring up to 1,000 additional CBP Officers, Intelligence Analysts and support staff, to be located at Container Security Initiative locations overseas, U.S. ports of entry, or the National Targeting Center."

The Senate Appropriations Committee approved similar language in its version of the Supplemental on March 22, 2006. NTEU again is extremely grateful to the Committee for funding the hiring of additional CBPOs at sea ports and land ports. In addition, the SAFE Port Act requires CBP to hire a minimum of 200 additional CBP Officers in FY 2008 for ports of entry around the nation.

CBP Understaffing at Airports

First let me comment on the severe security risks our nation takes by understaffing. Customs and Border Protection has two overarching and sometimes conflicting goals: increasing security while facilitating trade and travel. NTEU has noted the diminution of secondary inspection in favor of passenger facilitation at primary inspection since the creation of the Department of Homeland Security. Why has there been this decrease in secondary inspections? NTEU believes that it is because of a decrease in CBP staffing levels. According to the Government Accountability Office (GAO) Report (GAO-05-663), International Air Passengers Staffing Model for Airport Inspections Personnel Can Be Improved, there is much evidence that airports are experiencing staffing shortages.

There has been expressed to NTEU and Congress considerable concern about clearing international passengers within **45 minutes** which is being done at the expense of specialized secondary inspection. Prior to 9/11 there was a law on the books requiring INS to process incoming international passengers within 45 minutes. The Enhanced Border Security and Visa Protection Act of 2002 repealed the 45 minute standard, however "it added a provision specifying that staffing levels estimated by CBP in workforce models be based upon the goal of providing immigration services within 45 minutes (page 12-13)." See footnote #1.

It has also come to NTEU's attention that the U.S. Travel and Tourism industry has called for a further reduction in passenger clearance time to **30 minutes**. The

industry's recently announced plan, called "A Blueprint to Discover America," includes a provision for "modernizing and securing U.S. ports of entry by hiring customs and border [protection] officers at the top 12 entry ports to process inbound visitors through customs within 30 minutes." This **CANNOT** be achieved at current staffing levels without jeopardizing security.

On pages 16-19, GAO states "The number of CBP staff available to perform primary inspections is also a primary factor that affects wait times at airports...For example, CBP and airline officials in Houston stated that the increase in the number of inspection stations at George Bush Intercontinental Airport, in combination with the addition of new CBP officers has reduced passenger wait times...However, the benefit of adding inspection stations has been limited because, as of June 2003, CBP has not increased staffing levels."

Regarding the building of new inspection stations, GAO states, "Airport and airline officials said that these projects were planned, funded, and completed with the expectation that CBP would increase staff for the new facilities as passenger volume increased. However, CBP officials stated that the agency is not legally or contractually required to allocate new staff when inspection facilities are constructed or expanded and the agency is to make no commitment implicitly or explicitly regarding the future staffing levels in approving new inspection facility design proposals." (page 21)

NTEU is very grateful that the Congress in its FY 07 DHS appropriations conference report directed CBP to submit by January 23, 2007 a resource allocation model for current and future year staffing requirements as specified by the House and Senate Appropriations Conference Report. Specifically, this report should assess optimal staffing levels at all land, air and sea ports of entry and provide a complete explanation of CBP's methodology for aligning staffing levels to threats, vulnerabilities, and workload across all mission areas." (See September 28, 2006 Congressional Record page H7817) It is NTEU's understanding that, to date, the Appropriations Committee has not received this report from CBP.

Congress also mandated CBP to perform a Resource Allocation Model in Section 402 of the SAFE Port Act. This report is due June 2007. NTEU will look to Congress to continue oversight in reviewing how CBP is conducting staff allocations.

It is instructive here to note that the former U.S. Customs Service's last internal review of staffing for Fiscal Years 2000-2002 dated February 25, 2000, known as the Resource Allocation Model or R.A.M., shows that the Customs Service needed over 14,776 new hires just to fulfill its basic mission—and that was before September 11. Since then the Department of Homeland Security was created and the U.S. Customs Service was merged with the Immigration and Naturalization Service and parts of the Agriculture Plant Health Inspection Service to create Customs and Border Protection and given an expanded mission of providing the first line of defense against terrorism, in addition to making sure trade laws are enforced and trade revenue collected.

One Face at the Border Initiative:

On September 2, 2003, CBP announced the misguided One Face at the Border (OFAB) initiative. The initiative was designed to eliminate the pre-9/11 separation of immigration, customs, and agriculture functions at US land, sea and air ports of entry. In practice the OFAB initiative has resulted in diluting customs, immigration and agriculture inspection specialization and quality of passenger and cargo inspections. Under OFAB, former INS agents that are experts in identifying counterfeit foreign visas are now at seaports reviewing bills of lading from foreign container ships, while expert seaport Customs inspectors are now reviewing passports at airports. The processes, procedures and skills are very different at land, sea and air ports, as are the training and skills sets needed for passenger processing and cargo inspection.

It is apparent that CBP sees its One Face at the Border initiative as a means to "increase management flexibility" without increasing staffing levels. For this reason, Congress, in the Immigration and Border Security bill passed by the House in the 109th Congress, HR 4437, section 105, requires the Secretary of Homeland Security to submit a report to Congress "describing the tangible and quantifiable benefits of the One Face at the Border Initiative...outlining the steps taken by the Department to ensure that expertise is retained with respect to customs, immigration, and agriculture inspection functions..."

Also, the Homeland Security Appropriations Committee added report language to the FY 2007 DHS Appropriations bill that, as part of CBP's One Face at the Border Initiative, directs "CBP to ensure that all personnel assigned to primary and secondary inspection duties at ports of entry have received adequate training in all relevant inspection function." And, GAO will be issuing a report in the next few months evaluating the One Face at the Border Initiative and its impact on legacy customs, immigration and agricultural inspection. **NTEU urges the Committee to take action to ensure that inspection specialization is not further diminished by the misguided One Face at the Border Initiative.**

Trade Operations Staffing

CBP has the dual mission of not only safeguarding our nation's borders and ports from terrorist attacks, but also the mission of regulating and facilitating international trade; collecting import duties; and enforcing U.S. trade laws. In 2005, CBP processed 29 million trade entries and collected $31.4 billion in revenue.

Section 412(b) of the Homeland Security Act of 2002 (P.L. 107-296) mandates that "the Secretary [of Homeland Security] may not consolidate, discontinue, or diminish those functions...performed by the United States Customs Service...on or after the effective date of this Act, reduce the staffing level, or reduce the resources attributable to such functions, and the Secretary shall ensure that an appropriate management structure is implemented to carry out such functions."

When questioned on compliance with Sec. 412(b), then-CBP Commissioner Bonner stated in a June 16, 2005 letter to Representative Rangel that "While overall spending has increased, budget constraints and competing priorities have caused overall personnel levels to decline." The bottom line is that DHS is non-compliant with Section 412(b) of the HSA. As stated in the June 16, 2005 letter, "CBP employed 1,080 non-supervisory import specialists in FY 2001 and 948 as of March 2005."

NTEU continues to have concerns that CBP's most recent data shortchanges how many trade operations personnel should be in place to be compliant with Section 412(b). For example, CBP's most recent data shows 892 full-time, plus 21 part-time Import Specialists—913 total employed by CBP. In the Resource Allocation Model issued by the U.S. Customs Service in 2000, there were 1249 Import Specialists employed by the federal government to ensure trade compliance. The same Resource Allocation Model calls for the hiring of 240 additional Import Specialists by 2002 to maintain trade workload.

At a hearing in the last Congress, CBP Commissioner Basham stated that they need only 984 Import Specialists to be in compliance with Section 412(b). NTEU challenges that assertion and Congress in the SAFE Port Act of 2006 calls for a new Resource Allocation Model to be completed by the Agency. GAO has also been commissioned by the SAFE Port Act to conduct a study to determine if the Agency trade function is indeed being maintained. Both these reports are due later this year. NTEU asks the Committee to carefully scrutinize these studies in determining CBP trade function funding needs. Customs revenues are the second largest source of federal revenues that are collected by the U.S. Government. Congress depends on this revenue source to fund federal priority programs. The Committee should be concerned as to how much DHS non–compliance with Section 412(b) of the HSA costs in terms of revenue loss to the U.S. Treasury.

NTEU also represents the highly skilled trade attorneys at the CBP Office of International Trade, Regulations and Rulings (ORR) division. ORR attorneys take part in every phase of the negotiation and implementation of all free trade agreements—from participating in negotiating sessions through issuing binding rulings regarding the proper interpretation of the CBP regulations implementing the agreement. Even though these attorneys have negotiated a popular employee telework program, CBP management refuses to fully implement the program so that all eligible attorneys are able to participate. Continuity of governance concerns alone should put DHS on the forefront of encouraging telework programs for their non-uniformed employees.

DHS also has not embraced a student loan repayment program as authorized by Congress. Many ORR attorneys are burdened by mortgage-sized student loans from law school. New attorneys who struggle to meet their education debt obligations on entry-level government salaries often leave the public sector after a couple of years for higher paying salaries. As a result, ORR has effectively become a spring training camp for private sector law firms seeking experienced customs trade attorneys. Both the telework and student loan repayment programs have shown proven success in recruiting and

retaining federal workers. Congress should inquire as to why these programs that also contribute to higher employee morale are not personnel priorities at DHS.

Law Enforcement Status

The most significant source of consternation for CBPOs is the lack of law enforcement officer (LEO) status for CBP Officers. LEO recognition is of vital importance to CBPOs. CBPOs perform work every day that is as demanding and dangerous as any member of the federal law enforcement community, yet they have long been denied LEO status.

Within the CBP there are two classes of federal employees, those with law enforcement officer status and its benefits and those without. Unfortunately, CBPOs and Canine Enforcement Officers fall into the latter class and are denied benefits given to other federal employees in CBP.

CBPOs carry weapons, and at least three times a year, they must qualify and maintain proficiency on a firearm range. CBPOs have the authority to apprehend and detain those engaged in smuggling drugs and violating other civil and criminal laws. They have search and seizure authority, as well as the authority to enforce warrants. All of which are standard tests of law enforcement officer status.

Every day, CBPOs stand on the front lines in the war to stop the flow of drugs, pornography and illegal contraband into the United States. It was a legacy Customs Inspector who apprehended a terrorist trying to cross the border into Washington State with the intent to blow up Los Angeles International Airport in December 1999.

A remedy to this situation exists in an important piece of legislation involving the definition of law enforcement officer introduced in this Congress, H.R. 1073, the Law Enforcement Officers Equity Act of 2007. NTEU strongly supports this bipartisan legislation introduced by Representatives Bob Filner (D-CA) and John McHugh (R-NY) which has 68 cosponsors to date. This legislation would treat CBPOs and legacy Customs Inspectors and Canine Enforcement Officers as law enforcement officers for the purpose of 20-year retirement.

On March 28, 2007, the House Homeland Security Committee approved H.R. 1684 that included Section 501, a provision that grants LEO status to CBPOs as of the creation of CBP in March 2003. CBPOs are extremely grateful for this recognition of their law enforcement activities at CBP. Unfortunately, Section 501 does not recognize previous law enforcement service in the legacy agencies that were merged to create CBP. Therefore, in order for CBPOs with legacy service to qualify for the enhanced LEO retirement benefit, they must serve an additional 20 years starting in March 2003.

This will result again in a two-tier system at CBP, where younger and newly hired CBPOs will be able to qualify for the LEO retirement benefit and older CBPOs working side-by-side will not. This is because many CBPOs will not be able to serve these additional 20 years needed to qualify, especially if they already put 10, 15 or 20 years as a legacy employee. Under Section 501, the LEO clock starts on March 2003. March 2023 is when the first CBPOs will be able to retire at 50 years with 20 years with the

1.7% benefit. There is no retroactive coverage in this provision. This will have a detrimental effect on employee morale.

The Committee is sympathetic to this unfortunate consequence of Section 501 and is working with NTEU on hybrid-LEO coverage proposals that would mitigate this result.

Section 501 is a start. It is a breakthrough in that the House Homeland Committee recognizes that CBPOs should have LEO coverage and NTEU members are very appreciate of the Committee's efforts.

CONCLUSION

Each year, with trade and travel increasing at astounding rates, CBP personnel have been asked to do more work with fewer personnel, training and resources. The more than 15,000 CBP employees represented by the NTEU are capable and committed to the varied missions of DHS from border control to the facilitation of trade into and out of the United States. They are proud of their part in keeping our country free from terrorism, our neighborhoods safe from drugs and our economy safe from illegal trade.

These men and women deserve more resources and technology to perform their jobs better and more efficiently. These men and women also deserve personnel policies that are fair. The DHS personnel system has failed utterly and should be repealed by the full Congress. Continuing widespread dissatisfaction with DHS management and leadership creates a morale problem that affects the safety of this nation.

The American public expects its borders and ports be properly defended. Congress must show the public that it is serious about protecting the homeland by fully funding CBP staffing needs, extending LEO coverage to all CBPOs, reestablishing CBPO inspection specialization at our 317 POEs and repealing the compromised DHS personnel system.

I urge each of you to visit the land, sea and air ports of entry in your home districts. Talk to the CBPOs, canine officers, and trade entry and import specialists there to fully comprehend the jobs they do and what their work lives are like.

Again, I would like to thank the committee for the opportunity to be here today on behalf of the 150,000 employees represented by NTEU to discuss these extremely important federal employee issues.