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DECISION TIME: A NEW HUMAN RESOURCES MANAGEMENT SYSTEM AT THE DEPARTMENT OF HOMELAND SECURITY

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE
AND AGENCY ORGANIZATION

OF THE

COMMITTEE ON
GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

OCTOBER 29, 2003

Serial No. 108–162

Printed for the use of the Committee on Government Reform

Available via the World Wide Web: http://www.gpo.gov/congress/house
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

94–775 PDF WASHINGTON : 2004

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DECISION TIME: A NEW HUMAN RESOURCES MANAGEMENT SYSTEM AT THE DEPARTMENT OF HOMELAND SECURITY

WEDNESDAY, OCTOBER 29, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION,
COMMITTEEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. Jo Ann Davis of Virginia (chairman of the subcommittee) presiding.

Present: Representatives Jo Ann Davis of Virginia, Murphy, Blackburn, Mica, Danny K. Davis of Illinois, Norton, and Van Hollen.

Staff present: Ronald Martinson, staff director; B. Chad Bungard, deputy staff director & senior counsel; Robert White, director of communications; Vaughn Murphy, legislative counsel; John Landers, detailee; Christopher Barkley, legislative assistant/clerk; Tania Shand, minority professional staff member; Earley Green, minority chief clerk; and Jean Gosa, minority clerk.

Mrs. DAVIS OF VIRGINIA. The Subcommittee on Civil Service and Agency Organization will come to order.

Thank you all for joining us today at this important hearing. When Congress created the new Homeland Security Department last year, we included in the legislation a directive to the Secretary and the head of the Office of Personnel Management to develop a new, modern system of personnel management that would fit the unique needs of the new department. We hold this hearing today at a point in time when the establishment of that system is nearing.

Last week, a Senior Review Committee, made up of officials from DHS and OPM the employee unions and outside experts, met for 3 days in public to discuss the many options, 52 in total, that are on the table. These proposals would affect pay, classification, employee appeals, adverse actions, and labor management relations, every major element of a human resources system.

I applaud the design team and the Senior Review Committee for the many months of work on this issue. We gave you an important task and you have taken it very seriously. That was illustrated very clearly by the sessions last week.

We are holding this hearing now, while the decisionmaking progress is ongoing, due to the significance of this process. I think

all of us are aware that the choices made by Secretary Ridge and Director James are likely to reverberate throughout the Federal Government. Homeland Security is viewed as a test to see how the principles of performance-based management work when put into practice on a large scale, how it will work. If the new department does indeed move away from the General Schedule and some of the statutory Civil Service provisions of Title 5, its success or failure in doing so will be a lesson for other departments and agencies.

So it is important that we get this right. And I hope I can make it through this hearing and keep my voice going, so you will have to bear with me. I say "we" because, after all, Congress gave the department this authority to waive several provisions of Title 5, and we specifically required the department to develop a new personnel system. We have a lot invested in this process, too. We want this to be a success. We want the department to have the flexibility it needs to meet its critical mission, and we want it to do so while creating a workplace environment where good workers are rewarded and poor performers are rehabilitated or removed.

One of the interesting items to emerge from last week's public review sessions, I believe, was the wide agreement that poor performers have no business working for the Federal Government. I think this issue really gets at the essence of creating a real, credible, performance-based management system and an effective pay-for-performance plan.

Such a system begins with an effective way to measure performance. Managers must be accustomed to giving real performance ratings, not simple pass/fail marks, to their employees, and these ratings must have a direct relation to duties and responsibilities of each employee. This takes training, to be sure, but it also requires a willingness to make hard choices, and it demands that managers are held accountable for their decisions.

Once you have a credible tool for measuring performance, and managers who understand the system and want to implement it, it is fairly logical to have a system that rewards the best performers and does not coddle the worst. I hope and expect that this is the direction the Department of Homeland Security is heading. I look forward to our discussion today, and I thank you all for being here.

[The prepared statement of Hon. Jo Ann Davis follows:]

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Chairwoman Jo Ann Davis
Subcommittee on Civil Service and Agency Organization
"Decision Time: A New Human Resources Management System At the Department of Homeland Security"
Opening Statement
October 29, 2003

Thank you all for joining us today at this important hearing. When Congress created the new Homeland Security Department last year, we included in the legislation a directive to the Secretary and the head of the Office of Personnel Management to develop a new, modern system of personnel management that would fit the unique needs of the new department. We hold this hearing today at a point in time when the establishment of that system is nearing.

Last week, a Senior Review Committee, made up of officials from DHS and OPM, the employee unions and outside experts, met for three days in public to discuss the many options – 52 in total – that are on the table. These proposals would affect pay, classification, employee appeals, adverse actions and labor-management relations – every major element of a human resources system.

I applaud the design team and the Senior Review Committee for the many months of work on this issue. We gave you an important task, and you have taken it very seriously – that was illustrated very clearly by the sessions last week.

We are holding this hearing now, while the decision-making progress is ongoing, due to the significance of this process. I think all of us are aware that the choices made by Secretary Ridge and Director James are likely to reverberate throughout the federal government. Homeland Security is viewed as a test to see how the principles of performance-based management work when put into practice on a large scale. If the new department does indeed move away from the General Schedule and some of the statutory civil service provisions of title 5, its success or failure in doing so will be a lesson for other departments and agencies.

So, it's important that we get this right. I say "we" because, after all, Congress gave the department this authority to waive several provisions of title 5, and we specifically required the department to develop a new personnel system. We have a lot invested in this process, too. We want this to be a success. We want the department to have the flexibility it needs to meet its critical mission, and we want it to do so while creating a workplace environment where good workers are rewarded and poor performers are rehabilitated or removed.

One of the interesting items to emerge from last week's public review sessions, I believe, was the wide agreement that poor performers have no business working for the federal government. I think this issue really gets at the essence of creating a real, credible performance-based management system, and an effective pay-for-performance plan.

Such a system begins with an effective way to measure performance. Managers must be accustomed to giving real performance ratings, not simple pass/fail marks, to their employees, and these ratings must have a direct relation to duties and responsibilities of each employee. This takes training, to be sure, but it also requires a willingness to make hard choices, and it demands that managers are held accountable for their decisions.

Once you have a credible tool for measuring performance, and managers who understand the system and want to implement it, it is fairly logical to have a system that rewards the best performers and does not coddle the worst. I hope and expect this is the direction the Department of Homeland Security is heading. I look forward to our discussion today. Thank you.

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Mrs. DAVIS OF VIRGINIA. I would now like to recognize the ranking minority member of this subcommittee, Mr. Danny Davis, for an opening statement.

Mr. DAVIS OF ILLINOIS. Madam Chairwoman, I think your voice is going to be fine, and I want to thank you for calling this hearing.

The process that agency officials at the Department of Homeland Security and the Office of Personnel Management designed to help develop the new personnel rules at DHS has been hailed as being very collaborative and inclusive.

A local columnist in last Sunday's paper described a recent personnel development working session as, "Bush administration appointees and Federal union leaders gathered around a table and tried to step outside their adversarial relationship. For 3 days, officials from the Department of Homeland Security and Federal unions took stock of one another as they discussed how best to overhaul pay and work force rules affecting 180,000 Civil Service employees."

I am pleased that DHS' human resources development process has been collaborative and inclusive, as called for in the Homeland Security Act. However, the act also expresses the "Sense of Congress" that the "human resources management system envisioned for the Department should be one that benefits from the input of its employees."

It is not enough only to solicit the ideas of DHS employees and union officials. Their ideas and proposals must be considered and reflected in the proposed personnel system.

It is my understanding that the 52 personnel system options that have now been forwarded to the Secretary of DHS and the Director of OPM for consideration range from keeping the current General Schedule pay system to implementing a new performance-based pay system. In the area of collective bargaining, some options increase management rights by limiting the issues that can be bargained over, and other options increase union rights by expanding the scope of bargaining.

The Secretary of DHS and the Director of OPM have a difficult but congressionally stated responsibility to design a system that reflects the ideas and concerns of the employees who are the bread and butter of this agency. I hope that the much touted collaborative design process results in a human resources system that reflects the views of all those involved in the design process itself. Collaboration requires a tremendous amount of give and take. It also requires a great deal and a high level of sensitivity. I trust that process can in fact be implemented, and it can be done successfully.

I look forward to hearing from the witnesses and learning where they believe there is room for consensus and compromise in design of a new personnel system at DHS.

And again, Madam Chairwoman, I thank you for holding this hearing and look forward to the discussion which will ensue.

[The prepared statement of Hon. Danny K. Davis follows:]

STATEMENT OF CONGRESSMAN DANNY K. DAVIS AT THE SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION HEARING THE DEPARTMENT OF HOMELAND SECURITY'S NEW PERSONNEL SYSTEM

Wednesday, October 29, 2003

Chairwoman Davis, the process that agency officials at the Department of Homeland Security (DHS) and the Office of Personnel Management designed to help develop the new personnel rules at DHS has been hailed as being very collaborative and inclusive.

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Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Davis.

Mr. Murphy.

Mr. MURPHY. Thank you, Madam Chairwoman. I just want to add my hopes too that throughout these hearings we will hear certainly some great ideas for moving the Department of Homeland Security forward as a model for helping Government run more efficiently and to do what you had said, to make sure that good workers get rewarded and those who are not working, we find other ways of either helping to improve their performance or helping them move on.

But above all, I want to make sure that all the parties involved, we hear from them, whether they are representing the workers or representing administration on this. I want to hear how people are working together to resolve any issues or, in the future, how they will do so. Those are some of the things that I hope, as we hear testimony, I will hear some elaboration on.

Thank you, Madam Chairwoman.

Mrs. DAVIS OF VIRGINIA. Mr. Mica.

Mr. MICA. Thank you, Chairman Davis. Good to be with you this morning. I think this is an appropriate and long overdue hearing, but timely in that we need to make decisions on new human resource management system at Homeland Security.

Homeland Security is a unique consolidation of many agencies, and I know that there has been an air of uncertainty among the work force because of the nature of the consolidation and some of the reorganization of activities within one of our largest agencies of the Federal Government.

I wanted to speak for just a second, and, again, I think this is very important. I think that we have to respect the service and the loyalty of many of those who serve the country in Civil Service positions, but also keep in mind that no one is entitled to a position forever in the Federal Government, and times do change and responsibilities change and organizations change.

Having chaired the Civil Service Subcommittee, I watched in awe some of the transition of the Department of Defense and the downsizing that it faced in the post-cold war period, and they did it, for the most part, without a whimper. Maybe that is the nature of the Department of Defense. And many of the positions, too, were represented by organized labor. But I think folks have to realize that the purpose of Civil Service was to make certain that there was not political interference, that there wasn't the hiring of folks on nepotism basis, and that people weren't dislodged from their positions solely on the basis of political convenience, transition, and patronage.

So we have to keep in mind that the private sector does make these transitions, that the Defense Department and others have made these transitions, and that there will be consolidations and new experience. We live in a different era.

All that said, we need to do our best again to properly retrain, to reassign, and to place those who have been loyal in their service to the Federal Government; I respect that. My folks were both lowly paid State civil servants at one time, so I have a great respect for that.

The final point that I wanted to make is on one of the largest components of Homeland Security, and that is the Transportation Security Administration. It was created with a core of some existing Department of Transportation, and other security-related transportation employees. It expanded and grew to 55,000 plus, I am told. And one of the things in helping to create and establish that agency, we wanted to make certain that we did, because of the nature of their responsibility, also the importance of accountability in a security system of that sort, was not to have that agency as part of Title 5. And I think that is important that we continue to respect that decision. Most of the folks who are employed are screeners.

We converted the airline screening responsibility to Federal responsibility, but I may remind the subcommittee and Members of Congress and others that we do have a transition provision which we put in the legislation to allow for private screening, all with Federal supervision and Federal responsibility and oversight audit, and that will continue. We now have five demonstration projects that are working very successfully, but I think that airports will soon be demanding to opt out, and they have that right, 1 year from this month. I have asked TSA to ensure a smooth transition, and I think that it is important that the uniqueness of the creation and the responsibility of this new agency, and particularly the screening responsibilities, be recognized with both the past intent and the current operations and the future conduct of this important responsibility, and it will transition. This is not unlike the European transition of that screening responsibility, but it does involve a large portion of the number of people who are now under the purview of Homeland Security.

So a lengthy opening statement, but willing to work, as chairman of the Aviation Subcommittee and with the Civil Service Subcommittee, I am proud to be a member of the committee. I, again, appreciate your fulfilling your responsibilities and taking up this issue, and look forward to hearing the witnesses.

And thank you again, Madam Chairwoman.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Mica, and we certainly appreciate your experience and expertise on the Civil Service Committee and all that you have done with Homeland Security and the TSA.

Ms. Holmes Norton, do you have an opening statement?

Ms. NORTON. I don't have a formal opening statement, Madam Chairwoman. I appreciate this hearing and thank you for this hearing. I just want to say as we begin this process with the Department of Homeland Security, and I am a member of the Select Committee on Homeland Security, that we don't go through another very polarizing process of the kind we have just finished on the Department of Defense. That was not a model of how to go about dealing with the interests of efficiency and the justifiable interest of the people who work in the Department. You can't organize a department around the people who work there, and it is time the Government, if it is going to reorganize these functions, took their cue from the way in which the Fortune 500 does it. I served on the board of three Fortune 500 companies, and I watched how companies had to be elastic and flexible and change, particu-

larly as the economy changes. I have never seen anything like the DOD process. Any company that went through that would be throwing its best people out the window and telling them to go search for other jobs, because people are not going to stand for changes that don't take them into account; and I hope that is the kind of process we are about to embark upon here, or I think we are going to have the same kind of polarized response that we had with respect to the Department of Defense.

And I thank you very much, Madam Chairwoman.

Mrs. DAVIS OF VIRGINIA. Thank you, Ms. Norton.

I ask unanimous consent that all Members have 5 legislative days to submit their written statements and questions for the hearing record, and that any answers to written questions provided by the witnesses also be included in the record. Without objection, so ordered.

I ask unanimous consent that all exhibits, documents, and other materials referred to by Members and the witnesses may be included in the hearing record, and that all Members be permitted to revise and extend their remarks. Without objection, it is so ordered.

On the first panel we are going to hear from the two key agencies making the final decision about the new personnel system. First today will be Ronald L. James, the Chief Human Capital Officer at the Department of Homeland Security. He will surely have a lot to say on this topic. Next will be Mr. Steven R. Cohen, Senior Advisor for Homeland Security Issues at the Office of Personnel Management. Joining him behind the table will be Ronald P. Sanders, Associate Director for Strategic Human Resources Policy at OPM.

We have also asked the Merit Systems Protection Board to submit a written testimony for the record, which they are happy to do. The MSPB has also played a significant role in the development of the new personnel system at DHS.

It is standard practice for this committee to administer the oath to all witnesses, so I am going to ask, if everyone is here from the second panel as well as the first panel, we will just swear everybody in at one time. If you will please stand, I will administer the oath.

[Witnesses sworn.]

Mrs. DAVIS OF VIRGINIA. Let the record reflect that the witnesses have answered in the affirmative, and please be seated.

Mr. James, we will begin with you. We have your full written statement in the record, and if you would just like to give a summary or say whatever you would like to say, you have 5 minutes.

STATEMENTS OF RONALD L. JAMES, CHIEF HUMAN CAPITAL OFFICER, DEPARTMENT OF HOMELAND SECURITY; AND STEVEN R. COHEN, SENIOR ADVISER, HOMELAND SECURITY, OFFICE OF PERSONNEL MANAGEMENT

Mr. JAMES. Good morning, Chairwoman Davis and distinguished members of the subcommittee. I am Ron James, Chief Human Capital Officer at DHS. Thank you for the opportunity to appear before you today.

DHS was created with the overriding mission of protecting the Nation against future terrorist attacks. Component agencies analyze threats and intelligence, guard our borders and airports, protect our critical infrastructure, and coordinate the response of our Nation for future emergencies. DHS is also committed to and being sensitive to protecting the rights of American citizens and enhancing public services such as natural disaster assistance by dedicating specific teams to these important missions.

In creating the Department, Congress provided a historic opportunity to design a 21st century human resource management system that is fair, effective, and flexible. We, and I, take this very personally, have a responsibility to create an innovative system, while at the same time preserving basic Civil Service principles for our DHS loyal, effective, and hard-working employees.

Our Department has an incredibly important mission. Whatever system we develop must be mission-centered first and foremost. Day in and day out, our mission is preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism, and minimizing the damage and assisting in the recovery from terrorist attacks that do occur within the United States. The design must facilitate our ability to perform this mission. In order for us to achieve this mission, the system created must be performance-focused, contemporary, and excellent. The system must generate respect and trust and be based on merit principles and fairness.

We have a responsibility to put into place a human resources management system that meets employees needs, while at the same time creates a high performing organization, one which will effectively help us fight the war on terrorism. The American public is depending on us to create such a system.

The bottom line: the world has changed, jobs have changed, missions have changed, and our human resources system needs to change as well to support this new environment. The current system, while it has many positive features, is insufficient to meet our needs and the different circumstances that we have faced since September 11.

In order to successfully lead implementation of the national strategy for Homeland Security, the Department must excel at the management of its most precious resource: its people.

We are and have been following a process, and are committed to following a process that ensures maximum collaboration with our employees and their representatives, stakeholders, and subject matter experts. We created a Design Team of DHS front-line employees and managers, union representatives, and HR professionals from OPM and DHS. This team began its research and design work in early April and presented to a Senior Review Committee a wide range of options for pay, performance management, classifications, labor relations, adverse actions and appeals at the end of September. Their commitment and hard work have been absolutely exceptional, and we owe all of them a big and a gigantic thank you.

The SRC met last week for 3 days to deliberate the options developed by the HR Design Team, and, as others have mentioned, the team and the committee is very diverse. The committee had a very candid and thorough and thoughtful discussion about the options

and key issues related to them. Committee members openly shared their individual perspectives, and although there was and will continue to be disagreement at times, the dialog created new possibilities for a fair, credible HR system through listening and mutual understanding.

One thing was clear: each and every SRC member agreed upon the need for the HR system to support the vital mission of the Department of Homeland Security and its employees. All SRC members agree they wanted to develop a system that is fair, credible, and transparent, and one that creates an environment for openness, inclusiveness, and accountability.

Based on the discussions from the meeting, the SRC will produce a summary report over the next 2 weeks. The report will be available to members of this committee as well as the general public. The report will be forwarded to Secretary Ridge and OPM Director James, no relation. The Secretary and Director will issue proposed new personnel rules for the Department early next year. The proposed regulations will be available for public comment for a 30-day period, and the issuance of the regulations will also trigger the congressionally mandated collaboration period with our employees' representatives, which includes notice of the proposals. And I might add that even though that is just being triggered now, the ongoing dialog has been continuing with our employee representatives and employees since April of this year.

We know change is difficult, but change is inherent in the creation of the Department of Homeland Security. It is incumbent on us to realize that changes which may result from this process will need time to design in detail. We will need to train our employees and managers, as we will need to assess the effectiveness of these changes and continue to make improvements. We are up to the challenge.

Thank you, and I welcome any questions you may have.

[The prepared statement of Mr. James follows:]

STATEMENT OF RONALD J. JAMES
CHIEF HUMAN CAPITAL OFFICER
DEPARTMENT OF HOMELAND SECURITY

Before a hearing conducted by the
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
October 29, 2003

Good morning Chairwoman Davis and distinguished members of the Subcommittee. I am Ron James, Chief Human Capital Officer for DHS. Thank you for the opportunity to appear before you today.

The Department of Homeland Security was created with the overriding mission of protecting the nation against further terrorist attacks. Component agencies analyze threats and intelligence, guard our borders and airports, protect our critical infrastructure, and coordinate the response of our nation for future emergencies. DHS is also committed to protecting the rights of American citizens and enhancing public services such as natural disaster assistance by dedicating offices to these important missions.

In creating the Department, the Congress provided an historic opportunity to design a 21st century human resource management system that is fair, effective, and flexible. We have a responsibility to create an innovative system, while at the same time, preserving basic civil service principles for the employees of the Department.

Our Department has an incredibly important mission. Whatever system we develop must be mission-centered first and foremost. Day-in and day-out, our mission is preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism, and minimizing the damage and assisting in the recovery from terrorist attacks that do occur within the United States. The design must facilitate our ability to perform this mission. In order for us to achieve this mission the system created must be performance-focused, contemporary and excellent. The system must generate respect and trust and be based on merit principles and fairness.

We have a responsibility to put in place a human resources management system that meets employee needs while at the same time creates a high performing organization—one which will

effectively help us fight the war on terrorism. The American public is depending on us to create such a system.

Bottom line---The world has changed, jobs have changed, missions have changed…and our human resource system needs to change as well to support this environment. The current system, while it has many positive features, is insufficient to meet our needs and the different circumstances that we face since September 11th.

In order to successfully lead implementation of the national strategy for Homeland Security, the Department must excel at the management of its most precious resource—its people.

We are following a process that ensures maximum collaboration with our employees and their representatives, stakeholders, and subject matter experts. We created a Design Team of DHS front line employees and managers, union representatives, and HR professionals from OPM and DHS. This team began its research and design work in early April and presented to the Senior Review Committee a wide range of options for pay, performance

management, classification, labor relations, adverse actions and appeals at the end of September. Their commitment and hard work have been exceptional. We all owe them a thank you.

The Senior Review Committee (SRC) met last week for three days to deliberate the options developed by the HR Design Team. The Committee is composed of DHS and OPM senior officials, union presidents, and a group of distinguished technical advisors—all of whom were carefully selected for their knowledge and experience in leading people. The Committee had very candid and thoughtful discussions about the options and key issues related to them. Committee members openly shared their individual perspectives and although there was disagreement at times, the dialogue created new possibilities for a fair, credible HR system through listening and mutual understanding.

One thing was clear: each and every SRC member agreed upon the need for the HR system to support the vital mission of the Department of Homeland Security and its employees. All SRC members agreed they want to develop a system that is fair, credible,

and transparent, and one that creates an environment for openness, inclusiveness, and accountability.

Based on the discussions from the meeting, the SRC will produce a summary report over the next two weeks. This report will be available to the members of this Committee as well as the general public. This report will be forwarded to Secretary Ridge and OPM Director James. The Secretary and Director will issue proposed new personnel rules for the Department early next year. The proposed regulations will be available for public comment for a 30-day period. The issuance of the proposed regulations will also trigger the congressionally mandated collaboration period with our employee representatives which includes notice of the proposals, followed by Congressional notification, consultation and mediation.

We know change is difficult – but change is inherent in the creation of the Department of Homeland Security. It is incumbent on us to realize that the changes which may result from this process will need time to design in detail. We will need to train our employees and managers. And, we will need to assess the effectiveness of these

changes and continue to make improvements. We think we are up to the challenge.

Thank you and I welcome any questions you may have.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. James.

Mr. Cohen, we have your complete statement, but you are recognized for 5 minutes to either summarize or whatever. Thank you.

Mr. COHEN. Thank you, Madam Chairwoman. Good morning, members of the committee. I am Steve Cohen, and I serve as Senior Advisor for Homeland Security at the Office of Personnel Management, and I thank you for the opportunity to testify on the design of a modern, merit-based human resources management system for the Department of Homeland Security. As you have indicated, Madam Chairwoman, I have with me Dr. Ronald Sanders, who serves as Associate Director for our Division of Strategic Human Resources Policy at OPM.

For well over a century, our Civil Service system has served this country and its citizens well. Most importantly, it has served as a source of strength and continuity during periods of crisis in our history, and as a model for the rest of the world.

Today, as never before, our basic Civil Service system is facing a major challenge to its very existence. A system that has served us so well in the past has grown out of date and unresponsive to the needs of today and the likely needs of the future.

The Homeland Security Act of 2002, which was signed by President Bush just last November, presented to the Secretary of the Department of Homeland Security, Tom Ridge, and to the Director of the Office of Personnel Management, Kay Coles James, an unprecedented opportunity to address that challenge and, by so doing, to demonstrate to the world that what was created 120 years ago can be updated once again to reflect the needs of a new era while still holding true to those ideals that we all value so very deeply: merit, veterans preference, due process, and protections against prohibited personnel practices, discrimination, and reprisal for whistle blowing.

Secretary Ridge and Director James addressed this challenge to our Civil Service system by creating a Department of Homeland Security human resources management design process that has been, at their direction, inclusive, collaborative, thorough, and timely. It has won the praise of the General Accounting Office in a recent study entitled "DHS Personnel Design Effort Provides for Collaboration and Employee Participation." It has won the praise of top managers of the Department of Homeland Security and the presidents of the three major employee unions within the Department: the American Federation of Government Employees, the National Treasury Employees Union, and the National Association of Agriculture Employees.

The design process has demonstrated that an atmosphere of mutual respect and trust can be created within which labor and management can work effectively together, even when that atmosphere was originally one of distrust and animosity, and even when disagreements continue to exist. It also will shortly demonstrate that human resource systems can be developed to meet the unique needs of any organization and its employees, and at the same time serve well the American people and our obligation to preserve the world's greatest Civil Service system and the core values I mentioned previously.

At the heart of the DHS human resources design process was an outstanding design team, as was indicated by Mr. James, a team made up of managers and employees from DHS, technical experts from OPM and DHS, and professional staff representatives from the Department's three major employee unions, those that I mentioned previously. The nature of this highly collaborative design effort has been recognized as being the first of its kind and as a model for others to follow in the future.

To meet the charge of Director James, the team cast a wide net in its research efforts, examining HR policies and practices in private sector companies, non-profit organizations, State and local governments, and other Federal agencies. The team met with highly regarded human resources experts, academics, and practitioners, and with over 2,000 front-line DHS employees, managers, and supervisors at town hall meetings and focus group interviews.

Relying on that broad approach as its foundation, the team created the 52 human resources options in the areas of pay, classification, performance management, labor management relations, adverse actions, and appeals that were the subject of 3 days of intense discussion just last week by a highly select Senior Review Committee. I was honored to serve as co-chair of that committee, along with Janet Hale, Under Secretary of Management for DHS.

The report of that committee's deliberations is scheduled to be submitted to Secretary Ridge and to Director James within the next 2 weeks. That report will serve as the foundation for the subsequent decisions of the Secretary and the Director that will ultimately result in a human resources management system for the Department that is both responsive to the uniquely critical mission of the Department and to the need to protect the basic Civil Service rights of its employees, and that will also serve as a model for the rest of the Government.

Thank you again for the opportunity to testify. I will be happy to answer any questions the committee may have.

[The prepared statement of Mr. Cohen follows:]

STATEMENT OF STEVEN R. COHEN

SENIOR ADVISOR FOR HOMELAND SECURITY

OFFICE OF PERSONNEL MANAGEMENT

Before a hearing conducted by the

SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

October 29, 2003

Madam Chair, I am Steve Cohen. I serve as Senior Advisor for Homeland Security at the Office of Personnel Management. I thank you for the opportunity to testify on the design of a modern, merit based human resources management system for the Department of Homeland Security. I have with me Dr. Ronald P. Sanders, Associate Director, Division for Strategic Human Resources Policy, Office of Personnel Management. Dr. Sanders was hired by Director James to the OPM team last year and has served with me on the Senior Review Committee and in a leadership capacity on the design team. I will cover both later in my testimony

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reflect the needs of a new era while still holding true to those ideals that we all value so very deeply-- merit, veterans preference, due process, and protections against prohibited personnel practices, discrimination and reprisal for whistle blowing.

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Thank you, again, for this opportunity to testify. I will be happy to answer any questions the Committee may have.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Cohen. I would like to thank you and Mr. James both for agreeing to testify here before us today.

I would like to now yield to our Civil Service Subcommittee ranking member, Mr. Danny Davis. You have the floor.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman.

Mr. Cohen, you just testified that Secretary Ridge and Director James will have 52 options in terms of development of a system. Would both of you comment on how you think they will go through the process of ferreting out and making use of those options to arrive at a conclusion?

Mr. COHEN. I would be happy to, sir. I think, first of all, it is important to note that the 52 options were presented or were developed as a way of, one, categorizing all of the different possibilities, or at least most of the different possibilities that could be considered in a broad range. When we are looking at performance management, labor relations, appeals, and the others, they covered as broad a range as they could of possible actions to take. Those options were considered very carefully, as indicated previously, by the Senior Review Committee, and the report of that Senior Review Committee, that which will go to the Secretary and the Director, will basically summarize the discussion, the sense of where the committee members were coming as they deliberated not option by option, but the parts of the various programs that we are considering. So the report will not, as I say, go from option 1 to option 52, but, rather, it will cover all of the significant parts of those various programs and will present to the Director the various views of the committee members.

As the Secretary and the Director then review the materials before them, they will have the options themselves, and they will also have the summary of those deliberations, that is, all of that material that we hope will be helpful to them as they go about their thought processes.

Mr. DAVIS OF ILLINOIS. So they will be summarized and grouped together.

Mr. COHEN. That is correct.

Mr. DAVIS OF ILLINOIS. Mr. James.

Mr. JAMES. I would just echo Steve's comments and maybe just give an example. For example, among the first five options, one essential element is that they basically say the status quo, release simply variations of the status quo. And I would echo Steve's comments, that is, if there is some desire to mix and match, that could be one element, that some portion of what is current could come out of those first five options. So I think the Secretary will get a document that will point to him like options and will basically say these are the status quo, these options have this element of fairness with regard to due process that was a concern of the committee, and this seemed to be the sense of this group of individuals or this seemed to be the sense of this one individual.

As to the second part of your question, the Secretary does plan to consult with the senior staff, obviously. He also plans to meet once again, probably at the end of the first week of November or the beginning of the second week of November, with at least, at a

minimum, the presidents of the three largest unions who represent our employees. So there will be ongoing dialog and ongoing collaboration and ongoing requests for input and ongoing requests for feedback from a number of sources.

Mr. DAVIS OF ILLINOIS. It is my understanding that a Booze, Allen, Hamilton report prepared for the administration noted that Homeland Security employees who participated in focus groups during the summer voiced reservations about pay banding and other performance-based alternatives. Do any of the pay-related personnel options reflect the concerns that were raised by employee groups in the focus activity?

Mr. JAMES. Mr. Davis, not only was that expressed at the town meetings and in the focus group, it was also expressed at the Senior Review Committee. And while I don't want to pretend to summarize any consensus that came out of the committee, there were individuals who spoke eloquently to the issue of if you want to do pay banding, you really need to build credibility and fairness and accountability in the performance system, and it was said time and time again that a critical condition precedent to any pay banding would be training of managers, getting an understanding and getting a buy-in. And it is my belief, again, I have not seen the report and I am not sure it will be written, that those kind of elements that were articulated at the Senior Review Committee will in fact go forward and the Secretary will have those kind of words, those kind of concerns in front of him.

Mr. COHEN. If I may add to that, sir. I agree totally. In addition to that, as was indicated earlier, the options do obviously contain a broad range of possibilities, and the status quo is always one of them, and that is in fact reflected in one of the options. When we talk about the General Schedule, for example, that is there as it presently exists, and it is there also with modification. So my point simply is that we do believe that the design options that were put together reflect this broad range, that which would indeed reflect the concerns of the employees and others who feel they like the predictability of the system that presently exists, along with others who believe that this is really the time for change.

Mr. DAVIS OF ILLINOIS. Thank you, gentlemen, very much.

And thank you, Madam Chairwoman.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Davis.

Mr. Murphy.

Mr. MURPHY. Thank you, Madam Chairwoman.

And thank you, panelists. I appreciate your being here. And clearly as I read through many of these options, there is a lot of work that has gone behind them, and I am sure a lot yet to be understood, because they appear so complex. But let me ask, in this process I think both of you alluded to the inclusiveness issue here, working with groups along the way. Can you elaborate on the extent that employee groups have been involved in working on these plans, because obviously having the early buy-in and working together is going to be instrumental in maintaining that along the way?

Mr. COHEN. I would be happy to, sir. Our basic design team consisted of employees and managers from the Department of Homeland Security. It also consisted of a field review team that had a

large number of individuals, field employees and managers, from the Department of Homeland Security who reacted to where we were heading. As we indicated earlier, we met with over 2,000 of the DHS employees and managers in our various visits across the country to major locations of DHS employment. These visits included town hall meetings as well as the focus group meetings that we alluded to earlier. And their thoughts, of course, were very much considered.

Also a major portion of this design effort and what made it, I think, so unique is that part of the basic team itself included professional staff from the three major unions that we referred to earlier. So they worked with us, the union representatives I am referring to, worked with us from day one up through to today, and, of course, members of the Senior Review Committee included the presidents of those unions. So we really do believe that as part of this process we did the best that we could to assure that employee views and the views of their representatives were well represented.

Mr. MURPHY. As you continue on with this and looking at these many options, you are not going to be using all of them, obviously, but could you describe the next steps in terms of selecting the options that will be put into place? Will there be a mixture of these depending upon people's job classifications? Sometimes it appears least confusing if there are multiple levels. Could you clarify what you are going to do and how you are going to do that?

Mr. COHEN. Yes. The next step will be for a report to go to Secretary Ridge and Director James that will include the summary of the discussions of the Senior Review Committee along with the options themselves. As Mr. James indicated earlier, the Secretary and the Director will then not only obviously carefully review with their staff all of those materials, but they will be consulting with MSPB, they will be meeting with the union presidents we mentioned earlier.

Mr. MURPHY. Are you going to present all the options to them or recommend certain ones proceed forward?

Mr. COHEN. I'm sorry?

Mr. MURPHY. Are you going to be presenting all the options to them or recommend that certain ones be put forward?

Mr. COHEN. To the Secretary and to the Director?

Mr. MURPHY. Yes.

Mr. COHEN. They will be getting all of the options, basically, which is a result of the product of the design team, along with the results of the discussion on those options that was held by the Senior Review Committee members.

Mr. MURPHY. I am just wondering at this point if there were some recommendations for certain ones to be implemented; that there was some agreement among all the parties who have been discussing this to say these are the ones that you think are the most workable, fair, clear, transparent, etc.

Mr. COHEN. The discussion didn't go that way in terms of the Senior Review Committee process, and that was rather deliberate. We did not start with option 1 and go through to option 52. Frankly, we thought it would be much more productive, rather than doing it in that manner, to talk about the major elements of the programs that we were talking about, and when it was appropriate

or when it seemed to fit properly, many of the individual members would refer back to option 32 or 33 or option 4 or what have you. But we didn't either discussion, nor will we present the report option by option.

What I think is important to keep in mind is that these options really are intended to be conceptual in nature; I mean, we could have added more. When you look at a pay banding system, for example, there are a variety of different approaches that could be used, and we certainly didn't make an attempt to identify each and every one and present them that way. So they are intended to be conceptual, and what we fully expect is that when the Director and the Secretary sit down and ultimately design what they believe would make most sense for the Department, they will be looking at broad program elements as opposed to specific options per se.

Mr. MURPHY. All right, thank you.

Thank you, Madam Chairwoman.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Murphy.

Ms. Holmes Norton.

Ms. NORTON. Thank you very much, Madam Chairwoman.

Do you see what you are doing as a model for other agencies? We have been trying to figure out how the administration is going about this management reform involving human resources. We didn't know whether DOD was the template. We noted some differences. It seemed to be even more severe than the statute setting up the Department of Homeland Security.

I suppose I should be asking Mr. Cohen. Are you doing this on an agency-by-agency basis? What are you doing?

Mr. COHEN. There are many who have asked the same question. What we are doing, of course, is in response to really the unprecedented authority that the Congress gave to the Secretary and to the Director to develop a new personnel system for the Department in the six areas that we talked about earlier. Without that congressional authority, we wouldn't be able to propose the design of the system as we are doing it.

Ms. NORTON. Well, wait a minute. I don't recall that it was specific authority for the DOD at the time they proceeded.

Mr. COHEN. No, this was contained within the Homeland Security Act.

Ms. NORTON. I understand that. But you said without this authority you implied there is nothing you would be doing or could do.

Mr. COHEN. We couldn't be basically reshaping all of those chapters within Title 5 as we presently have the authority to do.

Ms. NORTON. Are you reshaping those because you regard these functions that have been placed in the new Department to be essentially different from the functions when they were spread out among the other departments? And if so, how is that?

Mr. COHEN. Not that the functions are different, but I think there are two issues here. One is the critical mission of the Department of Homeland Security, which in many respects makes the outmoded Civil Service system all the more outmoded. The other is, as I was alluding to earlier in my statement, the basic concern that we have for our entire Civil Service system, and that, indeed, it needs to be updated and made more responsive to the needs of

today and the needs of the future. We are looking at this opportunity to shape a personnel system for Homeland Security that is indeed mission-oriented and is reflective of the unique needs of the Department, but at the same time one that can be used as a model for the rest of the Government.

Ms. NORTON. Well, of course, that is why we are going to look at it very closely.

Mr. COHEN. Yes, ma'am.

Ms. NORTON. This, in a real sense, is not like the rest of the Government. That is why you were given the statutory authority to do something very different, because the agency is very different. The whole notion of defending the homeland with an agency within the merit system is very different, I suppose, from what DHS does or what the Department of Labor does and the rest.

I found your testimony very thin, and I think the reason is that we have called you as we had to, because we are about to adjourn, I hope. We called you at a point before this report was issued. Do I recall in this testimony you said there would be a report in 2 weeks?

Mr. COHEN. Within 2 weeks, yes, ma'am.

Ms. NORTON. So this is a kind of, we are going to try to do everything right testimony, and I suppose without the report or your willingness to talk about the report at this time, it is difficult to get to what is really happening with respect to this process. Therefore, I must ask you what you regard as the major differences between you and employees that have arisen thus far in the process, since we get no sense of anything but a broad process from your testimony?

Mr. James.

Mr. JAMES. Can I have the question repeated?

Ms. NORTON. I would like to know what are the major issues between the Department and its employees at this time.

Mr. JAMES. The major issue is one of trust and lack of confidence in the current performance appraisal system.

Ms. NORTON. Mr. James, you misunderstand me. By issue I mean substantive issues.

Mr. JAMES. Well, I will try to repeat what I heard and the concerns I heard raised, and the concerns I heard raised were about trust.

Ms. NORTON. Trust is not a substantive issue.

Mr. JAMES. Well, I don't know how to answer the question.

Ms. NORTON. It is a relationship issue. You know, this is a congressional committee. I am trying to find out what are the major issues. Let me put it this way. What are the major issues that you have been discussing with employees? You are very proud of this design system. All I am trying to find out is how it works. What are you talking about?

Mr. JAMES. The major issues have been the ones that have been outlined: pay, labor relations, the appeals process, employee scale.

Ms. NORTON. So what have been the major differences on those issues?

Mr. JAMES. Well I will give you the kind of concerns I have heard echoed. The question is like if you have an internal panel, will we still have due process; will you have union participation; will there

be employee involvement in that process. But with all due respect, that goes to an issue of trust, and that is a substantive issue.

Ms. NORTON. Well, they seem to be very specific issues that can be answered yes, you will or no, you won't, or let us work it out.

Mr. JAMES. And that has been the process, it is like let us talk about how can we balance the agency's mission and actually talking to people about what the mission is and talking about how do you in fact still have due process and at the same time get to a faster resolution. Because it is unfair to employees, it is unfair to the agencies to have an interminable process that goes on where employees are in limbo for 2 or 3 years. Those are concerns that were raised by employees, those were concerns that were raised by managers; and, in fact, on that issue, what I heard, and this is my individual I heard, was agreement. And I come from the experience of dealing with the Teamsters, and I am just absolutely amazed that people are talking, because that is the first major issue, is getting the people to the table and talking about the issues and saying we disagree about this. You know, what is the level of due process? If you change pay, how can I be assured that I can trust my manager not to do the old boy system or the old girl system?

Ms. NORTON. Madam Chairwoman, I see my time is expired.

Mr. James, I just want to say, in closing, that the issue is not trust. What did Ronald Reagan say? Don't trust, just verify? I don't think the employees can ever know whether management, with changes from administration to administration or from person to person, is somebody you can trust. The question is does the system work. So I have great problems with your framing these notions in a way that does not allow the committee or the employees to know whether it is working because of systems that are in place that would enable us to know, and I tell you trust isn't one of them. I don't know what that means as an approach to a system.

Mr. JAMES. If you install new systems in response to concerns being raised by employees, one issue discussed is how do we measure that we in fact have done what we promised to do, that we are being fair, that we are being effective; and part of that is initially the commitment of continued talk. I come from a private sector experience, 25 years mergers and acquisitions, and the reason that 50 percent of the private sector acquisitions fail is because they fail to involve their employees; they fail to develop their trust, they keep them in the dark, they don't let them know what is going on. And I see that issue as fundamental to building any kind of platform in terms of talking about issues.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. James.

Thank you, Ms. Norton. We may have time for a second round.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Madam Chairwoman, and thank you for holding this hearing at this particular juncture; I think it is important that we get an update before the recommendations are forwarded to the Secretary and the Director.

And I thank both of you gentlemen for being here today. And I have read ahead to some of the testimony from some of the others who were involved in this process, Mr. Gage of AFGE, and Ms. Kelley of NTEU, and both of them have strongly praised the process you have gone through as being a collaborative process that did

bring people together, it was inclusive, and so I congratulate you on that. But I want to get to this question of credibility and trust, because now as I understood your answers to Mr. Murphy's questions, these 52 options are now being forwarded without being further condensed, really, they are being forwarded to the Secretary and the Director, is that correct?

Mr. COHEN. That is correct, along with an analysis of their evaluation by the Senior Review Committee and others.

Mr. VAN HOLLEN. But among those 52 options are obviously very different routes that can be taken on each of these issues, like employee rights, grievance process, and all that, isn't that correct?

Mr. COHEN. That is correct, sir.

Mr. VAN HOLLEN. Right. So the credibility that you have gained by making this an inclusive process, and that will disappear tomorrow if what happens is those 52 recommendations are forwarded to the Directors and all of a sudden they come out with conclusions, it would seem as if this whole process had been wasted time because they are the conclusions that are most diametrically opposed to the interests and rights of employees. It will all be seen as a big sham if that is the final result. So I am a little troubled by the fact that this collaborative process, this group is not, and I don't know if Mr. Murphy was suggesting this, but in listening to your answers, I thought it would be a good idea, if the people who spent the most time looking at these issues maybe narrowed the options a little more so that out of this process didn't come recommendations in the final form from the Secretary and the Director that were least beneficial to the employees, because that trust that you said is a little bit shaky, but I think you have gained some trust in this collaborative process, but it will be gone tomorrow if this all looks like the books were cooked from the beginning with a predetermined answer.

I would like you to respond to that.

Mr. COHEN. I would be happy to, sir. I indicated that we didn't specifically eliminate options, but maybe I ought to put it a little bit differently and better. The result of the discussion will show what was discussed and obviously, therefore, what wasn't discussed, and it will make it clear, or we will make sure that it makes it clear, those options that really were not discussed by the committee and, therefore, by definition, were not considered to be significant enough or important enough or did not get the support of various members of the committee where that exists; and that will be made clear.

But beyond that, the process will not end with the report of the committee and the options going to the Secretary and the Director. There will be discussions with the union presidents. There will be further consultation. There will be consultation with MSPB and others. And there has been a commitment made by the Secretary and others throughout the Department of Homeland Security and certainly echoed, to the extent that we can, at OPM, that there will be collaboration and involvement with the unions and the employees and representatives in the development and implementation of whatever it is that ultimately is resolved or developed.

Mr. James talked about trust, and that is really important. The other, I think, major aspect here to consider is the unique mission

of the Department of Homeland Security, and why that unique mission, we believe, creates the need for different systems. It creates the need to look at, for example, in the labor relations area, the scope of bargaining and the timing of that bargaining when critical conditions develop; or the appellate process or whatever. It is that unique nature in that organization that is responsible for keeping this country safe that forces us to take a look at how these processes work that were really developed for a totally different age.

Mr. VAN HOLLEN. Just to very quickly followup. I appreciate that. As I read the testimony, there is a recognition of that on all sides, that we need to make sure that the system is consistent with the mission. But even within those parameters, as your report shows, there are lots of different options. I mean, let us just take the issue of having an independent appellate board. I mean, it may be true that you need to have an expedited procedure. I think the critical issue, as one example, is the independence of the board that is resolving disputes. Because if it is a body that is clearly answerable primarily to the Secretary or the Director only, and doesn't have independence, it is not going to have any credibility with the employees going forward. That is just one example. There is a big difference between negotiations and consultation when it comes to bargaining rights.

So within your 52 options there is lots of room for maneuverability, and what I am suggesting is if you forward 52 options to the Secretary and Director, and they end up with a proposal that is at the end of the spectrum that is least favorable to the rights of the employees, then I think the whole process, which currently has credibility, will become discredited.

And I thank you, Mr. Chairman.

Mr. MURPHY [assuming Chair]. Thank you. I guess it is back to me for some questions here.

And a lot of this comes down to, I guess, what is going to be in the reports. Let me ask, first of all, is there going to be a draft of this or are you going to be releasing the whole report in its final form when you come up with this?

Mr. JAMES. One of the things that the Secretary has decided is that in order to make sure that the report fairly and accurately reflects the views of the members, he has decided to extend the process slightly so that the report can go in draft form to every single member of the Senior Review Committee so they can make comments, edits, criticisms, and the like. So the answer to the question is no, there are not going to be a public draft, but the Secretary has committed to making sure that while people may disagree with what was said, that their views were accurately reflected. And that is why it is going to be at least probably another week or two.

Mr. MURPHY. When you say not a public draft, does that mean we are included in the public, members of this committee?

Mr. JAMES. No. Congress will be one of the first after the members get their views in, and then the report is considered final, absolutely.

Mr. MURPHY. It is critical that the DHS' new human capital system is linked to the DHS strategic plan. But has DHS implemented a strategic plan? Does the Department plan on implementing a per-

sonal management system that supports and facilitates the strategic goals outlined in the strategic plan? Is there a strategic plan?

Mr. JAMES. There is a strategic plan in progress that is being staffed currently, and that plan will obviously be impacted by the elements from the various options that the Secretary and Director James decide that will go in the regulations; and that will further determine the balance of the strategic plan.

Mr. MURPHY. And I would think that these two have to be working together.

Mr. JAMES. Pardon for the interruption, but they are inextricably intertwined. The answer is yes.

Mr. MURPHY. So we can expect those reports to be paralleled reports? I am just curious what the timeframe is and knowing what the strategic plan is, along with the human capital plan, timeframe-wise.

Mr. JAMES. If I can get back to you on that, but let me sort of walk at it this way. Hopefully, after consultation by the Secretary and with Director James, the regs will hopefully be published early next year. There will be a comment period that is required, so we are probably talking about early next year before we have final published regulations. And we are going to need what are going to be the final regulations, the final published regulations before we can complete our strategic plan and begin that process. So I think my best guess is that we are talking about the spring or late winter of next year.

Mr. MURPHY. OK. One other line I want to ask about, and that is as people from Homeland Security are working here, there inevitably will be times when this clashes with the public, as they try, for example, at airports or aspects of interfacing directly with the public and the public may feel inconvenienced as luggage is taken and reviewed, etc. How will these plans work in terms of making sure that if public does raise some complaints about employees, that those are going to be handled in a fair way? I mean, there obviously will be some disagreements in terms of what really happened, and as someone is inconvenienced, tempers may flare and they may say things which may not always be accurate. We want to be fair for employees here but obviously protect security. What are the mechanisms in place for this to make sure that those are appropriately weighted and handled to protect the needs of our Nation as well as the employee rights here?

Mr. JAMES. There are a couple of processes, and I am not qualified to speak to one, but just as an overview, the Department has hired an ombudsman. Part of the responsibility of that office, which is independent of the Secretary, is to in fact investigate, interview, inquire about complaints, for example, of passengers who feel they have been abused or feel they have been mistreated. So there is that separate, independent component. And there is, within TSA, a review process by supervisors and managers that is part of their personnel process to in fact respond to inquiries, complaints, and to do interviews and do investigations.

Mr. MURPHY. Well, I know probably every member of this panel has probably been stopped at airports checks, so I know they certainly are thorough and fair about those things as well.

Thank you.

Mr. Davis.

Mr. DAVIS OF ILLINOIS. No further questions.

Mr. MURPHY. No further questions? Then I will just keep going, then. Thank you, Mr. Davis.

I want to go back to some of these questions about what we may expect here in terms of this. It is hard to guess right now, because you are coming up with this report, the 52 options, etc., but it seems to me that a tremendous amount of work has gone through this panel. And I know as I read through these options, without having been to many of these meetings, they are pretty difficult to understand in terms of what are all the specific meanings of these phrases in here, etc., but surely something must have come out of this in discussions with the many partners at the table of seeing what are some of the more efficient mechanisms to use. So let me ask about what you may see as efficient mechanisms to use in evaluating employee performance and meeting the strategic needs of DHS.

As part of this, have you reviewed what has worked outside of the Government sector, what has worked in private industry, what has worked with other labor management issues in terms of implementing some of these options?

Mr. COHEN. Yes, sir, we have. That was a very important aspect. In fact, more than half of the time spent with the design team that started around April 1st or April 2nd was in research and data gathering, that form, indeed, the bulk of the time of the members design team. We did look at what other governments were doing, State and local; we did look at what the subject matter experts told us would make most sense, and academics, as well as the literature search and all that we could really do to see what was going on and what worked best; and we think that the options reflect that. So, yes, that very much was taken into account.

Mr. MURPHY. So given that, I am just curious, then, because I thought the idea was, when you are going to present this information to the Secretary, that there is not going to be any particular recommendations that come through all this. I mean, I just would think that there would be something out of all these options. You are saying this appears like it might work for these kinds of jobs and this mechanism might work for these job descriptions.

Mr. COHEN. Yes. What the Secretary and the Director will get, of course, are the best thoughts of the members of the Senior Review Committee and their staff, and further consultation. So, sure, they are going to be getting recommendations based on what the discussions told us and what our literature search has revealed and everything else, so certainly. But it is not going to be in terms of a specific option, necessary, but rather in terms of a system. There are, for example, when we talk about pay for performance or performance management based systems, we look at those that are time-based, that are basically the systems that exist today, the General Schedule. You know, how long you have served in a particular job is the basic determinant as to whether or not you are going to get a next increase. We look at that. We look, rather, at results-oriented, which is really where we believe we should be going, with results-oriented systems, those that focus on performance, those that focus on competency, those that focus on the re-

sults of individuals, on teams, on organizations. That is the type of change that we are talking about; that is the type of thing that we think will be important for the Department.

Mr. MURPHY. Thank you, Mr. Cohen.

Ms. Holmes Norton, you have further questions?

Ms. NORTON. Thank you very much, Mr. Chairman. I just have one question about the process.

Look, I fully appreciate that when you are putting a new human resources system in place, somebody has to do that, management has to do that. You can't have that system put in place by a group; that is not the point. I ran an agency when it was very, very troubled, the Equal Employment Opportunity Commission, so I know something about what management faces when a system is completely up in the air and you are trying to change everything; and, in a real sense, that is what I was trying to do, reorganize from top to bottom. So everybody is concerned about what is going to happen with her job, and that is natural, but the buck stops with management. The question then becomes how management deals with that buck.

Now, as far as I am concerned, you are already way ahead of the game. I remember sitting here when the DOD reorganization was before us, and there were bitter complaints from employees that the consultation was a sham, that they hadn't been consulted on many things, and I thought the whole process was a total disaster; and you are having just the opposite being said by your own unions, and that I want to say puts you way ahead of the game, as far as I am concerned.

I also think you are in a quandary. It is true that there is this long list of options and everybody would like to see those options winnowed down, but at the same time management has to understand what all those options are. I note a 30-day period, I think it is in your testimony, after management has chosen its version of the options, and I would like to ask you about that period. I don't expect that during that period everything is open for discussion and we can start all over again, but I am wondering how you see that period being used by all who want to comment, but especially employees, who are most directly affected.

Mr. COHEN. As you indicate, there is a 30-day public period comment that follows the issuance of the proposed regulations, and then there is yet another 30 days. There is a basic 60-day, minimum 60-day period reconciliation, consultation, and the like that was written into the law itself. But that is minimum. And I am certain that if there is the need for further discussion felt by the Secretary and by the Director, further discussion with the union leadership and whomever else that they feel it might be necessary to consult with, I am certain that 60-day period will be extended to the extent that it is necessary.

No one is going to, I am sure, and I can't speak for them, but I certainly feel comfortable in saying no one is going to rush to judgment. As you indicated earlier, and has been indicated, this is a very, very critical issue that we are dealing with here; it involves the lives of all of the employees of the Department, it involves our security, it involves other aspects of the Federal Government. So these issues are not going to be taken lightly, I am certain.

Ms. NORTON. When I came to the EOC, I found out that the APA, the Administrative Procedure Act, didn't have to be followed. I, indeed, insisted upon following it in the way you, of course, under the statute are doing, which is to say to put everything out for comment and to receive comment. And I can't say enough about how important comments were in keeping us from making mistakes. You live only in your own brain and your own head. The notion that comments are necessary is a fool's errand.

Mr. Cohen, I must say I was pleased by your answer regarding the period of time and that there is no rush here. It is a whole great big agency you are dealing with. No one has done it before. If the public is commenting, of course, what they will do is they will write comments and you look very closely at those comments.

Mr. COHEN. Yes, ma'am.

Ms. NORTON. Is it possible that employees could have face-to-face meetings, understanding that the parameters are limited and that people are not negotiating? But assuming that comments in fact help to improve a system, do you envision that the comment period could involve face-to-face discussions and meetings with employees about the final option or the proposed option that is on the table?

Mr. COHEN. I don't want to preclude anything in terms of the Secretary and the Director; that will ultimately be their decision. They certainly are committed to meeting with and will indeed be meeting with the employee representatives, without any question. Whether they will subsequently feel that another round of town hall meetings or something might be desirable, I really can't speculate; I honestly don't know.

Ms. NORTON. I appreciate your response.

Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Ms. Norton.

Just as a reminder, members of the committee will have 5 legislative days to submit other questions, so if any members will have questions, I hope you will get back to us in a timely response.

I would like to thank this panel for participating, and we will move on to the next panel now. Thank you.

I would like to invite our second panel of witnesses to please come forward to the witness table. And first off we will hear from two employee groups. I will go ahead and introduce them as they come forward. John Gage, the national president of the American Federation of Government Employees, making his first appearance before this subcommittee. Welcome, Mr. Gage.

Beside him will be Ms. Colleen Kelley, national president of the National Treasury Employees Union, who is also with us today. Next we have Hannah Sistare, the executive director of the National Commission on the Public Service, also called the Vocal Commission. The bipartisan Vocal Commission has been instrumental in making far-reaching recommendations to improve the Civil Service. And last we will hear from George Nesterczuk, president of Nesterczuk & Associates, who has a long history of expertise in Civil Service reform.

I believe you all took the oath before. Am I correct? Thank you very much. The panel will now be recognized for an opening statement. We will ask you to summarize your testimony in 5 minutes

time, and any fuller statement you may wish to make will be included in the record.

I would like to welcome you, Ms. Sistare. Thank you for being with us today. You are recognized for the first 5 minutes, if you are ready.

STATEMENTS OF HANNAH S. SISTARE, EXECUTIVE DIRECTOR, NATIONAL COMMISSION ON THE PUBLIC SERVICE; JOHN GAGE, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; COLLEEN M. KELLEY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; AND GEORGE NESTERCZUK, PRESIDENT, NESTERCZUK & ASSOCIATES

Ms. SISTARE. Thank you very much. Mr. Chairman, Congressman Davis, and other members of the subcommittee, thank you for inviting me to testify on behalf of the National Commission on the Public Service on the performance management recommendations made by the Commission and how they relate to the pay system now being designed for the Department of Homeland Security.

The Commission gave substantial weight to the role of performance in assuring the future health of the public service. Commission Chairman Paul Volcker introduced the Commission report writing: "Disciplined policy direction, operational flexibility, and clear and high performance standards are the guiding objectives of our proposals."

The bipartisan group of public servants who made up this Commission was united by a deep concern about the level of public trust in Government. The decline in trust during the past 40 years deprives our Government and Government officials of the support they need, and it discourages talented Americans from joining the Federal service.

Whatever the full range of causes, surveys have shown a strong correlation between public trust and Government performance.

The Commission identified several barriers to improve Government performance, including: a system under which most pay increases are based on time on the job and geographic location; employee appraisal systems where nearly everyone is rated superior, surpassing even Lake Woebegone, where everyone is merely above average; pay caps, which in an ever-increasing number of cases make it impossible to reward strong performance; bonus systems that are so underfunded that they are spread around like peanut butter to give everyone a little taste; a conviction held by two-thirds of the Federal work force that management doesn't deal adequately with poor performance; and an organizational structure which produces duplication overlap and gaps in program application, and which is burdened with excessive numbers of political appointees.

How would the Commission recommend that the Department of Homeland Security rectify such problems in its own HR system design?

Organizationally, the Department's design is consistent with the Commission's vision of mission-centered departments with considerable operating flexibility. But also, to protect against abuse, the Commission recommended that the authorizing statute for each de-

partment specify the principles that would underlie any personnel system that was established.

The Department of Homeland Security authorizing statute did set out important core principles, rights and responsibilities, but as Paul Volcker noted in speaking to this issue last week, the principles and protections spelled out in the statute have not been sufficient to assuage the concerns of many who will be affected by these new systems. Clearly, employees are still concerned about the assurance of fundamental fairness, objectivity, and due process protections in a pay-for-performance system.

In light of these concerns, the Commission and the National Academy of Public Administration jointly sponsored a public forum last week with the goal of informing and advancing the debate about performance-based pay. From this discussion, we were able to identify some lessons that have proven important in the successful adoption of pay for performance in the private sector, in GAO, and at the IRS.

There was considerable agreement among the participants about the safeguards that were necessary for a pay-for-performance system to be effective. The safeguards that most felt should be assured at DHS and elsewhere are: a credible appraisal methodology; a transparent system; a timely set of processes; consultation with those affected; peer review, possibly even by a neutral third party; ongoing communication, including feedback from all involved; training of managers and supervisors, who themselves would be evaluated how well they manage performance. And as former Secretary Donna Shalala noted in her testimony before this committee last March, you have to have credible people in both political and career management positions for such a system to work. And finally, of great importance, training of employees to participate in the system.

To this list, Paul Volcker and his fellow Commissioners would add the protection of careful and ongoing oversight by the responsible leadership in the executive branch and by the Congress.

Participants in the forum also identified several factors for which implementers must be prepared: one, adequate time for the adoption of such a system. GAO began laying its groundwork many years ago, and this may require a phased implementation starting with those agencies or units that are ready to do a good job. Verifiable performance systems, where individual performance is linked to organizational goals and sound performance management systems, including agreement and buy-in among all those who are part of the system; culture change, which also takes time. Adequate funding. There must be enough money to make meaningful rewards for a commendable performance. Careful assessment. Pay for performance is very complicated because it is difficult, once you get below the clear top performers, to really make meaningful distinctions.

In conclusion, I thank the subcommittee again for its interest in the Commission's work, and the Commission and the National Academy of Public Administration hope these recommendations made by participants at the forum will be of value to the subcommittee in its work.

Thank you.

[The prepared statement of Ms. Sistare follows:]

Subcommittee on Civil Service and Agency Organization
Committee on Government Reform
U.S. House of Representatives
October 29, 2003

Testimony Presented by Hannah S. Sistare

Executive Director, National Commission on the Public Service

The National Commission on the Public Service
Paul A. Volcker, Chairman

Commissioners

Charles Bowsher,
Frank C. Carlucci
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Richard Ravitch
Donna E. Shalala
Bill Bradley
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Franklin D. Raines
Robert E. Rubin
Vin Weber

Ex Officio
Bruce Laingen **Strobe Talbott**

The **National Commission on the Public Service** was initiated by the Brookings Institution Center for Public Service, which is directed by Paul C. Light. The Commission report and further information on the Commission and the many organizations and individuals that assisted it are at www.brookings.edu/Volcker. For a printed copy of the report, contact Hannah Sistare at hsistare@napawash.org.

The **National Commission on the Public Service Implementation Initiative at the National Academy of Public Administration** was established in July 2003. The Academy is an independent, non-profit, non-partisan corporation chartered by Congress to provide "trusted advice" on issues of governance and public management. The Commission and the Academy remain independent entities but jointly sponsor activities to inform and further the debate on issues critical to the public service today. Further information about the Academy and its work is at www.napawash.org .

Chairwoman Davis, Congressman Davis and Members of the Committee. Thank you for inviting me to testify on behalf of the National Commission on the Public Service on the performance management recommendations made by the Commission and how they relate to the pay system now being designed for the Department of Homeland Security. Commission Chairman Paul A. Volcker and the Commission Members appreciate this Subcommittee's interest in their findings and recommendations.

The Commission gave great weight to role of performance in assuring the future health of the public service. Commission Chairman Paul Volcker introduced the Commission report writing:

> *Disciplined policy direction, operational flexibility, and clear and high performance standards are the guiding objectives of our proposals.*

The bipartisan group of public servants who made up this Commission was united by a deep concern about the level of public trust in our federal government. During the past 40 years, survey after survey has found a steep decline in public trust in government. This failure of trust deprives our government of public support. And, important to the work of the Commission, it discourages talented Americans from joining the federal service.

Whatever the full range of causes may be, surveys have also shown a strong correlation between public trust in government and government performance. Thus the basis for the commission's focus on government performance is clear.

The Commission identified several barriers to improved government performance, and made several recommendations for reform. In brief, the barriers included:

- A system under which most pay increases are based on time in the job and geographic location.
- Employee appraisal systems where nearly everyone is rated superior – surpassing even Lake Wobegon, where everyone is above average.

- Pay caps, which in an every increasing number of cases make it impossible to reward strong performance.
- Bonus systems that are so underfunded that they are spread around like peanut butter, so everyone can get a taste.
- A conviction held by two thirds of the federal workforce that management doesn't deal adequately with poor performance.
- An organizational structure which produces duplication, overlap, and gaps in program application and which is burdened with excessive layers of political appointees.

How would the Commission recommend that the Department of Homeland Security rectify such problems in its own HR system design?

First, the organizational theory behind the Department's creation is consistent with the Commission's recommendation that government be organized in mission-centered departments, with agencies with considerable operating flexibility within them.

Second, also consistent with the Commission's recommendations, the Department has been given considerable flexibility in setting up its own personnel systems.

Third, the Commission recommended that the authorizing statute for each department set out the principles that would underlie any personnel system that was established. The Department of Homeland Security authorizing statute did set out important core principles, rights and responsibilities. These included protection of merit principles, assurance of equal employment opportunity, equal pay for work of equal value, whistleblower protection, prohibited personnel practices and collective bargaining rights.

But as Paul Volcker noted in speaking to this issue last week, the principles and protections spelled out in the Department of Homeland Security statute have not been sufficient to assuage the concerns of many who will be affected by these new systems. Clearly employees are still concerned about fairness, objectivity and due process protections in a pay for performance system.

In light of these concerns, the Commission and the National Academy of Public Administration jointly sponsored a public forum with the goal of informing and advancing the debate about performance based pay. From this discussion we were able

to identify some lessons that have proven important in the successful adoption of pay for performance in the private sector, at GAO and at the IRS.

Importantly, there was considerable agreement among the participants about the kinds of safeguards that were necessary for a pay for performance system to be effective. The safeguards that most felt should be assured at DHS and elsewhere are:

- A credible appraisal system
- A transparent system
- A timely system
- Consultation with those affected
- Peer review (external review by a neutral 3rd party was advocated by some)
- Ongoing communication, including feedback from all involved
- Training of managers and supervisors, who themselves are evaluated on how they manage performance. As former Secretary Donna Shalala noted in her testimony before this Committee last March, you have to have credible people in both political and career management positions for such a system to work.
- Training of employees to participate in the system.

To this list, Paul Volcker and his fellow Commissioners would certainly add the importance of careful and ongoing oversight by the responsible leadership in the executive branch and by the Congress.

Participants in the forum also identified several factors for which implementers must be prepared:

- Adequate time: Adoption of pay for performance will take time. GAO began to lay the groundwork for its system years ago. This may require a phased implementation, starting with those agencies or units that are ready to do a good job.

- Verifiable performance systems: Individual performance must be linked to organization goals and sound performance management systems, including agreement and buy-in among all those who are part of the system.

- Culture change: This is necessary throughout the organization.

- Adequate funding: There must be enough money to make meaningful rewards for commendable performance.

- Careful assessments: Pay for performance is complicated because it is difficult to make meaningful distinction in evaluating performance once one gets below the top performers in an organization.

In conclusion, I thank the Subcommittee again for its interest in the Commission's work. The Commission and the National Academy of Public Administration hope that the recommendations made by participants at their forum on performance based pay will be of value to this Subcommittee and those designing the new pay systems for the Department of Homeland Security. If there is any other way in which we can contribute to resolution of these issues, we are at your service.

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Mr. MURPHY. Thank you, Ms. Sistare.

Now proceed on and recognize Mr. Gage. Thank you for being with us today. You may proceed with your opening statement for 5 minutes.

Mr. GAGE. Thank you. You have my prepared comments and those reflecting the attitudes of our membership and employees in Homeland Security regarding this process. I am sorry if my remarks led many of you to believe that we were entirely pleased with the inclusion in the system in this process of developing these new personnel systems.

My experience last week in the 3-day debate, if you will, left me with some mixed feelings. Much of the rhetoric and theory behind, for instance, pay for performance, is something that, as a negotiator of union contracts and someone who has really worked most of their adult life in trying to develop good performance plans that people have confidence in and also that recognize the important missions of the management of these agencies, I was a little bit lost in the lack of details that are being put forward in these options. I have seen this before, some high-sounding academic type plans, and I think the round file is full of them. It is for agencies, I think, and practical operational managers, and those are the ones myself and I think Colleen tried to talk to last week when we were there, that there really is a threat that some of these theories really are a black hole of resources and maybe full-time employment for human resource specialists.

Let me give you some examples. And, first of all, when you look at the research, and I have heard a lot said this morning about the research, not one of these pay-for-performance plans shows any increase in employee productivity. Not one. I was really struck by that when I looked at the research that was done. Second, they all are admitting that there are problems with employee acceptance of these systems. And I will give you a good reason, and just one, and that is this idea that is littered through the pay-for-performance options, and that is forced distributions. Now, what that means is going into a pay-for-performance system someone has to pay for it. And the way these systems, the options are rigged is that there are a predetermined number or percentage of employees that is deemed up front that they will not get any money at all. That money will then be given to high performers, with a couple cuts in between.

The problem I have with that is that it doesn't reflect a modern, and especially law enforcement type of work force. To say that hard working people are no longer being measured against a performance standard, but they are subject to a predetermined cut of whether they will receive base pay, I think that putting in a system like that will have no credibility with employees, and it is a basic flaw of the pay-for-performance systems. The reams of material that are going to come down from some lucky consultant about all these performance standards and all these technical ways to judge performance are going to be a drain on resources, but they really are false because an employee is not really being compared to a performance standard and judged on what he does; he is being compared to a predetermined percentage of employees that, by defi-

nition, is being said that they will receive no money and that the performance is not acceptable.

That is a cannibalism that I think destroys the type of unity and cohesiveness that is needed, especially in law enforcement. Most of our law enforcement people, in the border patrol, in customs, and INS, really scratch their heads when they look at how this system will be implemented. For instance, some of our law enforcement border patrol, some see their supervisors once a week, some once every 6 months. Others, for instance, our adjudicators in the legacy INS, right now the state of supervisor, and for a lot of reasons, is not good. We have, for instance, 57 employees who are adjudicators, some of them trainees, and they are supervised by two temporary supervisors who are located in a building 30 miles away. There has been a real problem in getting supervisors because of a test that has been imposed by OPM, which really limits management's judgment in determining who can be a supervisor.

Now, we have some suggestions, and I hope this committee really interjects some practicality and some realism into what is going on. When I hear the theorists say that we have to go full speed ahead, we have to throw out the classification system, we have to throw out all performance management, we have to throw out the Federal pay system because the iron is hot, and don't worry, managers, you are going to get criticism, there is going to be disruption in the agencies, but take it all up front, now, that is irresponsible. That doesn't match the mission of this agency. That is HR theorists really imposing a system that they don't know that it will work, and I believe won't work.

Now, many of the operational managers, and I think this was a good thing at the meeting that we had last week, after they heard kind of a debunking of some of this theory and really ideology, began to say, well, we can't judge whether it will take away collective bargaining rights or union rights; we haven't even seen this system, no one has seen this system. There are some conceptual options that are up.

Now, I really think that before we decide on anything about this system, that we ought to get some real meat and potatoes, a little more chicken on the bone to take a look at this system that is being talked about in these conceptual means, because the harm this can do to an agency work force, especially one that is good, especially one that is a law enforcement type of work force, where that unity and that cohesiveness and that teamwork are essential to getting this mission done, to really drive a supervisory work force that is not equipped to do this and can't make these types of discussions I think is something that we ought to really take a look at, and I am hoping this committee will moderate.

One thing that really irritates me, though, is to say that even though we don't know what the system is going to look like, the one thing we know is there can't be collective bargaining and there can't be independent employee rights, appeal rights. Now, that is a notion that I hope we debunked last week. We have put up recommendations here, practical recommendations. For instance, using our career ladder. We also think that adding a grade at the top for super achievers and solid techniques or leads would really go to solving the problem of people topping out in grade.

Also at the bottom, Madam Chairwoman, on poor performers, we think we have some answers to that on poor performers. Nobody likes to see poor performers. I mean, our work force certainly doesn't like to see someone who is not pulling their fair share. But to determine that 20 percent of our people are going to be poor performers, that is wrong and theoretical, and can't be part of the system. I think that we can go into poor performers in a better way. We have agreed already with management, and I think that Colleen and I could sit down with the agency managers and work out some systems on collective bargaining and appeals in an hour; and that is to speed up collective bargaining, to speed up the time it takes for appeals. But this committee, and I think the American public, really should stop and slow down this headlong plunge into a new system that is based on some premise that there can be no collective bargaining and there can be no outside independent appeals.

Wiping out employee rights before a new system is known or designed, implemented or tested, is just wrong. It will certainly not enhance our national security, and it will end up harming it, as morale plummets in the face of this confusion and anger. The stakes are high at DHS. The pay-for-performance ideas that appear to have found favor with some individuals in OPM are among the most indefensible and dangerous. The agency needs to slow down and think before it unleashes a program that will be a competition among those who must cooperate and an enormous strain on resources that are desperately needed for the urgent task of national security.

I thank you for the opportunity to testify today, Madam Chairwoman, and I would be happy to answer any questions.

[The prepared statement of Mr. Gage follows:]

STATEMENT BY

JOHN GAGE

NATIONAL PRESIDENT
OF
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

BEFORE

THE HOUSE COMMITTEE ON GOVERNMENT REFORM

SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

REGARDING

UNION VIEWS OF THE OPTIONS FOR THE DEPARTMENT OF HOMELAND SECURITY'S NEW PERSONNEL SYSTEM

ON

OCTOBER 29, 2003

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My name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 600,000 federal employees represented by AFGE, including 50,000 in the agencies that comprise the Department of Homeland Security (DHS), and the many thousands who work for the Transportation Security Administration (TSA) of DHS and seek our representation but have had their aspirations thwarted by the administration, I thank you for the opportunity to testify here today on the options for personnel system design that will be considered for DHS.

During the past six months, AFGE staff has joined with staff from the Office of Personnel Management (OPM), DHS, and other unions to participate in a "Design Team," charged with carrying out the process of defining the universe of alternative personnel systems that might be adopted in the new agency. In the Congressional debate which preceded the enactment of the legislation that established DHS, the Administration's rationale for its insistence on broad authority to waive certain chapters of Title 5 was that it would need flexibility to harmonize the 22 divergent personnel systems that operated in the agencies that were to be merged into DHS and at the same time enhance our nation's domestic security. The Administration won the broad authorities that it demanded, which set in motion the process of investigating what might replace the pay, classification, due process, labor relations, performance management, adverse action, and collective bargaining systems that have previously been enjoyed by the employees who now find themselves part of DHS.

The group assembled by DHS to consider alternatives to existing Title 5 systems has worked in a conscientious, collegial, and diligent way to solicit the views of employees at all levels of DHS who will be affected by the imposition of any new personnel system component. The group was addressed by experts in personnel system design from academic institutions, federal agencies, non-profits, and private firms. They read widely, and shared freely with one another their knowledge, experience, and their own views and the views of those they represented. As their time drew to a close, they took pen to paper and submitted a large number of proposals for new systems governing pay, classification, and labor-management relations in DHS.

As a group they adopted a set of criteria (or "guiding/design principles") which all proposals would strive to meet, and which any author believed would comply with the law's instructions regarding DHS's new personnel system. To facilitate judgement of whether the options submitted succeeded in compliance with the law's instructions, all the pay system, due process and appellate procedures, classification system, and collective bargaining proposals submitted for consideration were placed into an evaluation template. The template addressed each option according to whether and to what degree it was: "mission centered," "performance focused," "contemporary and excellent," " (likely to) generate trust and respect," "based on merit system principles and fairness," and mindful of cost.

Importantly, it was understood that any proposals submitted for consideration were to be informed by the data collected by the design team in the course of their Town Hall-style and focus-group meetings with DHS employees, the overwhelming majority of whom expressed a strong desire to retain their existing rights regarding pay, classification, collective bargaining, appeals of adverse actions, and due process procedures.

The Design Team process for soliciting the views of experts, gathering published information, eliciting and collecting information on the concerns, aspirations, attitudes, and priorities of DHS employees who would be affected by any changes in the personnel system imposed upon them; and finally assembling and evaluating submitted options for consideration by the Senior Review Committee seemed to have gone well. However, the fact that proposals were put forward that would either eliminate or dilute a wide range of employee rights at DHS in spite of the unequivocal and unanimous views of employees, expressed in Design Team-sponsored town-hall meetings and focus groups, is troubling. What seems to be even more troubling is the insistence expressed at recent public hearings by representatives of the Office of Personnel Management (OPM) and DHS that employee rights be eliminated and/or diluted prior to the imposition of new systems.

AFGE did not oppose the establishment of the Department of Homeland Security, however, we did not support passage of the Homeland Security Act.

The legislation was held up for many months because of profound disagreements over the authorities that would be granted to the Secretary regarding personnel issues in general, and collective bargaining in particular. The focus of the debate was the President's contention that the existing labor relations system would interfere with management's ability to protect and promote the nation's security, particularly in the area of counter-terrorism activities.

In that context, AFGE has striven not only to focus attention on the issues that most concerned the president and the Congress, but also to promote changes that respond directly to the goal of ensuring that union participation and the collective bargaining process contribute positively to strengthening our ability to be successful in countering terrorism. To fashion a mechanism for DHS employees to participate, through their elected union representatives, in the decisions which affect their jobs and their compensation, and which forecloses the delays described in the Congressional debate, has been AFGE's highest priority.

Thus to propose elimination or dilution of employee rights before new systems involving pay, classification, appellate procedures, or collective bargaining presumes that these new systems fail at their most basic task – to institute a new DHS personnel system that simultaneously enhances the Department's ability to pursue its counter-terrorism mission, and manage its human resources. Unless

the sole purpose of the establishment of DHS was to destroy its employees' rights to union representation through collective bargaining, this effort is a dangerous case of putting the cart before the horse.

Alternatives Concerning Collective Bargaining

The Administration's central complaint was that collective bargaining negotiations took too long in general, and that negotiations over mid-term operational changes in particular caused unacceptable delays in implementing necessary changes. I am pleased to report to you that many of the options that have been presented by the Design Team have elements that successfully address these important concerns.

There are five proposals which appear in various options submitted for consideration by the Senior Review Panel that accommodate the concerns that gave rise to the Homeland Security Act's authorities in the area of collective bargaining, and which preserve collective bargaining. They are as follows:

1. After a fairly short, clearly defined period of bargaining, any matter over which the parties are at an impasse can be sent to the impasse resolution body.
2. Impasses would have to be resolved within a specific short time limit after having been referred to the impasse resolution body.

3. Information disputes related to bargaining would be decided by the impasse resolution body, rather than through a separate "unfair labor practice" (ULP) complaint procedure.
4. Disputes over the scope of bargaining would be decided by the impasse resolution body, rather than through a separate "negotiability appeals" procedure.
5. Management would be able to implement changes on its own schedule, as long as there is a credible opportunity for swift, effective, *post-implementation* bargaining.

These five provisions imply the necessity for a DHS-specific labor relations panel, which is provided for in all options submitted for consideration, except for the status-quo option. However, it is crucial that unless that board is independent of the agency and is subject to judicial review, the overall system will not meet the statutory standard of being a collective bargaining system.

AFGE has not endorsed specific language relative to these elements. In fact, there are significant differences between many of the elements on any particular subject. But because these elements address essential subjects, we have concentrated our efforts on finding particular formulations that best serve our members, and the purposes of the Homeland Security Act.

It is equally important to note the elements in various options which are directly inconsistent with the principle of employee participation, through collective bargaining, in decisions affecting them.

There are proposals to eliminate the right to bargain over management decisions once 15 days have passed after notice of the proposed change, regardless of whether management was available to bargain during that period. In the same vein, it has been proposed to eliminate the right of employees to bargain unless they happen to be in bargaining units that, in some sense, can be described by management as the "most appropriate unit." Two of the options (nos. 28 and 30) would make impossible the current collective bargaining relationships in the Federal Emergency Management Agency (FEMA) and the Coast Guard, regardless of whether those relationships are satisfactory to the affected management or unions. Other options deprive Secretary Ridge of the authority that every other agency head has to bargain over subjects listed in the current 7106(b)(1). He alone, among the cabinet secretaries, will not be trusted to do this.

One proposed option would eliminate post-implementation bargaining over certain categories of emergency-based actions. Within the same option and two others is a proposal to allow management to eliminate completely employee participation in decisions regarding personnel rules and policy by putting them into the form of agency regulations. Similarly, it has been proposed in one option

to eliminate all employee participation in matters affecting working conditions during the life of any contract, and to eliminate the right of management and the union to channel bargaining to the levels they deem most appropriate.

Finally and most egregiously, one option (no. 28) provides that employees adversely affected by management actions cannot bargain for appropriate arrangements unless a third party determines (a) that the adverse effect is "significant" and (b) that a substantial portion of the entire bargaining suffered the same adverse effect. The fundamental basis for collective bargaining is that it allows employees who have voted in free and democratic elections, to have union representation to respond to management actions. It is perhaps the major rationale for union membership, and is the major reason for bargaining in both the private sector and in the public sector, whether on the state, local, or federal level. Collective bargaining over arrangements for employees adversely affected by management operational decisions is the essence of employee representation through their unions.

The alternative of eliminating collective bargaining altogether was not put forth as an option for the Senior Review Committee to consider. Although that alternative is within the authorities provided to the president in the Homeland Security Act, the president is only permitted to eliminate employee participation rights after a finding that the new labor relations system has failed to allow DHS management

to carry out its counter-terrorism responsibilities. We foresee no possibility that would allow for the exercise of this authority.

Alternatives Regarding Appeal Rights, Adverse Actions, and Due Process Procedures

Several options were offered to the Senior Review Committee for consideration on the subject of possible changes to the rights and procedures that allow DHS employees to appeal management charges against them, especially those that lead to adverse actions such as suspensions and termination. It is important to note that maintaining employee appeal rights would have no impact on management's ability to impose discipline or any other adverse action. Indeed, an employee appeal does not stay or prevent an adverse action from being implemented. Thus eliminating or altering these rights would not enhance management's ability to impose an action with an immediate impact.

Some of the deviations from current practice that appear in options submitted for consideration appear to assume that appeal rights are in conflict with management's ability to act, and are therefore entirely insupportable. DHS employees remain unanimous in their opposition to the elimination of their appeal rights, whether this elimination is explicit or implicit. That is, they are just as opposed to new schemes that pretend to maintain appeal rights, but effect an implicit elimination by means of internal "kangaroo courts" or other mechanisms

wholly internal to the agency that allow the accuser to be judge and jury for the accused, as they are to outright elimination.

One proposed option would be to limit appeal rights to employees who are veterans' preference eligibles. The rationale for segmenting the DHS workforce in terms of access to justice in the context of allegations of wrongdoing escapes me. Giving appeal and other due process rights only to those who have qualified for veterans' preference would seem to conflict with the requirement in Section 9701 (b) (2) of the Homeland Security Act (HAS) that the new DHS personnel management system be "contemporary." Although veterans are rightly given preference in the context of government hiring as a way of honoring their service to the nation, the freedoms they served to protect should not be denied their fellow citizens. Further, since veterans make up only a portion of the DHS workforce, imposition of such a policy would eliminate any accountability for management actions relative to the remaining portion of the workforce. Accountability is desirable, and accountability for actions relative only to a fraction of the workforce is not the standard toward which we should aspire in DHS.

Proposals that include longer probationary periods for DHS employees would also segment the DHS workforce into portions that enjoy due process and appeal rights, and those who do not. Employees do not have due process or appeal rights during the period of probation. While representatives of DHS management

have argued that there are some occupations that require a period of more than one year to assess an individual's ability to perform, this is not a reason to deprive all employees of due process for that period. Extending probationary periods during which employees can be fired without explanation is especially dangerous in the context of public employment because it facilitates cronyism and politicized "spoils system" hiring and firing, without accountability.
Using the Homeland Security Act's own criteria, allowing management to extend probationary periods arbitrarily and unilaterally is neither "fair" nor "contemporary."

Disparate treatment for employees with regard to due process rights --whether on the basis of years of service, or on the basis of prior military service --as a basic pillar of the personnel system is the wrong direction for DHS or any employer. It is easy to imagine that under the guise of such superficial demarcations disparate treatment of individuals and groups who have long been the victims of discrimination might serve as a justification for discrimination at DHS. Women or minorities, the relatively young or relatively aged, the supporter or opponent of a particular political party might be victimized if management is permitted to make due process and/or appeal rights available to only certain segments of the workforce.

One of the most disturbing proposals to appear in the options submitted for consideration regarding DHS employees' due process and appeal rights would

be to lower the standard of evidence necessary to sustain management's charges against an employee. The current standard is "preponderance of the evidence" which is a standard that is fair considering the stakes for employees in such proceedings. Management has proposed changing this to either "substantial evidence" or "sufficient evidence," both of which are lesser standards than "preponderance of evidence." (Moving to a higher standard than "preponderance of evidence" known as "clear and convincing evidence" has also been proposed; the latter being akin to the standard of "beyond a reasonable doubt.")

In American jurisprudence, "preponderance of evidence" is the standard for civil procedures, which are often disputes involving money or property, and "evidence beyond a reasonable doubt" is the standard for criminal procedures wherein the stakes for the accused involve the loss of his or her liberty. The higher the stakes, the higher the standard of evidence and the law treats the prospect of a loss of liberty as constituting higher stakes than the loss of money or property. In that vein, "preponderance of evidence" is commonly understood to mean at least 51 percent certainty, and "evidence beyond a reasonable doubt" is understood to mean at least 75 percent certainty.

While "substantial" evidence has a meaning in the context of the evaluation of performance, we do not know what "sufficient" evidence is supposed to mean. Do they intend to impose a standard that would allow the imposition of adverse

actions when the adjudicator is presented with evidence that allows him or her to be 35 percent certain that the charges are valid? 25 percent? Is this a "close enough for government work" cynicism on the part of DHS management, the same people to whom we have entrusted our domestic security? The fact is that there is no rationale offered, or available, for lowering the standard of evidence except that it would become easier for management to act against employees whether or not the evidence justifies it.

In order to sustain a charge that will affect the livelihood of an employee and his or her dependents, and will affect the integrity of the apolitical civil service, there must be an adequate and serious standard of evidence, and it should be at least better than 50-50, which is another way of saying that the evidence has failed to persuade by anything more than a flip of a coin. Further, to be consistent with the American system of jurisprudence, there should be a greater burden on the accuser than the accused. Indeed, the "preponderance of the evidence" standard leads the adjudicator to decide in favor of the party whose claim is right, rather than the party who merely was able to state his case well enough to produce 50 percent or less certainty.

Current law allows some federal agencies to suspend employees, summarily and without pay, if the head of the agency judges the action to be necessary to protect national security. Employees who are suspended in this way may later be terminated on the basis of the allegation, without the procedural and appellate

protections other employees at the same agency receive. This type of approach is similar to providing rights only to certain categories of employees; what is different is that the due process rights are withheld on the basis of the type of allegation made against the employee, rather than on the basis of the type of employee against whom an allegation is made.

There is considerable doubt about whether such a process is constitutional. Characterizing an alleged action as a threat to national security allows management to do unimaginable harm to an employee's life and career, without allowing the accused to defend him or herself or refute the charges. If an employee's conduct does or might do harm to national security, DHS should not compound the harm and allow fear to justify the forfeit of our democracy's procedural standards for the removal of an employee from his or her position.

In the course of its work, the Design Team had the privilege of being addressed by the Honorable John Charles Thomas, former justice of the Virginia Supreme Court. He emphasized that the American system of justice does not tolerate having the prosecutor, judge, and jury rolled up into one. Judge Thomas also pointed out the important principle, discussed above, that the more serious the alleged offense, the more strenuous the effort must be to ensure that the accused has a chance to prove his or her innocence. This principle is reflected in Chapter 75 of Title 5, which provides lesser procedural requirements for taking minor discipline against a federal employee than for severe adverse actions. We

therefore consider it especially egregious to suggest denying all appeal rights to those accused of the most serious charges.

Termination should be a possible consequence for an employee who is found to have harmed national security, or committed an offense that threatened national security. It is, however, our position that in cases where such a serious allegation is made that the burden of proof be upon the accuser, and that the accused be given an opportunity to make his or her case before an impartial adjudicator.

An additional proposal that has been included in the proposed options for DHS to adopt in the areas of adverse actions, appeal rights, and due process rights would be to eliminate outside administrative review altogether. AFGE strongly opposes this approach. Regardless of how independent one may insist an internal appellate mechanism is, the fact would remain that decisions would be made by employees who report to the Secretary of DHS. This is "independence" in name only, and everyone on all sides at DHS will know it. Internal administrative review has no credibility at all with employees. Again, as Justice Thomas warned the Design team, internal review is another example of trying to combine prosecutor, judge, and jury into one – an approach which is not only unconstitutional, but which makes a mockery of the constitutional approach to justice.

It is important to note that the Design Team investigated the approaches taken by eleven states with regard to the question of internal versus external administrative review. All eleven provided outside review of adverse actions taken against public employees. They did so not only to be consonant with Constitutional procedures, but also to provide accountability to taxpayers who support an apolitical civil service in their states. In addition, the Federal Managers Association, the Senior Executives Association, as well as the focus group participants interviewed as part of the Design Team process were unanimous in their support and insistence that there continue to be external review of adverse actions taken by DHS management.

Another proposal that federal employees consider both extreme and entirely reprehensible that has been submitted for possible adoption by DHS would eliminate judicial review. Whatever decision were reached by the internal reviewer or outside administrative adjudicator would be final. Even the most arbitrary decision could not be reviewed by a federal court. This is clearly unconstitutional. The very essence of due process and the accountability it is designed to effect requires independent judicial review of government actions.

Along these same lines is the proposal to eliminate for DHS employees the right to hearings. To deny employees the opportunity to confront and cross-examine their accusers is a violation of due process rights. If this change were imposed in DHS, it would violate several sections of the Homeland Security Act, including

section 9701 (f) (1) (B) (I) which requires the Secretary and the Director to ensure that employees of the Department are afforded due process; section 9701 (f) (2) (B) (I) which requires that appeals procedures be consistent with due process; and section 9701 (f) (2) (C) which provides that appellate procedures in the current chapter 75 may only be modified "insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." No one could consider this change "fair" although the elimination of due process is undeniably efficient and expeditious.

AFGE is not opposed to all proposed changes in procedures involving adverse actions and appeals. The difficulty in defining exactly what those changes might be arises because no one knows what type of pay and classification system DHS will adopt. Thus, while we can say that any action taken against an employee must be for cause, the cause must be related to DHS mission. Cause in this context may include conduct or unacceptable performance, but performance-based actions must be based on a determination of unacceptable performance as measured against pre-established, objective performance standards. To consider eliminating the right or ability of DHS employees to hold management accountable to such a standard prior not only the decision of whether to change the pay, performance-evaluation, and classification, or how specifically it will be changed is irresponsible.

Pay System Alternatives for DHS

At every town hall meeting and in every focus group gatherings conducted by the Design Team, DHS employees were unanimous in their vehement rejection of supervisor-controlled "pay for performance." No matter how the question was framed and, no matter which version of "pay for performance" was concerned, the message was the same. Federal employees, at DHS and elsewhere, are not in favor of replacing their current Congressionally-passed annual pay adjustment for a pay adjustment decided by their supervisor, nominally or actually based upon their individual performance.

DHS employees recognize the hype surrounding the promotion of pay for performance for what it is. They view the promise of higher pay in return for improved performance with disdain because they understand that it is a trap designed to exploit perceived resentment against so-called "poor performers" on the part of so-called "high performers." The employees at DHS, whether they are employed in law enforcement at the border in an office processing requests for disaster assistance or anywhere in between, know that they must cooperate with their coworkers to be successful, not compete against them. They know that the mission of DHS is too important to cast aside in the pursuit of individual gain. And make no mistake: individual pay for performance makes looking out for oneself the highest priority, above teamwork, above mission, above the spirit of public service.

Just as important, managers and bargaining unit members alike emphasized that no systems exist that would allow individual pay for performance to be administered in a way that would be fair and based upon objective, measurable performance factors. They know that the General Schedule structure has been hugely successful in preventing pay discrimination based upon race, gender, or politics. They know that implementing a new pay system would not only breed confusion, resentment, antipathy, and fear; it would also divert scarce resources away from the vital job of protecting Americans from terror and other threats to their security.

AFGE has testified before this committee previously regarding the shortcomings of pay for performance, and cited the work of academic experts and the experience of both public and private sector employers who have abandoned their experiments with this fad.

This is not an endorsement of the status quo. AFGE has proposed improvements in the General Schedule and the current classification system. There is no reason why steps and grades cannot be added to the existing GS matrix, or why workers cannot be moved more rapidly through career ladders on the basis of performance in the GS. There is no reason why journeyman status

should mean the end of pay progression, or why the only alternative for high performing journeymen is a move into management.

Among the options regarding pay that were put before the Senior Review Committee were several categorized as either "time-focused" or "performance-focused." AFGE considers the distinction between "time-focused" and "performance-focused" options to be a false dichotomy. In three of the so-called time-focused options, performance would have a significant impact on an employee's pay. In the current debate over federal pay, taunting the GS with the charge that adjustments are more a function of passage of time than any other factor has taken the place of rational argument. Regardless of the politicized nature of the nomenclature coming out of the Design Team, the fact is that the current GS system, which is among the options, is performance-focused system since employees are only supposed to receive "within-grade increases" (WIGI) if they are performing up to certain, objective standards, and managers are supposed to reward superior employees with "quality step increases" (QSI). That the GS is not called performance-focused is evidence of both ideological bias and the fact that its performance related components have not bee utilized by managers because they have not been funded. Renaming the system or merely making performance-related components even more dependent on dedicated appropriations will only make this problem worse.

In the absence of adequate funding, pay for performance degenerates. Indeed, in the Design Team deliberations, inadequate funding became a virtual assumption as various ways to implement a poorly funded or entirely unfunded system were contemplated. The ideas for implementing zero-sum, one worker's gain is another's loss, pay-for-performance were as follows:

- Require *forced distributions* – no more than a certain percentage of the workforce is eligible for high ratings and larger payouts. This approach skews ratings to fit the budget instead of measuring actual performance and providing an incentive to the entire workforce to excel. It also forces managers to make meaningless distinctions among employees whose performance is similar.
- Expand the number of high ratings given, but simultaneously lower the value of each. Although this is fairer, they benefits become too small to justify the efforts and problems associated with pay-for-performance. Further, if it is successful it will approach the pay distribution that characterizes the current GS. This outcome is both ironic and wasteful because administering pay for performance is far costlier and burdensome for agencies than the GS.
- Give below acceptable, or even acceptable employees no increase in order to pay others larger increases – this takes money out of the pockets of good employees to pay a few so-called stars – guaranteed to demoralize the majority of the workforce.

- Rotate who gets the outstanding rating and larger payout from year to year. This cynical approach tries to make the best of a bad system that forces meaningless distinctions among workers.
- Give one outstanding employee a larger amount because that employee is lower in the pay range or did not get a promotion recently, or is being pursued by another employer, or for some other reason *not* directly related to their performance. This is not pay for performance and employees should not be misled that they are under a system that rewards them for their performance if decisions actually will be made that have more to do with who is considered to be more important, or whose job is more difficult to fill or who is able to threaten a project by leaving.

One method premised on an assumption of inadequate funding is far less objectionable than the rest and has been called the "plug and play" pay for performance option. It is found in option number nine, and it is one that could be used in connection with any pay for performance option.

- Provide a pay adjustment to employees rated "fully successful" or better first. If and only if there is additional funding, additional pay adjustments should be granted to those rated "outstanding" and "excellent." Further, the agency should only be allowed to differentiate among employees by performance and pay them different amounts if it has the money to do so.

Pay adjustments should not be granted under the banner of "pay for performance" if they are actually responses to recruitment or retention challenges.

This option says that if pay-for-performance is not specifically funded, an agency should not be permitted to distribute pay adjustments at will and call it pay-for-performance. This option acknowledges that the Congress authorized putting increased emphasis on performance in the distribution of federal pay adjustments but it did not authorize the distribution of federal pay adjustments merely as management sees fit.

Pay-for-Performance is not appropriate for all occupations, organizations or work cultures. If DHS must have some pay-for-performance, it should not make the mistake of trying to force it onto its entire workforce. A better idea would be to establish a basic pay structure DHS-wide, but allow for the methodology of pay progression to be negotiated on behalf of the various components and occupations. Negotiating over performance-based pay progression, at least where local or component management has discretion to determine the pay progression method is probably the only way to ensure that the plan is accepted and trusted by affected employees. Pay progression could be based on steps, on performance, on competencies, on gainsharing or a combination of one or more of these – whatever makes sense for the job and the work environment and is acceptable and affordable for management

Ability to Budget Less for Payroll Than the GS System

Sadly, some options allow DHS or its components to budget less than the amount that would be necessary to fund continuation of the GS system. Over time, this would lead to the overall erosion of federal pay as agencies try to make up budget shortfalls or mismanagement by cutting the pay of some or all of their employees. This could occur by having the agency freezing pay ranges rather than adjusting them by the amount of the rest of the federal system, or by refusing pay increases for employees who are rated "fully satisfactory" and below. AFGE will continue to advocate that DHS and its component agencies budget for the GS system if there is no explicit pay for performance beyond WIGI and QSI, and for additional appropriations to fund any explicit pay for performance program so that all employees who meet expectations receive an annual pay adjustment.

Performance Review Boards

Performance Review Boards (PRB) are featured in several options (nos. 5, 6, 7, 8, 11, 13, 23, and 24). In these options, PRBs are contemplated to consist of either managers only or a combination which may include frontline employees or union representatives. They may serve one or more purposes:

1. They oversee the performance evaluation system to ensure that ratings are fair. Several members of the Design Team seem to believe that such a board can greatly reduce or even eliminate the problem of favoritism, subjective appraisals, and different rating styles among different managers. The PRB would be able to adjust the ratings.

2. The PRB (or a Pay Pool Panel) could regulate performance-based payouts, making sure that one component does not get the lion's share of a pay pool. It might also make determinations about individual payouts that require parsing, how to distinguish between two outstanding employees on the basis of difficulty of assignments, timing of most recent promotion, or position in a band.

3. The PRB could also hear employee complaints about their ratings or payouts, in some cases before the ratings are actually issued. Some of the options offer no other appeals mechanism, either because there is a union representative on the PRB or because the board adjusted the ratings before they were issued and made them so perfect no appeals process is necessary.

4. Competencies and skills must be validated, including involvement of the employees themselves, in order to ensure that the right skills are being measured and measured correctly.

Internal boards such as these should never be permitted to take the place of the right to appeal to an external, impartial third party. While we have argued extensively above on this issue with regard to adverse actions, it is equally true regarding disputes over performance ratings that may have profound implications for an employee's pay. While a PRB may provide some oversight to a pay for performance system, there must be an opportunity for employees to hold to account any body that comes between the employee and supervisor, and the recommendations it may make. A supervisor could have been communicating all year long with an employee, assuring the employee that his or her work was excellent and that there would be a financial reward at the end of the year. In these options, the PRB could overrule the supervisor for reasons that were never communicated to the employee, thereby denying the employee the opportunity to adjust performance during the rating period in order to win a payout.

Competency-Focused Systems

As an alternative to subjective pay for performance systems that open the door to discrimination and political cronyism, competency or skills-based systems have some appeal for AFGE members. There is an acknowledgement that skills certification can be a far more objective way for an employee to advance or receive supplemental pay than by performance appraisal. Employees, especially those in law enforcement, are accustomed to the idea of skills requirements and

testing, and gaining certification of competency is areas such as marksmanship, foreign languages, and other necessary abilities. In fact, a true skills-based system is quite compatible with the kind of career development/career ladder system that AFGE favors.

In order for a career development/career ladder system based on competency to succeed, several conditions must hold:

1. Competency or skills-based systems require organizations committed to training and career development; they fail in organizations that cut training budgets and leave career development to chance.
2. Competency-based programs can suffer from the same problems that affect pay-for-performance. Unless there is collective bargaining to effect accountability, managers can manipulate training authorizations and job assignments to ensure that their cronies or favorites are able to jump ahead of others in gaining the skills that lead to higher pay.
3. "Skills" or "competencies" must have objective, concrete meaning. Trying to measure personal traits, behaviors or values is problematic and subjective, and that is what failed competency-focused systems attempt to do.

Conclusion

AFGE greatly appreciates the fact that the Subcommittee decided to hold this hearing. The authorities held by the president and the Secretary of DHS are extremely broad, and it will be important to the employees of the agencies and to taxpayers that the Congress maintain an ongoing oversight role with respect to the exercise of those authorities.

The stated rationale for extending such broad authority to the Executive branch regarding the labor relations and pay systems in DHS was the contention that the existing system might somehow interfere with domestic security and that extraordinary performers were not receiving adequate financial rewards. We

believe that both of those concerns can be accommodated by improvements in the labor relations and pay systems that entail neither the elimination of due process rights, nor a reduction in pay for DHS employees who perform well and do everything that is asked of them.

There is tremendous anxiety among the employees of DHS: They are concerned about political cronyism in pay, hiring, and adverse actions if some of the options that were presented to the Senior Review Committee are adopted. They are

concerned about whether their elected union representatives will retain its ability to represent them. They are concerned that they will be asked to continue to put their lives on the line every day for an agency that refuses to reciprocate their loyalty by paying them fairly and allowing them to exercise their democratic rights.

This concludes my statement, and I will be happy to answer any questions the members of the Subcommittee may have.

Mrs. DAVIS OF VIRGINIA [resuming Chair]. Thank you, Mr. Gage.

Ms. Kelley, it is always good to have you back here testifying. You are recognized for 5 minutes.

Ms. KELLEY. Thank you, Madam Chairwoman.

Ranking Member Davis, distinguished members of the subcommittee, thank you very much for the opportunity to testify on the human resources management options that are being considered for the Department of Homeland Security.

I have the honor of representing over 12,000 Federal employees who are now in the new Department, and I am proud to have served as the representative for NTEU last week on the Senior Review Committee. This committee was the most recent part of a process that, to date, has been OK. But the real test for this process, as Mr. Van Hollen mentioned earlier, is what final decisions are actually made by Secretary Ridge and Director James, and if they are reflective of this process.

NTEU believes that in order for any new human resources management system to be accepted by employees as fair and ultimately to be successful, it is essential that it incorporate a number of basic Federal employee protections.

Concerning labor relations, NTEU strongly believes that any labor relations systems must preserve the right to organize and to bargain collectively. The scope of bargaining and the bargaining process must allow meaningful negotiations over working conditions, and not simply consultation. It is also essential that any new labor relations system balance the agency's legitimate need to address national security matters against the Homeland Security Act's statutory guarantee of collective bargaining rights.

In the area of adverse actions and appeals for Federal employees in the DHS, it is essential that any new DHS human resource management system includes an adverse action and appeal process that treats employees fairly and ensures that their due process rights are protected. Employees must be given reasonable notice and an opportunity to make a meaningful reply before disciplinary action is taken against them. Employees must be able to appeal agency actions to an independent adjudicator whose decisions are subject to judicial review and agencies should bear the burden or proving just cause for actions taken against employees. In a workplace without these bedrock protections, employee morale will suffer, which in turn will adversely affect performance.

NTEU also strongly believes that in designing pay, classification, and performance management systems for DHS certain core principles must be honored and applied.

First, any changes must be justified by mission needs and designed to minimize the burden on managers, on supervisors, and employees to administer and implement the systems so that all can remain focused on the mission to protect homeland security.

NTEU does not believe that radical changes are needed in the pay, performance, and classification systems. More importantly, employees in Homeland Security consistently stated this in the town hall meetings and focus groups. The basic structure of these systems is sound, and they must be fair, credible, and transparent to employees, but also to provide opportunities to recognize and to reward superior performance.

This is not to suggest that NTEU opposes any changes in the status quo. We believe some modifications could be made that would improve the HR systems for the benefit of DHS and its employees, as well as for the accomplishment of its mission. Options that provide fairness by ensuring that employees who meet all performance expectations identified by management must receive annual pay increases that at least include the amount of the General Schedule increase plus some reasonable amount to recognize an individual's successful performance or a step in the right direction.

NTEU also does not support diverting all or part of the GS increase to fund a pay-for-performance fund, or trying to implement a pay-for-performance system on a cost-neutral basis. Many of the options prepared by the DHS design team would make fundamental changes to the basic pay system for DHS employees by eliminating the GS grade structure. NTEU does not support these options, as we believe they are unduly disruptive to employees, to the agency, and its mission, and are not justified by business or mission needs.

The Homeland Security Act requires the Secretary and the Director to review pay and benefit plans that are applicable to DHS employees, and to recommend a plan to eliminate disparities in pay and benefits, especially among law enforcement personnel.

Among the issues that must be considered is the need to provide 20-year law enforcement retirement to CBP officers. Recently, DHS announced its "One Face at the Border" initiative and the creation of a CBP officer position which combines the duties of three positions, customs inspectors, immigration inspectors, and agriculture inspectors, into one job. We have concerns about this initiatives impact on maintaining the expertise of legacy customs, INS, and APHIS inspectional personnel. We have written to Secretary Ridge and expressed NTEU's belief that inspectors and canine enforcement officers of the CBP should receive the same law enforcement retirement benefits as those received by other Federal law enforcement personnel.

In conclusion, NTEU supports the mission and the personnel of the Department of Homeland Security. NTEU wants the same thing that I believe everyone wants who has had anything to do with the creation of this Department: we want a workplace environment where employees can be successful and do the quality work they want to do, and can be recognized and rewarded for doing that work, and can be treated with dignity and respect.

It would be a mistake to underestimate the impact that a new human resources system at DHS could have on all employees. A human resource system that is fair, credible, and transparent not only can coexist with the mission of homeland security, but it must coexist if employees and the Department are to be successful.

Thank you.

[The prepared statement of Ms. Kelley follows:]

National Treasury Employees Union

TESTIMONY OF NTEU NATIONAL PRESIDENT
COLLEEN M. KELLEY

ON

HUMAN CAPITAL MANAGEMENT AT THE
DEPARTMENT OF HOMELAND SECURITY

BEFORE THE

HOUSE GOVERNMENT REFORM COMMITTEE
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY
REORGANIZATION

WEDNESDAY, OCTOBER 29, 2003, 10 A.M.
2154 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C.

Chairwoman Davis, Ranking Member Davis, distinguished members of the Subcommittee; I would like to thank the subcommittee for the opportunity to testify on the human resources management options being considered for the Department of Homeland Security (DHS).

As President of the National Treasury Employees Union (NTEU), I have the honor of representing over 12,000 federal employees who are part of the Department of Homeland Security (DHS). I am also proud to be serving as the representative of NTEU on the DHS Senior Review Committee (SRC) that has been tasked with presenting to DHS Secretary Tom Ridge and OPM Director Kay Coles James, options for a new human resources (HR) system for all DHS employees.

The formal process for developing the new DHS human resource system options was included as part of the Homeland Security Act of 2002. The legislation allows the DHS Secretary and the OPM Director to make changes in six sections of Title 5 that have governed the employment rights of federal employees for decades. The six chapters of Title 5 include the areas of basic pay, performance management, position classification, adverse actions, appeals, and labor-management relations.

To assist in the creation of a new HR system, the Secretary and the OPM Director assembled a design team composed of DHS managers and employees, HR experts from DHS and OPM, and representatives from the agency's three largest unions, NTEU, American Federation of Government Employees (AFGE) and National

Association of Agriculture Employees (NAAE) in April 2003. The Design Team drafted 52 options in the six areas in which DHS and OPM have flexibility to deviate from the current provisions of Title 5 for the new DHS personnel system. The options include maintaining the status quo, making modest changes to current systems, and making significant revisions to the six areas of Title 5. As previously mentioned, these areas include: basic pay, position classification, performance management, adverse actions, appeals and labor relations.

As you know, these options have been presented to the DHS Senior Review Committee (SRC), of which I am a member, along with the National Presidents of AFGE and NAAE, Commissioner Bonner, and other high-ranking DHS and OPM officials. The Senior Review Committee held an extensive three-day hearing from October 20-22 to discuss and hear public testimony concerning the 52 options presented by the design team. The SRC members will soon forward a formal package of options to the Director of OPM and the DHS Secretary for their consideration.

I believe the collaborative agency/employee process that was mandated by the Homeland Security Act, that created both the DHS Design team and the DHS Senior Review Committee have worked well so far and I would like to strongly suggest that a similar process would continue to be extremely beneficial as the agency looks at the challenges of reorganizing other critical areas in the department. However, while it is not yet clear what the final HR system will look like for DHS personnel, the new HR system may be substantially different from the personnel systems the 22 agencies brought with

them when they were consolidated into DHS last year. NTEU believes that in order for any new human resources management system to be accepted by employees as fair and ultimately to be successful, it is essential that Secretary Ridge and Director James incorporate a number of basic federal employee protections, especially in the areas of labor relations, adverse actions, appeals, performance management, and retirement.

Labor Relations:

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

NTEU strongly believes that any labor relations system preserving the right to organize and bargain collectively must include several fundamental components that are central features of Chapter 71 of Title 5. The scope of bargaining and the bargaining process must allow meaningful negotiations over working conditions, and not simply consultation. After all, Chapter 71 of the Civil Service Reform Act has governed collective bargaining in the federal sector for more than 25 years. In contrast to consultation, which contemplates only the expression of viewpoints, collective bargaining in the federal sector includes a duty to bargain in good faith and results in either a voluntary agreement or a decision arrived at through an impasse resolution procedure.

Any labor relations system must also have a process to ensure that disputes can be submitted to an independent adjudicator whose decision, to the extent it involves questions of law, is subject to judicial review. Currently, labor relations disputes can be addressed in the negotiated grievance and arbitration procedure or by seeking relief from the Federal Labor Relations Authority (FLRA) or the Federal Service Impasses Panel (FSIP), as appropriate. Any system that does not preserve access to some type of independent forum to resolve labor relations disputes would be at odds with the Act's express preservation of DHS employees' collective bargaining rights.

Equally important to the preservation of those rights is the maintenance of the current requirement that collective bargaining agreements contain broad scope negotiated grievance procedures culminating in binding arbitration. The grievance and arbitration process provides the basic route for employees to have their workplace issues addressed. Without such a system, employees would be forced to seek relief in other ways, resulting in an increase in court litigation and EEOC filings. The current mandatory grievance and arbitration process provides an efficient and expeditious way to resolve disputes. It must be retained. Many of the options recognize that, due to DHS' unique and important mission, a new labor relations system should take into account matters involving national security. It is essential, however, that the agency's legitimate need to address national security matters be balanced against the Act's statutory guarantee of collective bargaining rights.

The Act safeguards the right of DHS employees to participate in labor organizations of their own choosing in decisions that affect them. This will not be possible without viable unions. NTEU believes that any new system must preserve the ability of labor organizations to function by retaining Chapter 71's current provisions regarding official time and bargaining unit determinations.

NTEU also notes that the current labor relations system can be made even more effective under the Act's flexibilities. Pre-decisional employee input into mission-related decisions is not required, or even encouraged by Chapter 71. The formation of mission-related DHS collaborative committees can only enhance the department's overall effectiveness and the effectiveness of its individual components. DHS front-line employees perform work that is vitally important to our country. They should have the chance to present their views, through their unions, about mission-related decisions that they will be required to carry out.

The current bargaining process can also be made more efficient. Combining the current parallel tracks for negotiability disputes, bad faith bargaining allegations, and impasse resolution procedures into a single process would allow all bargaining-related disputes to be addressed together. Parties to a dispute could also be given the right to mutually agree to select a private arbitrator to resolve a bargaining impasse. Currently, parties are not free to select an arbitrator without having first obtained permission from the FSIP. NTEU believes that these changes would simplify and expedite the current bargaining process.

Adverse Actions and Appeals:

In the area of adverse actions and appeals for federal employees in the DHS, it is essential that any new DHS human resource management system includes an adverse action and appeal process that treats employees fairly and ensures that their due process rights are protected. Chapters 43, 75, and 77 of the Civil Service Reform Act currently provide these vital safeguards to DHS employees.

Congress affirmed the importance of these principles in the Homeland Security Act. The Act records the sense of Congress that "employees of the Department are entitled to fair treatment in any appeals that they bring in decisions relating to their employment" and that any new system "should ensure that employees of the Department are afforded the protections of due process. NTEU strongly believes that, in order to meet these statutory requirements, any new human resource management system must contain certain basic elements. Employees must be given reasonable notice and an opportunity to make a meaningful reply before disciplinary action is taken against them. Employees must be able to appeal agency actions to an independent adjudicator whose decisions are subject to judicial review and agencies should bear the burden of proving just cause for actions taken against employees. These fundamental rights must be available, at a minimum, to all DHS employees and for all actions that are currently subject to the adverse action and appeals provisions of Title 5.

Any system without these fundamental elements will not satisfy the requirements of the Act and will not be credible to employees. Employees of DHS need to feel confident that issues related to their employment can be addressed fairly and objectively. Otherwise, they will not be sure that merit principles will be protected and that they, like all other federal employees, can be free to do their jobs without fear of arbitrary or unjust agency actions. In a workplace without these bedrock protections, employee morale will suffer, which in turn will adversely affect efficiency. This could create a situation where current DHS employees seek employment elsewhere and DHS would be at a competitive disadvantage in recruiting qualified new hires.

Pay, Performance and Classification

NTEU also strongly believes that in designing pay, classification and performance management systems for DHS, certain core principles must be honored and applied to the evaluation of options developed by the DHS HR Design Team.

First, any changes to the pay, performance and classification systems must be justified by mission needs, and designed to minimize burdens on managers, supervisors and employees to implement and administer the systems, so that all can remain focused on the mission to protect homeland security.

During the research and design process, DHS conducted a number of town hall and focus group meetings to obtain input from employees on their views of any problems with the current HR management systems and changes they would like to see made.

Most employees at the town hall meetings and focus groups reported that they were generally satisfied with the current GS system; most problems cited related to the application and administration of the system, rather than to the design of the GS system itself. The problems most frequently cited included inadequate funding for awards and Quality Step Increases to recognize superior performance, perceptions of unfairness in distributing awards, or in distributing work assignments that might lead to awards, and inadequate resources (including both a lack of time and a lack of adequate training) for supervisors to effectively manage and evaluate employee performance. Employees cited a few problems with the classification of some jobs under the General Schedule grading system, but most of these could be addressed through increased agency control over these grade level determinations, and/or a better appeal process for challenging classification determinations.

Like the DHS employees we represent, NTEU does not believe that radical changes are needed in the pay, performance and classification systems. The basic structure of these systems is sound, and they include numerous features to ensure both fairness to employees and opportunities to recognize and reward superior performance. Most of the perceived shortcomings of the current systems could be addressed through better funding and administration of Quality Step Increases and awards programs to reward top performers. Performance Management systems could be improved by providing more time and better training for supervisors to perform, monitor and provide feedback on employee performance, as well as improving the selection process for

supervisory positions so that selections are based on more managerial skills than technical expertise.

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, this is not to suggest that NTEU opposes any changes to the status quo, as we believe some modifications could be made that would improve the HR systems for the benefit of DHS and its employees and accomplishment of its mission. But, again, these changes must ensure fairness, and be tailored to address legitimate problems and avoid unnecessary loss of mission focus.

In establishing the basic pay system for DHS employees, NTEU believes that pay for all positions must be fair, meeting standards of internal and external equity. Internal equity ensures that all employees are compensated fairly in comparison to other employees within DHS. External equity ensures that pay for DHS employees is competitive with rates in the broader labor market, which will aid recruitment and retention of the highest-caliber employees.

NTEU supports several of the options submitted by the DHS HR Design Team that provide fairness, internal and external equity and allow greater opportunity to reward superior performance. These options provide fairness by ensuring that employees who meet all performance expectations identified by DHS management must receive annual

pay increases that at least include the amount of the general schedule (GS) increase plus some reasonable amount to recognize an individual's successful performance. NTEU does not support pay options that do not include this protection. NTEU also does not support diverting all or part of the general schedule increase to fund a pay-for-performance pool, or trying to implement any pay-for-performance system on a cost-neutral basis, as these would necessarily result in funding larger pay increases for top performers by giving smaller increases to others, even if these individuals are meeting all performance expectations established by the agency. We do not want a "rob Peter to pay Paul" system. This criticism extends to options using pay pool and share systems that do not include a mechanism to set a minimum rate or floor for pay increases for fully successful performers as a protection against inadequate funding of the pay pool.

Many of the options prepared by the DHS Design Team would make fundamental changes to the basic pay system for DHS employees by eliminating the General Schedule grade structure. NTEU does not support these options, as we believe that they are unduly disruptive to employees, the agency and its mission, and are not justified by business or mission needs. Furthermore, these options generally do not identify the specific pay rates applicable for each of the various types of employees, but leave them for further development by the agency. NTEU feels very strongly that, should DHS seek to implement a pay system that departs from the basic structure of the General Schedule, employees and employee representatives must be involved in the design of the pay and any associated performance management systems, through either collective bargaining or a more collaborative, less adversarial, joint labor-management effort. NTEU therefore

opposes those options that provide DHS managers with unfettered discretion to determine the number of pay grades or bands, the pay levels associated with these grades/bands, the jobs or job families assigned to grades/bands, local pay rates or adjustments (locality pay) or the amount of any annual general increase to employees and/or increase to the pay structure.

But before there can be any increased linkage between pay and performance, the underlying performance management system established by DHS must be credible, perceived as fair and supported by employees. Performance standards, including those based on employee skills or "competencies," must be clearly established, identified and explained to employees in advance, and they must be tested and validated before they are linked to pay. Supervisors must be given adequate training on how to evaluate performance and provide effective and timely feedback to employees. Any pay-for-performance system is doomed to failure if supervisors are unwilling or unable to effectively and fairly differentiate employee performance.

In order to ensure fairness and accountability for pay, performance and classification determinations by agency management, pay determinations and distinctions in pay for individual employees based on performance must be subject to grievance or appeal to an independent third party. It is extremely important that employees have the right to have these determinations reviewed through a process that is not entirely under the control of the agency, to protect against arbitrary and capricious decisions and to avoid perceptions of unfairness. In addition, although some element of subjectivity and

judgment is involved in evaluating employee performance, management discretion through any Pay Panels or Performance Review Boards should be constrained to ensure fair and equitable treatment of employees receiving similar performance evaluations.

It is imperative that the Congress provides adequate funding to pay for any pay-for-performance program, with built-in protections so that performance-based increases for top performers do not come at the expense of good performers. If Congress does not provide for increased funding to support performance-based pay, or for the training necessary to implement and administer such a system, it will fail, and the mission will suffer.

As you know, the General Accounting Office (GAO) recently released its study of the Federal Aviation Administration's (FAA) 7 year overhaul of its pay and personnel systems. The FAA replaced its pay system, which had been based on the General Schedule grade and step system, with what it calls a market-based pay for performance system. When the GAO interviewed FAA employees concerning the new system, nearly two-thirds of the employees interviewed "disagreed, or strongly disagreed that the new pay system is fair to all employees." This sense of unfairness, and employees' view that they will not be treated equitably by their managers, has led a greater number of them to seek union representation – the percentage of the FAA workforce who are members of unions jumped from 63% to almost 80% following the implementation of the new pay system.

Concerns about federal supervisors and managers having more control in the pay setting process are by no means unique to the FAA. The group, FPMI Communications, undertook a poll of federal workers last October on the subject of pay for performance. Fully two-thirds of the respondents in that poll believed that giving managers more authority on pay would lead to too much favoritism.

A demonstration on pay banding at the Bureau of Alcohol, Tobacco and Firearms (BATF) is another good case in point. The BATF program began in early 2000, with the first round of salary reviews scheduled for October of that year. Performance standards and critical job elements needed to be in place prior to implementation of the first salary reviews, however, insufficient thought was given to their development and haphazard standards resulted. As is far too frequently the case, managers received little or no training on how to write pay for performance evaluations for this new system. Although NTEU was given the opportunity to review and comment on the proposed standards, our suggestions largely went unused.

Under the BATF program, once performance appraisals were written by managers, they were forwarded to Performance Review Boards (PRBs) that further reviewed the evaluation and issued a final rating of employees. That rating was subsequently entered into a pay matrix that would determine whether or not the employee would be entitled to a performance based raise.

The PRB was given the authority to downgrade evaluations when compared to other employees in the same pay band and job series. And, in fact, evaluations were downgraded. Employees working for poorly trained managers who were, therefore, unable to write a clear, well-documented appraisal suffered under this system. No matter how stellar their performance, if the individual's supervisor was unable to document that performance in a well-written appraisal, the employee would not be eligible for a performance increase. In addition, the authority the PRB was given to downgrade performance evaluations led to the belief among many of our members that the Bureau was operating within a fixed pool of money. In other words, some employees had to have their evaluations downgraded in order for others to receive pay raises. There is no question that this perception of manipulation of the process by management led to employee skepticism about the overall performance appraisal system.

Another feature of the BATF program was one that permitted employees to provide a self-evaluation as well as any external information regarding their individual performance that they thought would be helpful in their review. This could include customer letters or recognition by a professional association or other information the employee thought complimentary to his or her performance review. Although this part of the program was voluntary, most employees were given no training or guidance on developing these self-assessments, further leading to skepticism concerning the program.

While a fair and unbiased performance appraisal system must be an underlying principle in any pay for performance system, the same basic principles must be heeded

when judging employees in other situations. In 1996, Congress strongly supported this principle during consideration of a proposal (H.R.3841) to give added weight to the use of performance evaluations during Reductions in Force (RIFs) of federal employees. Members of the House of Representatives raised serious questions during floor debate on this bill concerning the lack of formal guidance for performance appraisals and questioned their tendency to be subjective. In a September, 1996 speech on the House floor, Representative Cardiss Collins, the Ranking Member on the House Government Reform Committee, stated "...performance appraisals are routinely challenged as being subjective and unfair, over inflated and biased against minorities." The proposal was soundly defeated. However, little has changed since 1996 concerning performance appraisals.

Evidence also points to pay for performance schemes in the private sector producing less than desired results, especially when implemented in large or complex organizations. In testifying before the House Civil Service Subcommittee, Under Secretary of Defense for Personnel and Readiness, David Chu, noted IBM's use of pay for performance as something that would be good for DoD. Ironically, approximately three years ago, the Ford Motor Company implemented a Performance Management Program and unwittingly created a culture of backstabbing as employees tried to outdo one another instead of working as a team. Instead of cooperation, the system fostered infighting and divisiveness.

Individual employees were rated against each other and instead of working toward a common goal; employees became primarily focused on individual performance. The previous culture of team problem solving and risk taking gave way to a situation where employees were unwilling to make suggestions or propose solutions that might result in their being rated lower than their fellow employees. The federal government, much like Ford Motor Company, relies on employees working together to deliver results. Ford was forced to dismantle key components of their Performance Management Program in the face of sinking employee morale. There are lessons here for the federal government as well.

I think that everyone can agree that when it comes to DHS and its critical mission of protecting the security of our homeland and families, failure is not an option. We must do this right the first time, and establish a system that provides the environment for DHS employees to be able to use their skills, talents and dedication to the mission most effectively.

Premium Pay, Retirement, and the CBP Officer Position:

The Homeland Security Act requires the Secretary and Director to review pay and benefit plans applicable to DHS employees and recommend to Congress a plan to eliminate, to the maximum extent practicable, disparities in pay and benefits, especially among law enforcement personnel. The Secretary informed Congress that he expected the design process to address these issues.

Among the issues that must be considered is the need to provide 20-year law enforcement officer retirement to Customs and Border Protection (CBP) Officers. Recently, DHS announced its "One Face at the Border" initiative and the creation of the CBP Officer position, which combines the duties of customs inspectors, immigration inspectors, and agriculture inspectors into one job. A uniform premium pay and retirement system will, of course, be an essential part of the new CBP Officer position. Members of the Design Team have been tasked with devising options to address these premium pay and retirement issues in time for submission to the Secretary, along with the SRC's HR package.

There is no doubt that extending enhanced law enforcement officer retirement status to law enforcement personnel in DHS is critically important. NTEU strongly believes that providing enhanced retirement benefits to law enforcement personnel in DHS is critical to both the functioning of the new department and to the security of the American public. No one could reasonably dispute the importance of the work done by these law officers. Whether stopping terrorism, the flow of illegal drugs and contraband, or enforcing our nation's immigration and trade laws, these hard-working men and women provide a critical public service.

Given the significance of these jobs, it is vitally important that the CBP Officer position remain competitive with other state and local law enforcement agencies in the recruitment and retention of first-rate personnel. Yet we know that the combination of low starting salaries and second-rate retirement benefits does not always attract the best

candidates for these difficult, dangerous and essential jobs. Recruitment and retention of capable personnel was a preeminent consideration behind Congress' establishment of an enhanced retirement option for other law enforcement officers and firefighters. NTEU believes the same compelling reason exists here.

Currently, newer hires to the CBP are highly susceptible to the pull of enhanced retirement benefits and higher salaries offered by state and local law enforcement agencies. They have received costly training and on-the-job experience within DHS, but they know they deserve to be rewarded for the dangers and risks they are exposed to every day. Very often, talented young officers treat CBP as a stepping-stone to other law enforcement agencies with more generous retirement benefits. One only has to look at the number of legacy Customs personnel who were lost to the Air Marshal program during the last few years because of the benefit of an enhanced retirement. When this occurs, both DHS and the wars on terrorism and drugs suffer as a result.

NTEU is convinced that Inspectors and Canine Enforcement Officers of the CBP should receive the same law enforcement status retirement benefits as those enjoyed by other federal law enforcement personnel. When law enforcement officers from different agencies join forces on a drug raid or to search a boat for armed smugglers or terrorists, CBP officers are often the only law officers on the scene who are not considered law enforcement personnel for retirement purposes. They all face the same dangers and the risk of death or injury, but they don't all have the same rights and benefits.

Conclusion:

NTEU supports the mission and personnel of the Department of Homeland Security. NTEU wants the same thing I believe everyone who has been involved with the creation of the agency wants - a workplace where employees can be successful and do quality work in an environment where they will be treated with dignity and respect.

It would be a mistake to underestimate the impact that a new Human Resources System at DHS could have on employees. Quite simply, employees' successes will be the agency's successes. NTEU was proud to have a voice at the table during the public dialogue concerning the new HR system for DHS employees. This dialogue - among all stakeholders - must continue if the agency's goal is to build a DHS workforce that feels both valued and respected. NTEU looks forward to continuing to work with Congress and the Administration to achieve this goal.

Mrs. DAVIS OF VIRGINIA. Thank you, Ms. Kelley.

Mr. Nesterczuk, you are recognized for 5 minutes.

Mr. NESTERCZUK. Thank you, Chairwoman Davis, Mr. Davis. I want to thank you for the opportunity to express my views here today on the issues that are before you. I was specifically asked to address the questions of adverse actions and the appeals process. Let me begin by making a comment about the Senior Review Advisory Committee. I have a full statement for the record. I just want to summarize the key points.

I was an observer in that process last week, I sat through the public hearings, and it was a first-rate set of debates. The staff prepared the members, I think, very well, they briefed them very well; you saw the options packages that were prepared. And if nothing else, they will serve as a reference guide for other agencies around town who may be considering various types of modifications and reforms to their Civil Service rules. It doesn't mean that they would necessarily undertake as broad or vast a set of changes as DHS is facing; nevertheless, that compendium of options will be very, very useful to a large number of agencies.

Let me address the questions on the adverse actions and appeals procedures. Just so that we stay focused on what that represents, it is a set of procedures that currently are fairly cumbersome, don't necessarily serve all agencies well, particularly an agency like Homeland Security, with a national security and law enforcement focus. It takes a lot of time to go through there, and there are cases that we have seen in the past that have taken months and even years to finally adjudicate.

I would underscore that 98 to 99 percent of Federal employees will spend 20, 30, 40 years in their Federal careers without ever going through that process. Let us keep in mind that is a safety net for a very small number of employees that fall afoul of the system, either violating the rules or not meeting standards of performance.

Now, one of the things that is really wrong with the current system, it creates a level playing field in effect between management and some of these problem employees. There is a great burden on managers to prove their case. There is a perception, in effect, that a poor performer's judgment is equal to that of the manager who wants to take the performance-based action against him or her. In many cases managers have to spend more time dealing with problem performers than with good performers. That sends a wrong message to the system, to the entire work force, and it creates an entitlement paradigm, in effect, in the work force. That is one of the things that is important for DHS to change if they are going to be a performance-driven organization of excellence.

Now, again, let me underscore 98 to 99 percent of Federal employees will spend 20, 30, or 40 years in their Federal career without ever having to resort to an appeal. We are talking about a very small statistical number of people. Now, what kinds of reforms might DHS undertake? There is a variety of options that are presented. I am not going to go through all of those. We don't know which ones are going to be ultimately recommended. What I found interesting was that in addition to the status quo options, there were options that provided for a little more of the status quo, a lit-

tle less of the status quo, as well as some that provided real significant change to the current system; and those are the ones that I tended to focus on because I feel some radical changes do need to be entertained in the adverse action and appeals area.

Specifically, on pay for performance and performance review situations, that should be the sole purview of management. None of those questions should be appealable. Any pay determination, any performance appraisal should be the responsibility of management; it is management's job to effectuate those actions. It should definitely be subject to review, higher level review to ensure that there is fairness and uniformity in application of the pay and performance systems across the organization, but the results of those actions should not be appealable.

In the case of misconduct, I believe only removal actions or suspensions of 30 days or longer should go through the full appeal process. Those are very cumbersome. Those are the instances where significant harm can be afforded an employee if management makes a mistake; and management can and does make mistakes, they don't necessarily walk on water in all circumstances. So the appeal process should take that under consideration.

Finally, what kind of adjudication? I think an external panel to handle appeals to maintain some credibility in that appeals process, when it is necessary to exercise it, is probably the appropriate way to go.

Those are all options that are presented as part of the reviews for the Senior Review Advisory Committee, so I have touched on those. There are many others that are far closer to the current status quo.

Let me make one final comment. We talk a great deal about good performers and the soundness of the Federal work force, and what a great work force it is, and I am a firm believer in that; I have had hands-on experience in the Federal work environment. When it comes to evaluating managers, however, very often the debate turns sour. One would think that there is a lack of competence in the management levels of the work force, that we can't trust them to do their jobs, including evaluating employees, and so we have to create all these special safeguards and procedures to review their work products and to second guess them.

I would remind you that managers come out of that same Federal work force that we all think so highly of. It is not like, 1 day, when they are selected to be managers, they take dumb pills or stupid pills and all of a sudden lose all common sense. So as we get through this debate, let us keep that in mind. We are talking about basically the recruitment pool for the management work force, and it is a fairly decent work force. Thank you.

[The prepared statement of Mr. Nesterczuk follows:]

Testimony of
George Nesterczuk
President, Nesterczuk and Associates
before the
Subcommittee on Civil Service and Agency Organization
Committee on Government Reform
U. S. House of Representatives
at a hearing
on human resource management options for the
Department of Homeland Security
October 29, 2003

Chairman Davis and members of the Subcommittee, thank you for the opportunity to testify today on human resource management options for the Department of Homeland Security. My name is George Nesterczuk and I am President of Nesterczuk and Associates, a management consulting firm located in Vienna, VA. Of the broad array of Human resource options under consideration at the Department I have been asked to focus on the issues dealing with adverse actions and appeals.

Why are these issues of current concern?

In the interest of fairness and due process employees of the federal government are protected from adverse actions by a web of procedures that many characterize as overly cumbersome. In some instances the criticism is more severe, questioning whether the appeals system may be dysfunctional for some agencies. Viewed from the perspective of an employee facing removal the desire to have the process continue indefinitely is understandable. The employer, however, has a responsibility to maintain an organization that functions both efficiently and effectively and can't indulge in an endless process to enforce workplace rules. These competing, at times conflicting needs must be carefully weighed and properly balanced.

The federal government must be particularly scrupulous in its role as an employer since it promulgates the laws that shape employment rules in the rest of the country. However the government as employer cannot lose sight of its responsibility to maintain a productive workplace that is both healthy and safe. While employees who fail to perform or violate the rules should be afforded due process nevertheless the employing agency has a greater obligation to all other employees to maintain discipline and enforce workplace rules.

Looking at the human resource management system in government from a holistic perspective one can't help but conclude that the processes designed to deal with problems of employee performance or misconduct draw a disproportionate amount of attention. After an often lengthy and perhaps tedious competitive entry federal employees face a yearlong probationary period during which they can be summarily dismissed for little or no cause. Once past the probationary period all manner of due process protections accrue – notice and disclosure requirements, reviews, and multiple avenues of appeal. There are numerous examples of removal actions taking months and even years to wind through the process from initial notice, through agency review, to outside appeal, and subsequent

judicial review. Even lesser adverse actions such as suspensions can take months to adjudicate and are subject to review and mitigation by outsiders.

Ironically, the overwhelming majority of employees for whom these protections have been crafted will never have the need to avail themselves of either performance or conduct due process protections. They will spend the next twenty to thirty years advancing in their occupation, competing for promotion, going to training now and again, looking after their benefits, and of course interacting with their managers and supervisors in routinely accepting and fulfilling work assignments. The entire costly and cumbersome system devised to ensure due process is dedicated to the protection of employees who either break the rules or fail to perform adequately. While we have an obligation to protect the rights of this tiny fraction of the workforce and convey the message that everyone will be treated fairly one nevertheless must ask the question at what point has there been enough due process?

A culture of mediocrity

This is a particularly important question to raise when doubts exist whether superior performers rate as much consideration or attention as problem employees. When managers must spend a disproportionate amount of their time dealing with problem employees the system sends the message that managing poor performance is more important to the organization than identifying and promulgating good performance. This eventually gives rise to a culture of mediocrity.

The emphasis placed on job protections in the civil service also creates an entitlement mentality whereby employees believe they are entitled to pay raises and other rewards as well as to job security regardless of individual performance. This perception of job ownership or entitlement is so prevalent that serious disciplinary actions are difficult to initiate and accountability for performance is difficult to enforce.

This is a difficult environment in which to advance a performance driven agenda or to create organizations of excellence. Managers have too often been intimidated by counter claims filed by employees during a proceeding calling into question the manager's judgment or motivation. Sometimes the use of a preemptive filing in a favorable forum has been effective in dissuading a manager from even initiating an adverse action. As a result few performance based actions find their way into the appeal process. Managers prefer to take their chances on fact-based cases involving some form of misconduct to deal with the problem employee. Such cases usually are based on more objective and factual information and are less likely to involve a manager's subjective judgment.

Possible Reforms

The Department of Homeland Security (DHS) was created out of a need to better focus the government's resources and talents on the critical mission of homeland security. The merger of a large number of existing agencies and organizations required extending to DHS a range of procurement and other management flexibilities, including personnel, in order to create a better functioning new entity, a performance driven organization of excellence. There has been a general acceptance that management systems at DHS must be designed to support the mission of the department in its key

activities of law enforcement, intelligence, and national security. To achieve its goals the organization will place greater emphasis on performance and accountability.

In order to advance its performance agenda the department will need to change the current entitlement paradigm. The changes will need to reach beyond pay and performance management systems and reach the currently perceived job protections including the appeals process. The Department should address reforms in which actions are covered under adverse proceedings and which are not, which actions are subject to review and / or appeal, who is covered and under what circumstances, what are the administrative procedures such as notice and response periods, and what panels or bodies would adjudicate the cases. Some suggested options follow.

Review, no appeal

All performance appraisals and ratings should be reviewed at higher level for consistency

All pay adjustments should require affirmative processing by managers based on a performance appraisal; denial of pay increase not subject to appeal

Pay determinations must be left solely within the purview of management; pay determinations subject to review but not appeal

Other performance based actions not subject to appeal

Disciplinary actions involving suspensions of less than 30 days should be adjudicated within the department; not subject to appeal

Less serious disputes subjected to alternative dispute resolution (ADR) at the discretion of both parties.

Subject to appeal

Suspensions of 30 days or longer and removal actions should be subject to appeal.

Coverage and Notice

Employees who have completed their probationary period; currently 12 months, but could be longer in some occupations that require significant training before employee is ready for duty.

Notice period for action should be 7 days but must allow for a reasonable period of time for employee to respond.

Adjudication

For performance based actions review performed by a panel similar to the Performance Review Board (PRB) used for the SES; these panels also have the responsibility to insure equitable evaluations across the organization.

External review panel for removal cases or suspensions of 30 days or longer.

Conclusion

I will summarize my remarks by reiterating the importance for the Department to change the entitlement paradigm that currently pervades the civil service. Too much emphasis is placed on job protection and not enough on job performance. In the area of adverse actions and appeal rights the department should make clear which actions will be

discretionary to management, not subject to employee appeals, and which disciplinary actions will be subject to appeal. This will serve not only to expedite the entire appeals process but it will also enhance the agency's ability to focus its human resources on mission priorities. The Department should create a separate adjudicatory body so that its caseload is resolved in a manner consistent with the Department mission, not subject to broader civil service interpretations.

That concludes my remarks and I would be happy to respond to any questions that you might have.

Mrs. DAVIS OF VIRGINIA. Thank you, sir.

And thank all of you for your patience and being willing to be here to testify today.

I will yield now to our ranking member, Danny Davis. Mr. Davis, you have the floor for questions.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman.

Ms. Kelley and Mr. Gage, am I to discern from your testimony that collective bargaining and independent appeal rights are two areas relative to options that you have some serious concerns about and have really drawn a place in the sand in terms of where you are probably willing to go with that?

Ms. KELLEY. Yes, Mr. Davis. Collective bargaining and appeal rights are two of the critical areas. In our discussions regarding collective bargaining, the idea of replacing collective bargaining with consultation is one that I think actually is totally opposite of what is intended by the act. There has been a lot of discussion about need for change in regard to the mission of the Department, and I think history has shown, since September 11th, that when incidents occurred, when changes need to be made in working conditions, that employees did what they needed to do in order to make the country safe and to help the Department be successful, and no one was waiving their collective bargaining agreement saying I don't have to do this or I don't want to do that because of this agreement.

So I think the history and the recognition is there on the part of employees and the union that when there are issues that working conditions cannot be addressed before implementation because of whether they are national security issues or decisions that the Department feels it needs to make because of information it has, which we heard a lot about last week at the Senior Review Committee, was a lot of the information that the senior executives have from intelligence briefings, of course, are not available to and would not be available to the unions and to employees; and I accept that. I accept there will be those situations. But I believe that a framework can be designed that acknowledges those legitimate situations, and that they are not the rule for how we operate between the unions and the Department, but that there are those situations and that they may then have the need for what we would call post-implementation bargaining should a situation last for a long period of time.

And I guess going to that issue as well as the adverse actions, one of the comments I would like to add to that Mr. Cohen made on the prior panel, when he talked about these options, he talked about them as conceptual; and there surely are some of them that are conceptual, but I would suggest that if you have looked at the 52 options, there are many of them that are very, very specific, and that is for a very valid reason. The options that NTEU helped to draft or support were specific because we were trying to be responsive to the legitimate business interests that we heard identified by OPM and the Department throughout the design process. So we have gone to great lengths to provide specifics that have been responsive, and see those options that we have put forth for support as much more than just conceptual.

Mr. GAGE. I would just like to add that every argument that was brought forth saying that some collective bargaining or employee appeals were damaging to the mission of this agency were debunked. Collective bargaining is the only checks and balances that exist, as well as an independent employee appeal for these personnel systems, and to get rid of them at a time when proposals are out there that a manager or superviser can determine an employee's base pay, to think that there won't be mistakes I think is an illusion. Good managers like checks and balances, good managers are not afraid of collective bargaining, and good managers certainly want a mistake in management down the chain to be able to be looked at and to be handled fairly. It is just incredible to me that before these systems are even devised, the first decision is that we can't have collective bargaining and we can't have independent employee appeals, and I think both of those statements are wrong and illogical, and will result in any system that management comes up with to have just no credibility in the work force.

Mr. DAVIS OF ILLINOIS. Ms. Sistare and Mr. Nesterczuk, could you respond to the union's positions relative to the comments they have just made?

Ms. SISTARE. Speaking to the Commission's report on these issues, the Commission recognized the role for collective bargaining, certainly, in the Federal system, and the preservation, again, of the basic principles on which the Federal system is established.

Mr. NESTERCZUK. I think it will probably ultimately come down to looking at collective bargaining in the proper context; not isolated as an entity onto itself, but in the context of certain kinds of actions. They will probably reserve certain actions for management exclusively and will probably negotiate with representatives on other issues. It is just difficult for me to try to second-guess where that unity of thought might occur.

Mr. DAVIS OF ILLINOIS. Thank you very much.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Davis.

Mr. Murphy.

Mr. MURPHY. Thank you, Madam Chairwoman.

Mr. Gage, you had mentioned some things that really caught my interest. You talked about some of the employees really may not see their supervisor perhaps sometimes once a week, perhaps once in 6 months; they may not even be on the same site, and so it would be hard to evaluate them. You also brought up a point and I want to make sure I understand it. You talked about this 20 percent issue, that 20 percent will not do well. Do you see the way that some of these evaluation systems go is much like a bell curve or something, some who will be at the very top will get big raises, some will be in the middle, and some, no matter how well they do, will not see any benefits from this?

Mr. GAGE. That is exactly it. I think the financing of many of these options that are neutral are based exactly on that, a bell curve where you take away from the bottom, even though they may be producing according to their performance standards, but just how the thing is defined and how it is set up, that they are not going to be eligible for pay raises and that money will be used to do the top. And that really is driving a round peg in a square hole,

because our work force is not made up of these arbitrary percentages of poor performers and good performers.

Mr. MURPHY. I was struck by Ms. Sistare's comment before about the Lake Woebegone effect; sometimes evaluations is everybody is above average or superior. And I am sure you wouldn't want to see a system like that too, because that could be unfair in terms of rewarding people who are not performing. But let me ask you about ways we can do this.

Is part of what you see in interference here, if there was a finite amount of dollars and say we can only reward people so much, so we are only going to reward those on top, that may be part of the problem. But another part I wonder about is this. When some of the organizations require teamwork, and some may not, depending upon the type of job description, but some of the organizations may require that. Do you see this as helping or interfering with developing teamwork if they recognize that some people are going to be getting the increase and some are not on the team?

Mr. GAGE. I think it is going to be terrible for trying to continue the teamwork that we have in our law enforcement; it just breaks away the entire unity and cohesiveness that law enforcement organizations have been trying to build. And it takes away from the mission. Most of these performance standards, and I have been doing this for years, they are gobbledygook; they really don't help a supervisor evaluate employee performance. And many of the good agencies have seen the time, effort, and the results of these type of really top-down, heavily theoretical types of systems as just being a resource drain. So I think for a lot of reasons, but especially how these systems will break that cohesiveness in law enforcement, you have to go slow and really determine and test the effects this will have on employee morale.

Mr. MURPHY. Well, then in terms of going slow, not for the sake of going slow, but for the sake of being effective, I assume you mean on that, as these reports come out, will there be parts that you might be able to recommend and say that some of these options may work better with implementing now in terms of phasing them in, so some may work well with some departments, but not others, so that we can be most effective? Will there be some things you will be able to recommend?

Mr. GAGE. I hope so. We have already made some recommendations. For instance, on the whole collective bargaining and appeals, I think that we can sit down and really clean that up to make an efficient, speedy appeals and collective bargaining system and just take that right off the table. This delay and all that, we can take those straw men really right off the table. And I also think some existing systems we have, for instance, like career ladders, tinkering with those solves a big one of management's objectives, and that is let people move up according to their performance, and that is the basic pay banding. But using the career ladders is a system we already have; people know about. Just removing the time in grade, where you can't move up until you fulfill a time in grade, moving that out of it is certainly something we could support and I think would help the agency right now in recruiting and retaining some of these law enforcement personnel.

Mr. MURPHY. I might add, without having gone through all these options in detail, but I also recognize with some employees sometimes, in my own business that I ran or once when I worked in a Federal program, that sometimes a person who may not be getting the best rating, the answer is not that they are a bad person or bad worker, it is just that is not the best job for them. And I would hope that part of the options that might go with this is working with the people in a very proactive way, of saying, Mr. Smith or Ms. Doe, you are a great worker, but we have to find another place for you to show that greatness. And I hope that is part of the options that come through in these things.

Unfortunately, I have to leave to go to some other meetings, but I would like to continue our discussion at some point about some of the issues you see about collective bargaining and how we might protect it in a way that helps DHS, helps the employees for all the mutual goals, as Ms. Kelley, you outlined so clearly. We have mutual goals in this, and I welcome the opportunity to continue those discussions with all of you. Thank you.

Mr. GAGE. Thank you.

Mr. MURPHY. Thank you, Madam Chairwoman.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Murphy.

Ms. Holmes Norton.

Ms. NORTON. Thank you, Madam Chairwoman.

Mr. Sistare and Mr. Nesterczuk, I have a question for you about pay-for-performance, because, when it gets down to it, that seems to be what this is all about; that is the major concern. In fact, it seems to be the major push of the administration. One could argue that there is a structural flaw in pay-for-performance that has nothing to do with the agency, but originates with the Congress. Without adequate funding, which, of course, depends upon us, what is the key pay-for-performance from simply redistributing the scarcity imposed by Congress? And agencies have seen what that means; that is nothing new. And if you can't predict what Congress will do each year, how can you know that pay-for-performance would work? I would like both of you take a stab at that.

Mr. NESTERCZUK. Well, I am a firm believer in the concept; I have seen it work back in the 1980's in the old PMRS, the Performance Management Recognition System, that we used to run for merit-pay managers. It suffered, as you said, from the funding scenario, the lack of funding, in that good performers were very happy because they moved right through the grade structure and up the steps, much faster than they would have otherwise; so there was a favorable comparison to where they might have been had they not gone into merit pay. The poorer performers, moving more slowly, still had the old General Schedule to say, well, at this point in this year or next year I will be earning such and such, and, yes, I am now behind the curve. And then some folks in the middle started to slip, so there was a very adverse comparison compared to the General Schedule, so that hurt. And that was a situation where you started with the same level of funding and you basically redistributed, reprogrammed available funds.

The expectations for any pay-for-performance system have to be carefully managed to avoid that same pitfall in the future, and to get it started with credibility, I don't see how you can avoid adding

more money, spending more in payroll than you currently do. Eventually, as things sort out, you will get redistributions that will start to mirror a status quo for a good part of the work force, accelerate the better ones and the slower ones will fall behind.

One thing that I would recommend that DHS do now if they get serious about pay-for-performance, is to take the bottom end of performers and withhold the normal pay increases, the step increases within grades, etc., just withhold them as a signal that some component of pay today will now be evaluated on the basis of performance and awarded on the basis of performance.

Ms. NORTON. I am sorry, I don't know what you mean by withhold. What do you mean withhold them?

Mr. NESTERCZUK. Just don't provide the within grades or the step increases of a poor performer that currently is basically automatically awarded. There is a statutory requirement that says, yes, you can withhold that for less than adequate performance.

Ms. NORTON. So you mean if somebody gets a poor performance, at that point you would not allow.

Mr. NESTERCZUK. Yes. Correct.

Ms. NORTON. I see.

Mr. NESTERCZUK. It requires first promoting a performance management system, and then on the basis of that taking the pay actions. But at that point you could start to change the culture and get people to learn to accept the fact that, yes, pay will be awarded on the basis of performance without basically staying budget neutral at the beginning.

Ms. NORTON. Ms. Sistare.

Ms. SISTARE. The Volcker Commission felt that you did have to adequately fund these systems to have them work. You raised the issue if Congress did not. I think it is up to the administration and the Department in adopting and selling such a system to get buy-in, from Congress as well, that the system has to be funded to be effective.

Ms. NORTON. Well, of course. I mean, I just think you have demonstrated what I mean by a structural flaw. Congress couldn't if it wanted to bind itself to adequately fund any system. And as long as we have the form of Government we have, one has to wonder about a pay-for-performance system. I hope I don't have to go down the things we are not funding now that we promised employees. I see that as a fundamental question. Those of you who are for pay-for-performance, you have to tackle that question to be credible yourselves.

I want to know how the employee representatives respond to Mr. Nesterczuk's notion that somebody gets a poor performance, and as a result of a poor performance. You are not dealing now with anybody except somebody who has been found to be a poor performer. A person hasn't been fired, now. How do you respond to the notion that you can withhold the in-step increases and the pay for increases for that person?

Ms. KELLEY. The current system provides for that today. There is no need for a new HR system to allow that to happen; it should be happening.

Ms. NORTON. Even the step increases?

Ms. KELLEY. Yes. That should be happening. If a manager is properly trained and supported in the work that they are doing, of evaluating their employees; and very often I think that is the problem, is that managers are not provided with the training or the support to make those distinctions about performance and, therefore, they don't step up to that. But that process exists today. If there is an employee who is not performing acceptably in their job, they should be identified, they should be given appropriate notice. What we call in our negotiated agreements a performance improvement period so that they can have every opportunity to bring their performance up to an acceptable level. But during that time their within grade is denied. So that is a process that exists today and should be implemented today, and there is no need for a new HR system to do that.

Ms. NORTON. Thank you very much, Madam Chairwoman.

Mrs. DAVIS OF VIRGINIA. Thank you, Ms. Norton.

We do have several votes, but we have a few minutes before we have to go, so I am going to ask a question to all of you. Should employees have a right of appeal on all performance appraisals if the Department creates a system where the appraisal determines the amount of each individual pay increase?

Mr. NESTERCZUK. I will start.

Mrs. DAVIS OF VIRGINIA. Anybody can start.

Mr. NESTERCZUK. No, absolutely not.

Mrs. DAVIS OF VIRGINIA. Ms. Sistare.

Ms. SISTARE. At our forum, that view was expressed, but the view that was held by a greater number of people was that there should be an independent perhaps peer review of the entire system so that there was an ongoing check to make sure it was working.

Ms. KELLEY. Yes, there definitely needs to be a process for employees to appeal. The idea that they would be harmed financially based on a decision that may not be based with ill intent. I am not even assuming that is the starting point from this, but everyone is human. Managers manage in different ways; they are provided with different training, they have different spans of control of the number of employees and the locations of employees that they supervise; they have different first-hand knowledge of that. And there needs to be a process to ensure that there is credibility and transparency to the system, or it will not be accepted by employees.

Mr. GAGE. I would like to go even a little further. If you don't have an independent review, an independent appeal, this system will end up as one of patronage and basic unfairness, and it will be management by coercion, intimidation, and fear. But we are not talking about full-blown MSPB appeals. Most of our contracts have provisions called mini-arbitrations, where performance issues are worked out in an expedited type of hearing, which is informal by nature and fact-finding. So there is not a big time delay or a big resource issue involved with appealing these things. But if employees do not see an independent review, and if supervisors don't see an independent review, I think the decisions are starting to be made in a way that just doesn't go to judging performance, but is more toward some elements in a work site that I don't think anybody here wants to instill.

Mrs. DAVIS OF VIRGINIA. To those of you who said that there should be an appeal on all performance appraisals, can you explain how the Department could operate efficiently if every appraisal or every performance-based increase or decrease, or what have you, would probably trigger an appeal? I mean, how could the Department operate efficiently under that system?

Mr. GAGE. Everyone doesn't generate an appeal; however, when one sees an organization this big, there are going to be those situations which are blatantly unfair. And to let a work force see that a supervisor can do something which is seen as blatantly unfair, with no avenue or recourse, just spreads through the work force and will just kill credibility in this system. Usually in the pay-for-performance area it is not the bottom-feeders that make the appeals, it is those people who see themselves as outstanding and have always been outstanding, have felt that way, and through arbitrary numbers they get dropped down a notch. The good workers are usually the ones that are upset by this type of forced distribution system.

Ms. KELLEY. I would just add that NTEU has some experience with agencies where they have pay systems that are different than the GS system because they are not funded through appropriated funds, and in our experience the assumption that the system would be clogged with appeals just is not true. Whether it is the FDIC or ATF or the SEC, there are a small number of employees who use that process, and it is, in my experience, as John described, those who are designated average because of whether it is a forced distribution or just a manager evaluation, that believes factors were not considered that would acknowledge their outstanding performance and thus would result in some additional pay for them.

So I do not think that there is any experience out there that shows that it would bring the system to a halt. And if the system is built, one that is credible and transparent that lets employees know how they are being evaluated, that alone will eliminate many of the appeals and bring them to a realistic number.

Mr. NESTERCZUK. If I might make a comment. It is not just a question of efficiency or bringing the system to a halt; it is also the responsibility of management to issue those performance appraisals. They are not subject to debate; they are not a tit-for-tat. Those managers basically assign work, they evaluate that work throughout the course of the year. They are in the best position to make an ultimate judgment as to how the performance laid out for the course of the year. Plus they have the perspective of looking at peers, a cohort, and, with a second level review, an organizational perspective. To put that up for grabs in some appeal process makes absolutely no sense to me.

Mrs. DAVIS OF VIRGINIA. I am going to have to cut you all off because I have to go vote. I do have some more questions, and if I could just impose upon each of you, I would like to send them to you in writing and get you to respond back for the record, if you don't mind. And I do apologize. I would let you stay here and come back and ask more questions, but it is just me, and I don't want to hold you up.

But I do thank you all for being here today. And if any of the other Members have additional questions for our witnesses today, they can submit them for the record.

In closing the second panel, I would like to again thank all of the witnesses for being here, and again I appreciate all your input and all your expertise, and wish I could just sit here and ask you a bunch more questions, but thank you all so much.

The hearing is adjourned.

[Whereupon, at 12:14 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

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