Status Quo Streamlined [43]

NOTE: The content of this document has not been reviewed by legal counsel, nor does it represent a consensus view of the Design Team or indicate any kind of preference among options presented to the Senior Review Committee.

Summary Description:

This option would make a number of significant modifications to the existing adverse action and appeals systems to substantially simplify the current system and permit a dramatic reduction in the time necessary to take action and resolve appeals. Core elements of the current systems would be retained. Employees would be provided due process, including the opportunity to respond, prior to the effective date of any adverse action. All covered actions would be subject to identical procedures and the determination of employee coverage would be substantially simplified. All appeals would be to the MSPB and processed under a compressed time frame and subject to a lower standard of proof.

Key Features:

Adverse Actions

- A single, simple adverse action authority (thus eliminating Chapter 43 process) covering all permanent DHS employees (thus eliminating distinction in coverage between competitive and excepted service and between preference and non-preference eligible).
- Establishment of an initial 2-year trial period for all DHS employees during which they would not be covered by the adverse action or appeals system.
- Establishment of a 2-year "in-service" trial period upon initial assignment to a supervisory position or to any position above the journeyman level for that occupation.
- Elimination of 30 day advance notice period while retaining a 5-day right to respond.

Appeals

- While retaining the statutory right to pursue allegations of discrimination under current Title VII provisions, this option envisions a single - more timely - appeal process involving MSPB but eliminating processing of adverse action appeals by arbitrators under negotiated grievance procedures.
- Authorize MSPB administrative judges to issue decisions on the record (no hearing) where no issue of fact or credibility.
- Establish that the standard of proof for all adverse action cases will be substantial evidence.
- Substantially modify current mixed case procedures by providing that in appeals of adverse actions where a claim of discrimination is raised: (1) the decision of MSPB will not be subject to subsequent review by EEOC and (2) such the MSPB decision, including any allegation of discrimination, will be subject to review by the Federal Circuit.
- Establishment of much shorter timeframes under which MSPB adjudication of appeals would, absent unusual circumstances, be completed.

Sub-Options:

None at this time.

Relation to Other Options:

There are no apparent obstacles to integrating this option with options for other HR systems. Any Labor Relations option would need to reflect the elimination of the right of employees to elect to pursue review of adverse actions under any applicable negotiated grievance procedure.

Implications (This section contains "possible advantages/benefits" and "possible problems/challenges" and "other implications" suggested by design team members. The views expressed in these "implications" represent the opinions of one or more members of the design team and therefore reflect sometimes opposing points of view. These opinions do not reflect the collective judgment of the entire design team on any of the issues addressed, nor have they been reviewed by legal counsel.):

Possible Advantages/Benefits

- Should be easy to implement; does not require creation of new administrative bodies or precedent.
- Retains the core of the current system while making it much more simple and easy to understand; permits action to be taken in substantially less time and appeals to be resolved more quickly.
- Two year probationary period insures adequate time to fully assess an employee's potential in terms of suitability for career Federal employment.
- Reduction in the standard of proof from "preponderance of evidence" to "substantial evidence" reflects appropriate deference to management judgment and discretion.
- Steamlines and simplifies the current system while remaining fully consistent with the requirement of due process.
- To the extent it modifies current mixed case processing, is consistent with an OMB report and Congressional testimony offered by OMB in 1996.
- Elimination of arbitration of averse actions reduces forum shopping, simplifies the appeals process, and ensures that adjudication of adverse action appeals is carried out by Federal officials (MSPB) rather than by private individuals.

Possible Problems/Challenges

- Imposes very strict appeal time frames on potentially unrepresented employees.
- Would need to work closely with MSPB to implement new compressed time frames for processing their review of DHS adverse action appeals.
- Challenges DHS leadership to exercise management discretion to insure both that the flexibilities granted under this system are fully utilized and that supervisors are held accountable for taking appropriate action in a timely manner.
- Two-year probationary period may be more time than managers generally need to determine employee suitability.
- Reducing the standard of evidence from preponderance of evidence to substantial evidence might make the system less acceptable to employees and their representatives.
- Prohibiting coverage by negotiated grievance and arbitration procedures might not meet the statutory requirement that employees may bargain collectively and participate through labor organizations of their own choosing in decisions which affect them.
- The purpose of the probationary or trial period is to ensure that employees are fit for public service. Many employees in DHS serve probationary periods beyond one year because the time needed to train new employees in these positions makes it impracticable to determine their fitness for the position in one year (e.g. Secret Service employees assigned to protect the President of the United States).

Shortening or effectively eliminating this trial period by providing extended appeal rights could limit management's ability to deal effectively with new employees who are not well suited to these types of positions.

- To the extent that DHS would be required to submit an agency file for an MSPB appeal, it might be impracticable for DHS to do so in a shorter period than currently required.
- Eliminating grievance/arbitration avenue might lead to an increase in MSPB's workload.
- Would likely require legislation, or an OPM regulatory change, since probationary periods are found in Chapter 315.

Other Implications

- This option is based on the assumption that systems cannot replace responsible management.
- Considerable responsibility is placed on DHS leadership to make effective use of these systems and to hold supervisors accountable for addressing deficiencies in conduct and performance.
- The ultimate goal of this option is insure that the "system" is not a barrier to responsible management.
- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- Once new systems were in place, some significant decrease in costs could be expected as less time is spent by all parties on both processing actions and adjudicating coverage issues.
- The more dramatic, but less visible cost savings would be achieved as supervisors become less reluctant to take action under a system that is easier to understand under which challenges are resolved much more expeditiously.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- Permitting DHS management to take appropriate disciplinary action in as little as 6 calendar days allows deficiencies in conduct or performance which impact achievement of DHS's mission to be addressed in a dramatically less time.
- A substantially simplified system, in terms of coverage and process, will be easier to use and allow DHS supervisors to focus less time on process and more time on mission.

Performance Focused

- The extended initial trial period and the new "in-service" trial period will enable DHS management to fully evaluate the performance of both new employees and those assuming critical new responsibilities.

Contemporary and Excellent

- Straightforward and more expeditious, these systems involve less process and are less legalistic.
- The modification of mixed case procedures recognizes the fact current procedures for review of MSPB decisions by EEOC are rarely used and almost never result in EEOC reversal of the MSPB holding regarding the discrimination issues.

Generate Trust and Respect

- This option involves no reduction in employee's entitlement to due process or to independent review of major adverse actions.

• The processes, both prior to action being taken and during any appeal, are more simple and thus more transparent to all parties. <u>Based on Merit System Principles and Fairness</u> • Fully compliant with all merit system principles, there are no significant bases for legal challenges.
Transition & Implementation: Since the core of this option is the existing system, Implementation of this option would be straightforward and could be accomplished with a minimum of disruption and within a relatively short time period, particularly in comparison to options which require establishment of entirely new administrative bodies and totally original sets of policies, procedures, and practices.

Detailed Description
By System Component and System Element

D		Discipline/Adverse Action System
System elements:		Summary description:
1	Coverage - Employees - Actions - Probationary/ trial period	• Covered employees include all permanent DHS employees not serving a trial period. • Covered actions include any action for cause which results in reduction in base pay exceeding the equivalent of 2 weeks pay, a reduction in grade or band, or a removal from Federal service. • All permanent employees must complete a 2-year trial period upon initial appointment (all prior Federal service is creditable toward completion of this requirement) prior to being covered. • All employees will be subject to a 2-year "in-service" trial period upon assignment to a supervisory position or to any position above the full performance level. o Failure to complete this "in-service" trial period will result in the return of the employee to their previous position or an equivalent position at a pay level equal to what they would have received had they not been assigned to the new supervisory position or other position above the full performance level.
2	Basic Process - Advance notice - Reply opportunity - Rep. right - Decision - Timeframes - Cause	• Single authority and process for all covered actions (eliminate Chapter 43). • All actions must be "for such cause as will promote the efficiency of the service." • Prior to a covered action being effected, employee has a right to a written proposal notice, an opportunity to respond orally and in writing, and a written decision from agency management. • A minimum of 5 calendar days must be provided for the employee to respond. • Action can be effected immediately upon delivery of above decision (current entitlement to 30-day advance notice eliminated). • Current provision in law permitting waiver of advance notice where substantial evidence of crime (crime provision) is deleted since unnecessary. • Right to representation unchanged from current statute. • 5 USC 7531 (permitting immediate suspension and removal without outside review where national security requires such action) is explicitly extended to cover DHS. • Require that the agency decision be concurred in by an official at a higher level within DHS than the level at which the action was proposed. • Level at which proposals and decisions would be made, including whether performed by a panel or individual, would be left to DHS discretion. • Similarly, DHS would be free to conduct pre-decisional hearing as necessary. • No "statute of limitations" for agency action, including action based on unacceptable performance. • No deadlines on agency decision after proposal/response.
3	Evaluation	• Response of employees, supervisors, and managers to annual survey which includes such questions as: o "The new system appropriately provides a fair process for employee to

D		Discipline/Adverse Action System
System elements:		Summary description:
		challenge adverse actions." o "Appropriate action is taken to deal with employees whose performance or conduct is deficient." • Documented time to process adverse actions, including resolution of any challenge to such actions. • Cost of taking adverse actions, including cost of resolving any challenge to such action.

A		Appeals System
System elements:		Summary description:
1	Coverage - Employees - Actions - Probationary/ trial period	• Appeals system coverage is identical with coverage under the adverse action system (i.e., any employee and action covered under the above adverse action system would be able to appeal such action under this appeals system). • This appeal process is the exclusive avenue (except as provided immediately below) for review of actions and persons covered (i.e., such actions are excluded from the coverage of any negotiated grievance procedure). • While an employee is free to file an EEO complaint over any covered matter and to pursue such complaint through the EEO complaint process (including to EEOC and District Court), prior to filing an appeal with MSPB, an individual must certify that they have not filed such a complaint but have elected to have any allegation of discrimination reviewed by the MSPB.
2	Reviewer - Composition - Authority	• Current MSPB structure retained (initial review and possible hearing before administrative judge and further review before full MSPB).
3	Review Process - Components - Timeframe	• Appeals must be filed within 15 days of effective date of any adverse action (versus current 30 days). • While some discretion will be granted administrative judges - in general, absent a finding of good cause, any hearing must be initiated within 30 days of receipt of the appeal. • In order to meet this deadline, AJ's have discretion to impose deadlines on the agency's submission of the record and to constrain discovery by either party. • Absent unusual circumstances, the initial decision of administrative judges must be issued within 60 days of receipt of any appeal. • The right to a hearing will be limited to those cases where in the discretion of the administrative judge, there are substantial questions of fact or credibility requiring such a hearing. • Current post initial decision review process retained except that absent unusual circumstances, the full Board will be expected to issue a final decision or other response to a petition for review within 60 days of receipt.
4	Decision - Precedential?	• Generally, no change from current system.

A		Appeals System
System elements:		Summary description:
	- Burden of proof - Standard of proof - Judicial review	• Burden is on agency to prove by substantial evidence that the action promotes the efficiency of the service (current standard proof is generally preponderance of the evidence). • Judicial review of MSPB decisions is limited to Federal Circuit Court of Appeals, including cases involving allegation of discrimination.
5	Other Appeals Systems - Discrimination - Prohibited personnel practices	• In appeals of adverse actions where a claim of discrimination is raised, the decision of MSPB will not be subject to subsequent review by EEOC. • No change in handling of allegations of prohibited personnel practices including allegations of whistleblower reprisal.
6	Evaluation	• Same as above under Adverse Actions.