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THE KEY TO HOMELAND SECURITY: THE NEW HUMAN RESOURCE SYSTEM

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

AND THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

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THE KEY TO HOMELAND SECURITY: THE NEW HUMAN RESOURCE SYSTEM

WEDNESDAY, FEBRUARY 25, 2004

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION, COMMITTEE ON GOVERNMENT REFORM, JOINT WITH THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA, COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE,

Washington, DC.

The subcommittees met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. Jo Ann S. Davis of Virginia [chairwoman of the Subcommittee on Civil Service and Agency Organization) presiding.

Present: Mrs. Davis of Virginia, Mr. Mica, Mr. Davis of Illinois, Ms. Norton, Mrs. Blackburn, and Mr. Van Hollen.

Also present: Senators Voinovich, Lautenberg, and Akaka.

Staff present: Ronald Martinson, staff director; B. John Landers and Christopher Barkley, professional staff members; Robert White, director of communications; Reid Voss, clerk; Tania Shand, minority professional staff member; and Teresa Coufal, minority assistant clerk.

Senator VOINOVICH [assuming Chair]. I'd like to explain that our Chairwoman, Jo Ann Davis, is on the floor doing something that's very important, getting the GAO bill passed this morning, something that we just got finished in the Senate. Hopefully we'll get that done and have the President sign it and we can move on with some changes in our personnel system here in the Federal Government.

I am going to make my opening statement and hopefully Jo Ann will be back. If she's not, then we have a problem, because I have to leave at 10:30 to go over and cast a vote in the Senate.

This joint hearing of the Senate and House Subcommittees with oversight of the Federal work force is extremely important, for we're examining the new human resources system for the Department of Homeland Security. When Congress wrote the Homeland Security Act of 2002, it required that the Office of Personnel Management and the Department of Homeland Security collaborate with the Federal employee unions to design a modern personnel system that meets the mission needs of the Department. This process has taken over a year, and just last Friday the administration published the regulations for the new human resources system for the Department of Homeland Security.

The Department was established to protect the United States from further terrorist attacks. Make no mistake, the employees of the Department and the way in which they are managed are critical to ensuring the operational success of this Department and the security of the United States. Because September 11 happened a while back, I think we forget, except periodically when the President issues an alert, that we still have serious domestic national security problems that need to be addressed. That's why we've created this new Department.

It is my hope that this human resources system will facilitate the recruitment and retention of the best and brightest Americans into the Department. I always stated, if your business is going to be successful you have to have good finances and you have to have good people. If you've got both of those, you're in great shape. We need to do that in the Federal Government.

It is my hope that this Department will compensate and treat their employees fairly, that it will provide them the training they need to reach their full potential and perform their jobs at the highest level. Training is a high priority with this Senator and needs to be a much higher priority in the Federal Government. And we hope that this system will facilitate productive labor management relations, which are so important to any successful governmental operation.

I was pleased also that the Homeland Security Act included several government-wide human capital reform provisions, which I authored.

As important as this is, the new Homeland Security human resources system is notable for another reason. It is a milestone in the evolution of the Civil Service. It is possible that elements of this human resources system could be applied elsewhere in the executive branch in the coming years. Therefore, what the Department of Homeland Security is doing and the imperative to get it right has implications far beyond the Department. I know that the unions were concerned with this legislation for this reason. They realize that once this is all over, there's a good possibility that other departments in the Federal Government will be asking for the same kind of flexibilities that exist in Homeland Security.

Director James and Admiral Loy, I would like to compliment you for the manner in which you worked to design the new personnel system. You clearly have taken a thoughtful and deliberate approach that should serve as an example to others. I look forward to your testimony and learning the details of the new human resources system. I would also like to thank Clay Johnson, the Deputy Director of Management at the Office of Budget and Management, who is also involved in this important task.

I must tell you that I was very concerned about the management function of the Office of Management and Budget. I always said that there was an OMB, but there was no "M." This administration tried very hard initially to put an "M" into OMB. From my meeting with him, Clay Johnson seems to get it and understand that it's important that this be an open process and that you work with everyone.

I congratulate you on the time you have taken. I know that everyone is not happy with the result, but the fact of the matter is

that I was concerned that there might be a rush to get it done in 30 days, publish the regs and go through it. I think that you really spent a great deal of time trying to do this the right way, trying to give everybody an opportunity to share their concerns with you.

For that I thank you very much, because you took care of something that I was concerned about. I think you conscientiously did this in a systematic way and tried to be as sensitive as you could to understanding that if the system doesn't have the input of the people that are going to be involved with it, in the long run it may not be a success.

I'm also looking forward to hearing the views of Comptroller David Walker. Mr. Walker has been a leader on the human capital issue, both as an advocate of reform in the Federal Government and as a practitioner of that reform at the General Accounting Office. And as I said, that's what Congresswoman Davis is doing today, giving GAO more flexibility.

As such, his views carry extra weight with me. I was pleased to introduce and advance this legislation in the Senate. It's my understanding that similar legislation, is going to pass this morning.

Last but certainly not least, I'm looking forward to the testimony of the leaders of the three Federal employee unions that represent the greatest number of employees in the Department. My staff and I have enjoyed working with the presidents of the unions and their staff during my time in the Senate. I know that they have serious concerns about the new personnel system.

When the Homeland Security Act was pending in Congress, I thought it was very important that there be a dialog among the administration, and the employee unions. In addition, I thought that the law should allow for third party arbitration of impasses between labor and management. That wasn't part of the legislation.

Once the legislation passed, as I mentioned, I was concerned that the administration might rush and try to establish the system without conducting dialog, and as I mentioned, I'm glad that dialog did occur. From what I understand, there were robust discussions between the administration and the unions. While I appreciate that there are real differences, and I've read some testimony that expressed some real concerns, I'm glad that the dialog occurred. I hope it served to reduce the number of areas of disagreement. I'm sure that it did.

The 30 day statutory collaboration period in which the unions will make their formal requests for changes to the personnel regulations has begun. I'm interested in learning what those requested changes will be. In addition, now that it is over, I'd like to hear the union presidents' evaluation of the collaborative process of last year.

I might also say that one of the big concerns that the unions had was that the President might exercise his National Security Exclusionary Authority. Many of the unions were very concerned about this. I'm pleased that the President has not exercised this authoirity, as many said that he would. There's a provision in the law that says if he does, that it doesn't go into effect until 10 days notice is given, so that everybody knows it's going to be happening. It's not going to be something that's done at 2 a.m. So I'm pleased with that.

Finally, I will be asking all of today's witnesses their views on next steps. It is likely that additional administrative or legislative changes will have to be made to the new system to ensure that it works as it should. I look forward to working with the administration, Federal employee unions and my colleagues on this effort.

I ask unanimous consent that all Members have 5 legislative days to submit 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, so ordered.

Senator Lautenberg and Senator Akaka, I appreciate your being here. Would you like to make some opening remarks?

Senator LAUTENBERG. I appreciate that, Mr. Chairman. I thank you for convening this. I'm always happy to see Admiral Loy, his first name is Admiral. We can't stop calling him that. [Laughter.]

Anyway, this is a very complicated situation and I think that having this hearing at this time is particularly appropriate. I wasn't here in the Congress when the Homeland Security Act of 2002 became law. But obviously I had an interest and have an interest. If I had been here, frankly, I would have objected to some of the personnel provisions that are included in the bill, particularly those that denied employees of DHS the same rights to bargain and to appeal personnel decisions afforded to other Federal employees.

This notion that somehow or other collective bargaining rights threaten national security, that Federal employees who belong to a union are somehow suspect is, I find, deeply offensive. It's tiring to hear the administration's relentless attacks on organized labor. One came up the other day regarding teachers and the education association. We have to look at this as it affects not only the individuals but the well-being of our country. We have in the Federal Government, I think, an unusually talented, committed group of people. And I want to see that we respect their rights and listen to the things they have to say.

In the case of the World Trade Center calamity, the first responders, who were civilians, filed past the victims on the way down, the way up, they belong to unions. I challenge anyone to question the commitment or the professionalism or certainly the bravery of the union members who gave their lives on September 11 trying to save other people.

I'm a strong believer in protecting the Federal work force. As someone who has had fairly extensive experience in the private sector, I can attest to the unique commitment, talent and spirit of public service that we have in our Federal employees.

With regard to the new DHS personnel proposal, it was truly comprehensive. But within the 167 page plan, there are some troubling and problematic provisions. I'm particularly concerned with a plan that allows DHS management to install rules, unilaterally, on the deployment of personnel and the assignment of work.

I'm also skeptical about the proposed pay for performance system, which certainly could be subject to political manipulation. Who's going to make those decisions and who are they going to talk to as they make those decision can make a substantial differences in the outcome.

Also, doing away with the normal GS system probably creates more problems than it solves. The new system, which sets wages according to the results of annual salary surveys of private sector workers in different occupations, different regions, strikes me as almost impossible to carry out in a fair manner. I think it's unfair to the Federal workers.

There are conditions that may dictate a format in a region. But we forget that Federal employment often creates more modest salaries for similar jobs in the public sector than we see in the private sector. Private sector wages often vary regionally or fluctuate due to sporadic market changes. And I don't think that Federal pay scales should be determined by directly comparing public sector wages to private sector ones. Nor do I think that this system will effectively draw the Nation's best and brightest to work at DHS.

Finally, I'm perplexed why TSA employees would be left out of the plan. What is there about the screeners that makes them different? Is it because they're brought in, if they are brought on as a full agency employee, they would have to be given the right to organize? I hope that's not the case, and I am anxious to hear from our good friend and distinguished public servant, Admiral Loy, he's very familiar with TSA, about whether or not the screeners at airports should be allowed to organize.

These words aside, I think we share overriding goals, which are to attract the best human capital to DHS and make the working conditions at DHS the most effective and productive that we can for the 180,000 Federal workers who have been brought together from lots of different agencies and departments. We want them to feel good about their work so that their productivity can be at its highest level.

I hope we can work together to fix some of these problematic components of the new plan. I welcome our witnesses, and Mr. Chairman, once again I thank you and I appreciate the opportunity to make my statement.

Senator VOINOVICH. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

I want to say thank you to you for holding today's hearing on the proposed regulations establishing a new human resources system for the Department of Homeland Security. Also I want to say thank you to Chairwoman Jo Ann Davis, who has been unavoidably detained this morning. She certainly will be here.

I also want to welcome Admiral Loy to the hearing and say thanks for many things he has done since he has been in this position. The Homeland Security Act required DHS and the Office of Personnel Management to work together to propose joint regulations for the new human resources system. I want to applaud you, Admiral Loy, and the manner in which you solicited and gathered input for the joint proposal.

Although I do not agree with all of the provisions of the proposed regulations, I believe that the open, transparent and accountable

manner in which these regulations were developed exemplify the level of cooperation and interaction expected under the Homeland Security Act and what I would look for in other reform proposals.

The Federal Civil Service is responsible for implementing and managing Government programs in an effective and responsive manner. However, defining the proper relationship between the career Civil Service and elected and appointed officials has always been a critical issue. We share a common desire to ensure that all employees are able to do their job without undue influence.

I would like to remind my colleagues that the Civil Service Reform Act was passed back there in 1978 to address the various conflicting responsibilities of the Civil Service Commission, which was charged with providing equal employment opportunity, ethics, protecting the merit system, overseeing labor relations and personnel management. Congress divided the responsibilities of the Commission because we found that fostering the principles of modern personnel management was inevitably in conflict with the commission's role in ensuring the application of rules and procedures.

The reforms in the CSRA shored up a cornerstone of the Federal Civil Service system, by ensuring that Federal employees who are charged with protecting the interests of the American people have real and meaningful protections. The passage of the Homeland Security Act in 2002 was to provide managers with work force flexibility, and not reduce the rights and protections of the Civil Service. The act required the new human resources system to be based in merit principles and provide for collective bargaining.

For DHS to recombine these responsibilities in the Department suggests that we are no longer on the same page when it comes to employee protections. Some of the proposals appear to be in direct conflict with the fundamental principles of the Federal Civil Service and could substantially erode the rights and protections of Federal employees.

Under the proposed regulations, DHS would create an internal appeals process to review certain aggravated offenses which require mandatory firing. This internal appeals panel would be governed by individuals who would be appointed by and removed by the Secretary. There are currently no provisions for judicial review of panel decisions.

In 1996, Congress granted the Federal Aviation Administration similar authority to create an internal appeals system. Despite the inclusion of certain safeguards, Congress reinstated appeal rights to the Merit Systems Protection Board in 2000 amid concerns that the internal process was unfair and impartial.

The fact that the proposed internal panel at DHS would be selected by the Secretary and would be required to give deference to agency mission and operations fails to assure employees and even me that the panel would be objective and unbiased. Furthermore, the proposed changes to MSPB processes and the fact that DHS and OPM could eliminate MSPB appeals should MSPB decisions fail to give due weight and deference to the Department's critical mission would undermine the effectiveness of the independent quasi-judicial agency.

Likewise, I am concerned that the proposed labor relations system at the Department could strip the bargaining rights of Federal

employees. Granting the Secretary sole discretion to engage in bargaining to implement agency regulations and select and remove the members of a proposed internal labor relations panel would eliminate the very essence of bargaining and turn labor unions into policy advisors, rather than active parties and about the bargaining process.

It has been proven time and again that there must be separation of management and oversight. Otherwise, conflicts exist. The proposed regulations, while reserving some of the basic rights of Federal employees, is in effect reinventing a square wheel. I look forward to our witnesses' testimony and their thoughts on how to best protect employee rights at the Department of Homeland Security. And I would like to also compliment Director James for her work on this regulation as well.

Thank you very much, Mr. Chairman.

Senator VOINOVICH. Thank you, Senator Akaka.

It's the standard practice for this committee to swear in all the witnesses. If the witnesses could please stand, I will administer the oath.

Please raise your right hands.

[Witnesses sworn.]

Senator VOINOVICH. Let the record indicate that they have answered in the affirmative.

I understand that Congresswoman Davis is on her way over. But in order to move forward with this hearing, I'd like to begin the testimony this morning with Director James.

STATEMENTS OF KAY COLES JAMES, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT; AND JAMES LOY, DEPUTY SECRETARY, DEPARTMENT OF HOMELAND SECURITY

Ms. JAMES. Thank you and good morning, Mr. Chairman.

First of all, I want to thank the members of the subcommittees and I'm grateful for the opportunity to be here today. I'd especially like to thank Chairman Voinovich and Chairwoman Jo Ann Davis and Senator Durbin and Congressman Danny Davis for their continued commitment to the best interests of Federal workers and for their steadfast commitment to the American Civil Service.

I'd also be remiss if I didn't thank Secretary Ridge and Deputy Secretary Loy for their leadership and their cooperation throughout this design process. I think that working together in a true collaboration, I can report to the subcommittee with complete confidence that we are and have been united as a team with a single purpose and that is to create a personnel system that will honor those in service to our country at the Department of Homeland Security.

And as you know, the bipartisan legislation that created the Department gave the DHS Secretary and the Director of the Office of Personnel Management authority to jointly prescribe regulations establishing a completely new HR system for most of the Department's 180,000 employees. Those proposed regulations, published last week for employee and public comment, represent a historic step in the evolution of the Federal Civil Service, rewriting the laws and regulations that govern how the Department classifies, evaluates, compensates and disciplines its employees as well as how it deals with its labor unions.

As originally envisioned and as enacted in law, the regulations remain firmly grounded in and bound by our Civil Service system's core principles and values. As we focus on what is changing, I think it's also important to focus on what has not changed: merit, equal employment opportunity, due process, veterans preference, and protections against reprisal, discrimination and other prohibited personnel practices.

As we discuss those proposed regulations today, it's important, I think, not to lose sight of their genesis. On September 11, 2001, our Nation came face to face with a horrific terrorist attack on our homeland. And it was against that backdrop that the President asked Congress to consider his proposal to create the Department of Homeland Security. That merger represented one of the largest of its kind since the creation of the Department of Defense.

As Director of OPM, I am held accountable for preserving and protecting our core Civil Service principles and values in the new DHS HR system. And even as we seek to give the Department all the flexibility it needs to deal with the most ruthless and resourceful of enemies, it's important to remember those core values and those principles.

The Department's new HR system must assure the Department's ability to achieve its primary mission: safeguarding the American people from a terrorist attack and other threats, natural and man-made, to our homeland security. DHS must have the unfettered flexibility to move people and resources without delay. It must be able to get the right people into the right jobs at the right time, give them the technology they need, and hold them accountable for their performance.

I believe that the new HR system will do so without in any way compromising the fundamental rights of the Department's Civil Service. Even before the enactment of the Homeland Security Act, and well prior to the legislative debate, Secretary Ridge and I made a commitment to the Department's employees and major unions that if the legislation passed, the new HR system would be designed using a collaborative and inclusive process. I'm here to report today that I believe we have kept that promise.

Over the course of the last 10 months, we have met and talked to over 2,500 DHS employees and managers in town hall meetings and focus groups across the country. We've consulted with dozens of experts to identify promising and successful models from the private sector, State and local governments and other Federal agencies as well. We worked with the presidents of the Department's major unions and their key staffs, literally providing OPM office space for the latter so they could be an integral part of the design process.

And with that input and involvement, our joint design team developed and presented an impressive array of options to top DHS, OPM and Federal employee union officials for careful examination and discussion. Those officials, along with a number of highly regarded experts in the field of public administration, provided Secretary Ridge and me with a thoughtful review of the options that inform the development of the proposed regulations we published last week.

Again, none of this was required by law. It was just the right thing to do to identify the best thinking and make employees inside DHS equipped to succeed. And I should say that we will hear as we go throughout the hearing today that at the end of the day, we may not all agree on the outcome. But the process is not yet over. We are in the comment period, and we are looking forward to that part of the process as well.

Such openness and inclusion are absolutely essential to any large organizational transformation. Secretary Ridge and I want employees and unions to have a voice in the process. And while we may not be able to alleviate all of their anxieties nor satisfy their every request, their honest involvement has contributed significantly to its high quality and will help shape the future outcome.

Secretary Ridge and I are both committed to continuing this open and inclusive, transparent collaboration as we begin to finalize the regulations and then start the implementation process. In doing so, we will realize the promise and the historic opportunity of the Homeland Security Act.

I want to thank you again for the opportunity to testify before you today and look forward to an engaging dialog. Thank you very much.

[The prepared statement of Ms. James follows:]

Statement of
Director Kay Coles James
Office of Personnel Management

before the

Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
Committee on Governmental Affairs
United States Senate

and the

Subcommittee on Civil Service and Agency Reorganization
Committee on Government Reform
U.S. House of Representatives

on

"The Key to Homeland Security: The New Human Resources System"

February 25, 2004

Mr. Chairman, Madam Chair, and members of the subcommittees:

I am grateful for the opportunity to appear before you today to discuss the status of the Department of Homeland Security's (DHS's) proposed human resources (HR) regulations. Thank you for your ongoing leadership, support, and advice regarding the Department's operations, especially the HR system. My interaction with the various members of the Committees and your staffs has been extremely positive and informative over the past 15 months. I would especially like to thank Chairman George Voinovich, Chairwoman Jo Ann Davis, Senator Richard Durbin and Representative Danny Davis for your continued commitment to the best interests of Federal workers and your steadfast commitment to the civil service as evidenced by your support for the merit principles

which distinguish our civil service system from all others. The hearing today is important and especially well-timed for the one year anniversary of the Department.

I would also like to thank Secretary Tom Ridge and Deputy Secretary Loy for their leadership and cooperation throughout the DHS design process. Together, as a team, we have worked diligently to ensure clear communications between our two agencies, and more importantly, with the workers of DHS. Working together in a true collaboration, I can tell the Subcommittees with complete confidence that we are and have been united as one team, with a single purpose: to create a personnel system that will honor those in service to our country at DHS.

As you know, the bipartisan legislation that created the Department gave the DHS Secretary and the Director of the Office of Personnel Management (OPM) authority to jointly prescribe regulations establishing a completely new HR system for most of the Department's estimated 180,000 employees. Those proposed regulations were published last week for employee and public comment. I believe that they represent an historic step in the evolution of the Federal civil service, rewriting the laws and regulations that govern how the Department classifies, evaluates, compensates, and disciplines its employees, as well as how it deals with its labor unions. At the same time, as originally envisioned and as enacted in law, the regulations remain firmly and absolutely grounded in, and bound by, our civil service system's core principles and values: merit, equal employment opportunity, due process, veterans' preference, and protections against reprisal, discrimination, and other prohibited personnel practices.

As we discuss those proposed regulations today, let us not lose sight of their genesis. On September 11, 2001, our Nation came face to face with a horrific terrorist

attack on our homeland, another day of infamy in American history. We each remember the horror of that day, and the heroism of those public servants who responded, many making the ultimate sacrifice. By their courage, they demonstrated to the world what they are made of. On September 12, they did so again, with much less fanfare. On the day after September 11, the Federal Government was open for business, and America's civil servants demonstrated their courage and patriotism.

It was against that backdrop that President George W. Bush asked Congress to consider his proposal to create the Department of Homeland Security, an institution designed to defend against an enemy who acts ruthlessly and without remorse in targeting our citizens, our Federal employees, and our cities. When it came to the professionals who were to be charged with that defense, the men and women of this new Department, the President had no doubts. He knew how dedicated and selfless they were and would be, for they had demonstrated those qualities before, during, and after September 11. However, the Administration did have doubts about the personnel system they would labor under, its impact on their ability to respond quickly, to act decisively, to achieve and reward excellence. That system had become obsolete, not in its core principles and values, but in the way that those principles and values had been operationalized over the years. In a very real sense, the employees who were honoring their Nation by defending our homeland would have been serving under a broken and unresponsive personnel system. As a reminder, the merger represented the largest of its kind since the creation of the Department of Defense, with 22 agencies, 18 payroll systems, 180,000 employees, 17 unions and 77 bargaining units.

Congress responded with the bipartisan passage of the Homeland Security Act just about fifteen months ago. However, in the months since the legislation passed and even to this day, those who were never in the arena have claimed there was a sudden and deliberate denial of civil service rights, and with them, the demise of the Federal civil service system itself. To the cottage industry of critics and professional spectators who write such nonsense, let me say this: nothing could be further from the truth. While I fully respect alternative opinions, it is important to get the facts right.

The cherished principles and values that make up the very fabric of the Federal civil service -- merit and equal employment opportunity, veterans' preference, freedom from partisan political influence, protection for those who expose waste, fraud, and abuse – remain intact. Indeed, they are sacrosanct. Our merit principles still serve as the immutable foundation for the DHS HR system; veterans' preference is undiluted and uncompromised; whistleblowers are still protected; employees are still afforded due process before an adverse action is taken against them; and they are still free to join unions and bargain collectively; and those personnel practices that were prohibited before are still prohibited today. As America moves forward in the protection of our homeland, the legacy of civil service principles envisioned and defended by President Theodore Roosevelt lives on.

These principles are the bedrock of our civil service system. They have not changed, and I believe that it is irresponsible to leave anyone with the impression that they have. They still apply with full force and effect to the men and women of DHS and will do so in the future. This is not an empty promise, either. The President and the Congress have charged the Director of OPM to keep it that way. The Act states that the

regulations giving rise to the Department's new HR system are to be "jointly prescribed" by the DHS Secretary and the OPM Director, and I take this to mean exactly what it says: that, as Director of OPM, I am to be held accountable for preserving and protecting our core civil service principles and values in the new DHS HR system, even as we seek to give the Department all the flexibility it needs to deal with the most ruthless and resourceful of enemies.

In fulfilling that responsibility, I am equally mindful of the Department's urgent need for better, more effective ways to manage its people. This too is a driving imperative. The Department's new HR system must advance and assure the Department's ability to achieve its primary mission: safeguarding the American people from terrorist attack and other threats, natural and manmade, to homeland security. In order to achieve that mission, DHS must have the unfettered flexibility to move people and resources without delay; it must be able to get the right people in the right jobs at the right time, to give them the technology they need, and to hold them accountable for their performance. This is what the American people expect and demand. I believe that the new HR system can and will do so without compromising the fundamental rights of the Department's civil servants. The Secretary and I are absolutely committed to that end, and we have proposed a bold new HR system that we believe will accomplish this. It includes the following key components:

- A pay-for-performance system in which high performance is expected and rewarded, to an extent not permitted under the General Schedule; that streamlines and modernizes job classifications and pay levels; and that takes into account both

national and local rates paid by employers in the private sector in setting pay for the Department's key occupational groups.

- A labor relations system that permits the Department to act quickly in situations where flexibility and swift implementation are most critical to achieving its mission (for example, in the deployment of personnel or introduction of new technology); that provides for the swift and fair resolution of labor disputes by a newly established and independent DHS Labor Relations Board; and that preserves the right of employees and their unions to bargain collectively over important working conditions.

- A streamlined mechanism for handling major disciplinary actions and employee appeals that preserves due process and retains intact all existing employee protections against reprisal, retaliation, and other prohibited personnel practices. It is important to note that the proposed regulations on employee appeals are the result of extensive and constructive consultation with the Merit Systems Protection Board, as required by the statute.

In developing this system, the process we employed was almost as important to Secretary Ridge and me as the substance of its outcome. Even before the enactment of the Homeland Security Act, well prior to the legislative debate, Secretary Ridge and I made a commitment to the Department's employees and major unions that if the legislation passed, the new HR system would be designed using a collaborative and inclusive process.

Secretary Ridge and I both trusted the practical wisdom of front-line managers and employees, and we wanted their perspectives to inform our decision-making. Accordingly, we promised that the process would involve and engage managers, employees, union representatives, and a broad array of stakeholders and experts from the Federal sector and private industry. We also promised a process that would ultimately be subject to the scrutiny of the American people, one that would be open and transparent, with numerous opportunities for public review, input, and comment -- from the very beginning of the design process.

I believe we have kept that promise. Over the course of the last ten months, we have met and talked to over 2,500 DHS employees and managers in town hall meetings and focus groups across the country. Understanding that advances in compensation strategies and system designs could inform the process, we consulted with dozens of companies and experts to identify promising and successful models from the private sector, state and local government, and other Federal agencies. We worked closely and collaboratively with the presidents of the Department's major unions and their key staff members, literally providing OPM office space for the latter so that they could be an integral part of the design process. Our joint DHS/OPM design team also included supervisors and front-line employees from the Department's major components, as well as a number of local union officials, to provide a reality check as the process unfolded.

With that input and involvement, our joint design team developed and presented an impressive array of options to top DHS, OPM, and Federal employee union officials (including the presidents of the Department's three largest unions) for intensive examination and discussion. That discussion took place during proceedings that were

open to employees and the public. Those officials, along with a number of highly regarded experts in the field of public administration, provided Secretary Ridge and me with a thoughtful review on the options – a review which, in turn, informed the development of the proposed regulations we published publicly last week. Again, none of this was required by the law…it was just the right thing to do to identify the best thinking and make employees inside DHS equipped to succeed.

The outstanding work done during the design phase of this project is behind us, but there is much more to be done. Last week's publication of proposed regulations officially began that process, with an opportunity for *formal* public comment and more collaboration with employee unions and other stakeholders. Some might say "enough already," but Secretary Ridge and I strongly encourage and welcome more input; we view it as yet another chance to hear from those who have something to offer. Such openness and inclusion are absolutely essential to any large organizational transformation, and we believe DHS, with 180,000 employees, is among the largest ever undertaken. We want employees and unions to have a voice in this process, and while we may not be able to alleviate all of their anxieties nor satisfy their every request, their honest involvement has contributed significantly to its high quality and will help shape the final outcome.

Secretary Ridge and I are both committed to continuing this open, inclusive and transparent collaboration as we begin to finalize the regulations and then start the implementation process. In so doing, we <u>will</u> realize the promise (and the historic opportunity) of the Homeland Security Act: a modern, contemporary HR system that helps the Department and its dedicated managers and employees achieve its most critical

mission without compromising the core ideals and the oversight institutions that have made the American civil service system the envy of the world.

Thank you again for the opportunity to testify before you today.

Senator VOINOVICH. Thank you very much, Director James.

Admiral Loy.

Admiral LOY. Good morning, Mr. Chairman, Chairman Davis when she arrives, and to the rest of the members of the committee. Thank you very much for a chance to discuss this enormously important foundation element for moving this new department forward in the service of our country.

You all have been enormously strong advocates for the General Service schedule system over time. And it is enormously important that we continue to inter-operate, if you will, together to sort our way through the tail end of this process that we've undertaken to get this very important piece right.

Secretary Ridge is testifying elsewhere today and asked me to join Director James for this hearing. I'm honored to do so, and would offer my written statement for the record if I may, Mr. Chairman, and mention just a few points as a part of an oral opening statement.

First, we report to you today on a task that was explicitly offered by the Congress in the Homeland Security Act. The challenge so offered recognized the importance of licensing the Secretary and the Director to design a new HR system that would meet the needs of our time to get past the times of the past, including the cold war or even World War II kinds of thoughts.

The General Service system has served this country enormously well. But like so many things identified with the cold war, it simply fails to measure up to the needs now clear to all of us in the very different post-September 11 security environment. We must build a sense of urgency in to our HR system, just like we have done with equipment or procedures or protocols or tools elsewhere in the other aspects of DHS responsibility. We at DHS have been challenged to think and act in bold, broad, 21st century ways. And I can offer dozens of examples of having done exactly that.

We must now do so after a very sound, methodical review with our HR system. I for one believe it's a fundamental key, a very real foundation block, for doing what America expects of this new Department.

What do we want to accomplish? First, we want to be able to meet mission, to meet mission which, as the chairman mentioned, causes us to remember September 11 on a daily basis one way or the other. Our system must be designed to safeguard America and its citizens from terrorist attack and from threats, natural or man-made. September 11, September 11, September 11. Remember that terrible day. It's our generation's Pearl Harbor or our Alamo. And given that people make the choices and do the things to preclude recurrence, this HR system is every bit as important to rethink and rebuild as any intelligence system or any sophisticated sensor.

Clarity, simplicity, efficiency, agility, adaptability, these are all elements of something called transformation that will make the difference for us. Lots of things tie for sort of a distant second place. But we must be very concerned about attracting and retaining the very best we can in the Federal work force. We must reward performance instead of longevity. We must provide competitive pay in job categories in local as well as national markets. And we must

protect all merit principles, including whistle blower provisions that the Director has already itemized.

We must demand timely, efficient decisions from our processes and from our people. Key flexibility areas for us have to do with deployment, have to do with technological inserts, have to do with people assignments, those things our HR system must support. We believe we have done so in the four basic areas that we were by law allowed to change. There are actually six that sort of tend to converge on four.

Remember, our work force is in great majority those people on line operationally, actually doing this work for America. This is not like DOD, so to speak, where civilian support, enormously important, is not what is actually on the line doing the work. In DHS, it is the civilian Federal work force in the trenches.

A word on process, Madam Chairwoman. We are very proud of the inclusiveness and of the thoroughness of our process. Director James and Secretary Ridge met even during congressional dialog and deliberations on the law. Meetings were held with key union officials, experts were consulted and the work force members were polled for ideas.

A design team was formed of over 80 people, experienced experts as team leaders, union members, representatives from work units across the Department, supervisors, managers, consultants, HR inputs literally from across the land. Sixty or more town hall meetings were held, and more focus groups than that, with our own work force members at DHS. Senior DHS representatives were on the stump listening to concerned work force members. Enormously high quality inputs were received.

The process produced concepts and ideas then offered to a senior review committee. I sat on that committee with senior DHS colleagues, with agency heads, with assistant secretaries, with the three Union presidents, with academics, with public administration experts and for 3 days, we listened very carefully to the presentation from the design team in a very public forum, robust with discussions and presentations.

The Secretary has since sat down personally, as did Ms. James, with union presidents to ensure we heard their concerns and ideas, even beyond the senior review committee. The final product in the proposed regulations published on Friday reflects significant listening and idea incorporation.

Madam and Mr. Chairman, this is anniversary week for DHS, 1 year. We have just completed our strategic plan for the Department, our vision, if you will, of the way ahead. One of our seven strategic goals is organizational excellence. This new HR system is our chance, with the Congress' blessing, to step up and do the right thing. This new system will pay for performance when lesser performance would jeopardize America. It will clarify and simplify job classifications. It will recognize differences in local variations in pay markets. It will ensure the ability to act quickly and decisively when appropriate to secure America. It will introduce new technology now to improve performance. It will resolve disputes quickly and fairly. It will protect merit principles. It will set standards for all of Government to emulate, and it will preserve union bargaining rights over important working conditions.

I believe this is the right system for the right time. As the Director mentioned, we began on Friday a 30 day comment period which offers still more opportunity to work with the committee, with the members and the staff, to work with the unions, to work with all who would comment, so that at the end of that effort, we will have the very best system we can possibly design.

I believe this is one of the most important changes we potentially can make in furthering the mission of this Department. The comment period began Friday, we look forward to offering every opportunity for continued dialog. This is a chance for us to discuss proposed regulations that have the potential to continue the evolution the chairman spoke of in this system that serves America so well.

Thank you, Mr. Chairman. I look forward to your questions.

[The prepared statement of Admiral Loy follows:]

Statement of
Deputy Secretary James M. Loy
U. S. Department of Homeland Security

The Key to Homeland Security: The New Human Resources System

Senate Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia
and the
House Subcommittee on Civil Service and Agency Organization

February 25, 2004

Good morning Chairman Voinovich, Chairman Davis, and distinguished members of the Subcommittees. I am pleased to appear at this joint hearing of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia and the Subcommittee on Civil Service and Agency Organization. The Department of Homeland Security appreciates the support we have received from both Committees as we have worked with Director James, our employees and their representatives to develop our proposals for a new human resource management system. I want to acknowledge the significant leadership of Director James, her counsel and advice has been invaluable in helping us arrive at the proposals you have in front of you.

As the Congress recognized with the passage of the Homeland Security Act, DHS has been given a critical responsibility. Our mission is to protect the country from terrorists and keep terrorists' weapons from entering the country. We can't afford to fail. We must recognize the responsibility entrusted to us and keep the harsh realities of the post-September 11 environment in the forefront of our minds as we go about our daily work. We need the ability to act swiftly and decisively in response to critical homeland security threats and other mission needs. To achieve this it is essential that we continue to attract and retain highly talented and motivated employees who are committed to excellence -- the most dedicated and skilled people our country has to offer. The current system is too cumbersome to achieve this.

The existing system was designed for a different time. The world has changed, jobs have changed, missions have changed...and our HR systems need to change as well to support this new environment. The current system, while it has many positive features, is insufficient to meet our needs. That is why the

Congress granted DHS the ability to meet the nation's changing security needs in the Homeland Security Act.

The Department has an historic opportunity to design a system that meets our critical mission requirements and is responsive to DHS employees. We understood Congress' desire to allow employees to participate in a meaningful way in the creation of a new system. With Director James' support and leadership, we chose to use this as a point of departure for an unprecedented collaborative effort to create the new system. Over 80 DHS employees, supervisors, union representatives and OPM staff were appointed to a Design Team. During the spring, that team conducted 64 nationwide town hall and focus group meetings to gain input from employees in all major DHS components. They also contacted over 65 public and private sector organizations and human resource experts as part of their research. The Secretary appointed a Senior Review Committee to guide the work of the Design Team and to review all the options developed by the Team. The Committee included both DHS and OPM leaders and the three Union Presidents from the largest DHS unions.

In developing these proposals for a new human resource management system, the Secretary and the Director accepted the guiding principles developed by the Senior Review Committee and the Design Team. These principles state that the Department of Homeland Security must ensure, first and foremost, that such systems are mission-centered. Such systems must be performance-focused, contemporary, and excellent. They must generate respect and trust; they must be based on the principles of merit and fairness embodied in the statutory merit system principles; and they must comply with all other applicable provisions of law.

We believe the proposal which we issued last week achieves those objectives. We have worked hard to ensure that our employees and their representatives, the general public, and other interested parties know that we are seeking input during the thirty day public comment period.

We are proposing a system that has a stronger correlation between performance and pay and greater consideration of local market conditions. Our proposal contains three major changes to the current General Schedule pay structure: first, we have proposed open pay ranges eliminating the "step increases" in the current system which are tied to longevity; second, we are proposing that pay would be adjusted by job type in each market not across all job types in each market; and third, we are proposing to create performance pay pools where all employees who meet performance expectations will receive performance based increases.

The proposals for performance management are designed to foster high levels of performance and to ensure that good performance is recognized, rewarded, and reinforced. The system will be designed to make meaningful distinctions in

performance and to hold employees accountable at all levels. We are proposing to phase in the performance management system before making any adjustments to pay based on that system. We are fully cognizant that this is one of the biggest challenges that lies ahead and that in the detailed work that must be done before we can implement the new system.

We have proposed changes which clarify and streamline the adverse action and appeals process while ensuring fairness and due process. We pledged at the beginning of this process to preserve fundamental merit principles, to prevent prohibited personnel practices, and to honor and promote veterans preference. These are core values of public service which we will not abandon.

We don't propose significant changes in the definition of adverse actions but have proposed to shorten the notice and reply period from 30 days to 15 days. In addition, our proposal creates one process for dealing with both performance and conduct issues in place of the separate processes under current title 5.

We do propose to create a category of offenses that have direct and substantial impact on the ability of the Department to protect homeland security. These offenses would be so egregious that supervisors have no choice but to recommend removal. We would not propose to use this authority lightly or frequently and employees will know in advance the list of offenses that would warrant mandatory removal. Only the Secretary could identify these offenses, and the Secretary or his designee could reduce the penalty. Employees alleged to have committed these offenses will have the right to advance notice of the charged offense, an opportunity to respond, a written decision, and a further appeal to an independent DHS panel.

The vast majority of cases, which do not involve mandatory removal offenses, will still be brought before the MSPB, but with certain substantive and procedural modifications designed to bring greater efficiency in decisionmaking. These modifications to MSPB procedures will further DHS mission without impairing fair treatment and due process protections.

Finally, our proposed labor relations construct meets our operational needs while providing for collective bargaining and encouraging consultation with employee representatives. One of the most significant changes which we have proposed is the scope of bargaining over management rights. In the face of a committed and unpredictable enemy, the Department must have the authority to move employees quickly when circumstances demand; it must be able to develop and rapidly deploy new technology to confront threats to national security; and it must be able to act without delay to properly secure the Nation's borders and ports of entry. We propose that the Department not be required to bargain over the exercise of these rights. Our proposal provides for consultation with employee representatives both before and after implementation when circumstances permit.

We have proposed to retain the same bargaining obligations as we have today concerning the exercise of the remaining management rights.

We also propose to create a Homeland Security Labor Relations Board. We determined that the Department should establish a separate Labor Relations Board focused on the DHS mission. We put a high premium on the Board members' understanding of and appreciation for the unique challenges DHS faces in carrying out its homeland security mission. We also gave great weight to the benefits of a unified, expeditious process to resolve bargaining disputes. To ensure independence and impartiality, which both we and the unions value, the Board will not report to the Secretary; the three external members will be appointed for fixed terms and subject to removal only for inefficiency, neglect of duty, or malfeasance.

We recognize that these are significant changes. They are necessary for the Department to carry out its mission and fulfill the requirements of the Homeland Security Act to create a 21st century system that is flexible and contemporary while protecting fundamental employee rights. We have developed these proposals with extensive input from our employees and their representatives. And we continue to encourage a dialogue as we proceed through the regulatory process.

We are asking all employees, as well as the unions which represent our workforce and the general public to comment on these regulations. We look forward to hearing from members of your two committees as well as other members of Congress during this period. Following that comment period, we will need time to consider what we have heard. We have a statutory obligation to meet and confer for at least 30 days to attempt to reach agreement with employee representatives; during this period the Secretary may engage mediators to help us resolve any of the disagreements with employee representatives that we can. Then and only then can these proposals be implemented.

In the interim, our employees continue to do outstanding work on behalf of the American people. We are fast approaching the anniversary of moving twenty-two separate agencies into the Department of Homeland Security. We are proud of all we have accomplished in one year. And, we are especially proud of the employees who have made it possible.

That concludes my remarks. I welcome any questions.

Senator VOINOVICH. Thank you very much, Admiral.

I want to make one comment before I turn the meeting over to my co-chairman, Representative Davis. I envisioned that we would be having this hearing after you did your 30 day period. And this is going to give everybody, including those that are proposing the regulations and those that have some questions, to comment publicly during this period. In other words, even without this hearing, there is a chance for everybody to look in and see what's going on and what your recommendations are and what the concerns are of stakeholders.

I was pleased to hear from you, Director James, that it's not over, that you're still listening. That's very positive. Again I want to thank the two of you and the team that you have for taking the time to try and do this the right way.

Senator LAUTENBERG. Mr. Chairman, I have a question. I assume the record will be open, because we have a vote now over in the Senate, and we'll submit our questions in writing. We thank our colleagues from the House for joining us for today's very important hearing. We look forward to an outcome that's going to try to satisfy everybody. Ms. James and Admiral Loy, you're both used to this kind of thing, so we know that it's going to come out right. Thank you very much.

Mrs. DAVIS OF VIRGINIA [assuming Chair]. Thanks for your patience with our musical chairs here. Today's sort of been Murphy's law, if it could happen, it will, and it has. I apologize, I had to go over to the floor to manage the GAO bill that is a very important piece of legislation we passed out of this committee. So I do apologize.

I'm not going to take the time to do an opening statement, other than to publicly say how much I appreciate Senator Voinovich and his leadership on this issue as well. It's just a real pleasure to work with him. I thank him and his colleagues for coming over today.

I would like to recognize our ranking member, Mr. Davis, if you have an opening statement.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman. Because of the logistics of what I've got to do, I am going to read an opening statement and ask that the witnesses just give me the opportunity to do that.

Chairman Davis, House and Senate colleagues, witnesses and observers, we have embarked on a sad and troubling era in the history of Civil Service. The enactment of major legislation transforming the personnel systems of the Government's two largest agencies, DOD and DHS, has broken the back of a Civil Service that is grounded in the fair and equitable treatment of employees.

Proponents of these changes argue that the current system is cumbersome and inflexible. But are agencies that are being granted exemptions from Title V fixing what is cumbersome and inefficient with the system, or simply what is inconvenient? Regrettably, the fixes imposed are radical, undermining the rights of workers, while empowering management in a disproportionate, unbalanced manner.

This ad hoc and non-transparent approach to reform will not serve us well. I suspect it will make it more difficult to maintain

stability within our work force. I am concerned that productivity and customer service may suffer as a result.

The title of this hearing has it almost right, the Congress and this administration have thrown out the key protections that employees relied upon to ensure fair treatment and a stable work environment, their appeal and collective bargaining rights. This was done, the proponents say, for the sake of homeland and national security. I greatly doubt, however, that the record will reflect that this sacrifice has made America any more of a homeland or any more secure.

I thank the witnesses for coming and look forward to hearing the rest of their testimony, and thank you, Madam Chairwoman, for holding this hearing.

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

**STATEMENT OF THE HONORABLE DANNY K. DAVIS
AT THE JOINT SUBCOMMITTEE ON CIVIL SERVICE
AND AGENCY ORGANIZATION AND SENATE SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE,
AND THE DISTRICT OF COLUMBIA
HEARING ON**

THE KEY TO HOMELAND SECURITY: THE NEW HUMAN RESOURCES SYSTEM

February 24, 2004

Chairwoman Davis, my House and Senate colleagues, witnesses and observers, we have embarked on a sad and troubling era in the history of the civil service.

The enactment of major legislation that transforms the personnel systems of the government's two largest agencies, the Defense Department and the Department of Homeland Security, has broken the back of a civil service that is grounded in the fair and equitable treatment of employees. The proponents of these changes argue the justification that the current system is cumbersome and inflexible. But are agencies that are being granted exemptions from Title V fixing what is cumbersome and inefficient or simply changing what is inconvenient?

Regrettably, the fixes imposed are radical and undermine the rights of workers, while empowering management in a disproportionate and unbalanced manner. This ad hoc and non-transparent approach to reform will not serve us well. I suspect it will make it more difficult to maintain stability within our workforce. I am concerned that productivity and customer service may suffer as the result.

The title of this hearing has it almost right. The Congress and the Administration have *thrown out* the key protections that employees have relied upon to ensure fair treatment and a stable work environment -- their appeal and collective bargaining rights. This was done, the proponents say, for the sake of homeland and national security. I greatly doubt, however, that the record will reflect that this sacrifice has made America any more secure.

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

Again, I'd like to say thank you for your patience to all of our witnesses who are here today.

I'd like to start out with an opening question to, I guess this would be to Admiral Loy. What do you believe to be the most significant improvements to managing your employees that would result from implementing your proposed new personnel system?

Admiral LOY. Madam Chairwoman, I think the sort of general notion of why we think this undertaking is so important probably goes back really to the dialog that was part and parcel of the Congress' deliberations that resulted in the Homeland Security Act. This world we are living in post-September 11 is just a dramatically different security environment than we have ever lived in before. For several hundred years, we took great comfort in these wonderful moats called oceans on either side of us that precluded, we felt, literally up to September 10, 2001, an opportunity for this impenetrable superpower to be challenged in ways that all of a sudden manifested themselves on September 11.

And in the midst of that mission that has been offered to this Department to take on for the Nation, that is to secure homeland and its citizens against those kinds of attacks, we need the attributes of agility and quickness and adaptability that are not necessary part of a system that requires so much conversation in advance of action.

We want very much to hold onto what was at the heart of the 1978 legislation. As you go through our recommended package, you will find attention and devotion to those principles from the beginning to the end. So the notions of merit and whether it's about the end, the boards that currently define our lives, even things like the EEOC and others, we are fundamentally supportive that those notions continue as support elements for our work force.

But we also want in this very new security environment to attract and retain high performers. We want to reflect on what's different about a locale in Portland or Chicago or Los Angeles that could make us competitive with local folks in the hiring process, to make sure we get the best employees there. We want to reward and incentivize performance rather than longevity in the process of due course of business. We want to induce timeliness and efficiency in everything we do. And most of this often occurs in the pre-event world that we live in today.

So as we are in the prevention and protection business of our security conscious Nation, those attributes in an HR system are fundamental to the foundation of being able to do those things well.

Mrs. DAVIS OF VIRGINIA. Your regulations, your plans that we've seen, they have a lot of changes for Federal employees. And I know they're very nervous. How can you assure our employees that they are going to be treated fairly when it comes to the pay system?

Admiral LOY. I think there absolutely must be a marketing dimension, a training dimension and education dimension to our effort over time. It's a matter of not being ready to turn the switch on, so to speak, until that education and marketing effort has been accomplished.

We, if you look carefully in the President's budget request for 2005, a lot of dollars are being asked for that allow us to make an

investment in the training required, so that supervisors are very good at the performance and appraisal systems that we are considering putting into motion through this new system. We want very much to hold on to those aspects of the Civil Service system at the moment that has sort of served us so very well in protecting the interests of the Federal work force.

Senator Lautenberg's comments were right on track, the heroism of Federal employees on September 11 or on any other day is not in question here. I have found myself either in uniform or in public service for almost 45 years. I have yet to find a Federal worker who comes to work in the morning with the intention of not doing a good job. They come with the intention of doing all that they can to do what we need to do.

So there's never a question in any of the design work about whether we mistrust or whether there is some challenge associated with why we're doing what we're doing. We're doing this because the new security environment, which is largely resident in the Homeland Security Department, requires aspects of work from employees that we cannot hope are there any more, we must mandate that they be there.

Mrs. DAVIS OF VIRGINIA. My time is up, but I want to followup with one quick question on the pay, because I think that's one of the things that is probably worrying the employees more than anything. Verbal communications can be used as a basis for performance. Can you give me an instance of when a supervisor or manager would use a verbal communication for a performance expectation as opposed to a written communication, and then that verbal communication be used toward their performance? I think I have that right.

Admiral LOY. I think it is right on to one of the sensitive foundation blocks of how we deal with performance appraisal on one hand, then hold accountability in terms of performance to that. I think there are probably countless examples of where a supervisor in the thrust of crisis or the notion of preventing a crisis from coming on would deliver verbal direction to an employee to do things that perhaps are outside the mainstream of the 24 by 7 kind of work that employee does.

Holding that person accountable thereafter to the kinds of things that truly make a difference to whether or not this Nation handles the upcoming crisis well or poorly is along the line of what you're talking about, Madam Chairwoman. And the ability that we have to have that agility within the system, such that whatever the written performance process is can be adapted, can be made agile by verbal instructions to get work done that absolutely must make a difference in our ability to secure America are the kind of things we need to go to.

Mrs. DAVIS OF VIRGINIA. My time has expired. I'm going to go on to one of my colleagues, but we may have a chance for a few more questions.

Admiral LOY. If I may, just a couple globals. No jobs lost, no pay loss as we enter this new system, and an opportunity over time to effect a sort of pay process that recognizes across the board increases on an annual basis, very much a part of what we listened carefully and heard from union representatives during our debates.

Discussions associated with local differences between categories of work in one corner of the country or another, the opportunity to reflect that on a fair and equitable basis to Federal employees with their local competitors for those same kinds of jobs.

And then last, the idea that superior performance can be incentivized by yet additional dollars coming your way as both a reward and incentive for continued high performance. That notion, as a pay for performance which still holds onto the basic principles of satisfactory performance yielding pay raises on an annual basis is a systemic notion that we have to educate and sell to our employees.

Mrs. DAVIS OF VIRGINIA. Thank you, Admiral Loy. I might say on the process, I was delighted to hear that you included so many people for the input on that process.

I'd like to yield now to Ms. Holmes Norton for questions.

Ms. NORTON. Thank you, Madam Chairwoman.

This is an important hearing. I can only hope that the good oversight, Madam Chairwoman, that you're offering, has some effect on OPM. I regret that we seem to be on a kind of 2 day week, which is a 1-day week, I have another hearing at 11 o'clock, I'm the ranking member and may have to run back and forth.

Let me say that what I look for when there's a change is evidence of best practices. Because frankly, I sympathize with what you're having to do in designing a new department, making sure that personnel, along with everything else, comports with what we need in the new era of global terrorism.

But I have to tell you, I was a member of three corporate boards before I became a Member of Congress. I was also a member of a UAW appeal board. I got to see on both sides how corporations, these were magnificent corporations, some were organized and some were not, and I got to see how unions go with things, up close. I also taught labor law.

So when I look, I come at it with eyes that go in several different directions. The first thing it seems to me you do when you're faced with your kind of problem, which is to take a whole personnel system, turn it on its head and think, what effect will this have on the people who are going to work here, particularly if they're dealing with homeland security. Because you can mess with the morale and the way people do their jobs in a number of agencies. You mess with this, you're messing with us.

So I'm really looking for evidence of best practices. My question is, where did all of this come from? Because I don't see in this much that indicates what I understand to be best practices. You will see that employees think, well, what's happening there are excuses to do the kinds of changes that management has always wanted to do. I have problems with consultation. I have problems with changes that seem to me to be truly gratuitous.

Let me give you an example. I can understand the reduction of bargaining on some matters, we're talking about the Homeland Security Department. But here you've come forward with permissive subjects, now, permissive subjects, are no longer subject to bargaining, even at the agency's discretion. Well, then agency might decide, I may be able to implement this matter more easily if I sit down and negotiate with my employees. And management is going

to say, I don't even want that discretion. And you're telling me that a Fortune 500 company would in fact do that.

Another example of gratuitous changes, why in the world would you want to eliminate the post-implementation bargaining? I mean, you've already done it. Bargaining doesn't mean that you have to do what the other side says. Why in the world eliminate that? And have you thought about the effect you're having on your employees? I want answers to both of those questions. Why you have eliminated those, and what factor has gone into the fact that you are fooling with folks who have undergone the most humongous change in their work life, and what effect is this going to have, not on how they feel, but on whether they do the job they do have to do in a sensitive agency charged with protecting the residents of the District of Columbia and the United States of America?

Admiral LOY. Let me take a stab at it first, Ms. Norton. Absolutely we are sensitive to the impact this would have on our work force. That is largely why the design process was so inclusive, to hear from thousands of them in the due course of the design work undertaken. Beyond that, we had at the table at our design team and at the senior review committee consultants from, I don't know if it was those specific Fortune 500 companies that you were part of, but we reached into corporate America, we reached into all those corners you describe, whether it was academic, consultative expertise, to get the best practices, as you describe them.

Ms. NORTON. So the bargaining at an agency's discretion, when management says, I want to be able to bargain, you're telling me that Fortune 500 companies have said, that's a best practice, that's how to get the most out of your employees?

Admiral LOY. What you asked me for, ma'am, was a description——

Ms. NORTON. I gave you an example. I really gave you an example so you wouldn't be talking in abstractions. I gave you a concrete examples of what, that I regard, because I don't think everything you've done here is wrong. I gave you a concrete example of something that I believe no Fortune 500 company that looks at its bottom line would do. And I want to know where that came from.

Admiral LOY. It came from the dialog of the debate that we took on over the course of this 9 months. The discretion at DHS about bargaining is arrived at the Department. So our challenge in that regard was to build a system that recognized that discretion. And it has to do—every moment of this goes back to the——

Ms. NORTON. This is at the discretion, Admiral Loy, this at the agency's discretion. I want you to tell me why, if the agency in its discretion wants to bargain about certain issues because it believes that is the best way to get the maximum from its employees, how that hurts management.

Admiral LOY. We just feel that the discretion of that bargaining should be at the Secretary's level at DHS, ma'am, given the mission that we have to conduct for the country.

Ms. NORTON. So this agency is going to be run from the top up by somebody who has nothing to do with folks at the management level, and even if the agency wants to decide that on certain issues the best way to get this done. That's what I'm talking about, to get

this done is in fact to operate in a consultative way with employees. You say the top of the agency should make that decision.

Admiral LOY. We believe so.

Ms. JAMES. I would just add as another factor, at the discretion of the Secretary, because of the unique mission of the Department of Homeland Security, with the information that may exist at the Secretarial level that may not exist at the agency level, that it certainly would be important to have the input of the Secretary to make those determinations.

Ms. NORTON. I have no problem with input. What I'm asking is, suppose there's input and the agency and the Secretary have a discussion, and the Secretary gets, it looks as though this is a Secretary's decision period, like it's not up for discussion because there is no discretion.

Ms. JAMES. I'm sure that there would be that kind of give and take. But at the end of the day, that kind of discretion needs to rest with the Secretary, because of the unique mission of that Department.

Ms. NORTON. But there is no discretion. So I take it that the Secretary doesn't even have the discretion.

Admiral LOY. But he does, ma'am. The Secretary has that discretion to make the choice as to whether or not he wants to do that at the agency level.

Ms. NORTON. So you're telling me that the Secretary then——

Admiral LOY. Can make that judgment.

Ms. NORTON [continuing]. Can decide that there will be bargaining on permissive subjects and that is your intent here?

Admiral LOY. Yes, ma'am.

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

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

I'd now like to yield to our distinguished co-chair, Senator Voinovich.

Senator VOINOVICH. I apologize for having to skip out. In examining the proposal, it's clear there are still many details to be worked out. If any of these questions are redundant, just say we've answered it already and I'll look at the record.

When do you plan to have all the details of this new personnel system worked out? Will there be additional regulations issued? Will additional rules be issued as directives as opposed to regulations? Is this being done intentionally so as not to cast anything in stone, so to speak?

Ms. JAMES. Let me just speak a minute to the process. We are now in the comment period, and I believe this is one of the most important periods in the entire process. For those who watch these things carefully, we have gotten to the point where we have issued the regulations, they are out there in a very transparent way.

When Secretary Ridge met with the union presidents, he encouraged them to keep the dialog open, and at the end of that period, we will sit down, this has been a collaborative process from the very beginning. We are in a period where we still have the opportunity to refine, if necessary, to receive input from Members of Congress as well as from our union presidents, as well as from employees within the Department. And we are listening to and incorporating their ideas and comments as well.

I would add to what Admiral Loy said in terms of the admonition that we look at best practices. I can assure you that we did, that we had some of the best subject matter and technical experts in the country, as well as from the Academy, as well as from good government organizations. And this is the culmination of that process.

Senator VOINOVICH. The point I'm making is, after this is over with, are there going to be any additional rules issued as directive as opposed to regulations? In other words, are the regs going to be comprehensive so that we can pretty well say that's it, and not have some new directives coming out later on?

Ms. JAMES. I think the regulations will be very comprehensive. But for those who have been at this a long time, they know that the implementation and how this gets interpreted is as important as well. For that reason, the Secretary and his staff, have come up with a very comprehensive implementation strategy, which is inclusive as well. So those individuals who have been at the table for the development of the regs will be at the table for the implementation as well.

Senator VOINOVICH. That's what I'm getting at.

I'm also concerned about parity between the classification and compensation systems of law enforcement personnel. As you know, GAO noted in a study published last year that TSA, which was given great personnel flexibility, drew away hundreds of uniformed officers from Capitol Hill Police, the Uniformed Secret Service and the Park Police. While this was beneficial to TSA, it was detrimental to these other police forces that are facing the same challenges of greatly increased security in the face of possible terrorist attacks against national leaders, facilities and monuments.

What did your design team do to avoid similar unintended consequences with this personnel system? As you know, I've asked OPM to conduct a study of Federal law enforcement pay and classification. That study is due on April 30th of this year. What I'm getting at is, what have you done to recognize that's a problem, so that once this is over we just don't have various agencies cherry picking other agencies because of the better pay that's being provided?

Ms. JAMES. I think that's one of the reasons why it's important Congress did what it did by including OPM in the process. Because we do have that Government-wide eye and have the opportunity to say, if something happens over here, what is the implication and the impact over here. We want to make sure that the Department of Homeland Security has the best personnel systems that will meet their mission.

But we also have an obligation and an ability to look Government-wide. So we always had one eye to that.

What I would say is that in the process of designing their pay systems and their classification systems, and they sort of go hand in hand, that the simplified structure and the increased flexibility that they have will give them the freedom to make sure that those very issues that you addressed are looked at, and with an eye toward what the implications are going to be across Government. We've got to bring some, and if the Senator gets to the larger question of the flexibilites that we grant at the individual level for the

departments and the unintended consequences that they have Government-wide.

And I think as we designed these systems within the Department of Homeland Security, our desire was to make sure that even within the Department there was not the opportunity to cherry pick between the various agencies. And Admiral Loy may want to talk about how they're going to address that internally.

Admiral LOY. Just a moment, sir. First of all, I have to confess to being the cherry picker at TSA when much of that was going on with the immediate crisis of staffing that agency and getting the job done that the Congress demanded and the very aggressive deadlines that were offered in that earlier legislation, the Aviation Transportation Security Act.

I think there is work to be done here, sir, and I think there is also congressional opportunity for participation. As you know, we can touch pay but not benefits. So we're in the algorithm of total compensation, the adjustments that might be going on locally or might be going on elsewhere in the Federal service, have a different benefit package than—we can't go there. So the inconsistences may be more than in just pay itself. That will take the consciousness of the Committee to be helpful, perhaps, with respect to sorting those kinds of things out when appropriate.

One initiative, for example, sir, that we've undertaken in the Department is the new CBP officer, this new organization agency that has been created by a combination of what heretofore has been INS functionality and Customs functionality, and even the Agriculture piece that has come over into the Department. The new Customs and Border Patrol officer will have one uniform, one package, one set of pay benefits and that will have already begun the process of eliminating that internal cherry picking, if that is the term of art we're using today, within the Department, and as an example for where we can do things better, if you will, across the board.

I also think Kay's comment about OPM's role in our collective design work, she brings to the table concerns across Government in other agencies that make sure that we are not designing something that ends up being problematic elsewhere.

Senator VOINOVICH. I'd appreciate a memo from you on how Congress can get into that. If you're looking at a benefits package, you've got to compare the whole thing.

Admiral LOY. Yes, sir. Uniformed services, Secret Service pay package is established in law. There are other elements of other agencies' forces that are established in law. So we are bound by those as we deal with making an effort toward consolidating our notions across the board for the Department.

Senator VOINOVICH. Is my time up?

Mrs. DAVIS OF VIRGINIA. You can take as much time as you'd like, Senator.

Senator VOINOVICH. Admiral Loy, in your opening statement, you made reference to the regulations removing the requirement for collective bargaining over the impact and implementation of core management rights, including deployment of personnel, assignment of work and use of new technology. Can you provide specific examples of actual situations in the past where collective bargaining

over these types of activities prevented management from meeting mission needs?

Admiral LOY. I think there are, I use the phrase prevention, on the prevention side of a God forbid event, in order to make certain that we have transformed the force and the authorities associated with using the Federal force to get people in places that we need them immediately without, and when I say immediately, it's sort of whatever the intelligence stream is telling us at the moment. It's about the idea of taking a product that has just been perfected by our science and technology work in the Department and instantly getting it into the force so it's a usable sensor wherever it might be necessary.

So the notions of deployment, the notions of assignment, the notions of technology to be used as efficiently and as quickly as possible broaches the requirements that we have offered in the bill.

There's a number of things in the past where the idea of new national procedures, for example, if the agency determines that we can use U.S. Visit, the new program, in a manner different than we have heretofore used it, because we've uncovered a new protocol, or uncovered a better way to do it, and there are people implications to it, we need to be able to take advantage of those kinds of things immediately. The idea associated with technology, if the VACA system in our ports all of a sudden has dimension to it that allows us to be more sensitive to bio and chemical threats to the Nation and it is a requirement that our people be so trained to use it immediately, we don't want to wait over time until those kinds of things can be put into place.

Senator VOINOVICH. Are you saying that the examples that you gave me are all subject to collective bargaining and would slow the process down?

Admiral LOY. At the moment, many of them could be, yes, sir. And we believe in the interest of mission, which is always where our least common denominator goes back to, we want to make absolutely certain that mission is served first in this new Department.

Senator VOINOVICH. I'll just ask one more. I'm sure this is on a lot of people's minds. The power of the Secretary to remove members of various boards described in the regulations may cause employees to question their independence. How do you plan to ensure the independence of members on the labor relations board and the mandatory removal panel?

Admiral LOY. I'll let Kay join me in the answer. The bottom line is, we imagine terms to those boards, so that it's not a situation where the Secretary can appoint today, unappoint tomorrow, rather that the terms associated with the appointments to those boards would be such that the opportunity for mischief, as someone had termed it earlier, is simply minimized or eliminated, we would like to think.

The real notion here is those boards must be sensitive to the mission of this Department as it is being driven by the Secretary. That requires a sensitivity to the work to be done and therefore requires a sensitivity to how the kinds of appeal process things might come forward to it.

There is a notion in the regs that has prompted a number of comments with respect to those mandatory removal offenses, and what that inventory might be and how does the Secretary appoint at the moment a board to review an appeal from an adverse action associated with that process. In that instance, I would offer first of all, we imagine a very, very small number of those kinds of things. They are enormously egregious notions.

For example, on the line as a CBP employee at the portals of our country taking a bribe to allow someone to go through the system without being tested, without being dealt with as appropriately as the protocols call for. The notion of intentional abrogation of classified material to sources that we simply don't want to have them, it's that kind of egregious offense that would cause the Secretary to have concerns and nationalized mandatory removal as a penalty for such activities.

That list, I think, will be enormously short. It is still to be developed. And I reinforce the notion that Director James has from the very beginning here today: this remains a work in progress for us and the comment period that has just begun on Friday is our last best chance to get the best ideas on the table that we can. But those kinds of notions, sir, I think go directly to your question.

Senator VOINOVICH. It's really important that these boards are looked upon as being independent.

Admiral LOY. Independent and objective, yes, sir.

Ms. JAMES. Madam Chairwoman, can I just state the obvious in answer to that question? That is, for those boards to be effective at all, they must be credible. And they must be credible to the employees. So the Secretary, of course, in making his selections for who would serve on those boards, would have to identify individuals that pass the straight face test in terms of credibility.

I believe that with the integrity of the Secretary and the people that he could draw from, you can put together boards like that. I'm confident that he will, that employees will feel comfortable going before them.

Senator VOINOVICH. I've been involved with lots of boards, at the State level and the local level. If we put some provisions in there that they have to be composed of so many Republicans, so many Democrats, we balance it and try to get good people. The fact that we go through that process adds credibility to those boards and commissions. If you're going to replace a familiar system with a new one, it's really important that it be considered legitimate, and as you say, pass the straight face test.

Admiral LOY. Yes, sir, I could not agree more. In fact, it's one of the things that we received an enormous amount of commentary from our own work force on, was not so much the makeup and getting the right answer at the other end, which of course goes without saying, but the timelines associated with getting those questions resolved quickly is very, very important to the work force at large. They want those answers back quickly so they can get on with their lives.

Senator VOINOVICH. Thank you.

Mrs. DAVIS OF VIRGINIA. Thank you, Senator. I just want to, on this point, clarify something. The credibility of who the Secretary appoints wouldn't concern me so much as, and I just want to make

sure that I heard your answer correctly, Admiral, to clarify. In there I think it says that the Secretary can, they're appointed for fixed terms, they can be removed for inefficiency and some other nebulous sorts of words. But if I heard you correctly, there is going to be something prepared that will specify what is inefficient, exactly for what reason the Secretary could remove the person from the Board.

But what I'm getting at is, what would keep the Secretary from saying someone is inefficient just to remove someone that he doesn't care for and he doesn't like the way they've been handling the problem?

Admiral LOY. I think that's a very, very good point and we must be very specific in the terms associated with both appointment and potential causes for removal.

Mrs. DAVIS OF VIRGINIA. So you'll be doing that, because it's a work in progress?

Admiral LOY. Yes, ma'am.

Mrs. DAVIS OF VIRGINIA. Thank you.

I would now like to recognize the gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you very much, Madam Chairwoman.

I would like to get an update on where you are, I just wanted to focus on the questions of rights in these regulations. As I understand it now, there are certain types of so-called infractions that would result in an in-house panel as opposed to the Merit Systems Protection Board, is that right?

Admiral LOY. That's right, sir. And a singular source that would be dealing both with performance and conduct kinds of things, rather than multiple sources, as indicates today.

Mr. VAN HOLLEN. How would the members of that internal review board be chosen? The question is, if we're going to substitute this internal review board for what is clearly an independent board, we want to make sure that it is perceived to be fairly selected by the employees who could conceivably be coming before the Board. What is the plan for that?

Admiral LOY. The plan is largely as we have just been discussing, sir, which would offer the Secretary the opportunity to make credible appointments to that internal board that face the music, so to speak, of objectivity and credibility in the fashion we were just describing.

Mr. VAN HOLLEN. Will you be consulting with the representatives of employees in making that selection?

Admiral LOY. Absolutely, those conversations would in fact take place.

Mr. VAN HOLLEN. As I understand it, with respect to appeals that do go to the Merit Systems Protection Board, the new regulations eliminate the MSPB's current authority to modify agency imposed penalties. Why would we do that in these situations?

Admiral LOY. Well, it's conditioned on the notion that charges are sustained by the board and on the occasion of the sustainment by the MSPB on the chargee that would come to it, the system as designed would not permit the MSPB to make adjustments. They can make recommendations to adjusting, but the Secretary would have the final say on the results of that deliberative process.

Mr. VAN HOLLEN. Is that different than appeals that take place in other agencies throughout the Government?

Admiral LOY. At the moment, the MSPB can in fact make adjustments downward, for example, in the penalty process, if you will, that would be forthcoming.

Mr. VAN HOLLEN. I mean, the idea of having an appeal, obviously, to the MSPB to have this independent authority, if they conclude that the penalties applied by the Department are unfair, at this independent body, why wouldn't we want to allow them to adjust the penalties for what they consider to be a just outcome? I mean, this is an independent body. Why wouldn't we want to allow them to do that?

Admiral LOY. Yes, sir, I understand your question. And the notion as constructed in the efforts so far that is in the regs would offer the MSPB every opportunity to make recommendations to modifications.

Mr. VAN HOLLEN. I understand that. Why would we want to take away from the MSPB in this instance the rights they have to address grievances for employees in any other department of the Government? Why is that necessary?

Admiral LOY. We just feel that in order to be sensitive to the unique mission of this Department, the Secretary's prerogative is the more appropriate choice.

Mr. VAN HOLLEN. And I understand you're also changing the burden of proof with respect to claims made to MSPB. Is that correct? In other words, the preponderance of evidence standard, which is applied throughout the Federal Government, which applies in courts of law throughout this country in civil cases, you want to change that, you want to reduce the burden of proof with respect to the appeals made from the Department of Homeland Security?

Admiral LOY. Yes, sir. At the moment in our work, on the performance side of the house, the burden of proof is at a substantial level. And for conduct offenses or appeals it's associated with preponderance of evidence, as you describe. The standard of proof that is being offered in the construct in the regs is that substantial is adequate for both performance and conduct paths.

Mr. VAN HOLLEN. Well, let me ask you this. If someone's accused of a certain infraction, the preponderance of the evidence standard means when the fact finders look at the evidence, they conclude that it's more likely than not that the infraction occurred, right?

Admiral LOY. Stronger than substantial, yes, sir.

Mr. VAN HOLLEN. More likely than not?

Admiral LOY. More likely than not.

Mr. VAN HOLLEN. The preponderance of the evidence, the scales adjust to say, looking at the evidence as a fact finder, why would we want to say, even where we don't find that it's more likely that this infraction occurred, that we can still punish the individual, even though the evidence doesn't show that it's more likely that an infraction occurred than it didn't, why would we want to do that?

Admiral LOY. We just feel that in the interests of supporting the mission of this Department, in supporting the general notions of simpler, faster, fairer processes——

Mr. VAN HOLLEN. Well, how is that fairer? How is that fairer, to be able to punish an individual, even though the evidence, the preponderance of the evidence, the weight of the evidence doesn't show they committed a violation? How is that fairer?

Admiral LOY. These are simply, sir, just to legal, technical mechanics. We believe the substantial standard is adequate to the test.

Mr. VAN HOLLEN. Well, I wouldn't call these technical. They're substantive changes. And that's obviously why they were made. And it's a departure from the standard that we apply throughout the rest of the Federal Government. I would hope that in the process, as we continue to review these regulations, you take a serious look at what clearly, I don't think can be defended. I don't think you can defend changing the rules of evidence, essentially, on the basis of national security in this case. It's just a matter of fairness.

Thank you, Madam Chairwoman.

Admiral LOY. We look forward to that discussion, sir.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Van Hollen. Now I'd like to recognize Mr. Mica.

Mr. MICA. Thank you. I'd have to disagree with my colleague on that last issue. I think in the instance of protecting the homeland that these positions are different. Substantial should be adequate.

In that regard, let me just ask a couple of questions. You have, regulations are silent on judicial review of decisions of Homeland Security Labor Relations Board or the panel that will decide on mandatory removal offenses. When would you have such a list compiled and what would you anticipate would be considered mandatory removal offenses, and would be criminal acts and things of that nature?

Admiral LOY. Yes, sir. Mr. Mica, as you know, having worked together with us over the last couple of years on the aviation side of the House a lot, the whole idea of this work that we're involved in offers forward some notions of mandatory removal from this work. If we find ourselves doing things such as uncovering folks who have with fraud or bribe accepted personal gain and turned their backs, so to speak, on their responsibilities as securers of the homeland. The whole notion of the kinds of material that we work with day after day, if an employee would breach classification boundaries and turn material over or look the other way when those kinds of things are possible. Those are the kinds of egregious things that will find their way onto what I think will be a very short list of these——

Mr. MICA. It would be your intent, though, to not have appeal, those offenses eligible for appeal?

Admiral LOY. There would be an appeal to a board of the moment established by the Secretary to hear it.

Mr. MICA. But not to the Merit Systems Protection Board?

Admiral LOY. Judicial review, sir?

Mr. MICA. Or to the merits.

Admiral LOY. I think we have work to be done on the judicial review of, but it would not be to the MSPB. It would be to in the cites that you're giving me.

Mr. MICA. When we created Homeland Security, one of the things we wanted was a performance based organization and the ability to fire non-performers.

Admiral LOY. Yes, sir.

Mr. MICA. You've made some improvement, I see, in adverse personnel action, speeding up the process. Having chaired Civil Service for 4 years, one of the problems I found is you couldn't get—well, first you couldn't get performance based standards, and second, you couldn't get rid of poor performers. You have some of that process here, and you've shortened that and I commend you for that.

But my concern is that we allow people in one of our most critical areas, that's homeland defense operations, to game the system, to not be able to fire them, one for bad performance, I've looked at your pass-fail, which you don't do, you have a different system in place. But we should have the ability to clearly fire poor performers without a lengthy appeal and gaming the system.

The second, and I see you speed up that process, but they still game it. I see gaming possibilities in the appeal process. You can appeal an adverse personnel action, you can also appeal pay banding. Do people get two bites, can they get two bites at the apple?

Admiral LOY. No, sir. Under the designed reg, there would be only one bite at the apple.

Mr. MICA. And then finally, this stuff gets to the Merit Systems Protection Board. What's your current backlog time of processing actions before the board, Ms. James?

Ms. JAMES. I don't have authority over the MSPB.

Mr. MICA. I know, but do you have any idea?

Ms. JAMES. I'm not entirely sure. I know that they do have a backlog, and I know that they have been very helpful in working with us in this design process to streamline the process and to be sensitive to the mission.

Mr. MICA. I'd like for the record the time of the current backlog before these various boards and then the process. It was years, I mean, nobody ever got fired, everyone gamed the system. The other game that's played is either poor performers or people who would have some action taken against them, adverse personnel action, then turn around and they're put in sort of a limbo or moved to another position while they're gaming the system. Is there any prohibition in what you're proposing on gaming the system for poor performers?

Ms. JAMES. Let me just say a couple of things about what the Department did that I think are creative and innovative. They did in fact look at ways of streamlining the system. The Department of Homeland Security had the opportunity to completely take out the MSPB, they did not. But what they did is sat down and worked with them and said, how can you work with us to streamline the process so that you can be sensitive to our mission and make sure that there is an appeal process in place.

Mr. MICA. And you streamlined that on the short end. I'm concerned about the long end judicial merit protection and EEOC cases that went on and on.

Ms. JAMES. I think we want to make sure that, being sensitive to the mission of the Department and balancing that against the

opportunity to protect employees' due processes, that they have done a good job of maintaining both and in working with them. So while people may not be entirely satisfied that we have these independent boards appointed by the Secretary, they are there. They will be transparent. They will be available as a process for employees.

While there have been opportunities for many bites at the apple, we have taken that and streamlined that so that it will no longer be an issue. And this is a work in progress. There will be opportunities to tweak it even further.

Mr. MICA. Just a couple of quick questions. There are 180,000 employees plus or minus, and many are excluded TSA, military——

Ms. JAMES. About 70,000.

Mr. MICA. So 70,000 is what we end up with.

Admiral LOY. About 110,000 that will be impacted, sir.

Mr. MICA. OK, that's my question. How many are impacted total?

Admiral LOY. I was trying to add that up last night. I think it's about 110,000.

Mr. MICA. Admiral Loy, did you say that when we consolidated these positions, there was not one position eliminated out of the 80,000 or whatever we consolidated?

Admiral LOY. With our Customs officers, sir?

Mr. MICA. With any of them. Did we eliminate any position?

Admiral LOY. I don't know that we have eliminated positions in the course of this design work. I'm not sure I'm following your question.

Mr. MICA. That was just a general question. In this whole consolidation, we considered the reform and homeland security and there was testimony from that table before this committee that there would be some consolidation, possibly. If you know of any, I'd love that for the record.

Then just finally, the cost to implement. I saw $130 million. Is that the cost to implement this new system one time, over a period of time, or does that include operational, with a new HR system? What are the estimates for implementation and then cost to run, and can you compare that with any of the current HR systems we have or we're eliminating? Maybe you can't answer here, but could you supply and make that part of the record.

Admiral LOY. I'll happily do that, sir. I can give you at least a snapshot up front. There will be, without doubt, a significant up front investment in order for us to do the training, mostly, appropriate to make sure our supervisors and managers are adequate to the task of the performance appraisals that are the cornerstone of doing what we need to do with pay and personnel decisions down the road.

Mr. MICA. But the long term is?

Admiral LOY. Longer term, I will get that back to you, sir. I don't know the comparative piece between an HR system now and then.

In the 2005 budget, we have asked for about $100 million to get on with this initial investment point. Then we've also asked for I think $12.5 million for the pay pool for fiscal year 2005. Because this will be a phased-in over time effort to reach those 110,000 at the other end of several budget cycles.

Mr. MICA. Thank you, Madam Chairwoman.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Mica. And just for clarification, before the gentlewoman from Tennessee who has been so patient, you didn't lose any jobs, but you didn't increase the size of the Federal Government and add jobs, did you?

Admiral LOY. No, ma'am.

Mrs. DAVIS OF VIRGINIA. Now I'd like to recognize the gentlewoman from Tennessee, Ms. Blackburn, and thank you for your patience.

Ms. BLACKBURN. Thank you, Madam Chairwoman, and thank you to you all for taking the time to come. We are interested in this and in the agency reorganization and homeland security and appreciate your mission and the mission that you all accept in securing our country.

I want to followup, let's go back and talk about this implementing the pay for performance. Because I appreciate the flexibility that you all need and that you desire. I support that.

I do want to look at this implementation on the pay for performance. One thing I have not heard, and I did not find in your testimony is what your timeframe is for your implementation, when you feel like you will move everybody into this new system.

And then also, one thing that I've not seen, and Admiral Loy, you may have just started to touch on that, your financial systems, the DHS financial systems, to track the pay for performance. Do you have your, the architecture in place for that? Who is handling that, and what kind of transition do you expect? If each of you would address that, that would be great.

Admiral LOY. Yes, ma'am. As far as initial implementation, our goal is in 2005 to have covered all of the headquarters work force, the one major directorate, if not two major directorates at headquarters to include the information awareness and infrastructure protection directorate and the science and technology directorate. We are choosing those so that we can sample across the board of occupation categories so we can make sure we're dealing with effectiveness at a variety of occupational categories.

Then we have chosen the Coast Guard civilian work force to be the agency's first effort out of the box, so to speak. That's about 5,000 civilian work force elements in the Coast Guard. We're trying to make that a turn-on by fiscal year 2005. We have asked in the President's budget as it came forward for the resources to do that.

Then onward through 2006 and the Congress, of course, gave us about 5 years, as I recall, in HSA, to get this accomplished over time, we would press on then in 2006 and 2007 to complete that reach to the 110,000 that Congressman Mica asked about, that number.

Ms. BLACKBURN. Admiral Loy, may I interrupt you for just one moment on that? If you would go back and speak within that, the groups, the headquarters, the different groups you're planning to implement in 2005, how are you planning to stairstep these in? Will this be a few each month? Is it going to be on a quarterly basis? How are you going to work that?

Admiral LOY. We would like to think that we will design the system to the point that we can turn it on for that wedge of people in the Department at the same time in fiscal year 2005 and then

press on, as I say, to 2006 for other elements of both the Department and the agencies within the Department.

The design work associated with the construction of that pay system in order to do that remains a work in progress, and we continue to work on that diligently and look forward to working with the committee and anyone else that would be helpful for us in that process. So as I sit here toady, it is not a finished product. It is something that we are still in the design work to get right at the other end of the day.

Ms. BLACKBURN. Estimated costs?

Admiral LOY. I'd have to get you that for the record, ma'am, in terms of the design work necessary for that financial system to support it. I don't have that number off the top of my head.

Ms. BLACKBURN. I would appreciate having that. Ms. James, anything to add?

Ms. JAMES. No, except that I was pleased that as the Department looked at their implementation that they recognized the importance of doing it over a staggered period of time and have a substantial investment that they have asked for in the budget to make sure that the appropriate training and the information and education of the work force takes place. I think those are vital elements, and very often when transformation takes place in a department, the department either doesn't take enough time or put enough investment in dollars to make sure that it is a smooth transition. I think the Department has done both.

Admiral LOY. We're trying to be very sensitive to what several members of the committee have mentioned this morning, and that is the potential for however our system comes out that it becomes a model of sorts that potentially could go wider across Government. We're very sensitive to that. Director James and her staff have held our feet to the fire, so to speak, on that, day after day after day in the design process. It's exactly the right thing to do.

We know to a limited degree what's going on in DOD. We are concentrating on this system to be best for DHS, but there clearly are implications for across Government best practices over time and we want to be very sensitive to that.

Ms. BLACKBURN. Thank you.

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

Director James, let me just throw this out. One of the things I've heard is that the managers will be trained. And in speaking to a group of about 50 managers yesterday, the one thing I heard the most, in fact I think it was unanimous in the room, they would like to have a standard for all managers, required training. I would just suggest that OPM take a real strong look at that. That might help across the board with some of these concerns.

Admiral LOY. Yes, ma'am, absolutely it will. We started last week, I conducted with the Under Secretary for Management and our Assistant Secretary for Human Capital in the Department, we had a radio broadcast, TV broadcasted meeting, an electronic town meeting with the senior leadership in the Department countrywide, giving them an opportunity to converse with us initially and open the gates, if you will, to dialog with the work force and especially the senior leaders.

As we speak, we are in the middle of a 3-day session of gathered senior executive service members from the Department out at Westfields in Chantilly. I gave a keynote with them yesterday, they spent virtually all day yesterday and today grappling through their responsibilities in the HR system and giving us additional feedback.

They're now at a point where it's no longer a notion or somebody's idea, it's upon them and they understand their obligations in the system. The Secretary spent several hours with them last night personally to hear them out.

So then the show we take on the road, so to speak, with a kit that will be consistent for every member of that leadership cadre in the Department will hopefully provide that constancy and consistency across the Nation that you just spoke of.

Ms. JAMES. Madam Chairwoman, I heard you and we will take on that responsibility. I think it's important that as we educate people about the new system and we bring them all on board and we inform them, that it's also important that we give them the tools to train them. Some of this is very technical and it's very complex. And as it filters down to those who actually have to implement it and operate it on a daily basis, they need very specific training to make sure that this happens in a very smooth way. So we will respond to that and take that on.

Mrs. DAVIS OF VIRGINIA. You may want to take it a step further and train all managers throughout the whole Federal work force.

Admiral LOY. One other mention I would make, Madam Chairwoman, just as a point of reference, it's enormously important that we complete one of our performance appraisal cycles before we pretend we can use those information elements to make pay decisions. So that cycle is enormously important for us to get right as well, ma'am.

Mrs. DAVIS OF VIRGINIA. I'd just like to say that we will, I know I've got some questions I would like to have submitted for the record. If any other Members have additional questions of our witnesses today, they can certainly submit them for the record, then we'd ask you to get that to us.

Ms. NORTON. Madam Chairwoman, can I ask for a clarification of something?

Mrs. DAVIS OF VIRGINIA. Yes, ma'am.

Ms. NORTON. Because I asked Admiral Loy a question about the agency having no discretion, even on its own, to bargain. And you said that decision could be made at the Secretary's level. So I went and had them get me your explanation for these regulations. And if, as I recall your answer, it was that the Secretary would hold the discretion.

But don't you think this language needs to be clarified? It said the Department will not be required to bargain over the Department's exercise of these rights over most of the other rights enumerated in chapter 71. That doesn't leave the impression that——

Admiral LOY. There's discretion involved.

Ms. NORTON. Right.

Admiral LOY. Let me take that one, Ms. Norton, back, and we'll look at that real carefully.

Ms. NORTON. I'd appreciate that. Thank you, Admiral Loy.

Mrs. DAVIS OF VIRGINIA. Again, I'd like to thank both of our witnesses for being here today and just reiterate that I'm a firm believer in collaboration, as I said to both of you before the hearing. I hope that the effort that's been put into this human resources system pays off in the creation of personnel rules that not only help the Department achieve its mission but are seen as credible by the employees and the managers.

I want to thank both Secretary Ridge and Director James and your respective staff for a very thoughtful proposal. And again, I'm glad to hear that you are keeping everyone involved in this. And now, if my distinguished co-chair has anything to say? If not, we will dismiss the panel.

Senator VOINOVICH. Thank you for coming.

Mrs. DAVIS OF VIRGINIA. With that, again I thank you today, and we'll move on to panel two.

We're very fortunate to have on our second panel today Mr. David Walker, the Comptroller General of the United States from the General Accounting Office. He has a lot of expertise in Federal personnel reform, and we're very glad to have him here with us today.

Mr. Walker, it's our pleasure to have you here today. And as is our custom in this committee, we do swear in our witnesses. I understand only the first panel was sworn in. If you would please raise your right hand, I'll administer the oath.

[Witness sworn.]

Mrs. DAVIS OF VIRGINIA. Let the record reflect that the witness has answered in the affirmative. You may be seated.

Mr. Walker, we want to again thank you and thank you for your patience. I'm sorry we've kept you so long here. I'll now recognize you for 5 minutes for your opening statement.

STATEMENT OF DAVID M. WALKER, COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE

Mr. WALKER. Thank you, Madam Chairwoman Davis, and also Chairman Voinovich, other members of the subcommittees. Let me first thank you for the opportunity to appear on this important topic. Second, let me also commend you on your bipartisan and bicameral approach to addressing this important issue. And third, let me thank you this morning for shepherding GAO's bill to unanimous passage this morning. Let me also thank Senator Voinovich for his efforts in the past. We might need you one more time, Senator, it might bounce back to the Senate now.

Mrs. DAVIS OF VIRGINIA. To correct the record, it hasn't passed yet. It's up for a recorded vote this afternoon.

Mr. WALKER. OK, well, I'm confident with your leadership what the outcome will be.

I have an extensive statement that hopefully can be included in the record and I'll just end up summarizing very quickly.

Mrs. DAVIS OF VIRGINIA. That will be fine.

Mr. WALKER. First, we're dealing with proposed regulations, as you know, that were just promulgated this past Friday. And so my testimony and our statement for the record is based on our preliminary review of those proposed regulations. Second, clearly these regulations have significant precedential implications that go far

beyond the Department of Homeland Security. They could potentially serve as a framework for action outside the Department of Homeland Security.

Third, the process that has been employed to date is one I think the Department should be commended for. It has involved a number of parties, including management, organized labor and a variety of others, and process is very important when you're dealing with something as important as basic human capital policies.

In addition, we know that proposals are always going to be controversial, so it's important that you have an appropriate process, because you know that there will be some degree of controversy no matter what proposals come out of that process, as is the case here.

In addition, I think it's important to note that many of the framework proposals in these proposed regulations are consistent with best practices, some of which frankly were pioneered by the GAO. So there are a lot of good things in here that I think the Department should be commended on. But again, they need to hear public comment.

At the same time, there are at least four areas that I think are deserving of additional attention. Not to say that others aren't, but there are four areas that, based on a preliminary review, really jumped out at me. First, we know that the past process has been a very inclusive one and a very open one. We don't know what the future processes will be. Because right now we have the framework, but there are a lot of details that have to be worked out, and those details are very important. So it's important to have a very inclusive and a transparent process going forward.

Second, the performance management system safeguards, we believe, need to incorporate the best practices that are in the report that I'm holding in my right hand, which is being released today. These represent the best practices for performance management systems, especially those systems that are intended to incorporate more modern, effective and credible pay for performance approaches.

Third, we think it's important to take a hard look at the appeal standard, structure and scope. What's the standard for appeals, who would be on these appeal boards, what's the basis for appointment, for removal, and also what would be the scope of their authorities.

And last but not least, obviously, there are likely to be some discussions and debates about the scope of bargaining, what issues should be bargained or not. But bottom line, we believe that they undertook a concerted, good faith effort involving an inclusive process to come up with a set of proposed regulations. They are now out for notice and comment. Obviously they will help to inform whatever the final regulations are. We think there are a lot of best

practices that are incorporated in here, but there are areas that deserve additional review and consideration.

I'd be happy to answer any questions that any of you may have. Thank you.

[The prepared statement of Mr. Walker follows:]

United States General Accounting Office

GAO

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Testimony

Before Subcommittees of the Senate Committee on Governmental Affairs and the House Committee on Government Reform

For Release on Delivery
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HUMAN CAPITAL

Preliminary Observations on Proposed DHS Human Capital Regulations

Statement of David M. Walker
Comptroller General of the United States

GAO-04-479T

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Highlights

Highlights of GAO-04-479T, testimony before subcommittees of the Senate Committee on Governmental Affairs and the House Committee on Government Reform

February 25, 2004

HUMAN CAPITAL

Preliminary Observations on Proposed DHS Human Capital Regulations

Why GAO Did This Study

The creation of the Department of Homeland Security (DHS) almost one year ago represents an historic moment for the federal government to fundamentally transform how the nation will protect itself from terrorism. DHS is continuing to transform and integrate a disparate group of agencies with multiple missions, values, and cultures into a strong and effective cabinet department. Together with this unique opportunity, however, also comes significant risk to the nation that could occur if this transformation is not implemented successfully. In fact, GAO designated this implementation and transformation as high risk in January 2003.

Congress provided DHS with significant flexibility to design a modern human capital management system. GAO reported in September 2003 that the design effort to develop the system was collaborative and consistent with positive elements of transformation. Last Friday, the Secretary of DHS and the Director of the Office of Personnel Management (OPM) released for public comment draft regulations for DHS's new human capital system. This testimony provides preliminary observations on selected major provisions of the proposed system. The subcommittees are also releasing *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects* (GAO-04-83) at today's hearing.

www.gao.gov/cgi-bin/getrpt?GAO-04-479T.

To view the full testimony statement, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

What GAO Found

The proposed human capital system is designed to be aligned with the department's mission requirements and is intended to protect the civil service rights of DHS employees. Many of the basic principles underlying the DHS regulations are consistent with proven approaches to strategic human capital management, including several approaches pioneered by GAO, and deserve serious consideration. However, some parts of the system raise questions that DHS, OPM, and Congress should consider.

- Pay and performance management: The proposal takes another valuable step towards results-oriented pay reform and modern performance management. For effective performance management, DHS should use validated core competencies as a key part of evaluating individual contributions to departmental results and transformation efforts.
- Adverse actions and appeals: The proposal would retain an avenue for employees to appeal adverse actions to an independent third party. However, the process to identify mandatory removal offenses must be collaborative and transparent. DHS needs to be cautious about defining specific actions requiring employee removal and learn from the Internal Revenue Service's implementation of its mandatory removal provisions.
- Labor relations: The regulations recognize employees' right to organize and bargain collectively, but reduce areas subject to bargaining. Continuing to involve employees in a meaningful manner is critical to effective human capital management.

Once DHS issues final regulations for the human capital system, the department will be faced with multiple implementation challenges:

- DHS plans to implement the system using a phased approach, however, nearly half of DHS civilian employees are not covered by these regulations, including more than 50,000 Transportation Security Administration screeners. To help build a unified culture, DHS should consider moving all of its employees under a single performance management system framework.
- DHS noted that it estimates that $110 million will be needed to implement the new system in its first year. While adequate resources for program implementation is critical to program success, DHS is requesting a substantial amount of funding that warrants close scrutiny by Congress.
- The proposed regulations call for comprehensive, ongoing evaluations. Continued evaluation and adjustments will help to ensure an effective and credible human capital system.
- DHS has begun to develop a strategic workforce plan. Such a plan can be used as a tool for identifying core competencies for staff for attracting, developing, evaluating, and rewarding contributions to mission accomplishment.

The analysis of DHS's effort to develop a strategic human capital management system can be instructive as other agencies request and implement new strategic human capital management authorities.

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Chairman Voinovich, Chairwoman Davis, and Members of the Subcommittees:

It is a pleasure to appear before you today to provide our preliminary observations on the Department of Homeland Security's (DHS) proposed regulations on its new human capital system.[1] The creation of DHS almost 1 year ago represents an historic moment for the federal government to fundamentally transform how the nation will protect itself from terrorism. DHS is continuing to transform and integrate a disparate group of agencies with multiple missions, values, and cultures into a strong and effective cabinet department. However, this unique opportunity also brings significant risk to the nation if this transformation is not implemented successfully. In fact, we designated this implementation and transformation as high risk in January 2003.[2]

Last Friday, the Secretary of DHS and the Director of the Office of Personnel Management (OPM) released for public comment proposed regulations for DHS's new human capital system. The regulations are intended to provide the broad outline of the DHS proposed system and are not, nor were they intended to be, a comprehensive presentation of the details of how the new system will be implemented. As the system evolves, critical issues such as how DHS will link individual performance expectations to DHS's mission and goals, how it will define performance expectations to promote individual accountability, and how it will continue to incorporate adequate safeguards to ensure fairness, will need to be addressed. Such detailed implementation policies and procedures will need to be developed in a transparent and inclusive manner as the system evolves. Although we are still reviewing these extensive regulations issued last week, this morning I will provide some preliminary observations on selected provisions that in our view are most in need of close scrutiny as Congress considers the DHS proposal.

The proposed DHS regulations have both significant precedent-setting implications for the executive branch and far-reaching implications on how the department is managed. In my view, many of the basic principles underlying the proposed DHS regulations are consistent with proven approaches to strategic human capital management, including several approaches pioneered by GAO, and deserve serious consideration. In designing the proposed system, DHS and OPM met with a wide range of individuals and organizations with expertise in human capital. At the request of DHS and OPM, we were pleased to share the results of our work looking at leading human capital practices as well as our own experiences with performance management at GAO. My statement today is based on our ongoing review of DHS's design and implementation of its human capital system, recent work on strategic human capital management, including performance management, and our own experience.

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[1]Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia and House Committee on Government Reform, Subcommittee on Civil Service and Agency Organization.

[2]U.S. General Accounting Office, *Major Management Challenges and Program Risks: Department of Homeland Security*, GAO-03-102 (Washington, D.C.: January 2003).

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Preliminary Observations on the Proposed Human Capital Regulations

DHS's and OPM's proposed regulations would establish a new human resources management system within DHS that covers pay, classification, performance management, labor relations, adverse action, and employee appeals. These changes are designed to ensure that the system aligns individual performance and pay with the department's critical mission requirements and to protect the civil service rights of its employees. However, it is important to note at the outset that the proposed regulations do not apply to nearly half of all DHS civilian employees, including nearly 50,000 screeners in the Transportation Security Administration (TSA). DHS officials have noted that additional employees can be included through further administrative action, but that legislation would be needed to include other employees such as the screeners and the uniformed division of the Secret Service.[3] We have found that having one performance management system framework facilitates unifying an organizational culture and is a key practice to a successful merger and transformation. Based on the department's progress in implementing the system and any appropriate modifications made based on their experience, DHS should consider moving all of its employees under the new human capital system.

Pay and Performance Management

Today, Mr. Chairman and Madam Chairwoman, you are releasing a report that we prepared at your request that shows the variety of approaches that OPM's personnel demonstration projects took to design and implement their pay for performance systems.[4] Their experiences provide insights into how some organizations in the federal government are implementing pay for performance and thus can guide DHS as it develops and implements its own approach. These demonstration projects illustrate that understanding how to link pay to performance is very much a work in progress in the federal government and that additional work is needed to ensure that performance management systems are tools to help them manage on a day-to-day basis and achieve external results.

As we testified last spring when the Department of Defense (DOD) proposed its civilian personnel reform, from a conceptual standpoint, we strongly support the need to expand pay for performance in the federal government.[5] Establishing a better link between individual pay and performance is essential if we expect to maximize the performance and ensure the accountability of the federal government for the benefit of the American

[3]The Homeland Security Act of 2002 gave DHS authority to waive or modify parts of civil service law in Title 5 of the U.S. Code. However, not all employees of DHS are covered under Title 5. According to DHS officials, this impacts coverage of TSA, part of the Coast Guard, the Uniformed Division of the Secret Service, and part of the Emergency Preparedness and Response Directorate. These same DHS officials indicated that DHS can administratively extend the new human capital system to many of these employees. However, they said that legislation would be required to move TSA screeners and Secret Service uniformed employees completely into the new system.

[4]U.S. General Accounting Office, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, D.C.: Jan. 23, 2004).
[5]U.S. General Accounting Office, *Defense Transformation: Preliminary Observations on DOD's Proposed Civilian Personnel Reforms*, GAO-03-717T (Washington, D.C.: April 29, 2003).

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people. However, how it is done, when it is done, and the basis on which it is done can make all the difference in whether such efforts are successful. The DHS proposal reflects a growing understanding that the federal government needs to fundamentally rethink its current approach to pay and better link pay to individual and organization performance. To this end, the DHS proposal takes another valuable step towards results-oriented pay reform and modern performance management. My comments on specific provisions follow.

Linking Organizational Goals to Individual Performance

Under the proposed regulations, the DHS performance management system must, among other things, align individual performance expectations with the mission, strategic goals, or a range of other objectives of the department or of the DHS components. The proposed guidelines do not detail how such an alignment is to be achieved, a vital issue that will need to be addressed as DHS's efforts move forward. Our work looking at public sector performance management efforts here in the United States as well as abroad have underscored the importance of aligning daily operations and activities with organizational results. We have found that organizations often struggle with clearly understanding how what they do on a day-to-day basis contributes to overall organizational results. High performing organizations, on the other hand, understand how the products and services they deliver contribute to results by aligning performance expectations of top leadership with organizational goals and then cascading those expectations to lower levels.

As an organization undergoing its own merger and transformation, DHS's revised performance management system can be a vital tool for aligning the organization with desired results and creating a "line of sight" showing how team, unit, and individual performance can contribute to overall organizational results. To help DHS merge its various originating components into a unified department and transform its culture to be more results oriented, customer focused, and collaborative in nature, we reported at your request, Mr. Chairman and Madam Chairwoman, how a performance management system that defines responsibility and assures accountability for change can be key to a successful merger and transformation.[6] While aligning individual performance expectations with DHS's mission and strategic goals will be key to DHS's effective performance management, it is important to note that DHS has not yet released its strategic plan which may hamper creating the formal linkage to the performance management system and make it difficult to ensure that the proposed regulations support and facilitate the accomplishment of the department's strategic goals and objectives.

Establishing Pay Bands

Under the proposed regulations, DHS would create broad pay bands for much of the department in place of the fifteen-grade General Schedule (GS) system now in place for

[6]U.S. General Accounting Office, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, GAO-03-669 (Washington, D.C.: July 2, 2003).

much of the civil service. Specifically, DHS officials have indicated that they will form ten to fifteen occupational pay clusters of similar job types, such as a management or science and technology cluster. Most of these occupational clusters would have four pay bands ranging from entry level to supervisor. Within each occupational cluster, promotion to another band (such as from full performance to senior expert) would require an assessment and/or competition. Under the proposed regulations, DHS is not to reduce employees' basic rate of pay when converting to pay bands. In addition, the proposed regulations would allow DHS to establish a "control point" within a band, beyond which basic pay increases may be granted only for meeting criteria established by DHS, such as an outstanding performance rating.

The use of control points can be a valuable tool because managing progression through the bands can help to ensure that employees' performance coincides with their salaries and can help to prevent all employees from eventually migrating to the top of the band and thus increasing salary costs. Both China Lake and the Naval Sea Systems Command Warfare Center's (NAVSEA) Dahlgren Division have checkpoints or "speed bumps" in their pay bands designed to ensure that only the highest performers move into the upper half of the pay band. For example, when employees' salaries at China Lake reach the midpoint of the pay band, they must receive a performance rating equivalent to exceeding expectations, before they can receive additional salary increases.

Pay banding and movement to broader occupational clusters can both facilitate DHS's movement to a pay for performance system, and help DHS to better define occupations, which can improve the hiring process. We have reported that the current GS system as defined in the Classification Act of 1949 is a key barrier to comprehensive human capital reform and the creation of broader occupational job clusters and pay bands would aid other agencies as they seek to modernize their personnel systems.[7] The standards and process of the current classification system is a key problem in federal hiring efforts because they are outdated and not applicable to the occupations and work of today. Many employees in agencies that are now a part of DHS responding to OPM's 2002 Federal Human Capital Survey (FHCS) believe that recruiting is a problem – only 36 percent believe their work unit is able to recruit people with the right skills.[8]

Setting Employee Performance Expectations

The DHS performance management system is intended to promote individual accountability by communicating performance expectations and holding employees responsible for accomplishing them and by holding supervisors and managers responsible for effectively managing the performance of employees under their supervision. While supervisors are to involve employees as far as practicable in

[7]U.S. General Accounting Office, *Human Capital: Opportunities to Improve Executive Agencies' Hiring Processes*, GAO-03-450 (Washington, D.C.: May 30, 2003).

[8]The DHS responses reported by the OPM FHCS approximate the views of some, but not all, employees now at DHS. For example, the Transportation Security Administration (TSA) screeners were not hired at the time of the survey. Also, though the Animal and Plant Health Inspection Services (APHIS) employees were divided between DHS and the U.S. Department of Agriculture (USDA), the APHIS respondents included those remaining at USDA. Details on the objective, scope, and methodology for the OPM FHCS are described in more detail in Appendix 1.

developing their performance expectations and employees seek clarification if they do not understand them, the final decision on an employee's expectations is the supervisor's sole and exclusive discretion. Supervisors must monitor the performance of their employees and provide periodic feedback, including one or more formal interim performance reviews during the appraisal period.

The proposed regulations provide a general description of DHS's performance management system with many important details to be determined. Under the proposed regulations, performance expectations may take the form of goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level; a particular work assignment, including characteristics such as quality, accuracy, or timeliness; or competencies an employee is expected to demonstrate on the job; and/or the contributions an employee is expected to make, among other things. As DHS's system design efforts move forward, it will need to define in further detail than currently provided how performance expectations will be established, including the degree to which DHS components, managers, and supervisors will have flexibility in setting those expectations.

Nevertheless, the range of expectations that DHS will consider in setting individual employee performance expectations are generally consistent with those we see used by leading organizations. In addition, DHS appropriately recognizes that given the vast diversity of work done in the Department, managers and employees need flexibility in crafting specific expectations. However, the experiences of leading organizations suggest that DHS should reconsider its position to merely allow, rather than require the use of core employee competencies as a central feature of DHS'S performance management efforts.[9] Based on our review of others' efforts and our own experience at GAO, core competencies can help reinforce employee behaviors and actions that support the department's mission, goals, and values and can provide a consistent message to employees about how they are expected to achieve results. For example, the Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo), which covers various organizational units of the Air Force, Army, Navy, Marine Corps, and the Office of the Under Secretary of Defense, applies organizationwide competencies for all employees such as teamwork/cooperation, customer relations, leadership/supervision, and communication.

More specifically and consistent with leading practices for successful mergers and organizational transformation, DHS should use its performance management system to serve as the basis for setting expectations for individual roles in its transformation process.[10] To be successful, transformation efforts, such as the one underway at DHS, must have leaders, managers, and employees who have the individual competencies to integrate and create synergy among multiple organizations involved in the transformation effort. Individual performance and contributions can be evaluated on competencies such as change management, cultural sensitivity, teamwork and

[9]U.S. General Accounting Office, *Creating a Clear Linkage between Individual Performance and Organizational Success*, GAO-03-488 (Washington, D.C.: March 14, 2003).
[10]GAO-03-669.

collaboration, and information sharing. Leaders, managers, and employees who demonstrate these competencies are rewarded for their success in contributing to the achievement of the transformation process. DHS, by including such competencies throughout its revised performance management system, would create a shared responsibility for organizational success and help assure accountability for change.

Translating Employee Performance Ratings into Pay Increases and Awards

A stated purpose of DHS's performance management system is to provide for meaningful distinctions in performance to support adjustments in pay, awards, and promotions. All employees who meet organizational expectations are to receive pay adjustments, generally to be made on an annual basis. In coordination with OPM, the pay adjustment is to be based on considerations of mission requirements, labor market conditions, availability of funds, pay adjustments received by other federal employees, and other factors. The pay adjustment may vary by occupational cluster or band. Employees that meet or exceed expectations are also eligible to receive a performance-based pay increase, either as an increase to base pay or a one-time award, depending on the employee's performance rating. Employees with unacceptable ratings are not to receive the pay adjustment or a performance-based pay increase. The proposed regulations provide managers with a range of options for dealing with poor performance, such as remedial training, reassignment, an improvement period, among other things.

In coordination with OPM, DHS may additionally set the boundaries of locality pay areas. Participants in the DHS focus groups expressed concerns regarding the shortcomings of the current locality pay system, including its impact on recruitment and retention.[11]

While the DHS proposal does not provide additional detail on how it would consider labor market conditions, its proposed approach is broadly consistent with the experiences of some of the demonstration projects that considered the labor market or the fiscal condition of the organization in determining how much to budget for pay increases. For example, NAVSEA's Newport Division considers the labor market and uses regional and industry salary information compiled by the American Association of Engineering Societies when determining how much to set aside for pay increases and awards. In addition, the Newport Division is financed in part through a working capital fund and thus must take into account fiscal condition when budgeting for pay increases and awards. Responding to higher salaries in the labor market, the Newport Division funded pay increases at a higher rate in fiscal year 2001 than in 2000. Conversely, in fiscal year 2002, the performance pay increase and award pools were funded at lower levels than in 2001 because of fiscal constraints.

Under the proposed regulations, DHS would establish performance pay pools by occupational cluster and by band within each cluster, and may further divide them by unit and/or location. Performance-based pay would be based on "performance points" whereby points correspond to a rating level. In an example used by DHS, for a four-level system, the point value pattern may be 4-2-1-0, where 4 points are assigned to the highest

[11]Details on the objective, scope, and methodology for the DHS focus groups are described in more detail in Appendix 1.

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rating and 0 points to an unacceptable rating. While each pay pool has the option to use this point value pattern or another, DHS is to determine the value of a performance point. The proposed regulations do not provide more detailed information on how ratings will be used for pay and promotions.

Under the proposed regulations, DHS may not impose a quota on any rating level or a mandatory distribution of ratings. DHS would create a Performance Review Board (PRB) to review ratings in order to promote consistency and provide general oversight of the performance management system to ensure it is administered in a fair, credible, and transparent manner. DHS may, in turn, appoint as many review boards within the departmental components as it deems necessary to effectively carry out these intended functions and, when practicable, may include employees outside the organizational unit, occupation, and/or location of employees subject to review by the PRB. The proposed regulations do not offer additional details on other matters such as the selection process for the members nor their qualifications. Where circumstances warrant, the PRB may remand individual ratings for additional review and/or modify a rating.

While much remains to be determined about how the DHS PRB will operate, we believe that the effective implementation of such a board is important to assuring that predecisional internal safeguards exist to help achieve consistency and equity, and assure nondiscrimination and nonpolitization of the performance management process. The key will be to create a PRB that is independent of line management and review such matters as the establishment and implementation of the performance appraisal system and later, performance rating decisions, pay determinations, and promotion actions before they are finalized to ensure they are merit based.

Several of the OPM pay for performance demonstration projects consider an employee's current salary when making decisions on permanent pay increases and one-time awards – a procedure that is worth additional consideration in the proposed DHS regulations. By considering salary in such decisions, the projects intend to make a better match between an employee's compensation and his or her contribution to the organization. Thus, two employees with comparable contributions could receive different pay increases and awards depending on their current salaries. For example, at AcqDemo, supervisors recommend and pay pool managers approve employees' "contribution scores." Pay pool managers then plot contribution scores against the employees' current salaries and a "standard pay line" to determine if employees are "appropriately compensated," "under-compensated" or "over-compensated," given their contributions.

As a result of this system, AcqDemo has reported that it has made progress in matching employees' compensation to their contributions to the organization. From 1999 to 2002, appropriately compensated employees increased from about 63 percent to about 72 percent, under-compensated employees decreased from about 30 percent to about 27 percent and over-compensated employees decreased from nearly 7 percent to less than 2 percent. A recent evaluation of AcqDemo by Cubic Applications, Inc. by Cubic Applications, Inc. found that employees' perceptions of the link between pay and contribution increased, from 20 percent reporting that pay raises depend on their contribution to the organization's mission in 1998 to 59 percent in 2003.

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Providing Adequate Safeguards to Ensure Fairness and Guard against Abuse

According to the proposed regulations, the DHS performance management system must comply with the merit system principles and avoid prohibited personnel practices; provide a means for employee involvement in the design and implementation of the system; and overall, be fair, credible, and transparent. Last spring, when commenting on the DOD civilian personnel reforms, we testified that Congress should consider establishing statutory standards that an agency must have in place before it can implement a more performance-based pay program and developed an initial list of possible safeguards to help ensure that pay for performance systems in the government are fair, effective, and credible.[12]

While much remains to be defined, DHS is proposing taking actions that are generally consistent with these proposed safeguards. For example, as I noted previously, DHS plans to align individual performance management with organizational goals and provide for reasonableness reviews of performance management decisions through its PRB. Moreover, employees and their union representatives played a role in shaping the design of the proposed systems, as we previously reported.[13]

DHS should continue to build in safeguards into its revised performance management system. For example, we noted that agencies need to assure reasonable transparency and provide appropriate accountability mechanisms in connection with the results of the performance management process. This can include publishing overall results of performance management and individual pay decisions while protecting individual confidentiality and reporting periodically on internal assessments and employee survey results relating to the performance management system. DHS should commit to publishing the results of the performance management process. Publishing the results in a manner that protects individual confidentiality can provide employees with the information they need to better understand the performance management system. Several of the demonstration projects publish information for employees on internal Web sites about the results of performance appraisal and pay decisions, such as the average performance rating, the average pay increase, and the average award for the organization and for each individual unit.

Adverse Actions And Appeals

The DHS proposal is intended to streamline the employee adverse action process, while maintaining an independent third-party review of most adverse actions. It is designed to create a single process for both performance-based and conduct-based actions,[14] and shortens the adverse action process by removing the requirement for a performance-improvement-plan and reducing other timeframes. The proposed regulations also adopt

[12]GAO-03-717T.
[13]U.S. General Accounting Office, *Human Capital: DHS Personnel System Design Effort Provides for Collaboration and Employee Participation*, GAO-03-1099 (Washington, D.C.: Sept. 30, 2003).
[14]Title 5 has a process for performance-based actions in Chapter 43 and a different process in Chapter 75 which can be used for conduct or performance-based actions.

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the lower standard of proof for adverse actions in DHS, requiring the agency to meet a standard of "substantial evidence" instead of a "preponderance of the evidence." An independent review is to be retained by allowing employees to appeal to the Merit Systems Protection Board (MSPB). The appeals process at MSPB is however, to be streamlined by shortening the time for filing and processing appeals. The proposal also encourages the use of Alternative Dispute Resolution (ADR).

The proposal authorizes the Secretary of DHS to identify specific offenses for which removal is mandatory. Employees alleged to have committed these offenses will have the right to a review by an adjudicating official and a further appeal to an independent DHS panel to be formed. Members of this three-person panel are to be appointed by the Secretary for three-year terms and qualifications for these members are articulated in the proposed regulations. Members of the panel may be removed by the Secretary "only for inefficiency, neglect of duty, or malfeasance." Qualifications for the adjudicating officials, who are designated by the panel, are not specified.

Retention of a qualified and independent third-party to address employee appeals may be especially important in light of OPM's FHCS results. Specifically,

- 38 percent of DHS respondents believe that complaints, disputes, or grievances are resolved fairly –lower than the governmentwide response of 44 percent; [15]and
- 38 percent of DHS respondents perceive that arbitrary action, personal favoritism and coercion for partisan political purposes are not tolerated –lower than the governmentwide response of 45 percent.

Providing an avenue for an independent appeal can enhance employee trust of the entire human capital system. A similar theme was echoed during the DHS focus groups, in which employees and managers believed it was important to maintain a neutral third-party reviewer in the appeals process. In a separate survey that we administered (GAO survey), members of the field team identified the presence of a neutral third party in the process as the most critical challenge in terms of the discipline and appeals system, while others identified options retaining a third party reviewer as most likely to address the department's challenges in discipline and appeals.[16]

DHS's commitment to use ADR is also a very positive development. To resolve disputes in a more efficient, timely, and less adversarial manner, federal agencies have been expanding their human capital programs to include ADR approaches. These approaches include mediation, dispute resolution boards and ombudsmen. Ombudsmen are typically used to provide an informal alternative to addressing conflicts. We reported on common approaches used in ombudsman offices, including 1) broad responsibility and authority to address almost any workplace issue, 2) their ability to bring systemic issues to management's attention, and 3) the manner in which they work with other agency offices

[15]In all instances comparing DHS's results to the OPM FHCS governmentwide average, DHS results are lower by a statistically significant amount according to OPM data.

[16]Field team participants served as a key source of information during the design process. The field team consisted of DHS managers and staff. Details on the objective, scope, and methodology for the GAO-administered survey of the field team are described in more detail in Appendix 1.

in providing assistance to employees.[17] The proposed regulations note that the department will use ADR, including an ombudsman, where appropriate.

One potential area of caution is the authority given to the Secretary to identify specific offenses for which removal is mandatory. I believe that the process for determining and communicating which types of offenses require mandatory removal should be explicit and transparent and involve a member of key players. Such a process should include an employee notice and comment period before implementation, collaboration with relevant Congressional stakeholders, and collaboration with employee representatives.

We also would suggest that DHS exercise caution when identifying specific removable offenses and the specific punishment. When developing these proposed regulations, DHS should learn from the experience of the Internal Revenue Service's (IRS) implementation of its mandatory removal provisions.[18] We reported that IRS officials believed this provision had a negative impact on employee morale and effectiveness and had a "chilling" effect on IRS frontline enforcement employees who are afraid to take certain appropriate enforcement actions.[19] Careful drafting of each removable offense is critical to ensure that the provision does not have unintended consequences.

Moreover, the independence of the panel that will hear appeals of mandatory removal actions deserves further consideration. Removal of the panel members by the Secretary may potentially compromise the real or perceived independence of the panel's decisions. As an alternative, the department should consider having members of the panel removed only by a majority decision of the panel.

Labor Management Relations

The DHS proposed regulations recognize the right for employees to organize and bargain collectively.[20] However, the proposal reduces the scope of bargaining by removing the requirement to bargain on matters traditionally referred to as "impact and implementation," which include the processes used to deploy personnel, assign work, and use new technology, for example, and redefining what are traditionally referred to as the "conditions of employment." A DHS Labor Relations Board is proposed that would be responsible for determining appropriate bargaining units, resolving disagreements on the scope of bargaining and the obligation to bargain, and resolving impasses, and would be separate and independent from the Federal Labor Relations Authority (FLRA). The Labor Relations Board would have three members selected by the Secretary. No member could be a current DHS employee and one member would be from FLRA. The

[17]U.S. General Accounting Office, *Human Capital: The Role of Ombudsmen in Dispute Resolution*, GAO-01-466 (Washington, D.C.: April 13, 2001).
[18]Section 1203 of the IRS Restructuring and Reform Act of 1998 outlines conditions for firing of IRS employees for any of ten acts of misconduct. 26 USC 7804 note.
[19]U.S. General Accounting Office, *Tax Administration: IRS and TIGTA Should Evaluate Their Processing of Employee Misconduct Under Section 1203*, GAO-03-394 (Washington, DC: February 2003).
[20]Under current law, the rights of employees to bargain may be suspended for reasons of national security. 5 U.S.C. Sect. 7103(b), 7112(b)(6).

FLRA is retained to resolve complaints concerning certain unfair labor practices and to supervise or conduct union elections.

Regardless of whether it is as a part of collective bargaining, involving employees in such important decisions as how they are deployed and how work is assigned is critical to the successful operations of the department. During the course of the design process, DHS has recognized the importance of employee involvement and has been involving multiple organizational components and its three major employee unions in designing the new human capital system.[21] This is consistent with our finding that leading organizations involve unions and incorporate their input into proposals before finalizing decisions.[22] Engaging employee unions in major changes, such as redesigning work processes, changing work rules, or developing new job descriptions, can help achieve consensus on the planned changes, avoid misunderstandings, speed implementation, and more expeditiously resolve problems that occur. These organizations engaged employee unions by developing and maintaining an ongoing working relationship with the unions, documenting formal agreements, building trust over time, and participating jointly in making decisions.

DHS employees' comments can prove instructive when determining the balance in labor management relations. In the DHS focus groups, employees suggested having informal mechanisms in place to resolve issues before the need to escalate them to the formal process and holding supervisors accountable for upholding agreements. Supervisors and employees also expressed a need for increased training in roles and responsibilities in the labor process and an interest in training in ADR. Respondents to the GAO survey said the most critical challenge in terms of labor relations will be to maintain a balance between the mission of the agency and bargaining rights.

DHS Faces Multiple Implementation Challenges

Once DHS issues final regulations for the human capital system, the department will be faced with multiple implementation challenges. While we plan to provide further details to the Congress on some of these challenges in the near future, they include the following.

Implementing the system using a phased approach. The DHS proposed regulations note that the labor relations, adverse actions, and appeals provisions will be effective 30 days after issuance of the interim final regulations later this year. DHS plans to implement the job evaluation, pay, and performance management system in phases to allow time for final design, training, and careful implementation. We strongly support a phased approach to implementing major management reforms. A phased implementation approach recognizes that different organizations will have different levels of readiness and different capabilities to implement new authorities. Moreover, a phased approach

[21] GAO-03-1099.
[22] U.S. General Accounting Office. *Human Capital: Practices that Empowered and Involved Employees*, GAO-01-1070 (Washington, D.C.: Sept. 14, 2001).

allows for learning so that appropriate adjustments and midcourse corrections can be made before the regulations are fully implemented organizationwide.

Providing adequate resources for additional planning, implementation, and evaluation. The administration recognizes the importance of funding this major reform effort and has requested for fiscal year 2005 over $10 million for a performance pay fund in the first phase of implementation (affecting about 8,000 employees) to recognize those who meet or exceed expectations and $100 million to fund training and the development of the performance management and compensation system. In particular, DHS is appropriately anticipating that its revised performance management system will have costs related to both implementation and development – a fact confirmed by the experience of the demonstration projects. In fact, OPM reports that the increased costs of implementing alternative personnel systems should be acknowledged and budgeted for up front.

DHS is recognizing that there are up front costs and that its components are starting from different places regarding the maturity and capabilities of their performance management systems. At the same time, DHS is requesting a substantial amount of funding that warrants close scrutiny by Congress. In addition, certain costs are one-time in nature and therefore should not be built into the base of DHS's budget for future years. Furthermore, presumably most of any performance-based pay will be funded from what otherwise would be used from automatic across the board adjustments and step increases under the existing GS system.

For example, the DHS proposal correctly recognizes that a substantial investment in training is a key aspect of implementing a performance management system. The demonstration projects' experiences show that while training costs are generally higher in the year prior to implementation, the need for in-depth and varied training continues as the system is implemented. We have reported that agencies will need to invest resources, including time and money, to ensure that employees have the information, skills, and competencies they need to work effectively in a rapidly changing and complex environment.[23]

Evaluating the impact of the system. High-performing organizations continually review and revise their human capital management systems based on data-driven lessons learned and changing needs in the environment. DHS indicates that it is committed to an ongoing comprehensive evaluation of the effectiveness of the human capital system, including the establishment of human capital metrics and the use of employee surveys. Collecting and analyzing data is the fundamental building block for measuring the effectiveness of these approaches in support of the mission and goals of the agency.

DHS should consider doing evaluations that are broadly modeled on the evaluation requirements of the OPM demonstration projects. Under the demonstration project authority, agencies must evaluate and periodically report on results, implementation of the demonstration project, cost and benefits, impacts on veterans and other equal

[23]U.S. General Accounting Office, *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the Federal Government*, GAO-03-893G (Washington, D.C.: July 2003).

employment opportunity groups, adherence to merit system principles, and the extent to which the lessons from the project can be applied governmentwide. A set of balanced measures addressing a range of results, customer, employee, and external partner issues may also prove beneficial. An evaluation such as this would facilitate congressional oversight; allow for any midcourse corrections; assist DHS in benchmarking its progress with other efforts; and provide for documenting best practices and sharing lessons learned with employees, stakeholders, other federal agencies, and the public.

Building a DHS-wide workforce plan. DHS has recently begun drafting a departmental workforce plan, using the draft strategic plan as a starting point. Workforce plans of different levels of sophistication are used in the five legacy agencies we studied. Despite the efforts of the DHS legacy agencies we studied, DHS headquarters has not yet been systematic or consistent in gathering relevant data on the successes or shortcomings of legacy human capital approaches or current and future workforce challenges–a deficiency that will make workforce planning more difficult. The strategic workforce plan can be used, among other things, as a tool for identifying core competencies for staff for attracting, developing, and rewarding contributions to mission accomplishment.[24]

Involving employees and other stakeholders in designing the details of the system. We reported last fall that DHS's and OPM's effort to design a new human capital system were collaborative and facilitated participation of employees from all levels of the department.[25] We recommended that the Secretary of DHS build on the progress that has been made and ensure that the communication strategy used to support the human capital system maximize opportunities for employee involvement through the completion of the design process, the release of the system options, and implementation, with special emphasis on seeking the feedback and buy-in of frontline employees.

Moving forward, employee perspectives can provide insights on areas that deserve particular attention while implementing the new performance management system. For example, DHS employees responding to the OPM FHCS reported that

- 37 percent indicated that high-performing employees are recognized or rewarded on a timely basis, which is lower than the governmentwide average of 41 percent;
- 60 percent believe that their appraisals are fair reflections of their performance, which is lower than the governmentwide average of 65 percent;
- 23 percent believe that steps are taken to deal with a poor performer who cannot or will not improve, which is lower than the governmentwide average of 27 percent; and
- 28 percent perceive that selections for promotions in their work units are based on merit, which is lower than the governmentwide average of 37 percent.

In the GAO survey, members of the field team said that the most critical challenge in terms of performance management will be to create a system that is fair. Such data

[24]U.S. General Accounting Office, *Human Capital: Key Principles for Effective Strategic Workforce Planning*, GAO-04-39 (Washington, D.C.: Dec. 11, 2003.
[25]GAO-03-1099.

underscore the continuing need to involve employees in the design and implementation of the new system to obtain their buy-in to the changes being made. More specifically, employee involvement in the validation of core competencies is critical to ensure that the competencies are both appropriate and accepted.

Summary Observations

As we testified on the DOD civilian personnel reforms, the bottom line for additional performance-based pay flexibility is that an agency should have to demonstrate that it has a modern, effective, credible, and as appropriate, validated performance management system in place with adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to ensure fairness and prevent politicalization and abuse of employees. To this end, DHS's proposed regulations set the foundation for results-oriented pay reform and modern performance management. DHS's performance management system is intended to align individual performance to DHS's success; hold employees responsible for accomplishing performance expectations; provide for meaningful distinctions in performance through performance- and market-based payouts; and be fair, credible, and transparent. However, the experiences of leading organizations suggest that DHS should require core, and as appropriate, validated competencies in its performance management system. The core competencies can serve to reinforce employee behaviors and actions that support the DHS mission, goals, and values and to set expectations for individuals' roles in DHS's transformation, creating a shared responsibility for organizational success and ensuring accountability for change. DHS should also continue to build safeguards into its revised human capital system.

DHS's overall effort to design a strategic human capital management system can be particularly instructive for future human capital management and reorganization efforts within specific units of DHS. Its effort can also prove instructive as other agencies design and implement new authorities for human capital management.

Mr. Chairman, Madam Chairwoman, and Members of the Subcommittees, this concludes my prepared statement. I would be pleased to respond to any questions that you may have.

Contacts and Acknowledgments

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Appendix I

Methodology

In presenting our preliminary observations on the Department of Homeland Security's (DHS) regulations, we reviewed the proposed human capital regulations issued jointly by DHS and the Office of Personnel Management (OPM) on February 20, 2004, in the *Federal Register*. Additional documents reviewed include relevant laws and regulations, the 52 DHS human capital system options released in October 2003, and testimony presented by leaders of DHS employee unions and the Merit System Protection Board (MSPB). Interviews with experts in federal labor relations and the federal adverse actions and appeals system provided additional insights. The official transcripts and report summarizing the proceedings of the Senior Review Advisory Committee meetings in October 2003 were also examined. A draft of the report summarizing the proceedings of the Senior Review Advisory Committee meetings in October 2003 was reviewed by members of the committee to ensure its reliability. Additionally, we attended the committee's October 2003 meetings. Relevant GAO reports on human capital management were used as criteria against which the proposals were evaluated.

To respond to your particular interest in seeking out and incorporating employee perspectives on the human capital system, we gathered information on employee perceptions from a variety of sources and presented these findings throughout the statement. Insights to employee opinions were gathered from OPM Federal Human Capital Survey (FHCS), a GAO-administered survey of the field team used to inform the human capital system design effort, and a report summarizing findings from the DHS focus groups held during the summer of 2003.

OPM Federal Human Capital Survey

To assess the strengths and weaknesses of selected provisions of DHS's proposed human capital system, we reviewed the analysis of the DHS component agencies' responses to relevant questions on OPM's FHCS of 2002 for those legacy components that are now within DHS: the Animal and Plant Health Inspection Service (APHIS); the U.S. Coast Guard; the U.S. Customs Service; the Federal Emergency Management Agency; the Immigration and Naturalization Service; Federal Law Enforcement Training Center; U.S. Secret Service; Office of Emergency Preparedness and National Disaster Medical System; and the Federal Protective Service. This governmentwide survey was conducted from May through August 2002. It was administered to employees of 24 major agencies represented on the President's Management Council, which constitute 93 percent of the executive branch civilian workforce. There were 189 subelement/organizational components of the 24 agencies that participated. The sample was stratified by employee work status: supervisory, nonsupervisory, and executive. Of the more than 200,000 employees contacted, a little over 100,000 employees responded to the survey, resulting in a 51 percent response rate. OPM reported that the margin of error for the percentages of respondents governmentwide was plus or minus 1 percent at a 95 percent confidence interval. Likewise, it reported that the margin of error for the

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percentages of respondents for individual agencies was somewhat higher but less than plus or minus 5 percent.

The OPM survey was conducted during the same time frame that the administration proposed legislation to form DHS; thus, the opinions expressed by the respondents to the survey were before the formation of DHS. For reporting purposes, OPM compiled the DHS responses by combining the various subentities cited above. The responses approximate the views of some, but not all, employees now at DHS. For example, the Transportation Security Administration (TSA) screeners were not hired at the time of the survey. Also, APHIS employees were divided between DHS and the Department of Agriculture (USDA), so the APHIS respondents included some employees who remained at USDA.

Because OPM did not provide us with a copy of the full survey data set that included all records or the strata weights for any of the records, we could not perform our own analyses of the data or calculate the confidence intervals that would be associated with such analyses. OPM did, however, provide us with access to a Web site that provided reports with weighted data analyses for the FHCS 2002. We addressed the reliability of the survey analyses by (1) reviewing existing information about the survey data collection and analysis processes and (2) interviewing OPM agency officials who were knowledgeable about the data. We determined that the data were sufficiently reliable for the purposes of this testimony. We reviewed the analyses of the DHS component agencies presented on the Web site in four areas (pay and performance management, classification, labor relations, and adverse actions and appeals) that compared the component's data to DHS-wide data and DHS-wide data to governmentwide data.

Field Team Survey

We were interested in obtaining the views of the field team participants who served as a key source of information for DHS's Core Design Team. The field team consisted of DHS managers and staff. Members were selected by departmental management or the three major unions.

From October through December 2003, we surveyed the 31 members of the team to obtain their insights into the DHS design process and proposed human capital system options. The survey, administered by e-mail and fax, contained two parts. The first part addressed their views on how effectively the field team was utilized throughout the design process. The second part addressed their views about human capital challenges and the proposed policy options in four areas: (1) pay and classification, (2) performance management, (3) labor relations, and (4) discipline and appeals. Prior to distribution, the questionnaire was reviewed by DHS and OPM officials and pretested with a field team member to ensure clarity of the questions and determine whether the respondent had the knowledge to answer the questions. The questionnaire was revised based on their input. We received completed questionnaires from 19 of 31 field team members. We aggressively followed up with nonrespondents by telephone and e-mail. Because many of the field team members were either not based in offices, on extensive travel, or

difficult to reach, we extended our survey through December 2003. The views that we obtained are not representative of all the participants.

DHS Focus Groups

DHS conducted multiple focus groups and Town Hall meetings from the end of May through the beginning of July 2003 in 10 cities across the United States.[26] Six focus group sessions were held in each city to obtain employee input and suggestions for the new human resource system. In most cities, five of the six sessions were devoted to hearing employees' views while the remaining sessions heard the views of supervisors and managers. Each focus group was facilitated by a contractor. The contractor used a standard focus group facilitation guide to manage each session. Additionally, the contractor was responsible for recording the issues identified during each focus group session and compiling a summative report on the findings from all the focus groups. We did not attend any focus group sessions and were not able to review any original notes from the sessions to assess the accuracy of the summative report.

Participation in the focus groups was not random nor was it necessarily representative of DHS employees. DHS reports that employee participation generally reflected the population in that location. For example, the level of bargaining unit representation at the focus groups was determined based on OPM data on bargaining unit membership. Bargaining unit employees were selected by union representatives to participate in the focus groups, while nonbargaining unit employees and supervisors were selected by DHS management. Union representatives and DHS managers were asked to select a diverse group of participants based on occupation, work location, gender, ethnicity, and age.

This work was done in accordance with generally accepted government auditing standards from March 2003 through February 2004.

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[26]The 10 cities were Atlanta, Georgia; Detroit, Michigan; El Paso, Texas; Los Angeles, California; Miami, Florida; New York, New York; Norfolk, Virginia; Seattle, Washington; Washington, D.C.; and Baltimore, Maryland.

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April 30, 2004

The Honorable George V. Voinovich
Chairman
The Honorable Richard Durbin
Ranking Minority Member
Subcommittee on Oversight of Government
Management, the Federal Workforce, and the
District of Columbia
Committee on Governmental Affairs
United States Senate

The Honorable Jo Ann Davis
Chairwoman
The Honorable Danny Davis
Ranking Minority Member
Subcommittee on Civil Service and
Agency Organization
Committee on Government Reform
United States House of Representatives

Subject: *Additional Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*

On February 25, 2004, I testified before your subcommittees at a hearing entitled "The Key to Homeland Security: The New Human Resources System."[1] I provided responses to an initial set of questions in correspondence dated March 22, 2004.[2] This report responds to your request that I provide answers to additional posthearing questions posed by Senator Akaka and Senator Lautenberg. The questions and responses follow.

Questions from Senator Akaka

1. **In your written testimony, you recommend giving members of the internal appeals panel, rather than the Secretary, the authority to remove their fellow panel members for inefficiency. However, you are silent on the**

[1]U.S. General Accounting Office, *Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations*, GAO-04-479T (Washington, D.C.: Feb. 25, 2004).
[2]U.S. General Accounting Office, *Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*, GAO-04-570R (Washington, D.C.: Mar. 22, 2004).

same issue for the internal labor-management board. What recommendations do you have for improving the impartiality of the proposed labor-management board at the Department of Homeland Security (DHS)?

As you noted, I raised independence concerns about the panel to be created to hear appeals for mandatory removal offenses. Members of that panel are appointed by the Department of Homeland Security (DHS) Secretary for 3-year terms and may be removed by the Secretary "only for inefficiency, neglect of duty, or malfeasance." These appointment and removal procedures are identical to the appointment and removal provisions for the members of the proposed DHS Labor Relations Board. As I noted in my statement with regard to the mandatory removal offense panel, removal of the panel members by the Secretary may potentially compromise the real or perceived independence of the panel's decisions. We suggested, as an alternative, that the department should consider having members of the panel removed only by a majority decision of the panel. Such changes might also strengthen the independence of the Labor Relations Board. We also said that DHS might wish to consider staggering the terms of the members to ensure a degree of continuity on the board.

2. **The General Accounting Office (GAO) has been active in reviewing and making recommendations regarding new personnel flexibilities in the federal government. As you know, DHS has requested $102.5 million for the implementation of its new personnel system. Based on GAO research and your own experience with the personnel system at GAO, is the department's request sufficient to adequately implement the system? How much do you expect the financial cost of the system to be in the long term?**

As you note, the administration has requested for fiscal year 2005 $102.5 million to fund training, the development of the performance management and compensation system, and contractor support. In addition, the fiscal year 2005 budget requests over $10 million for a performance pay fund in the first phase of implementation (affecting about 8,000 employees) to recognize those who meet or exceed expectations and about $20 million to fund the development of a departmental human resources information technology system. The training costs do not include employees' time during training or expenses of the internal training resources that already exist within DHS.

We have reported that based on the data that the Office of Personnel Management's (OPM) personnel demonstration projects provided us, direct costs associated with salaries, training, and automation and data systems were the major cost drivers of implementing their pay for performance systems. The demonstration projects reported other direct costs, such as evaluations and administrative expenses. We described a number of approaches they used to manage the direct costs of implementing and maintaining their pay for performance systems.[3]

[3]U.S. General Accounting Office, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, D.C.: Jan. 23, 2004).

While we do not have an estimate of additional implementation costs, clearly, further funding will be required as the system is rolled out to additional DHS personnel. In addition, ongoing training is essential to reinforce the considerable cultural change that is needed to continue to implement a new performance management system. DHS is recognizing that there are up-front costs and that its components are starting from different places regarding the maturity and capabilities of their performance management systems. While the investments are important to the ultimate success of DHS's efforts, it is equally important that certain costs are one-time in nature and, therefore, should not be built into the base of DHS's budget for future years.

3. **The GAO has conducted extensive reviews of personnel reform in other countries and at other federal agencies. In the case of the FAA, Congress granted certain flexibilities but then reinstated the current labor-management relations system found in chapter 71 and appeals to the MSPB. I also understand that other countries, which initially moved from a centralized system to an individual agency personnel system, have since returned to a form of centralization. What are the lessons learned from personnel reform efforts both here and abroad and, in your opinion, has DHS incorporated these best practices?**

Since the United States is not alone in experiencing challenges in managing its human capital, we reviewed other countries' experiences in our August 2002 report on performance management.[4] For example, Australia devolved almost all human capital management responsibilities to individual departments and agencies whose chief executives may negotiate compensation with individuals or groups of employees. Australia's Public Service Commission was to remain responsible for promoting high-quality human capital management and its Department of Employment and Workplace Relations plays a key role in helping agencies develop workplace relations that are consistent with a high performing public service. We have not updated our work to identify if there have been any changes in their responsibilities.

As we noted in our statement, we strongly support the need for government transformation and the concept of modernizing federal human capital policies. To help the new DHS, we convened a forum of a cross-section of leaders who have had experience managing large-scale organizational mergers, acquisitions, and transformations, and identified key practices and implementation steps that can help agencies implement successful transformations of their own.[5] While no two efforts are exactly alike, the "best" approach for any given effort depends upon a variety of factors specific to each context. Last September, we reported that DHS's design of its human capital system generally reflects these elements of effective transformation.[6]

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[4]U.S. General Accounting Office, *Results-Oriented Cultures: Insights for U.S. Agencies from Other Countries' Performance Management Initiatives*, GAO-02-862 (Washington, D.C.: Aug. 2, 2002).
[5]U.S. General Accounting Office, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, GAO-03-669 (Washington, D.C.: July 2, 2003); and *Highlights of a GAO Forum: Mergers and Transformation: Lessons Learned for a Department of Homeland Security and Other Federal Agencies*, GAO-03-293SP (Washington, D.C.: Nov. 14, 2002).
[6]U.S. General Accounting Office, *Human Capital: DHS Personnel System Design Effort Provides for Collaboration and Employee Participation*, GAO-03-1099 (Washington, D.C.: Sept. 30, 2003).

Our work has also shown that changes to human capital management should be implemented only when an agency has the institutional infrastructure in place. This institutional infrastructure includes, at a minimum, a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program goals and mission and desired outcomes; the capabilities to develop and implement a new human capital system effectively; and a modern, effective, and credible performance management system that includes adequate safeguards to prevent abuse of employees. We have issued several products that discuss this framework in more detail.[7]

As you noted, the Federal Aviation Administration (FAA) is managing its personnel under one of the most flexible human capital management environments in the federal government. This is a result of 1995 legislation that granted the agency broad exemptions from laws governing federal civilian personnel management found in title 5 of the United States Code. Congress provided these flexibilities in response to FAA's position that the inflexibility of federal personnel systems was one of the most important constraints to the agency's ability to be responsive to the airline industry's needs and to increase productivity in air traffic control operations. In a report issued last year, we noted that FAA had not fully incorporated elements that are important to effective human capital management into its overall reform effort.[8] These elements include data collection and analysis, performance goals and measures, and linkage of reform goals to program goals. FAA human resource management officials said that the agency should have spent more time to develop baseline data and performance measures before implementing the broad range of reforms, but that establishing these elements was a complex and difficult task. We additionally reported that FAA had also not gone far enough in establishing linkage between reform goals and the overall program goals of the organization. Clearly, FAA did not have the institutional framework in place that could have helped to maximize its personnel flexibilities.

Consistent with the institutional infrastructure described above, agencies in other countries are placing a greater emphasis on achieving alignment between individual and organizational results. A first step towards this end is to align the performance expectations of top leadership with organizational goals and then cascade those expectations down to lower levels and then to align performance expectations between agencies and with governmentwide priorities.

The proposed DHS regulations state the department's interest in the alignment of individual performance expectations with the mission and strategic goals, but do not yet detail how individual performance expectations will be aligned with the department's mission and strategic goals. The release of the DHS Strategic Plan can enable this alignment. In addition, the proposed regulations describe a phased approach to implementation and a commitment to an ongoing evaluation of the

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[7]U.S. General Accounting Office, *Human Capital: Key Principles for Effective Strategic Workforce Planning*, GAO-04-39 (Washington, D.C.: Dec. 11, 2003); *Human Capital: Effective Use of Flexibilities Can Assist Agencies in Managing Their Workforces*, GAO-03-2 (Washington, D.C.: Dec. 6, 2002); and *Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success*, GAO-03-488 (Washington, D.C.: Mar. 14, 2003).

[8]U.S. General Accounting Office, *Human Capital Management: FAA's Reform Effort Requires a More Strategic Approach*, GAO-03-156 (Washington, D.C.: Feb. 3, 2003).

effectiveness of the human capital system. A phased approach recognizes that different organizations will have different levels of readiness and different capabilities to implement the new authorities. Moreover, a phased approach allows for learning so that midcourse corrections can be made before the regulations are fully implemented organizationwide. Likewise, evaluations of the system's success will ensure that these system revisions are based on data-driven lessons learned.

4. **According to the proposed regulations, law enforcement officers are not among the list of individuals excluded from the personnel system. As the Department plans to implement a pay-for-performance system, I am concerned over the method by which law enforcement officers are judged on their performance and whether a pay-for-performance system could increase civil rights abuses. Due to your extensive experience in studying, as well as implementing, pay-for-performance systems, what are the best practices on how to measure the performance of law enforcement officers?**

While we have reported on local police forces' experiences in recruiting and retaining officers after the terrorist attacks of September 11, 2001, we have not reviewed how to measure the performance of law enforcement officers.[9] However, high-performing organizations use validated core competencies to examine individual contributions to organizational results. Competencies define the skills and supporting behaviors that individuals are expected to exhibit to carry out their work effectively and can provide a fuller picture of an individual's performance and contribution to organizational goals.[10] With regard to law enforcement, a focus on competencies would entail identifying and validating those competencies that are critical to successful law enforcement efforts. This approach should include a range of factors, including achieving results and protecting individual constitutional rights and civil liberties. A related pay for performance approach would center on creating incentives for—and rewarding—demonstrated proficiencies in the validated core competencies.

Question from Senator Lautenberg

1. Could you explain how local labor market rates will determine the pay bands and why you think that private sector salaries should affect DHS employees' salaries?

A competitive compensation system can help organizations attract and retain a quality workforce. To begin to develop such a system, organizations assess the skills and knowledge they need; compare compensation against other public, private, or nonprofit entities competing for the same talent in a given locality; and classify positions along levels of responsibility. While one size does not fit all, organizations generally structure their competitive compensation systems to separate base salary—which all employees receive—from other special incentives, such as retention allowances or performance awards.

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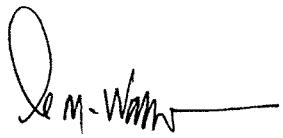
[9]U.S. General Accounting Office, *Federal Uniformed Police: Selected Data on Pay, Recruitment, and Retention at 13 Police Forces in the Washington, D.C., Metropolitan Area*, GAO-03-658 (Washington, D.C.: June 13, 2003).
[10]GAO-03-488.

Similar to many other aspects of DHS's proposal, important elements of the new pay system have not been determined. Under the proposed regulations, DHS, after coordination with OPM, may consider factors such as labor market conditions, among other things, in setting and adjusting ranges of basic pay for bands. We have reported that OPM's personnel demonstration projects have considered the labor market in determining how much to budget for pay increases.[11] For example, the Naval Sea Systems Command Warfare Center at Newport uses regional and industry salary information compiled by the American Association of Engineering Societies when determining how much to set aside for pay increases and awards. Specifically, in response to higher external engineer, scientist, and information technology personnel salaries, Newport funded pay increases and awards at a higher level in fiscal year 2001 than in fiscal year 2000.

We are sending copies of this report to the Chair and Ranking Minority Member, Senate Committee on Governmental Affairs; the Chairman and Ranking Minority Member, House Committee on Government Reform; the Chairman and Ranking Minority Member, House Select Committee on Homeland Security; and other interested congressional parties. We will also send copies to the Secretary of the Department of Homeland Security and the Director of the Office of Personnel Management. Copies will be made available at no charge on the GAO Web site at http://www.gao.gov. For additional information on our work on federal agency transformation efforts and strategic human capital management, please contact me on (202) 512-5500 or J. Christopher Mihm, Managing Director, Strategic Issues, on (202) 512-6806 or at mihmj@gao.gov.



David M. Walker
Comptroller General
of the United States

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[11]GAO-04-83.

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

I just want to followup with the last comment that I made to the witnesses talking about training for the managers. In my view, the training that's arising out of this changeover that we're doing is going to be just huge. I was wondering, based on your experience, how much training on the new pay classification and performance management system do you think would be needed. It seems almost overwhelming.

Mr. WALKER. We have had a broad banding system at GAO for a number of years. We are ahead of the curve in implementing pay for performance systems at GAO. We've modified ours recently, within the last couple of years. Training is absolutely of critical importance. In fact, it is not a one time event. We, in going to a new state-of-the-art competency based performance appraisal system that has linked our strategic plan and linked our pay and promotion decisions, we had extensive training in year one. But quite frankly, we've had additional training in year two and anticipate additional training in year three.

I think it is critically important in order to maximize this chance that you get it right, that it's consistently applied within and between units and that it's viewed as credible, equitable and non-discriminatory.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Walker. I'm going to give time now to my colleagues to ask questions. I'm going to be called for a vote here in one of my committees in probably 1 minute.

I'm going to yield to Ms. Holmes Norton for questions.

Ms. NORTON. Thank you very much, Madam Chairwoman. I think you, Mr. Walker, pointed out the categories of concern that any agency undergoing this kind of extraordinary change, someone has, when you're dealing with 170,000 employees, you somehow mesh them all together for the first time, it's a very delicate task. Someone has compared it to repairing an airplane while it's in the air. I just want to make sure that some of the passengers don't get lost in the process.

The notion of performance based accountability is of course the rationale for this change, and it's why this change is occurring. I'm very concerned about how you get accountability on the part of employees rather than wholesale problems between supervisors and managers when the regulations do not require, as they do now, that written performance, the elements of what is required, be written down, so that standards will be known and standards set out.

I want to know on three scores, I have problems with this on three scores. One, how is the employee to know what's expected of the employee if it's not written down somewhere? I thought that was kind of the ABCs of accountability. Won't that result in a he said, she said, you should have known, I wasn't sure problem? Why in the world would anybody not want to write what you want people to do, especially when you have a whole bunch of employees? That's the first thing. How do you get accountability if nobody has communicated what that is?

I'm particularly concerned, as a former chair of the EEOC, how one will ever bring an EEO complaint. And one of the things that

we're, the entire Congressional Black Caucus, the entire Congressional Hispanic Caucus and many Members of this Congress are going to be looking at is whether or not you are, they are, dismantling what it took our country 100 years to get, which is accountability for racial discrimination and gender discrimination. Well, I don't see how there can be any accountability or how you can even bring a complaint to the EEOC when there's no documentation as to what was expected of you.

And finally, how in the world are you going to hold managers accountable? If a manager hasn't had to write down what it is that the managers expect of their employees, this is what I meant when I asked the prior panel whether they had looked at best practices. Their answers were entirely unsatisfactory. So yes, we have.

But I certainly can tell you this, I don't think anybody in the private sector would say, at least in a big operation, that we're not going to write down, and don't even ask us to write down, because it's an administrative burden. Don't ask us to write down what is expected of you. I don't know what the view of that is, whether you think it's a best practice or whether you have any recommendations with respect to not writing down or having the discretion not to write down what you expect from your employees.

Mr. WALKER. Ms. Holmes Norton, as you know, these are proposed regulations. My view would be that it is critically important that performance standards be documented in order to have a clear understanding between the individual and their superiors as to what they are expected to do in order to make sure they are focusing their energy and efforts on those items and in order to be able to assess their performance and in order for them to be able to hold themselves accountable for their performance. I think it's critically important that it be documented.

Now how you go about doing that can vary. For example, at GAO, we have adopted a modern, effective and credible competency based performance appraisal system which was validated, the competencies were validated by our employees, not only to gain acceptance but also to minimize litigation risk, quite frankly. So I think how you go about doing that can vary——

Ms. NORTON. How many employees did you have?

Mr. WALKER. We only have about 3,300. We have a number of occupations——

Ms. NORTON. Well, let's——

Mr. WALKER. It's a difference.

Ms. NORTON. But it's a terrible challenge. What we've done to this agency is we've put all these folks together and we've given this agency really a challenge that I don't think any agency in the world has had. This is a Constitutional system, this is State action. The response on preponderance of the evidence bordered on the unconstitutional, when the answer was, well, we need to do this and—but the Constitution requires due process of a Federal employer.

I don't believe this can withstand Constitutional scrutiny. I don't think it can withstand Constitutional scrutiny to say that you can fire somebody from his job without even telling him what his job is. And you tell me, well, there are lots of ways to do it. I want

to ask you, is there any other way to do it if you have 170,000 employees, other than writing it down?

Mr. WALKER. I think it needs to be documented. I think the standards need to be documented. I also think that you need to have an appropriate safeguard within the Department, outside of the line, to review for consistency and non-discrimination. I think that you need to have alternative dispute resolution procedures, and you need to have qualified, independent appeal bodies available to employees in the event they believe that they somehow have not been treated fairly. I think all those elements are critical components.

Ms. NORTON. Would you agree, then, that they haven't begun to do any of the things you just named?

Mr. WALKER. I think they've started, but I think more work is necessary. And in the four items that I mentioned, some of the issues that you've talked about are some of the ones that I think are deserving of additional attention and scrutiny. Hopefully we'll get it as a result of this comment period and oversight by the Congress.

Ms. NORTON. Thank you, Chairman Voinovich.

Senator VOINOVICH [assuming Chair]. Following up on Congresswoman Norton's question, you've been involved in performance evaluation now for some time. Do you believe that if you dot the Is and cross the Ts and do the things that are necessary that performance evaluation can work in the Federal system?

Mr. WALKER. Oh, absolutely. I believe it's critically important that we move to more of a pay for performance system. And where we're paying for skills, knowledge and performance, rather than the passage of time and the rate of inflation.

Senator VOINOVICH. I think this committee would be interested in having you identify, benchmark examples of where pay for performance is working, not only at the General Accounting Office, but other places, and what were the ingredients that were in place to make that successful.

Mr. WALKER. A number of them are in the document that is being released today and I would recommend it to you and the other Members.

Senator VOINOVICH. Thank you. We're in the position right now of listening to comments about the proposed regulations. The fact that we're meeting here today and giving people an opportunity to express themselves publicly is important.

Could you briefly, give us your thoughts on what are the strongest elements of the proposed regulations and then share with us where you think there is some real work that needs to be done? You've done that in your opening statement, but could you expand on that?

Mr. WALKER. I think conceptually broad banding makes sense, provided you do a good job of setting up those bands by major occupational categories, also to potentially consider what some have referred to as speed bumps, to make sure that you have a situation to control, to make sure that people don't automatically get to go to the top of whatever the band is for compensation purposes irrespective of their performance.

Second, I think the concept of moving more toward a pay system that compensates people based upon skills, knowledge and performance, and also an alternative way of looking at locality based pay has strong conceptual merit. I believe the areas that require further attention are the ones that I mentioned, and that is, what are the future processes going to be.

I think it's important that if they're going to go for a pay for performance system they need to incorporate these safeguards and best practices. I believe they need to look at the standard for appeal, the structure for appeals and the scope of those appeals, are the primary issues. I'm sure that the next panel will talk about whatever issues they have with regard to the proposed scope of bargaining as well.

Senator VOINOVICH. You mentioned the issue of locality. I'm interested in a proposal to base annual pay raises on, among other items, market related adjustments. The Federal Government has had a difficult time comparing certain Federal occupations across the Government's 32 locality areas, because some of the occupations don't exist in the private sector.

How do you think this will work for fields such as law enforcement, and do you think that market related adjustments will close the pay gap for DHS law enforcement officers in high cost of living cities?

Mr. WALKER. I would hope so. But the fact is, one of the things we can take some comfort in is that there are benchmarks for law enforcement all across the United States. Every State and locality has law enforcement personnel. So that's an area where I think we should be able to get appropriate compensation information.

One of the things that was referred to earlier was that when TSA was set up, because of the additional flexibilities that they attained, quite frankly, they ended up hiring a bunch of people from GAO, the Capitol Police and many other departments and agencies, because they had more pay flexibility than those other entities did.

So yes, I do believe it's appropriate and possible to come up with some competitive compensation studies that will do a much better job of determining appropriate pay by locality than our current one size fits all approach.

Senator VOINOVICH. Do you see any changes in the personnel system that might require additional legislation?

Mr. WALKER. My understanding, Mr. Chairman, is that there are certain restrictions in dealing with the Secret Service and the TSA, and that they are not covered by all or part of these proposed regulations. So Congress would have to determine whether and to what extent it would want to allow them to make changes dealing with those two particular entities.

Second, I think if I recall correctly, Mr. Chairman, the safeguards that we came up with, the proposed statutory safeguards that are included in the GAO bill, that we recommended be included in the DOD bill. I'm not sure that they're in this bill.

So to the extent that you would want to think about doing that, I don't recall whether we were able to get them in or not, because I think this bill passed well before we worked those out. So that's something you may want to think about. Because I think this is precedential across the Government. And I think that while man-

agement needs to have reasonable flexibility to design different systems, given their missions and work forces, there ought to be some principles and safeguards that apply universally throughout the Federal Government to protect employees and to assure a reasonable degree of consistency.

Senator VOINOVICH. I was very much involved in trying to negotiate some of those human resource provisions for the Department of Defense. Did those safeguards get into that?

Mr. WALKER. Some of them did. But let me just say that the DHS process is night and day different than the DOD process. I think DOD could learn a lot from DHS, and hopefully they will.

Senator VOINOVICH. Some of those that are here today ought to know that some of us feel that if we can work out a decent system with DHS, perhaps we might suggest that some of the things we incorporate in the DHS Personnel System could be followed over at the Department of Defense. It's going to be interesting to see as we move down the road which is the more successful way of getting the job done.

Mr. WALKER. Well, there's a big difference in process already. The other thing that really candidly troubled me recently is the announced intention of the Department of Defense to implement a new system for 300,000 people by the end of this year. But I'm going to speak with Under Secretary Chu and others within the next week or so to hear more about that.

Senator VOINOVICH. I would have felt much better if Secretary Chu and Secretary Rumsfeld had spent some time with the members of the Governmental Affairs Committee in the U.S. Senate, talking to us and working on this issue before they went forward with their program. But again, time will tell.

Regarding TSA, what would be wrong with giving TSA the authority to give their workers a right to collective bargaining?

Mr. WALKER. That's obviously a decision for the Congress. I will tell you from a personal standpoint, I believe in collective bargaining. There may be some limitations in appropriate circumstances due to national security as to what issues ought to be bargained. But from a conceptual standpoint, I think that's something, I believe in it from a conceptual standpoint, subject to certain limitations. But that's ultimately a decision for the Congress.

I think whether or not you have bargaining, it's critically important that you have active and ongoing employee participation, whether it be through their representatives, the bargaining units and the leaders of the bargaining units, or whether, if they are not a member of a union, appropriate representative employees. If you take GAO, for example, we don't have a union or unions, but we actively partner with our employees through a democratically elected employee advisory council and treat them with the same status as our top executives in defining and rolling out new proposals that deal with all our employees.

Ms. NORTON. I have just one question. I wonder if I could get Mr. Walker on record here. Senator Voinovich, this is a matter that's going to be coming to the Senate, as I understand, soon. It has to do with the so-called 10 deadly sins. You may be aware of these 10 deadly sins. In any case, they were mandatory removal offenses that the IRS could remove peremptorily.

Now, it is interesting to note that H.R. 1528 has passed the House that would remove that ability from the IRS. That's just what that experience has shown us. Nevertheless, mandatory removal offenses have now popped up in the DHS regulations. At least at the IRS there was an independent, there was instant removal but there was independent review, whereas any review here would be internal and nobody even pretends that's the same kind of review as is normally thought to be independent.

And the IRS offenses that you could be removed for were written in statute. So again, we weren't, collecting money is very important, just as our security is very important, but somehow, some balance had been found. And yet the experience had been so faulty that a bipartisan bill repealed this section of IRS, this IRS provision. Do you believe that mandatory removal is something that should be written into these regulations, given the experience we have already had, which has caused something that seldom happens in this House, which is the repeal of something that we put into law?

Mr. WALKER. First, I believe in my full statement I have some reference to the fact that I think it's important that lessons learned from the IRS experience be considered in determining what should be done with the Department of Homeland Security. Second, I do think there are certain circumstances where certain actions should result in removal. At the same point in time, I think it's important that there be an appropriate due process, involving qualified and independent players as a check and balance when you are talking about somebody losing their job.

So I would be happy to provide additional information for the record if you would like on that.

Ms. NORTON. You think they should be put in law, at least, or regulations, as the IRS was? We put them in statute. They're not even in regulations here in DHS. It's at the discretion. This is the first time I think even anybody thought about this. At the discretion of the Secretary, without anything written down, you can be instantly removed.

Mr. WALKER. My personal opinion is it should be in either law or regulation, because both of those will result in some type of due process consideration of what they are. Then second, after that ends up happening, then you have to determine what type of appeal process there might be, if there is a perceived inequity in the application of whatever the law or the regulations lay out.

Ms. NORTON. Thank you very much, Mr. Walker.

Mr. WALKER. Thank you.

Mrs. DAVIS OF VIRGINIA [resuming Chair]. Mr. Walker, as always, it's been a pleasure having you here. Thank you for coming to testify. I'm sure some of our members may have additional questions they want to submit for the record.

Mr. WALKER. Thank you, and good luck this afternoon for both of our sakes.

Mrs. DAVIS OF VIRGINIA. Thank you very much, and thanks for your patience.

We will now move on to panel three, and I'm sorry to keep you all waiting. I have some other not so great news for you. I've just been told we have to be out of the room at 1:15 because the room

has been booked for another hearing. So we need to move on to panel three, and we're very fortunate to have on our third panel representatives from the three largest unions at DHS.

First of all, we'll hear from Mr. John Gage, National President of the American Federation of Government Employees. Then as always, we're pleased to have back Ms. Colleen Kelley, national president of the National Treasury Employees Union. And last but not least, we'll hear from Mike Randall, president of the National Association of Agriculture Employees.

Again, thank you all very much for being here today and thank you for your patience. As always, it is the policy of this committee to swear in our witnesses. So if you would all please stand and raise your right hands.

[Witnesses sworn.]

Mrs. DAVIS OF VIRGINIA. Let the record reflect that the witnesses answered in the affirmative.

You may be seated.

Mr. Gage, again, thank you for being here today. You are now recognized for 5 minutes.

STATEMENTS OF JOHN GAGE, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; COLLEEN M. KELLEY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; AND MIKE RANDALL, PRESIDENT, NATIONAL ASSOCIATION OF AGRICULTURAL EMPLOYEES

Mr. GAGE. Thank you, Madam Chairwoman.

We have a detailed statement that we submitted with some of our concerns and recommendations to the overall plan. I wanted to talk, and of course we met with Secretary Ridge, had a good discussion with him. I really hope that further discussion with Secretary Ridge is going to enable us to correct some pretty glaring problems with the DHS personnel system.

It's just a couple of observations. I mean, getting the details right on this new personnel system is going to be very, very difficult. When we see the Department coming out of the box, intentionally excluding from the system fair checks and balances to correct mistakes and to safeguard against abuses, I am pretty shocked about that. And I know your questions about training, and I think training is going to be a huge issue.

But now that we have all these trained and various degrees of trained supervisors to start the system off with taking employees' rights away, where they can contest problems or abuses or mistakes that these supervisors make is just not the way it should be. If this system is so good, and when you hear the personnelists talk about it, well, if it's so good, it should welcome scrutiny. Slanting the standards of evidence, minimizing collective bargaining, setting up management as the sole judge and jury on discipline and pay, employees' sense of fairness and credibility that they should have in this system, it's just not going to happen.

When they talk about all the inclusiveness that the DHS system process went through, it did. It talked with 2,000 employees. Just about all those 2,000 employees said, don't take our rights away, there's no reason for that, it's not mission oriented. Almost all of those 2,000 employees said, my supervisor is going to rate me and

determine my base pay and that concept is very foreign to what we currently have in the supervisor/employee relationship. And the ability to put up an appraisal system for 175,000 employees that is going to be done fairly hasn't been done yet.

Now, to put the extra added attraction that these supervisors can also determine employees' pay, when in the past whether they could rate a person fairly at all was in question, and to take away the employee's right to any appeal or to any scrutiny, employees are very distraught about this. They are very concerned about it.

Senator Voinovich asked Admiral Loy, and I've asked him the same question, give me an example where collective bargaining stops this agency from doing anything. There are no examples. When we talk about deployment, that it's a mission issue of deployment, yes, it very well could be. But it also could be a supervisor in San Diego re-deploying a border patrol agent or officer to Texas.

Now, shouldn't there be at least a post-bargaining discussion, a post-implementation discussion of those types of arbitrary moves? This isn't Secretary Ridge making these moves. These are very low level supervisors who can have all kinds of different agendas going on. And to take employees' rights away or the union's rights away to at least scrutinize some of these decisions is really overkill.

I want to make just one other observation. The fact that TSA employees, these baggage screeners, cannot have any appeal rights, any collective bargaining rights, is shameful. These employees are calling us daily with things that are going on in work sites in airports across the country. You can see the turnover rates of these folks. We could do a lot, I think, in stabilizing that work force. I think they're doing a fine job. I think they're doing a better job than has ever been done at our airports.

But to say that they have no rights whatsoever and no collective bargaining rights, and that's some type of a mission, that nexus hasn't been established. And I think in this country, when you say that someone has to lose a right, you'd better well express very clearly how that mission abrogates those rights. That test hasn't been made for TSA employees, and we're going to continue fighting to get them the rights that they deserve.

Thank you, Madam Chairwoman.

[The prepared statement of Mr. Gage follows:]

STATEMENT BY

JOHN GAGE
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE

THE SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA

AND

THE HOUSE SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

REGARDING

PROTECTING THE INTEGRITY OF LABOR RIGHTS AND CIVIL SERVICE RIGHTS IN THE DEPARTMENT OF HOMELAND SECURITY

ON

FEBRUARY 25, 2004

American Federation of Government Employees, AFL-CIO
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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 who work in the Department of Homeland Security (DHS), I thank you for the opportunity to testify here today on the proposed new personnel rules for DHS.

I met with Secretary Ridge earlier this month and had meaningful and substantive discussions on some of the issues presented by management's proposal. The Secretary has committed to continue these discussions, and we expect that the result will be substantial changes in the proposed regulations.

I INTRODUCTION

The Department of Homeland Security was created by the Homeland Security Act, which was passed in November 2002 to bring together 23 different agencies with related missions.

The Act authorized the creation of a personnel system that could deviate from numerous provisions of title 5 of the United States Code. The rationale was to put all 170,000 of the agency's employees under one set of rules and policies. Conveniently ignored was that 60,000 of the 170,000 (more than a third) of those employees, the TSA screeners, would be outside the supposedly agency-wide system.

Under the Homeland Security Act, the Secretary of Homeland Security and the Director of the Office of Personnel Management (OPM) are authorized to

issue regulations jointly that would establish and describe the new personnel system.

II PROCESS

The development of the personnel system involves both a formal collaborative process between unions representing the agencies rank and file employees and agency operational managers, an earlier design process created by the Secretary and the Director.

A. THE STATUTORY COLLABORATION PROCESS

The Homeland Security Act requires that the new personnel system be created with full participation by elected representatives of the employees.

Under section 9701(e)(1)(A), the Director and Secretary are to provide their proposal to the employee representatives. The unions have 30 days to review the proposal and make recommendations to improve it. After receiving these recommendations, the Director and Secretary must give them "full and fair consideration in deciding whether or how to proceed with the proposal."

After deciding how much of the employee representatives' recommendations to adopt and how much to reject, the Secretary and Director are to tell Congress what recommendations were rejected. The Secretary and Director must then meet and confer for at least 30 days with the unions, in order to attempt to reach agreement on the points in dispute. The Federal Mediation Service will assist.

Ultimately, the Secretary and Director can adopt regulations over the employees' objections.

B. THE DESIGN PROCESS.

Rather than launch right into the statutory process, the Secretary and Director established a preliminary design process, which included substantial union involvement through approximately October 2003.

During a good part of last year, AFGE participated in developing options for the new personnel system along with management representatives from DHS, OPM, and other unions. The group, called the Design Team, divided into two sub groups – one focused on Pay, Performance and Classification while the other focused on Labor Relations, Adverse Actions and Appeals. Over the six months that the group operated, it heard from experts in personnel system design from academic institutions, federal agencies, non-profits, and private firms. The members of the group read from the extensive body of literature on human resource systems and contacted organizations in the private sector, the non-profit sector, federal agencies, and state and local governments to learn more about their personnel systems.

In addition to the Design Team, a Field Review Team was established, comprised of union representatives and managers from DHS facilities around the country. The Field Review Team and the Design Team shared ideas and criticisms of the developing materials at these times.

Last summer, members of the Design Team and top DHS, OPM and union officials traveled to eight cities around the country to hold Town Hall meetings for DHS employees in the area and to conduct focus groups with both management and non-management employees. These visits took place in Norfolk, Virginia; New York, New York; Detroit, Michigan; Seattle, Washington; Los Angeles, California; El Paso, Texas; Miami, Florida; and Atlanta, Georgia. During the Town Hall meetings, employees were free to ask questions, make comments or express their concerns. And they did, in city after city, speak up and say what was on their minds!

In the focus groups, DHS workers were asked to discuss pay, classification, performance management, labor relations, adverse actions, and appeals – specifically to talk about what works, what doesn't and what might be an improvement. Employees shared their ideas, told us about rumors circulating in their workplaces, and voiced their deep concerns about radically changing a system the vast majority felt needed only small changes to work.

In fact, the Design Team heard over and over again, both in the Town Hall meetings and in the focus groups, that if the current system were properly funded and carried out, it would work well. DHS employees said it was important to working people to be able to have some confidence in the stability of their income so they could plan for their families' futures. They said that their performance appraisal systems did a poor job of accurately and fairly making distinctions among employees about their performance. They said that favoritism and poor management were big problems where they worked and that giving supervisors

and managers more control over their pay was a bad idea. They said they feared what pay-for-performance would do to cooperation, teamwork, and the sense of pulling together for a common mission. They said they wanted to be protected from erroneous or vengeful management actions against them.

While the members of the Design Team were in these eight cities, they also visited several DHS workplaces in the area. This gave the Team insights into the variety of jobs DHS employees perform and an appreciation of the vital work done by the Department. At several of the sites, Team members had an opportunity to talk with employees. Once again, the overriding themes were of concerns about putting pay decisions, based on subjective performance evaluations, into the hands of managers, pitting employee against employee to win the prize of a higher payout, losing protections against wrongful management actions, and losing the right to have a meaningful say about conditions in their workplaces.

Once the Design Team members were back home, work on developing the options started in earnest. The Team brainstormed ideas for options, grouped similar ideas together, and set up committees to begin the work. Out of this process came the fifty-two options that went forward to the Senior Review Committee and then to the Secretary of DHS and the Director of OPM.

The Senior Review Committee (SRC) included me in my capacity as AFGE National President, as well as the presidents of the National Treasury Employees Union (NTEU) and the National Association of Agricultural Employees (NAAE), top officials from DHS and OPM and technical advisors from

the universities and the private sector. The SRC met first in July to approve the guiding principles and the process developed by the Design Team. In October, we held a two-and-a-half-day facilitated meeting to discuss the options and various ideas and concerns we all had about personnel reform. There was no attempt to winnow down the number of options to those most palatable to the SRC as a whole; rather, all fifty-two went forward to the Secretary and the Director.

AFGE insisted on being able to participate in this endeavor, as we were assured that the group's findings would be heeded when DHS and OPM made decisions regarding the new DHS personnel system. In fact, both DHS and OPM involved AFGE well before the statutory collaboration process began. Substantial resources were devoted to establishing and supporting the Design Team, the Field Review Team, and The Senior Review Committee, as well as carrying out the ambitious schedule of Town Hall meetings and focus groups around the country. During the Design Team and SRC process there was a genuine sense of collaboration.

That is why we are so deeply disappointed with the outcome of the process. This disappointment goes beyond our fundamental disagreement with many of the decisions that made their way into the proposed regulations. We also are concerned that the proposed regulations do not reflect the research that was done by the Design Team, the views and preferences of the overwhelming majority of Town Hall and focus group participants, or the bulk of academic research in the field.

III PAY, CLASSIFICATION AND PERFORMANCE MANAGEMENT

A. *TOWN HALL MEETINGS AND FOCUS GROUPS*

As mentioned above, the Design Team heard over and over again, both in the Town Hall meetings and in the focus groups, that if the current system were properly funded and carried out, it could achieve everything the advocates of change professed to want. Both managers and non-managers made it clear that they did not believe that there were terrible problems that could only be solved by radical change. If anything, DHS employees said they feared that problems and disruptions would result from, not be resolved, by such change. Employees said it would harm morale and recruitment for workers to have no stability in their income. By far the vast majority of workers did not believe their appraisal systems or their managers could do a fair and accurate job of paying good employees different amounts based on their performance. They feared that such a system would create a cutthroat environment among employees and harm the Department's ability to carry out its mission. *There was absolutely no call from the employees the Design Team researched to make the changes found in the proposals.*

B. *REVIEW OF OTHER EMPLOYERS*

Even if one looks hard, one would find little, if anything, in the research findings that supports the proposed regulations. It is telling that in the introductory explanations to the proposed regulations, the authors do not even pretend that any proposals were drawn from the research or cite any research to support them. Instead they allude to undocumented and unproven allegations about the inability of federal managers to do their jobs under the current system. Indeed, the proposals reinforce the fears employees expressed to us during the site visits and in other communications, namely that the outcome was, for the most part, predetermined and based on the ideological wish lists of certain segments of management rather than on any study of the facts.

What does the research documented by the Design Team actually show? It shows that in all the organizations researched by the Team, only New York has any system in place to evaluate the success of its labor relations program. It shows that the Australian Customs Service has a pay-banding system in which pay, performance and classification plans are negotiated with the employees' unions and become part of the contract. It shows that in Great Britain's Her Majesty's Customs and Excise, there is a pay banding system with 11 bands and pay increases are negotiated with the two unions that represent the employees.

The Design Team research shows that the Kings County Washington Sheriff's Department Personnel Manager does not recommend pay-for-performance for public sector employees. He says it creates three or four months of chaos and resentment and there is no return on investment. It is hard to measure things objectively and counting things like arrests can backfire. It is

often the luck of the draw - one employee can have many cases that each take only a short time while another gets a case that takes years to resolve. How do you equalize employees' opportunities to do the things that get them pay increases?

In North Carolina, the Design Team learned that the State Department of Transportation implemented a competence-based system. Unfortunately, the state legislature failed to provide a general increase for state workers so everyone in the Department was given a one-time bonus of $550 and 10 bonus leave days. The research showed that in New York State, pay is negotiated with the employees' unions and there is no pay-for-performance system. In Philadelphia, four different unions negotiate the systems for white collar, blue collar, police, and fire fighters. Classification and pay changes are subject to review by a joint labor-management committee. In the state of Pennsylvania, bargaining unit pay is negotiated and, while employees are not required to join the union, they must pay a fair share if they do not join. There are no pay-for-performance systems.

In Hampton, VA, there is a pay-for-performance system, but it doesn't include police, fire or rescue employees, jobs similar to the core jobs in DHS. They get increases based on training and certification in required skills. In Pierce County in Washington State, half of an employee's pay increase is based on seniority and half on performance. Here too, however, police and firefighters get competency adjustments instead. Riverside County, California has a competency-based pay system for 500 Information Technology employees,

which must be negotiated prior to implementation in bargaining units. Employees with more than five years on the job are eligible for a "Historical Knowledge" competency, similar to a longevity increase, in order to recognize the importance of experience and loyalty.

St. Paul, Minnesota has 26 bargaining units that negotiate pay, performance appraisal systems, and other conditions of employment. Most employees are under a step system similar to the current General Schedule system. Attorneys, however, are under a collectively bargained performance progression system. The Washington State Legislature recently passed a law that expands the scope of bargaining to include economic issues. At the same time, the legislation called for changing the civil service system. They have rejected the idea of a pure pay-for-performance system as too onerous and contrary to their culture. They plan instead to have a mix of performance awards, incentives, skill-based systems, gainsharing, etc. They said that pay-for-performance should be the last thing implemented, if at all. First you have to have sound classification, pay and performance management systems in place.

According to the Design Team research, the Federal Aviation Administration has a Core Compensation Plan, which is negotiated in bargaining units, including pay. Since the completion of the Design Team process an additional bargaining unit reached agreement on the Plan, but it calls for any Organizational Success Increase determined by the Administrator to be divided equally among the employees rather than more being given to some based on their appraisals. Employees may grieve virtually all pay-setting actions through

the Merit Systems Protection Board (MSPB), negotiated grievance procedures for bargaining unit employees, or through what FAA calls its "Guaranteed Fair Treatment Process," in which the employee and management jointly select a neutral third party. The Bureau of Alcohol, Tobacco, Firearms and explosives has a pay-banding, pay-for-performance demonstration project that involves only its scientific, technical and engineering positions. The FBI has a pass/fail system and no pay banding.

The Federal Deposit Insurance Corporation (FDIC) has a pay system that is collectively bargained with NTEU. They used to have a pay-for-performance system tied to appraisals but abandoned it and replaced it with a pass/fail system. They found that the amount of pay differences based on differences in performance was too small to justify the administrative costs of running the program. They are replacing it with a program in which at least one-third of the employees will be recognized as top contributors and receive additional 3% increases. The Board of Governors of the Federal Reserve System has a pay-for-performance system that covers mostly professional employees. The General Accounting Office has a pay banding system in which employees are evaluated on their performance in core competencies. The Internal Revenue Service has a pay-banding system for managers.

Several small independent agencies have pay-for-performance systems, such as the National Credit Union Administration, the National Security Agency, and the Comptroller of the Currency, the Office of Thrift Supervision, and the Securities and Exchange Commission. Some of the employees of these

agencies are represented by unions while others are not. The research has no information about whether or not any of these systems are successful. The Transportation and Security Administration has a core compensation system based on the FAA system. Because of problems with the performance appraisal system, employees received increases equivalent to the GS increase in January 2003 rather than increases based on performance.

The Boys and Girls Clubs of America aims for a bell curve distribution of their performance ratings and bases its employees' pay on them. Boeing has broad bands, with merit pay increases based on performance. In bargaining units, the unions negotiate how much of the increase is guaranteed and how much is subject to performance pay. General Electric has a pay-for-performance banding system for managers – the bulk of the workforce is not included. IBM has a market-driven pay system that allows the top 20% of performers to get increases as much as three times the amount given to the bottom 20%. IBM told the Design Team that it is easy to differentiate the top and bottom performers but it is very difficult to make distinctions among their good employees in the middle. In the Union Pacific Railroad, about 70% of employees get performance cash awards. At PepsiCo, executives and non-union employees are in a pay-for-performance system. The research for Verizon only deals with managers who are in a pay-for-performance system.

None of the research shows that pay-for-performance works in the sense of improving employee performance, lowering costs, and improving recruiting recruitment or retention. Not surprisingly, there was no attempt to

try to demonstrate any of the alleged virtues of pay for performance. In fact, in response to AFGE requests for *any* evidence that pay-for-performance improves the quality or productivity of an organization, we were told that this was not the goal. Stunningly, OPM claimed that performance pay was a "fairness" issue. Apparently, according to both OPM and DHS senior leaders on the Design Team, employees resent working hard and having a co-worker, whom they believe, is not working quite as hard, get the same amount of pay. Why implement an entire pay system whose sole justification is to accommodate employees who pout about what a co-worker is paid? What about teamwork and agency mission? Even OPM admits that adopting agency-wide pay for performance is not a solution to managers' disinclination to address the much-hyped problem of poor performers. However, they are basing their recommendations on good employees' belief they are better than other good employees and grousing about not getting a little more money. This is an absurd and puerile basis for imposing a potentially destructive pay system on an entire agency.

C. *ANALYSIS OF PROPOSED PAY AND CLASSIFICATION SYSTEM*

Any new pay and classification system should support, not undermine, the mission of DHS. This is only possible with a system that promotes teamwork, rather than penalizes it. Unfortunately, the DHS proposal fails this basic test.

DHS has proposed establishing occupational clusters composed of four bands – (1) entry and developmental, (2) full performance, (3) senior expert, and

(4) supervisory. With proper design and safeguards we see potential benefits in the establishment of an entry and developmental band. Although it is not clearly specified how such a band would function, we believe that it could be modeled after the current career ladder system, which also is an entry and developmental system leading to a full performance level. With negotiated safeguards, which ensure fairness in moving within and between bands, availability of appropriate training, and assignments to demonstrate competence, we could support flexibilities that allow faster movement for those who demonstrate readiness for the next level sooner than a year. If bargained collectively, this is the type of reform AFGE might support as a means of enhancing the operation of DHS.

DHS proposes to eliminate the current classification system and replace it with a "new method," which will result in broad occupational "clusters" and "pay levels or bands." These clusters will be the new classification system. The current classification system provides a good framework for insuring the important principle of equal pay for substantially equal work. There is absolutely no indication of how these new clusters and bands will meet this important goal.

We do know that the regulations propose that an employee's assignment to a particular cluster or band *will not* be subject to an unspecified DHS reconsideration process (Section 9701.222). The regulations also state these matters will be barred from collective bargaining (Section 9701.305). Whether this system will be fair and equitable is anyone's guess.

We have many concerns about the system of pay adjustments, but foremost is whether or not the adjustments will be funded. Will the

Administration and the Congress fund the increases next year? If they do, will they fund them in the succeeding years? As we all know, today's Congress cannot bind the next one. This is especially troublesome in the DHS proposal for annual performance based pay increases, which, if not properly funded, will only produce a ruinous zero sum game with the perverse incentive to promote a coworker's failure.

The payout system proposed in the regulations would establish a point system that would result in either a dollar amount or percentage amount for each employee depending upon his or her appraisal. The system is set up in such a way that one employee does better if more of his or her co-workers do poorly. The value of a payout point is determined after employees have been evaluated. If the aggregate amount of "performance" is high, the value of a point is low. If the aggregate amount of "performance" is low, the value of a point is high. The incentive is both perverse and clear: The lower the performance of the organization as a whole, the bigger the raise an employee judged to be a high performer will receive. Someone motivated to work hard for the promise of a big raise will only achieve his goal if management judges the majority of his coworkers to be losers.

The example given in the proposed regulations describes a group of 100 employees for whom the performance pay pool is determined to be $84,390. In this hypothetical group, 30 employees receive a "fully successful" rating valued at 1 point, 46 employees receive an "exceeds fully successful" rating valued at 2 points, and 24 employees receive an "outstanding" rating valued at 3 points. The

total number of points for the group is 194, which is divided into the performance pay pool to come up with $435 as the value of a point. Thus a "fully successful" employee would get $435, an "exceeds fully successful" employee would get $870, and an "outstanding" employee would get a $1,305 pay increase.

But what if there were more "fully successful" employees or employees who fail to meet expectations and fewer "outstanding" employees or those who "exceed fully successful? And as for consistency, the original rationale for the establishment of the agency and its "flexibility" on pay and management: This system allows a point to be worth 2% of one worker's salary, and 0.05% of another worker's salary. We call this system "compensation cannibalism." It is a dysfunctional environment that encourages backstabbing rather than teamwork, and fairness is nowhere to be found.

The Human Resource literature is full of articles about how difficult and counter-productive pay-for-performance is. Just last month, Bob Behn of Harvard University's John F. Kennedy School of Government wrote about the pitfalls of pay-for-performance, particularly for government agencies, which cannot promise that their systems will be consistently and adequately funded over time. Behn argues that one risks demoralizing the majority of good workers by singling out a few for rewards – and then finds that, usually, employers cannot pay those employees enough to make it worth the problems. Behn says further, "Government needs to pay people enough to attract real talent. Then, to motivate them, it needs to use not money but the significance of the mission they are attempting to achieve."

The DHS proposals also call for market-based pay. DHS has had a hard time attracting law enforcement officers because the local police and sheriff's departments offer higher pay, so we understand the attractiveness of the idea to agency management. Our support for the Federal Employees Pay Comparability Act (FEPCA) is well known, and it is above all a market-based system. Indeed, it is odd that the crusaders for pay for performance routinely introduce "market-based" factors as if they were a "new" or "modern" idea that that the current system lacks. But what is the principle of comparability if not market-based pay? And why do pay for performance zealots disparage comparability and then suggest market-based pay as its alternative?

The answer is that market comparability is expensive, and difficult to administer with accuracy because so many federal jobs are unique to the government. One crucial and costly administrative factor is the collection of data that matches federal jobs with jobs in the private sector. Notwithstanding the Administration's insistence that half of all federal jobs are "commercial" in nature and ought to be contracted out since firms already doing similar work are listed in the Yellow Pages, the truth is that job matches for federal jobs are extremely scarce. Most federal jobs are not "commercial," they are inherently governmental and simply do not exist outside the government. For example, the FAA has a market-based system that excludes its core employees, the air traffic controllers, because, of course, there is no comparable job outside the federal government.

The market also is volatile. The Design Team saw systems in which an employee, whose job is no longer valued as highly in the market as it once was,

is left to languish, with little or no pay increases until the market changes or the employee drops below it and needs an increase to catch up.

While AFGE strongly opposes pay for performance, the fact is that it can actually be made worse by allowing some employees to move ahead in terms of pay because of high appraisals, while other employees, with equally high appraisals, are held back because they or their entire occupation are considered to be "over market." This is a worst of all worlds outcome, and one the DHS system seems designed to create.

IV **LABOR RELATIONS**

AFGE believes that the proposed regulations severely undermine collective bargaining in several serious ways.

A. RESULTS OF TOWN HALL MEETINGS AND FOCUS GROUPS

The political appointees in DHS and at OPM who urged that the statute give the agency increased flexibility to make changes in the labor-management relations system claimed that this was necessary for national security. However, during the extensive exchanges with employees that took place at the Town Hall Meetings with the Design Team, there was no support for fundamental changes in the labor management relations system. A few management representatives complained about the requirement to negotiate with the union, despite the specific Congressional finding that collective bargaining was in the public interest. But the overwhelming majority of comments from employees, including

many managers, urged the agency not to diminish the system of collective bargaining and union representation. Similarly, in the focus groups, the employees and managers who attended did not urge that the collective bargaining system in place be dismantled. Indeed, the sessions typically included the view that the problem with the current system of labor-management relations was insufficient enforcement of the unions' and employees' rights when management did not comply with the law.

B. RESEARCH ON OTHER EMPLOYERS

The Design Team examined the statutes that govern labor-management relations in 11 states and local governments, as well as the National Labor Relations Act, which governs the U.S. Postal Service. It found variation in the scope of bargaining, the administration of the collective bargaining system, and the resolution of bargaining disputes or impasses. However, there was no attempt to judge the effectiveness of the alternatives. There was also no effort to see whether any of the alternatives would better serve the Department, its employees or the public than the provisions of Chapter 71, and if so, how. Indeed, the Design Team did not even hear directly from the management representatives of the state or local governments, or the unions that represented their employees to inquire how their system was working for them.

C. *OTHER STATED REASONS FOR RADICAL CHANGES*

The union members of the Design Team urged management to show evidence of how the current labor relations system interfered with the Agency's mission. We noted that in the Immigration and Naturalization Service, Border Patrol, Customs Service, Animal and Plant Health Inspection Service, Federal Protection Service, Federal Emergency Management Agency and Coast Guard all had long histories of constructive relationships with labor unions. We asked if it were management's position that any of these agencies had been deficient in serving the public and if that was in any way caused by any aspect of the current system. We asked them to show us what the problems were and how the current system prevented them from being solved. We asked how such notions as a narrower scope of bargaining, restrictions on unions' ability to represent workers on official time, or elimination of impasse resolution by neutral third parties would enhance their ability to fulfil their mission. No such evidence or even argument was ever presented to the Design Team. The management representatives claimed that this was not relevant to our task. We were repeatedly told that ours was not to analyze, only to create a list of options from which the Secretary and Director could eventually select.

Lacking any evidence to the contrary, we cannot help but conclude that the proposed changes are not based on the results of thoughtful research or an examination of what is necessary for the Department's mission. Rather, as employees feared all during the Design Team process, these are the expression of a political agenda, unrelated to homeland security.

D. *ANALYSIS OF THE LABOR RELATIONS PROPOSAL*

1. **Elimination of the neutral administration of the labor relations system.**

One key element of the proposed labor relations system is that it be administered by a board chosen solely by management. This board would decide issues which, in the current system, and in every other system in the United States where the right to strike is prohibited, are decided by a neutral and independent body.

It is deceitful to establish a Homeland Security Labor Relations Board entirely selected by the Secretary and to call it "independent." Several of the options put forth by the Design Team called for a board made up of one member selected by management, one by the unions and a third to be selected by the first two. This is a process that has been used for years by many state governments.

Not one single expert testified that a labor relations system run by people beholden to management would, in the long run, benefit the agency or reflect our nation's traditions regarding due process and adjudication by neutrals. Not a single case was cited in which national security operations at one of the legacy agencies had been compromised from the type of decision that came from neutral decision-makers. Employees will have no confidence in a board,

empowered to decide matters of great concern that has been hand- picked by management and is dependent upon it for support.

2. Elimination of Bargaining Over Personnel Policies

The proposed regulation eliminates all the contract bargaining that would take place concerning personnel policies if chapter 71 were retained:

> [T]here is no duty to bargain over any matters that are inconsistent with . . . Departmental rules and regulations . . . [9701.518(a)(1)].

The major reason for bargaining a contract is to achieve changes in the existing personnel policies, nearly all of which would be in the form of agency rules and regulations. Under chapter 71, in certain circumstances but not all, rules and regulations issued at the top level of the agency, in contrast to those issued by components of the agency, could block bargaining if management could prove a "compelling need" to maintain the precise provisions of that regulation. The FLRA has seldom found agencies to have met this burden. With this proposed change, DHS could eliminate any contract provision agreed to by the parties at a lower level negotiation by issuing a Department-level regulation to the contrary. DHS could even use this authority to override its own labor relations board if it did not like an order to bargain on a particular union proposal

issued by this board. Thus, management would reserve for itself the exclusive ability to determine the scope of bargaining.

There is no evidence whatsoever that this change is needed in order for the agency to optimally carry out its responsibilities.

3. Elimination of Bargaining over Personnel Effects of Operational Decisions.

In the public sector as in the private sector, there is a distinction between bargaining over what the enterprise does to carry out its mission, and bargaining over the effects of those decisions on employees. Chapter 71 expressly requires bargaining over the effects of operational decisions, but bars bargaining over the decisions themselves.

The right of employees to participate in the "effects decision" is for practical purposes destroyed by several related parts of the management proposal:

(a) (N)o obligation to bargain unless "a substantial portion of the bargaining unit" is affected. 9701.518(a)(3). For example, if the jobs of 100 employees in a bargaining unit of 20,000 are being eliminated, there would be no bargaining over placement of the 100 because they do not constitute a substantial portion of the bargaining unit.

(b) No obligation to bargain over the effects of changed work assignments, changes in the organization, etc. 9701.518(a)(2)(i).

(c) Management can act unilaterally once it successfully stalls negotiations for 30 days. 9701.518(a)(6)

4. **Weakening of Information Sharing Obligation.**

For 70 years it has been recognized that unions are entitled to information maintained by management when it is necessary to support collective bargaining. A large body of case law has developed in both the private sector and the federal sector regarding what information is required and the conditions for providing it. The DHS proposal would add a caveat that management would not be required to provide information if it determined on its own that "alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation or a particular subject within the scope of collective bargaining is possible without recourse to the information." Once again, no evidence was provided to show that being forthcoming with information is an undue burden on management. In fact, we fear that increased litigation prompted by this may increase the burden on management. Further, managers will have to make determinations on whether and which alternative methods for obtaining the requested information exist. Managers will also determine whether negotiations can go on without the requested information. AFGE strongly opposes allowing management to decide what information the union needs to support its bargaining position.

E. *THE PROPOSED CHANGES ARE NOT NEEDED TO ENHANCE NATIONAL SECURITY OR ACHIEVE ANY OTHER GOALS ARTICULATED BY MANAGEMENT.*

1. If it were true, as management insists, that DHS needs a DHS-specific board operating and deciding cases under the DHS labor relations system, that could be achieved by having the board members chosen bilaterally: the unions would select a member, management would select a member, and those two members would select the third member.

2. There is no evidence that total, unilateral management control of general personnel policies is necessary if an employer is to operate effectively. Throughout this process, the unions have consistently offered to make absolutely clear that any contract provision can be bypassed when necessary for national security reasons.

3. There is not an iota of evidence that DHS cannot protect the national security if it has to bargain over the adverse effect on employees of operational decisions. In fact, the unions have offered to substitute post-implementation bargaining for pre-implementation bargaining, in order to eliminate the fear about delays in implementation while bargaining is taking place.

4. Not once did management identify any threat or impediment to national security or efficient operations caused by recognition of the union as the employees' exclusive representative.

5. Not once did management identify any problem to national security or efficient operations caused by the need to share information as currently required by chapter 71.

V ADVERSE ACTIONS

A. RESULTS OF TOWN HALL MEETINGS AND FOCUS GROUPS

There was general support for speeding up the adverse action and appeals system. There was no support for biasing it in favor of management or otherwise reducing the likelihood of fair and accurate decisions.

B. STATED REASONS FOR RADICAL CHANGES

There was not an iota of evidence, or a specific claim that the MSPB or arbitrators had erroneously decided any single disciplinary case in the legacy agencies.

There was no claim or evidence that giving an employee seven days to respond to charges was unfair to management.

There has been no explanation why the agency would be advantaged by having innocent employees punished simply because, as would nearly always be

the case, the erroneous charges were brought on the basis of substantial evidence.

C. ANALYSIS OF ADVERSE ACTION AND APPEALS PROPOSAL

Among other things, the proposal would make the following changes in the current system: a) eliminate the requirement for accurate determinations of guilt or innocence, b) reduce by two days the employee's opportunity to respond to charges, and c) eliminate independent decisions on the merits of charges in serious cases.

1. Lowering the standard of evidence allows those who are proven innocent to still be punished.

With one exception, the proposed regulations say that management decisions to punish an employee must be upheld by the person hearing the employee's appeal if supported by substantial evidence. 9701.706 (d)(1). The current Chapter 75 provides that an agency must demonstrate that a proposed adverse action against an employee is supported by a preponderance of the evidence. This means that there is more evidence of the employee's guilt than there is of her innocence. Under the DHS proposal, an appeals officer could conclude that even though the sum of the evidence weighs in the employee's favor, there is "a substantial amount" of evidence in the agency's favor, and

therefore rule against the employee. This is contrary to our American system of justice.

2. Eliminating two days from the employee's response time.

Currently, employees have seven days to respond to charges. The proposed regulations reduce that to five. 9701.697(b). Under the draft regulations, the decision on a proposed adverse action would be made by management no earlier than 15 days of charging the employee. 9701.606(a)(1). That would be so whether the employee had the first five days of the period or the first seven days of the period to prepare a response.

3. The more serious the alleged offense, the less credible the appellate process.

The proposed regulations say that in most cases, the employee's appeal will be to the MSPB. However, in cases deemed by management to be particularly serious, the appeal will be to an independent panel appointed by management. 9701.707(a), (d)(1). Any hearing will be presided over by a DHS employee designated by the panel. 9701.707(b).

D. *THE PROPOSED CHANGES ARE NOT NEEDED TO ENHANCE NATIONAL SECURITY OR ACHIEVE ANY OTHER GOALS ARTICULATED BY MANAGEMENT.*

AFGE is not necessarily opposed to an agency-specific appeals system, but any such system would have to be truly impartial and independent (just as labor arbitrators are now under Chapter 71).

When former Virginia Supreme Court Justice John Charles Thomas spoke to the Design Team members, he chided them for their options that had no appeals processes or only internal appeals processes. He told the group that this was unacceptable in America because we reject the idea of judge, jury and prosecutor rolled into one entity.

In response to concerns expressed by Design Team members that an external appeals body might not understand the mission of the agency, Judge Thomas made it clear that the American Arbitration Association (AAA) routinely puts together panels of arbitrators that are knowledgeable about the agency or industry they would be serving. This can be done by training retired DHS employees to be arbitrators or by having arbitrators go through a training session developed by DHS. In addition, he said, if necessary, AAA can put together a panel of arbitrators with security clearances. There is no excuse to avoid an independent, external appeals process.

The other change mentioned above would reduce the employee's response time from seven days to five days, with zero effect on the overall time for management acting on the case. It is impossible to even imagine a reason for this proposal.

VI *TSA*

Members of the House and of the Senate, whether they voted for the Homeland Security Act or against it, will be surprised to learn that it does not allow unification of all of the personnel systems covering all the employees transferred to DHS. According to the fact sheet issued by DHS and OPM last week, DHS is proposing that most employees will be covered by the new HR system, with the following exceptions:

- Military Personnel
- TSA Screeners
- Executive Schedule (EX, PAS)
- Employees of the Office of Inspector General
- Administrative Law Judges

With respect to TSA employees, the actual language of the regulations (97010.102(d)) is as follows:

> Transportation Security Administration employees . . . are not eligible for coverage under any job evaluation or pay system established under subpart B or C of this part. Similarly Transportation Security Administration employees also are not eligible for coverage under any performance management system established under subpart D of this part or the adverse action provisions established under subpart F of this part.

Although this section of the regulation does not say that TSA employees are excluded from subpart E, governing labor relations, the joint fact sheet quoted above indicates that that is the intent.

It appears that the administration failed to inform Congress that the following language was insufficient to authorize regulations that would cover all of the organizational units of DHS:

> [T]he Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish, and from time to time adjust, a human resources management system for some or **all of the organizational units of the Department of Homeland Security.** 5 U.S.C. 9701(a) (emphasis added).

Perhaps a short technical amendment to section 9701 will suffice to eliminate any doubt about the meaning of the phrase "all of the organizational units."

CONCLUSION

Thank you again for the opportunity to testify here today. We look forward to working productively with Secretary Ridge to address our serious concerns, and to working with you as we move through the statutory collaboration process that has just begun. Thousands of DHS employees and the American public depend on all of us to uphold the highest standards of fairness, integrity, and

accountability. Your continued oversight will be crucial to accomplishing this end.

If you have any questions, I will be happy to answer.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Gage, as always.

Ms. Kelley, you're now recognized for 5 minutes.

Ms. KELLEY. Thank you very much, Chairwoman Davis, Chairman Voinovich.

I appreciate your having this hearing today for the subcommittees and having the opportunity to testify on behalf of the 13,000 employees in the Department of Homeland Security that NTEU represents.

To assist in the creation of a new HR system, the Secretary and the new OPM Director assembled a design team that did include NTEU representatives. While I believe that the collaborative process worked well in allowing NTEU to offer our options, to address personnel issues that the Department identified, I am extremely disappointed with the lack of inclusion of our or other employee representatives options in the proposed personnel regulations.

To be successful from NTEU's perspective, any new HR system must be seen as fair, transparent and credible to employees, or it will fail. By these standards, the proposed regulations as written fail in many areas. I will focus my comments today on three areas, pay, labor relations and due process rights.

NTEU believes that any changes to the pay, performance and classification systems must be justified by mission needs and designed to minimize administrative burdens on managers, supervisors and employees. NTEU does not believe that the pay system in the proposed regulations meets these tests. During the research and design process, most employees reported that they were generally satisfied with the current GS system and that problems were cited related to the application and administration of the system by managers, rather than to the design of the system itself.

Unfortunately, the proposed DHS regs abandon the GS basic rate system and will provide employees with a radically different and unproven pay banding system based almost entirely on management discretion. The plan appears to eliminate even across the board annual raises, allowing employees in some locations and occupations to be paid significantly less than others. The pay band ranges will be set by an extremely complicated formula based on mission requirements, local labor market conditions, availability of funds and pay adjustments received by other Federal employees.

In addition, the President's budget for 2005 request $100 million to design this new system. This money could be put to much better use by hiring more front line personnel.

On labor relations, the Homeland Security Act requires that any new human resource management system "ensure that employees may organize, bargain collectively and participate through labor organizations of their own choosing in decisions which affect them." NTEU believes that the proposed regulations do not meet that statutory requirement. Collective bargaining disputes will not be subject to independent third party resolution, but will be resolved by an internal DHS board. This internal DHS board will replace the independent FLRA in determining what constitutes an appropriate bargaining unit for the purposes of union elections. And the scope of collective bargaining is so dramatically limited that the requirement that employees be allowed to "participate through labor organizations" is not met.

Under current law, the subjects of collective bargaining for the most part fall into three categories: management rights, permissive subjects of bargaining and mandatory subjects of bargaining. Management rights are now non-negotiable on the substance, but subject to impact and implementation bargaining. Permissive subjects bargaining would be redefined under the proposed regs as management rights, and again, not subject to bargaining even on impact and implementation, and as we read the regs, even at the agency's discretion.

So I'm glad to hear that will be looked at by the Department, based on Admiral Loy's comments. But even post-implementation bargaining will not be required on any of these issues.

Finally, any bargaining left will likely be dramatically curtailed by a new standard that states, "proposals that do not significantly impact a substantial portion of the bargaining unit are outside the duty to bargain." There is no definition of these terms provided and should there be a dispute as to whether this standard is met, it will not be resolved by an independent third party, but by the DHS internal labor relations board.

On due process, the proposed DHS regs would allow the Secretary, as we've heard, to define an unlimited number of offenses requiring mandatory termination without any independent review of the charges. Now, these DHS mandatory removal offenses are even more draconian actually than the IRS deadly sins which have been discussed. At least the IRS deadly sins are subject to independent review and are set by statute, not subject to the whim of a current or future Secretary.

It is important to note that President Bush supports repealing this mandatory termination provision that is in effect at the IRS. And as Ms. Norton mentioned, this has currently already passed the House. Now, under the proposed regs, we've heard that the MSPB appeals process has changed. I would offer that it has been gutted. The fairness of the MSPB appeals process is undercut as proposed, with the MSPB not having the authority to modify agency-imposed penalties and also changing the burden of proof standard.

In conclusion, NTEU supports the mission and the personnel of the Department of Homeland Security. NTEU wants the same thing that I believe everyone who has been involved with the creation of the Department wants. We want a work place where employees can be successful and do quality work in an environment where they will be treated with dignity and respect, and of course, where the Department can act swiftly and decisively to protect our country.

Changes in these proposed regulations are needed if the agency's goal to build a DHS work force capable of accomplishing its critically important missions is to be successful. As drafted, these regulations do not provide for a fair, transparent and credible HR system. And it will fail if implemented as written.

As I have heard many high ranking DHS officials say on many occasions, failure is not an option for the Department of Homeland Security. NTEU looks forward to continuing to work with Congress, with the administration and the Department to change these pro-

posed regs and to help the Department design and implement an HR system that can be successful for the Department, for the country and for the employees.

Thank you.

[The prepared statement of Ms. Kelley follows:]

National Treasury Employees Union

TESTIMONY OF NTEU NATIONAL PRESIDENT
COLLEEN M. KELLEY

ON

THE DEPARTMENT OF HOMELAND SECURITY NEW HUMAN RESOURCES MANAGEMENT SYSTEM

BEFORE THE JOINT

HOUSE GOVERNMENT REFORM COMMITTEE SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY REORGANIZATION AND THE SENATE GOVERNMENTAL AFFAIRS COMMITTEE SUBCOMMITTEE ON OVERSIGHT AND GOVERNMENT MANAGEMENT

WEDNESDAY, FEBRUARY 25, 2004, 10 A.M.
2154 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C.

Chairman Voinovich, Ranking Member Durbin, Chairwoman Davis, Ranking Member Davis, distinguished members of the Subcommittees; I would like to thank the subcommittees for the opportunity to testify on the recently released proposed human resources management regulations 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 13,000 federal employees who are part of the Department of Homeland Security (DHS). I am also pleased to have served as the representative of NTEU on the DHS Senior Review Committee (SRC) that was 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 was included in the Homeland Security Act of 2002. The legislation allowed 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 Human Resources (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. 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 included maintaining the status quo, making modest changes to current systems, and making significant revisions to the six areas of Title 5.

As you know, these options were presented to the DHS Senior Review Committee (SRC), which 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 then forwarded a formal package of options to the Director of OPM and the DHS Secretary for their consideration.

While I believe that the collaborative process worked well in allowing NTEU to offer our options to address personnel issues the Department identified, I am extremely disappointed at the lack of inclusion of our or other employee representatives' options in the proposed personnel regulations that were released on February 20. I will focus my comments on three areas: pay, labor relations, and due process rights.

PAY:

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. NTEU does not believe the pay system in the proposed regulations meets these tests.

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 more on managerial skills than on 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.

The proposed DHS regulations abandon the General Schedule basic pay system and wi provide employees with a radically different and unproven "pay banding" system based entire

ı managerial discretion. The plan appears to eliminate across the board annual raises, allowin nployees in some locations of the country to be paid significantly less than others. No formation has ever been produced to show that the new "pay band" system will enhance the ficiency of the department's operations.

The proposed regulations consist only of broad statements concerning the creation of :cupation clusters of related positions in the department and the ability of DHS/OPM to create ımber of "pay bands" for each cluster that relates to skill level. The "pay band" ranges will be t by an extremely complicated formula of mission requirements, local labor market condition: 'ailability of funds, and pay adjustments received by other federal employees. The President': ıdget for FY 2005 requests $100 million to design this new system. This money could be put much better use by hiring more front line personnel.

ABOR RELATIONS:

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

NTEU believes that the proposed regulations do not meet this statutory quirement for three reasons. First, and most importantly, collective bargaining disputes ıll not be subject to independent third party resolution, but will be resolved by an ternal DHS Board. Second, this internal DHS Board will replace the independent ıderal Labor Relations Authority in determining what constitutes an appropriate

bargaining unit for the purposes of union elections. Third, the scope of collective bargaining is so dramatically limited that the requirement that employees be allowed to "participate through labor organizations of their own choosing in decisions which affect them," is not met.

NO INDEPENDENT THIRD PARTY REVIEW OF BARGAINING DISPUTES

Currently, throughout the federal government, collective bargaining disputes are decided by the Federal Labor Relations Authority, an independent body appointed by the President and confirmed by the Senate. The statute creating the Authority provides that it shall not be composed entirely of members of one political party.

Under the proposed DHS regulations, collective bargaining stalemates will be resolved by a three-member board appointed by the Secretary of the Department of Homeland Security. Senate confirmation is not required, nor is political diversity. While the proposed regulations attempt to portray this as an "independent" board because members will not be removable at will, the fact is these appointees will not be independent. They will be chosen completely at the Secretary's discretion, without any Congressional advice or consent and may be dismissed by the Secretary for reasons as ephemeral as "inefficiency."

A true system of collective bargaining demands independent third party determination of disputes. These proposed regulations do not provide for that, instead creating an internal system in which people appointed by the Secretary will be charged

with deciding matters directly impacting their boss' actions. This fox guarding the hen house system raises questions as to whether the parties' interactions can actually be defined as providing for collective bargaining as required by the statute. NTEU believes it does not and we urge Congress to inform the Department of Homeland Security that these proposed regulations do not meet either the letter or spirit of Congressional intent in this matter.

NO INDEPENDENT DETERMINATION OF APPROPRIATE BARGAINING UNITS

The first step in a union election is the determination of what constitutes the bargaining unit. This determination is analogous to drawing Congressional District boundaries. It determines who will be eligible to vote in a union election and, like Congressional elections, the parameters of the bargaining unit can have an enormous impact on the outcome of the election.

Currently, the independent Federal Labor Relations Authority determines questions pertaining to the parameters of a bargaining unit for purposes of a union election. Under the proposed regulations, the Authority will retain only duties relating to the ministerial running of elections, while the internal DHS Labor Relations Board will determine what constitutes an appropriate bargaining unit. Can there be any doubt as to how these determinations will be resolved? This system of allowing the DHS to be the judge of a dispute between DHS and a union about what constitutes an appropriate

bargaining unit has no credibility and again undermines the Homeland Security Act's requirement that employees be allowed to "organize."

DRASTIC LIMITATIONS ON SUBJECTS AND STANDARDS OF COLLECTIVE BARGAINING

Under current law the subjects of collective bargaining for the most part fall into three categories: 1) **Management rights** – these subjects include deployment of personnel, assignment of work and the use of technology. While they are **not negotiable** on the merits, the **impact and implementation of working condition changes** in these areas **are negotiable**. Currently, matters covered by **government-wide regulations also fall into this category**. 2) **Permissive subjects of bargaining** – these subjects include methods, means and technology of performing work; numbers, types and grades of employees. Agencies, at their discretion, can negotiate over the substance of the proposals, but they are required to negotiate **the impact and implementation of changes** in working conditions. 3) **Mandatory subjects of bargaining** – these subjects include lay-off, promotion and disciplinary action procedures and they are **subject to negotiation on the merits.** The proposed regulations limit bargaining in each of these areas.

MANAGEMENT RIGHTS - Under the proposed regulations not only will these determinations be non-negotiable on the merits, even the impact and implementation of most management actions will not be negotiable. And even post-implementation bargaining will not be required for these matters. While currently, this standard of non-negotiability applies to matters covered by government-wide regulations as well as those

by statute, under the proposed regulations, matters covered merely by department-wide regulations or policies will fall into this totally non-negotiable area.

PERMISSIVE SUBJECTS OF BARGAINING – These subjects will be redefined as management rights, not subject to bargaining on the merits, even at the agency's discretion, with no right to impact and implementation bargaining and no requirement for even post-implementation bargaining.

MANDATORY SUBJECTS OF BARGAINING – These few areas that will remain potentially negotiable will be subject to a new standard that will likely dramatically curtail bargaining. According to the proposed regulations, "proposals that do not significantly impact a substantial portion of the bargaining unit are outside the duty to bargain." No definition of these terms is provided and should there be a dispute as to whether this standard is met, it will not be resolved by an independent third party, but by the DHS' internal labor relations board.

CONSULTATION RIGHTS – Much was made during the legislative debate around the Homeland Security Act about employee representatives being given consultation rights even when they couldn't negotiate. Even though NTEU believes that consultation rights are not ever an adequate substitute for collective bargaining rights, we would like to point out that the regulations say only that management "may" request the union's views. The comments make it clear that DHS will consult with employee representatives only "when circumstances permit."

Based on the sweeping limitations to collective bargaining rights enumerated above and coupled with the elimination of independent third party review of disputes, NTEU does not believe these proposed regulations meet the statutory requirement that any new human resource management system "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." And we urge Congress to see that changes are made to reflect its statutory directive.

A real example of where an adverse effect will be felt for both employees and the agency, because of the impact of narrowing the ability to collectively bargain over issues surrounding operations of the department, will be in the area of determining work shifts. Currently, the agency has the ability to determine what the shift hours will be at a particular port of entry, the number of people on the shift, and the job qualifications of the personnel on that shift. The union representing the employees has the ability to negotiate with the agency, once the shift specifications are determined, as to which eligible employees will work which shift. This can be determined by seniority, expertise, volunteers, or a number of other factors.

Employees around the country have overwhelmingly supported this method for determining their work schedule for a number of reasons. One, it provides employees with a transparent system for determining how they will be chosen for a shift. Two, it takes into consideration lifestyle issues of individual inspectors, such as single parents

with day care needs, employees taking care of infirmed family members or inspectors who prefer to work at night.

DUE PROCESS:

Mandatory Removal Offenses

The proposed DHS regulations would allow the Secretary of Homeland Security to determine an unlimited number of "deadly sins" that require mandatory termination, without access to any independent review of the charges; the only review would be by an in-house entity. These proposed DHS "deadly sins" are even more Draconian that the IRS' deadly sins, which are subject to independent review and are set by statute, not subject to the whim of the current or future DHS Secretaries.

It is important to note that President Bush supports repealing the mandatory termination provisions currently in effect at the IRS and legislation drafted by the Administration to do this (H.R. 1528) has passed the House with strong bipartisan Congressional, as well as, Administration support. The President's FY '05 Budget Proposal (p. 260 of the Analytical Perspectives Section) explains the Administration's position: "The proposed modification to the RRA98 is comprised of six parts. The first part modifies employee infractions subject to mandatory termination and permits a broader range of available penalties. It strengthens taxpayer privacy while reducing employee anxiety resulting from unduly harsh discipline or unfounded allegations."

The Administration believes that the IRS needs more flexibility in this area. nce flexibility has been the primary goal of personnel changes at DHS, it is totally consistent to introduce procedures that take away all discretion by requiring mandatory :nalties.

o independent review of suspensions:

Suspensions of 14 days or less would still be subject to grievance/arbitration procedures ›wever, appeals from arbitration awards would go to an internal review panel rather than the .RA, which is the current review panel.

ɔ grievance procedure for removals:

The proposed regulations take away an employee representative's right to ask an ıpartial arbitrator to consider serious adverse actions taken against employees. Arbitration is ; ıch faster, cheaper, and less formally legalistic way of addressing these issues.

SPB Appeals gutted:

While removals and other serious adverse actions could be appealed to the MSPB, the ɔposed regulations severely undercut the fairness of the process. First, they eliminate the erit Systems Protection Board's (MSPB) current authority to modify agency-imposed nalties. The result is that DHS employees will no longer be able to challenge the ısonableness of penalties imposed against them, and the MSPB will no longer be able to direc encies to change unreasonable penalties.

Second, the regulations also change the burden of proof in MSPB cases from the agency eding to show a "preponderance of evidence", to merely "substantial evidence." This is a uch lower standard. These two changes raise serious questions as to whether the new MSPB ocedures will provide employees with meaningful due process.

'eingarten Rights Drastically Weakened:

The right of a represented employee to have a union representative during interviews tha uld lead to disciplinary action is known as a Weingarten right. Currently, employees have thi ght whenever they are questioned by management or its agent. The DHS regulations overturn cent Supreme Court case law by refusing union representation in cases involving managemen ents such as Inspectors General or Internal Affairs, who often investigate routine allegations c isconduct.

onclusion:

NTEU supports the mission and personnel of the Department of Homeland curity. NTEU wants the same thing I believe everyone who has been involved with the eation of the agency wants - a workplace where employees can be successful and do ality 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 stem at DHS could have on employees. Quite simply, employees' successes will be agency's successes. NTEU was pleased to have a voice at the table during the public alogue concerning the new HR system for DHS employees. Clearly, we are

disappointed with the results. Changes in these proposed regulations are needed 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.

And all the way from Honolulu, we have Mr. Randall. Mr. Randall, you're recognized for 5 minutes.

Mr. RANDALL. Thank you, Chairwoman Davis, Chairman Voinovich. I'd like to thank you for the opportunity to come out and testify out here, even if it's such a long way. I thank the subcommittee.

I'm Mike Randall, president of the National Association of Agriculture Employees. Besides being the president of the National Association of Agriculture Employees, I work for USDA Plant Protection and Quarantine in Honolulu as a plant protection and quarantine officer.

We represent the Legacy-Agriculture bargaining unit split between DHS and USDA in March 2003. We continue to represent employees in both. We can make comparisons of the two communications systems and management styles between APHIS-PPQ and CBP. We can see the before and the after.

Agriculture inspectors perform regulatory compliance work. They need to make on the spot decisions. They have to take educated, supportable risks without consulting their supervisors. They need to have enough authority and not be in fear of losing their jobs.

Who would think of regulating a walking stick unless it had insect exit holes, was made of citrus wood or had mud on the tip? These are all reasons to regulate a walking stick. The customer is not going to be happy about having his walking stick regulated. We can try to explain our actions.

Our union collaborated with DHS and the other labor organizations in the development of the personnel system prior to the agency making its decision upon the regulation proposals. We were obviously not in at the decision phase. DHS and OPM need to materially modify the proposal if they intend to provide a humane system and an environment that will address the needs of our specialty in the Department's mission and be fair to our bargaining unit employees.

The proposed DHS personnel system proposals are designed for a police or military organization, not at all appropriate for the civilian labor force. They are not designed to advance unique missions and goals of protecting American agriculture. They discourage necessary communication and feedback essential in the scientific program and instead encourage silence and a management retaliation. They will not attract and maintain a highly skilled and motivated work force for performing homeland security functions and agriculture quarantine inspection functions. That presages disaster for DHS's mission to the extent it encompasses protecting American agriculture and food supply.

In order to make sweeping changes in the personnel system and be successful in accomplishing DHS's missions, the Department will need buy-in from the employees. Unfortunately, given Customs' and Border Protection's refusal to adhere to the personnel system by which it has been obligated to abide by March 2003, and its evident lack of desire to improve the lot of our agriculture bargaining unit employees through purely administrative actions it could have taken, we do not, and we cannot trust CBP or DHS in their roll-out of the new personnel system.

On pay, it's hard to have trust. The changes in pay require trust. Countless management actions or inactions during the past year have caused distrust. There have been continuing pay fiascos where employees have gone up to a month with no pay or the wrong pay. CBP has imposed shift changes and canceled overtime, leaving agriculture quarantine work undone. This has resulted in decrease in pay for most agriculture inspectors.

DHS's pay banding proposal has a component based upon performance evaluation. Legacy-Agriculture employees are fearful of this performance component. CBP has inserted other Legacy agency managers from INS and customers into the front line agriculture reporting chain. Many Legacy agency managers from other agencies have demonstrated and continued to show disdain and disregard for the agriculture protection mission. These managers are now in our performance evaluation food chain. As agriculture inspectors know, a bit of bad food in the food chain can cause Mad Cow.

Labor management relations, no communication is the apparent goal of DHS. This starts with prohibitions on union presence at formal meetings and negotiations. Prohibitions extend to the employee deployment and new technology. These prohibitions in bargaining are so expansive in scope they effectively preclude any meaningful negotiations including anything classified as work or any item that an employee touches. Bars on negotiations over deployment exclude most actions employers could perform involving a verb, any verb. What is not classifiable as a deployment? Not much, if anything.

The new technology prohibition could preclude negotiations about safety issues arising from an introduction of a new technology. Shame. During our first year with CBP, CBP management showed little to no interest in complying with existing law and regulations regarding labor relations. CBP continually violated an FLRA mediated settlement agreement we reached previously with USDA, an agreement that required negotiations. They violated a memo issued by Under Secretary Janet Hill that clearly states that this and other pre-DHS agreements were binding upon DHS management.

Nevertheless, CBP insisted upon implementing without negotiation and offered only post-implementation bargaining. Negotiations have yet to occur, despite numerous requests.

Often, CBP wrongfully claims national security. An example is a refusal to provide the union a list of the employees we represent in their work locations, a contract requirement ignored. I guess they just don't want us to know who we represent and where they're at.

Even when CBP does not assert national security, it implements countless changes without negotiating, occasionally offering post-implementation bargaining. This is another way to say, we really don't want to negotiate with labor and the employees it represents. We spit on your contracts and agreements. It does not please the king.

CBP, a law enforcement agency, should observe the law, not flaunt it. Now, DHS would change the rules to legalize all CBP's transgressions. Where are we going with this personnel system? Many of these proposed personnel system changes will cement the

foundation of an authoritarian law enforcement work place. Agriculture work is regulatory enforcement compliance from the public as sought, not extracted. Agriculture work requires that input be taken from the field.

Changes in a scientifically sound program must be suggested, observed and tested from the field from the front line. These things cannot be dictated from central control, top down management, particularly from CBP management, dominated by former Customs managers, who have zero training, experience or understanding of the agriculture mission and no desire to learn.

Mrs. DAVIS OF VIRGINIA. Mr. Randall, I don't mean to be rude and interrupt you here, but we have your full statement in the record. Could you summarize it? I know that Senator Voinovich has to leave, and we have to be out of the room. We'd like to have time for questions.

Mr. RANDALL. DHS needs professional, experienced, scientifically schooled agriculture inspectors to continue the agriculture mission. It will not succeed should DHS-CBP decide to replace these inspectors with generic law enforcement types. Many agriculture inspectors have been offended by the CBP management style, they are being chased away from the agency. Career change is at the center of discussion with many long term employees not yet at the retirement threshold.

With communication, trust can be built. Without communication, there is no trust and the system fails. There are a number of good ideas in the proposal; however, there is too much in the proposal that thwarts communication and kills mutual respect and trust. These proposals do not meet the standards and values the collaborative groups set. Diversity is another one of these values.

Thank you, Chairwoman Davis and Chairman Voinovich. Thank you for the opportunity to fly all the way out here from Honolulu and I hope everybody has a good lunch.

[The prepared statement of Mr. Randall follows:]

TESTIMONY OF MICHAEL E. RANDALL, PRESIDENT, NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION AND THE SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA
March 25, 2004

"NAAE" The National Association of Agriculture Employees represents the Legacy Agriculture bargaining unit personnel split between DHS and USDA in March 2003. We continue to represent employees in both as a rank-and-file union. We can make comparisons of the two communication styles and management between APHIS-PPQ and CBP. We can see the "before" and "after". As President of NAAE, I would like to share our experiences with the Subcommittee as they relate to the proposed DHS Personnel System.

Development of the DHS Personnel System Proposal, to this point, has been a collaborative process among Management, Labor and select specialists. NAAE devoted 15% of its small staff of our rank-and-file union leaders to a nearly 100% effort on the process. In viewing the results, we believe we were heard in certain areas, particularly in position classification, an area with a history of difficulty for us--Legacy-Customs and Immigration Inspectors have a journeyman level of GS-11; our journeyman level is a GS-9. We didn't expect to be 100% satisfied customers; however, we never suspected just how disappointed we would be. DHS and OPM need to materially modify their proposal if they intend to provide a humane system and environment that will address the needs of our specialty in the Department's mission and be fair to our bargaining unit employees.

The proposed DHS Personnel System will not attract and maintain a highly skilled and motivated workforce for performing Agriculture Quarantine Inspection functions. That presages disaster for DHS's mission to the extent it encompasses protecting American agriculture and food supply.

In order to make sweeping changes in the personnel system and be successful in accomplishing DHS's missions, the Department will need "buy-in" from the employees. Unfortunately, given Customs and Border Protection's refusal to adhere to the personnel system by which it has been obligated to abide since March 2003 and its evident lack of desire to improve the lot of our agriculture bargaining unit employees through purely administrative actions it could have taken. We do not because we cannot **trust** CBP or DHS in their roll-out of a new personnel system.

Pay and Classification

Parity among all employee components has been CBP's public cry; inequality has been the result. Legacy-Agriculture employees have Title V based workweek scheduling (and premium pay) systems that are negotiable, while the other two Legacy agencies have special non-negotiable statutory pay systems. In this past year, CBP has implemented (unilaterally and without negotiations) draconian scheduling changes resulting in inequalities in pay and degraded working conditions for Legacy agriculture employees as compared to their new co-workers, Legacy INS and Customs. More importantly, CBP scheduling actions also have resulted in the failure to meet the agriculture protection mission. Employees have been spread thin with new schedules and work has been left undone as CBP cancels necessary overtime work to "save money." Spreading the employees thin and canceling necessary quarantine work does not surprise us. These decisions are now routinely made by Legacy INS and Customs supervisors who view the Agriculture mission as secondary or non-existent. Nothing makes agriculture inspection employees angrier than not being able to protect American agriculture, the sole reason they signed on as federal employees in the first place. Result: we lack **trust**.

DHS's pay-banding proposal provides the employee a pay bundle as one unit. A private sector job-family comparison may set the base, and a performance determined "award" share composes the balance. Agriculture inspectors are fearful of this performance component. Last year, CBP inserted other Legacy agency managers (from INS and Customs) into the front-line agriculture reporting chain. Many Legacy agency managers from the other agencies have demonstrated and continue to show disdain and disregard for the agriculture protection mission. These managers are now in our performance evaluation food chain. As Agriculture inspectors know, a bit of bad food in the food chain causes Mad Cow. We do not **trust**.

NAAE is concerned about the concept of proposed "pay pools" to be used in determinations of the distribution of award amounts. As work units are unequal in size, there will always be disparities apparent in the pay pools between work units from the vantage point of the employees deprived of an equal share. The Department should be mindful of this fact and not rely upon a unit's "overall contribution to the mission." It may not be an employee's own fault that he or she is in a location that doesn't contribute as much.

Just on the mechanical level of getting employees paid, we are skeptical. We doubt the Department and its paymasters can or will get this multi-scale, multi-level pay system, with its per-individual differences, working in any fair way. CBP has already demonstrated a lasting inability to get paychecks to employees in a timely manner. It took months for CBP to correct seemingly simple pay problems that left some of our employees unpaid, not even a cent, for over a month. Some employees have not been paid correctly to this date. "**Trust** us, we'll pay." I don't think so.

Last week, a Miami manager communicated to all port employees in the largest work unit with Legacy Agriculture employees that the system to track the Congressionally mandated overtime pay cap "wasn't working so well" and confessed that CBP could not tell how much overtime each employee had worked. The manager gave the order through a unit-wide broadcast e-mail that all employees above a certain earnings level were immediately prohibited from working overtime until such time as the employee "has a consultation with me." They were directed to, "Please bring all of your pay statements with you so we can verify the amount you have earned thus far." Attached to this widely distributed e-mail was a table of all of the employees' names correlated with their Social Security numbers and their corresponding pay earnings to date- this is a serious Privacy Act violation--an demonstrates why grievance rights need to be preserved. Let's see if we **trust** you. No way!

We believe the proposed pay system is attempting to fix too many things at once. We are still feeling the effects in government of an earlier attempt of the early 1990s to fix pay, the Federal Employee's Pay Comparability Act. The Agency could have gotten things "right" or quite a bit closer to getting things "right", but there was not the will....or the funds. Will there be sufficient funds put into this pay effort to allow proper administration? Based upon past evidence, we doubt it. Proper funding will be key to making any system like this work. Proper performance evaluation will be a key in making the performance based system credible.

We believe certain components of the proposed pay system are worth noting as positive additions. We are supportive of the occupational cluster concept as it relates to classification issues. This treatment of classification should be curative of some of the problems NAAE experienced in USDA—the rigid Factor Evaluation System and the OPM Classification regulations. Agriculture inspectors are generalists. There are many different tasks they must perform and perform well to accomplish the agriculture protection mission. The current system rewards a specialist with higher pay and penalizes a generalist, even if the generalist is more highly valued and needed. Many agriculture inspectors were downgraded from GS-11 to GS-9 after an OPM classification review resulted in the "generalist penalty" being applied.

Other positives in the pay arena are special rates of pay, recruiting and retention bonuses, and payment for special skills. Some of the areas we need more detail in include the concept of basing pay rates upon local conditions in the private labor markets. We are particularly concerned with "captive labor markets" such as Hawaii (particularly to me—Honolulu is where I work.) A requests for a raise in Hawaii is usually met with, "If you don't like your pay, go to the Mainland." Another concern requiring further explanation is the formulae for setting base pay by examination of other labor market conditions. If the economy is in a recession, can the employees be put into recession too?

We are pleased DHS plans to initiate a pilot phase of the system on a number of managers. Of course, these managers do not have unions. Where will their grievances be lodged? Will there be honest feedback on the system? This remains to be seen. "You will **trust** us." To be determined.

Labor Management Relations

The proposed DHS Personnel System places employees in a militaristic system, one not at all appropriate for the civilian labor force. The System for all intents and purposes cancels the rights and protections of the Civil Service Reform Act and its intention to have Labor provide necessary feedback in betterment of government programs.

Formal Meetings

A union right that is paramount is the right to be present a formal meetings-- meetings where Management discusses working conditions with the employees. DHS has chosen to propose to abolish this right. This is the classic by-pass of the union. An excuse given in the regulation docket is that "managers might not know when a meeting is a formal meeting and if they should get it wrong it is at the manager's legal peril." We can offer no explanation for the origin of this regulation, except from our experience over the past year. CBP is not interested in communicating with the union or employees. CBP is interested in one-way communication top to bottom. We cannot see how this attitude will help in the defense of the country. Border inspectors, agriculture inspectors are the nation's eyes and ears. They need to provide feedback on what they hear and see. They need resources to perform their work. Resources that often are obtained by unions (DHS proposed prohibitions upon negotiations will make sure this never happens again.) Instead, CBP employees have been given reason to fear speaking out. They are being separated from their union. DHS states that unions still might attend meetings. What the docket does not say is "*if permitted*". Rank-and-file union officers would be subject to a work assignment to "stay away." Congress did not give DHS the right to create a new Department where employees have to testify to the inadequacies of their Agency shrouded by a curtain. This union by-pass tactic is an old management method of control. Let's not repeat the errors that other Agencies committed. Open speech-- **internally** on the program, open speech for the employees and their union.

Unit Determinations

At NAAE we have difficulty reconciling the possible outcomes of determination of "an appropriate unit" and its likely effect upon our bargaining unit of agriculture inspectors. The regulation calls for an emphasis upon recognition of the organizational structure of the Agency in determining "an appropriate unit." NAAE is concerned that DHS will define as "an appropriate unit" a single inspectional unit comprised of all Legacy Agriculture, Customs, and INS officers and inspectors. NAAE believes that placing the agriculture inspection workforce within the Customs line operation under Customs' control and Customs supervision, as it currently is, is irrational. This **dreadful mistake** will not become apparent until there is some serious outbreak of agricultural pestilence, aided and abetted by this faulty management structure. Such a serious outbreak is inevitable. It is only a matter of time under this "one unit" management concept. Practically all Legacy Agriculture management above the level of GS-12 have been separated from their employees. These agriculturally schooled managers have been

shipped off to departments with names like Administration, Enforcement, Intelligence, etc., often promised little opportunity (or forbidden) to utilize their agriculture expertise. The few Legacy Agriculture managers placed in port positions with wider scope of authority in a port, such as a Port Director, can exert little direct control over the day-to-day lives of the agriculture employees who were formerly part of their cohesive agriculture port unit.

The probable outcome of a unit determination will be the end of agriculture inspectors representing agriculture inspectors and the agriculture mission interest. Instead, this agriculture job specialty may be represented, under the "appropriate unit" theory, by another union whose primary interest is armed law enforcement employee representation. NAAE is convinced that DHS intends to use the "an appropriate unit" license to the detriment of the interests of our unarmed, science educated professionals performing regulatory compliance work designed to protect American Agriculture.

Official Time

NAAE is pleased that official time provisions remain nearly identical as provided in the current Statute. The time-tested provisions prove that Congress was not wrong in the original Civil Service Reform Act. We only wish that the Department had taken the course of utilizing some of the other tried-and-true provisions of the Act.

"Negotiations"

Prohibitions upon negotiations extend to Employee Deployment and New Technology. These prohibitions on bargaining are so expansive in scope they effectively preclude any meaningful negotiations, including anything classified as "work." Bars on negotiations over "deployment" exclude most actions employees could perform involving a verb, ANY verb. What is not classifiable as a "deployment?" Not much if anything.

Bars upon negotiating "new technology" could preclude negotiations upon almost any item an employee touches. When I asked DHS specifically about safety issues arising from an introduction of new radiation producing detection equipment, the response was "The intention is to prohibit negotiations upon the introduction of any and all new technology." I just wanted to know if the bargaining unit could get some information about the safety parameters of new machinery; negotiation gives us the right to know. No negotiations, no right to learn. The flat out prohibition upon bargaining takes that right away.

This past weekend I received an urgent communication from a bargaining unit employee asking for union help. She is about to be "excessed." Her work unit anticipates a reduction in force for all part-time employees. The words and the actions of the local Officer in Charge leave no doubt that the employees will be "riffed." My reading of the personnel system proposal says that the impact of lay-offs would be negotiable. NAAE has not heard from CBP Labor Relations about any reduction-in-force. When will CBP tell NAAE about the reduction in force? After the employees are gone? You don't have to **trust** us about anything you don't have to know about.

This ban on negotiations is totally overkill. We have had successful negotiations in USDA over the years regarding "deployment" issues. Those issues surround even **emergency** temporary duty for agricultural pest outbreaks at many locations in the country in all types of weather and working conditions. These emergency assignments typically come with little to no advanced notice. In USDA, we have negotiated protocols for getting employees to these emergency hot-spots quickly. We have dealt with and adequately addressed impact and implementation issues associated with such matters as single parents having to leave home, childcare needs, employee desiring to increase their professional skills by taking additional coursework, and planned leave. Dealing with these type issues makes a difficult but necessary situation more bearable. None of our negotiations has ever interfered with an emergency temporary duty deployment. All negotiations were in anticipation; they were done in advance and provided Management with adequate flexibility. Preventing negotiations upon "deployment" puts these negotiations out of bounds.

Department policies cannot be negotiated for impact and implementation. We strongly suspect the Department will just cloak all subordinate policies with the "Departmental" label, thus avoiding negotiations. There are no meaningful tools to prevent this abuse.

We are all for speeding up the process of negotiations to agreement, but not at the expense of real, meaningful negotiations. Speed for speed sake will undercut due process and destroy confidence in the fairness of the system.

The proposed regulations offer to allow negotiations if and only if changes have a "substantial effect" upon the appropriate unit. This escape route gives DHS Management regulatory license to ignore these employees comprising a minority of a large bargaining unit, and those affected solely because they are in a professional specialty occupation employing few individuals. We fear the CBP Agriculture Specialist may be deemed in the "ignore" category. Would negotiations on medical accommodations find a place on the barred negotiations list? It just may, it might depend upon how many people get sick. Would it not be a "substantial" part of "an appropriate unit."

Consultation and collaboration are good, but if differences are not settled by agreement or understanding, talk remains cheap. Many issues have been resolved when there are good communications. Good communication, especially *prior* to changes, can resolve myriad issues for the Agency and the employees. The proposed regulations do not provide adequately for this necessary component of dispute resolution. The negotiation prohibitions are the last straw.

During our first year with CBP, CBP management showed little to no interest in complying with the existing law and regulations regarding labor relations. CBP continually violated a FLRA mediated settlement agreement we reached previously with USDA. The agreement required negotiations to occur prior to implementation of any change in shifts or tours of duty. Undersecretary Janet Hale issued a memo clearly stating

that this and other pre-DHS agreements were binding upon DHS Management. Nevertheless, CBP insisted upon implementing without negotiating and offered only "post-implementation bargaining." Negotiations have yet to occur despite numerous requests. In another instance, CBP wanted to implement use of radiation detectors immediately and offered "post-implementation bargaining." NAAE does not have any problem with radiation detectors. We wanted to know the protocol for use and safety. CBP "hadn't worked that out yet," we were told. We also wanted to know what if any steps need to be taken to protect employee health, if or when employees contact a certain amount of radiation. CBP didn't know. We can't say CBP didn't care, but we are the ones that eventually had to call the company and talk to the designer of the equipment to find out the problems and solutions for our safety concerns. The foolish thing about this incident is that *CBP didn't even have radiation detectors on inventory* to pass out to all employees. This is clearly a time when the Agency could have negotiated "new technology;" it would not have hurt or delayed anything, and it didn't have to be "post-implementation." These proposed new prohibitions seem designed to perpetuate lack of open communication between the parties through a total ban. Communication solves problems.

In the interest of promoting dialogue and communications, NAAE has retracted a number of unfair labor practice charges this year it has had to file in the face of CBP's refusal to negotiate before implementation. However, a number of the most egregious violations remain under FLRA investigation.

We have worked tirelessly with CBP when the Agency asserts an individual item relates to national security. But when the Agency asserts that practically everything is "national security", we must raise a jaundiced eye. Most recently, CBP is preventing NAAE from obtaining a regular list of the names of our own bargaining unit members and the locations where they work. This is a long-observed contract requirement and is standard practice in federal labor relations. CBP irrationally asserts it is a national security item. They claim the List might "fall into the wrong hands." Does CBP not want NAAE to know who the employees we represent are? Does CBP not want NAAE to know where the employees we represent work? We presume CBP could easily print out this information from a computer. Presumably, it has the payroll list of employees and knows who came over from USDA-APHIS. NAAE will be forced to make up this list by hand. The Agency does not **trust** us. What an insult!

Even when CBP does not assert national security, it implements countless changes without negotiating, occasionally offering "post-implementation" bargaining. This is another way to say, "we really don't want to negotiate with labor and the employees it represents; we spit on your contract and agreements. It does not please the king." CBP, a law enforcement agency, should observe the law, not flaunt it.

Now DHS would changes the rules to legalize all CBPs transgressions. This is not a confidence booster.

Adverse Action

Recently, I provided some emergency long-distance counsel and advice to an employee who had become involved in an ethics question, a question I had dealt with before in USDA—an employee purchase (at market price) from a vendor we regulate at an airport site (If the practice were totally illegal, CBP employees could not fly on airlines and Agriculture inspectors could not eat imported food.) USDA's answer would be a hand slap and a promise from the employee to "not do it again." CBP's procedure was quite different, I still do not know what discipline will be meted out. Our fears are the worst; CBP has expended too many resources in pursuing the employee. It will now be a matter of justifying the investigation expenditure, or investigator pride. CBP Internal Affairs investigators descended upon the employee and ordered the employee into a formal meeting. The employee was afforded Weingarten union representation rights. The employee's representative was present. The employee was read Kalkines Rights, and the employee was ***Mirandized***. The employee made a statement to the investigators and the employee was presented an affidavit to sign. There were glaring inaccuracies in the statement and the employee requested to redact the statement. The investigator told the employee that it was an "*administrative matter*" and the employee was illegally ordered to sign the statement *as is*. The on-site union representative did the best he could with his limited experience in disciplinary matters. He implored the investigators to permit the employee to redact the statement with employee's legal counsel, away from the investigators. This was not allowed. The investigator admitted in the middle of the process that he wasn't sure which regulation and procedure to follow, but that he had to proceed "the way he knew how." In fact, certain calls to me and NAAE's General Counsel were made with the investigator insisting upon staying in the room. The employee was forced to stay in the presence of the investigator while preparing the redactions. Getting the investigator to even accept the concept of redactions of a sworn statement was like pulling teeth. The investigator had never heard of such a thing before. The employee left after signing a heavily redacted statement. Is Miranda the new standard in intimidation of employees for "purely administrative matters?" Will a Mirandized employee be prevented from obtaining legal counsel?

Above we detailed a hand slap type infraction, now we examine the routine and mundane. Agriculture inspectors have a tough job. We inspect without warrant and we informally seize agriculture products or items that may be injurious to American Agriculture. Often we seize gifts of food being brought by passengers from other countries. These gifts may be a forgotten taste of home for an immigrant or a new citizen. These may be the only gifts travelers bear as food is the most inexpensive commodity. Taking these food items may bring anger and resentment upon the inspector, often in the form of letters of complaint. USDA had an administrative process to deal with such complaints. This USDA process was fair to the employee and provided a minimum amount of disruption and anxiety for the employee. A common complaint takes the form of "Your Inspector took my salami and stuff his face." Of course the inspector didn't eat the salami, it was incinerated or steam sterilized—destroyed. The inspector likely would not even remember the passenger. CBP has a different approach to this common problem;

it must send out an Internal Affairs team to see if the inspector looks like he or she has been consuming salamis (never mind if the inspector buys them on his or her own.)

Limited Representation in Investigations

The proposed regulations provide that representatives of the Office of Inspector General, Office of Security, and Office of Internal Affairs are "not representatives of the Department for this purpose." Our experience thus far is that **ALL** investigations in CBP are Internal Affairs investigations. NAAE vigorously opposes turning our employees over to these lion's dens. Especially in view of investigator behavior cited above. Do DHS Agriculture employees deserve to have lessened rights by virtue of the fact of their transfer to DHS? No!.

We fear the onslaught of the new disciplinary apparatus. NAAE supports full judicial review being available to our employees in an effort to reclaim the rights of employees. Fully 90% of disciplinary actions NAAE has chosen to defend as a union have been reversed, often with the admonishment to Management from the arbitrator or FLRA "Wrong, wrong, wrong!" Justice should be served not reserved.

Limitations on MSPB

The MSPB will only be insuring EEO and Prohibited Personnel Practice rights. Any other case defect or finding of insufficient fact may result in a remand to DHS's own disciplinary board. MSPB cannot mitigate penalties in these remand cases. NAAE is very concerned about this new limitation upon MSPB. We believe in many instances that this will prevent MSPB from getting at root causes. Insufficient evidence cases and "only partly guilty" will be returned to the Department only to have the heretofore uncharged "tripping over the shoelaces charge" reserved by DHS Management for just such an occasion tossed into the disciplinary mix. Where is justice?

Performance Improvement

DHS has proposed to eliminate the PIP, performance improvement period. The pip requirement formalizes communication and memorializes that communication happen. The regulation contemplates taking the disciplinary/conduct action without having communicated with the employee while adding in a few possibilities for communication. How is this supposed to help and cultivate a loyal and knowledgeable workforce? We believe this proposal is ripe for abuse, and it will be abused routinely—discipline without communication—the new standard.

Excepted Service

NAAE is opposed to the requirement of an excepted service period of two years for our career Agriculture Biological Technician staff who desire to advance within CBP. Excepted Service is merely a two-year "honorary employee" status. More than 500

technician employees, loyal workers, transferred to CBP from USDA in March 2003. These employees have been given little direction or encouragement from CBP Management as to what their fate shall be under CBP. In USDA, these technicians were an essential part of the baggage clearance operation. They assisted Agriculture inspectors in operation of the baggage screening X-Ray machinery, data processing, contraband destruction, laboratory maintenance as well as a host of other functions. In CBP the message is there is no usefulness to this function. These employees have been given a distinct non-professional uniform, denied the opportunity to obtain a security clearance (this forbids touching any computer they formerly used as USDA employees), told that "they will be leaving the baggage room" (to work unknown) and given veiled directions out the door. Many of these long-time employees do not have the required agriculture college training to become CBP Agriculture Inspectors. There may only be one way for these employees may advance should CBP feel they are "redundant"—and that will be to apply for jobs as CBP Officers. Most Agriculture Bio-technicians could qualify as CBP Officers, but there is a hitch: they must apply to a job announcement and compete as if they are applying from the street as if they never worked for the government. No internal announcements for merit hiring. Not only this. They must be treated as an honorary employee for two years. This hiring method does not treat "family" as family. The Agency is already abusing the two-year probationary concept and applying it in ways it should never be applied.

The Future?

Many of these proposed personnel system changes will cement the foundations of an authoritarian, law enforcement workplace. Agriculture work is regulatory enforcement; compliance from the public is sought, not extracted. Agriculture work requires that input be taken from the field. Changes in a scientifically sound program must be suggested, observed, and tested from the field, the front line. These things cannot be dictated from central control, particularly from CBP management dominated by former Customs managers who have zero training, experience or understanding of the Agriculture mission and no desire to learn. The employees as well as their communication vehicle, the Union, need to provide feedback and exchange ideas with Management on how best to carry out the programs and freely without fear of intimidation or criticism. This is how our agriculture protection services worked in USDA. This is not how our agriculture protection services are working in CBP. The communications are absent; the atmosphere is chilled. Experienced career employees with an Agricultural mission to protect and uphold are afraid to speak out. Their performance evaluations will hang in jeopardy over their pay. The adverse action system and its proposed very limited appeals rights are too easy for a Management to abuse in retaliation.

Our history with CBP tells us the concern for work and family life for the betterment of the employees and the mission is out the door.

DHS needs experienced professional, scientifically schooled Agriculture inspectors to continue the agriculture protection mission. It will not succeed should DHS/CBP decide to replace these inspectors with generic law-enforcement types. Many Agriculture inspectors have been offended by the CBP management style. They are being chased away from the Agency. Career change is at the center of discussion with many long-term employees not yet at the retirement threshold.

350 vacancies transferred from USDA last March have burgeoned into well over 500 vacancies to date. We do not wonder why. The proposed new personnel system, unless drastically overhauled and humanized, guarantees these vacancies will only grow in number.

With communication, trust can be built. Without communication there is no trust and the system fails. There are a number of "keepers" in the proposal; however, there is too much in the proposal that thwarts communication and kills mutual respect and trust. The Department would be wise to return to the standards and values set by the joint Management, Union and Employee Design Team and carefully review the words and the "fit" of the proposed regulations to the standards, rather to rely upon a management agenda. All reviewers should see that there are some major "fit" problems with these proposals.

NAAE thanks you for the opportunity to present this testimony. We hope that it provides insight into some of the problem areas and positives in the new personnel system proposal. We hope our testimony will help lead to discussions on a personnel system the American People, the Department and the employees all can live with and will assist the Committees in further discussions of oversight of the Agricultural protection mission in CBP.

Respectfully,

Michael E. Randall, President
National Association of Agriculture Employees

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Randall, and I appreciate your flying all the way out here from Honolulu, and sorry you had to come from warm weather to cold weather. And I hope I get lunch today. I'm not sure I'm going to. And I doubt Senator Voinovich is, either.

Senator Voinovich, I'm going to go to you first, because I know you have to leave.

Senator VOINOVICH. First of all, I want to thank you for being here. I also want to thank you for the input that you've had in this, I think it was 10 months of dialog between the unions and the people in the Department. I'm a little disappointed, Mr. Gage, that you feel that some of the observations that your folks had were ignored in terms of some of the final regulations.

One of the reasons why we're having this hearing is to give you a chance, as I mentioned earlier, to air your concerns publicly about this in hopes that we can see some changes made during this period. And I welcome, and I know you've got them it in your statement, your thoughts as to what are the key issues that you really think need to be addressed for this to be a successful operation.

Second, Mr. Randall, it appears from what I can glean from your testimony that part of your concern about these new regs is the very bad experience that your people have had who have been transferred over to this new department, is that correct?

Mr. RANDALL. Absolutely. Our structure, anybody above GS–13 has been removed from our working environment in agriculture, shipped off to admin, to enforcement, to intelligence. Very few times has anybody from Agriculture been selected to command an overall operation in a port situation. Those people are gone, our organization has just been slipped into the Customs organization that is insensitive to the agriculture mission.

We have important homeland work to do, we're willing to do it, we have to continue doing the agriculture work 24 hours a day. It cannot stop being done for a moment, because the chances of letting in something agricultural, you can weigh that against the terrorism risk. It's ever-present. It's just as bad.

Senator VOINOVICH. That's something that I'm going to look into. One of the concerns that I think all of us had was that if you integrated various agencies into this new department, what kind of an experience would it be for them. Obviously yours hasn't been very good, and I think you've raised some legitimate concerns here.

One of the things that I was worried about in the beginning was the collaborative process. Many of you may know I would have liked to have seen mandatory arbitration, because I felt that arbitration might lead to more openness and responsiveness. Could you share with me your observations about the process and what was good about it? What part of it most bothered you?

Ms. KELLEY. Well, I would say, Senator, that the process was good, as far as it went. It just did not go far enough. Our involvement was around data collection, information gathering and information sharing, all of which was wide open and shared with all the members of the design team.

But the inclusion and collaboration stopped there. There was no collaboration on prioritizing the options presented to solve the problems, talking about which pieces could be used from different

options to come up with a solution. And in most areas where there were a range of options identified to solve a problem the Department identified that was a valid issue, they seemed to have always chosen the extreme solution, rather than one that would solve the problem they identified.

So we were not involved at all in decisionmaking leading up to these proposed regs. I mean, it stopped with information sharing. And then of course, we did have the SRC meeting, the open hearing. But it was, the things that are in these regulations were a surprise. They do not reflect NTEU's work as a part of this design team. And no explanation——

Senator VOINOVICH. The point is that you were on the design team, but that design team dealt with the issues you just mentioned?

Ms. KELLEY. It was fact gathering, data collection, information sharing.

Senator VOINOVICH. Information sharing. But then who made the recommendations for the regulations?

Ms. KELLEY. We had no role in that. DHS and OPM did that.

Senator VOINOVICH. What was the steering committee?

Ms. KELLEY. The senior review committee, we had a 3-day hearing where we talked about issues as a result of presentations of the design team, and from there, the Department and OPM went off to write the regulations.

Senator VOINOVICH. I think Director James and Admiral Loy mentioned the "senior design team."

Ms. KELLEY. The senior review committee.

Senator VOINOVICH. Were you on the senior review committee?

Ms. KELLEY. I was. We all were. That was the 3-day meeting.

Senator VOINOVICH. So that was the senior review committee.

Ms. KELLEY. Yes.

Senator VOINOVICH. They heard from you during that 3 day period. And then after that was over, you're not sure who got in the room and decided on——

Ms. KELLEY. I know it wasn't us. Now, there has been ongoing access and communication. I mean, if we need to talk to the Secretary or OPM, we have those opportunities to ask questions and they're clarifying questions. But I have never received an explanation as to why the most extreme solutions to the issues were put in these proposed regs versus other options that had been put forth that would have addressed the Department's issues.

Senator VOINOVICH. All right. Was it more open than you expected it would be? I know we talked before about what was going to happen. I was concerned that they would go off and quickly make decisions, and Director James indicated to me that she wasn't going to do that, they were going to try to get as much input as possible.

Ms. KELLEY. I think the information sharing and data collection was wide open and it was transparent and it was all inclusive. That part of it was. But at one point, we had asked that the 52 options that were being presented to the senior design committee, that the design team would do more to prioritize them, to perhaps pare them down and present the top 8 or 10 to the senior review committee. And those recommendations were declined.

Senator VOINOVICH. So what happened was that they developed the recommendations, you got the information and then they met with you in that 3 day period and talked about the 52 options?

Ms. KELLEY. Yes.

Senator VOINOVICH. And the 52 options were related to the 6 areas that they were looking at?

Ms. KELLEY. Yes.

Senator VOINOVICH. OK. What you're saying is that those were discussed during the 3-days, and that you feel some of the options that were more palatable to your way of thinking were ignored and that the ones that you considered more extreme were the ones that got preference, is that right?

Ms. KELLEY. Yes. And I would add, not only that were more palatable to NTEU, but that solved the problem the Department identified. For example, the speed with which appeals are heard and resolved, the speed with which bargaining is conducted. We proposed and were willing to come up with solutions that would have addressed those issues as defined.

So I wouldn't even say it was just about palatable. We provided options and supported options that solved the problem they identified.

Senator VOINOVICH. In your opinion, they did what fulfilled the mission they were trying to accomplish?

Ms. KELLEY. Yes.

Senator VOINOVICH. Have you compared the proposed regulations side by side with your preferences?

Ms. KELLEY. We are in that process now, of course, with the 167 pages. We are doing exactly that, and we will be responding to all of them, even much more than what you heard from us today. Because there are single words in those 167 pages that make a big difference that we didn't even have the opportunity to talk about today.

But yes, we will be aligning those and show what solutions could be implemented that solve the Department's problems and are appropriate solutions that are not extreme. We will be doing that.

Senator VOINOVICH. I think that the members of our committee would be interested in your views on those options. That would be very helpful to us, and perhaps we can also weigh in and share those with the Director and Mr. Loy and Secretary Ridge.

Ms. KELLEY. That would be great, thank you.

Senator VOINOVICH. Mr. Gage.

Mr. GAGE. The concern I have on the design team, and especially the 3-day meeting is that there was a disconnect between HR types and operational managers. And I think in our debate, and when we were talking about these things, I thought there was somewhat of a movement among the operational managers that when you discussed these things from a practitioner's point of view on behalf of employees that they really didn't understand what a lot of these things would do, and the time and money and what a huge change it was going to entail on the work site, in the middle of this critical mission.

That's the thing I'm still concerned about with Homeland Security. Going into some really radical moves here at a time when the agency is new and when there's strain on the management anyway.

I'm really hoping that Secretary Ridge will look at this from not the theoretical abstract HR point of view, but from a real operational one, and see that some of the things we're saying really make sense from an operational point of view.

Senator VOINOVICH. So your observation is that the human resources people prevailed over the operational people?

Mr. GAGE. Yes, at this point. Hopefully it's not over yet.

Senator VOINOVICH. Well, one of the things we've been trying to do is to bring HR people up and give them more input into the process. But what you're saying is, they've come up with a lot of ideas, but from a practical point of view, you don't think some of them make sense.

Mr. GAGE. I would hope their input period is over. [Laughter.]

Senator VOINOVICH. I would like, if you feel comfortable, for you to share with me some of the complaints that you have received from TSA employees. I must tell you that since I've had my pacemaker installed, I've really gotten to know some of the people in TSA quite well. [Laughter.]

I've been all over the country, and I really go out of the way to stop and talk to TSA employees and you're right, there's a lot of unhappiness. But I'd say it's 50–50. Some say things are fine, others say we've got problems. One thing that I have observed, though, is that the managers really have not had the training that they need to do the job that they're supposed to do.

And the difference from one place to another is absolutely astounding. It is my understanding that TSA may eventually be merged into the new personnel system. It seems to me that if they're going to do that, then it might make sense to give the opportunity to TSA employees to bargain collectively.

Mr. GAGE. It's so incredible that they know that there's all these problems, but the No. 1 thing is, you can't give an employee the right to contest anything. And that just doesn't add up to me. When you know there's things going wrong, and employees really have nowhere to turn, that's the thing that breaks your heart about this and I think really causes a great sense of frustration in our work force there.

Senator VOINOVICH. Well, again, I'm interested in getting your best information on the options and what you think the alternatives could be.

Mr. GAGE. Thank you, Senator.

Senator VOINOVICH. I'm going to excuse myself. I apologize for running out. But again, thank you for all of the work that you have done, and I hope to continue to work with you in the future. There's a whole lot more on the table. One of these days I'd like to have a hearing on the Defense Department.

Mrs. DAVIS OF VIRGINIA. When you do, I think I might like to join you.

Thank you, Senator.

Senator VOINOVICH. Madam Chairwoman, thank you very much. I've enjoyed working with you, and I look forward to working with you in the future. Hopefully this afternoon we'll get GAO.

Mrs. DAVIS OF VIRGINIA. I hope so. Thank you, sir.

And again, I apologize to our panel. They have scheduled this room for another hearing, so we're being pushed out. But I do want

to, Mr. Gage and Ms. Kelley, ask you this. I was real pleased to hear Director James and Admiral Loy talk about the collaboration and the openness and thought that you all were going to be happy about that.

But I'm really disappointed to hear that the openness was basically just for fact finding information. And in that regard, I assume you had the ability to give some recommendations. And if so, were any of your recommendations, Mr. Gage or Ms. Kelley, were any of your recommendations, even 1 minute one, were any of them used?

Mr. GAGE. Well, in the key area of employee appeals, collective bargaining, no.

Ms. KELLEY. And in pay, I would also add no. What I would say about the openness of the process on the information gathering is that was a very positive experience for me and for NTEU. Because very often in dealing with agencies, even in a bargaining environment, we are constantly chasing information and trying to get the facts upon which they are relying. In this case, I do feel that we have all the information that they are looking at. But we were excluded from any impact on the decisionmaking process.

We did put forth options that, as I said, as we put them up in the design process, I will put them up tomorrow, send them to you and to Senator Voinovich as he requested, to show that the options we put forth solved the problems that the Department identified. And yet they were not adopted.

Mrs. DAVIS OF VIRGINIA. Did the Department give you any reason why they did not use your options, the ones you preferred?

Ms. KELLEY. No. In fact, probably the one thing I haven't said about the process that needs to be said is, what was missing from what I describe as a true collaboration is, at the point of where data collection was over, there was no give or take. There has been no response, at least to me, and I don't know about John or Mike.

But I have had no response as to why our options were not adopted. We have just seen what it is they proposed and without exception, I would define it as, they chose the extreme solution to the problem rather than other viable solutions that met their needs and were better decisions for the Department and for employees.

Mrs. DAVIS OF VIRGINIA. But now they have to go back, you go back and you write down what you don't like. Do they then not have to come back to us and tell us why? Is that not correct? They have to come back to us and explain why they did what they did?

Ms. KELLEY. Yes.

Mr. GAGE. What we don't agree to. But the thing that is in these things, I mean, OK, they set up a board and they say, we're going to have collective bargaining. But then they get cute and we talked about gamesmanship, I heard Congressman Mica talking about it. All right, let's not have gamesmanship on either side, and you don't define collective bargaining in a way that really neutralizes it, or you don't tell the MSPB that they can't mitigate an action. That's ridiculous when it comes to due process.

And I think if we get some of those things out, well, I just hope Secretary Ridge, when we can sit down and explain exactly what these things mean, and how they will hurt the employees, and they really don't put any type of fairness into the system, that he's going

to be, we're going to be able to, a little more than tinkering, but just putting fair definitions to some of these due press issues would help me along in this process a whole bunch.

Mrs. DAVIS OF VIRGINIA. Well, I certainly understand why DHS and DOD have to have a streamlined process, especially with some of the cases, with the collective bargaining. And you both know I don't have a problem with that.

Mr. GAGE. Neither do we.

Ms. KELLEY. We offered streamlined processes. Very, very streamlined processes in our options. And you did not see them in these proposed regulations.

Mrs. DAVIS OF VIRGINIA. I'm not asking some of the questions that I need to have on record, but let me go to that again. How quickly would your streamlined process work?

Ms. KELLEY. I believe there were two different options. One offered 15 days, one offered 7. And neither of those are included, and in fact, post-implementation bargaining is not included in these proposed regulations, not even after the fact.

Mrs. DAVIS OF VIRGINIA. I think that goes to one of my questions I had for you, Ms. Kelley. Can you elaborate on that post-implementation bargaining, how would it work and was it a proposal that you put forward during the consultations and rejected?

Ms. KELLEY. Yes. It definitely was a proposal.

Mrs. DAVIS OF VIRGINIA. Can you elaborate on it, so I'll understand it?

Ms. KELLEY. This will be one of the best examples. At ports across the country, new shifts are created every day, because of whatever information or intelligence are received. And we accept the Department's need at times to put the shift in place today, to staff it with eight people, eight employees who meet certain qualifications.

In the cases where they would do that for emergency reasons without even a streamlined bargaining process, once they establish it and everything has been taken care of and we're safe, then a post-implementation process would allow us to bargain over the procedures used to staff these shifts in the future, so that if employees have child care issues, elder care, working spouses where they prefer a night shift versus a day shift, they would have an opportunity through the processes we would negotiate to express their preferences, perhaps received those assignments, we would suggest probably by seniority.

But the Department gets to describe and define the qualifications of the employees who can even bid on those shifts. So all of their controls from a business perspective is there. They define the shift they need covered, the number of employees, the qualifications of the employees. And what we would have the opportunity to bargain after the fact and for in the future, for the long run is how that shift is staffed, so employees can express a preference and have some say as they do today, and as they have done for years.

Mrs. DAVIS OF VIRGINIA. But it doesn't stop the Department from accomplishing the mission that they had at that particular moment.

Ms. KELLEY. No, it does not. They act, they do what they need to do, and they assign the eight people. And then after the fact, on

the assumption, our assumption is this will continue whether it's for 30, 60, 90 days or a year, so let's talk about the assignment, how that happens in the future with employee involvement. That's what post-implementation bargaining would be. And that scenario plays out day after day in port after port across this country, throughout CBP.

Mrs. DAVIS OF VIRGINIA. I'm going to be interested in hearing from DHS why they rejected that particular proposal.

Let me see if I have any other quick questions I can ask. I'm sure I'm going to have some for the record, if I could get you all to respond back. Just out of curiosity, Mr. Gage, how many of the 50,000 employees at DHS who are represented by AFGE, how many are dues-paying members, do you know?

Mr. GAGE. In the Border Patrol, we are very heavily organized. We have over, I think we have about 9,000 or 10,000. We're probably at about 65 or 70 percent ratio in the Border Patrol. In INS, it's lower than that. But I'm trying to think, in the new CBP, for instance, we have, it's probably more of like a 40 percent ratio of union members, 35, 40 percent in the Legacy-INS area. Then we have a lot of small, we have some attorneys and the membership there is a little lower. But it really depends on the group. The Border Patrol is probably the most highly organized.

Mrs. DAVIS OF VIRGINIA. Is there any way for you to get back to me on a number?

Mr. GAGE. Sure.

Mrs. DAVIS OF VIRGINIA. If you could, overall. Don't break it down in agencies, but overall of the 50,000, just so we'll have it. It would give me some idea of what we're looking at.

Mr. GAGE. OK.

Mrs. DAVIS OF VIRGINIA. And I have one last question, and then we're going to have to dismiss. Ms. Kelley, the regulations as you've said cut back on collective bargaining. But the statement by the Department insists that they're willing to work collaboratively with the unions, even in areas where bargaining is not required. Do you see that as an opportunity to work with them?

Ms. KELLEY. I know that's what they say. I don't believe that it will happen. I believe there will be enough leeway in the advice that is given that it will not be encouraged, supported, that managers won't be held accountable to do it, and because there is not bargaining, it will be an excuse to not discuss, collaborate, share information or do anything.

In our experience, over the past year, as a lot of new issues have come forward, because of the combination of so many employees into CBP, for example, we have seen exactly that, that they have run roughshod over the process even that is in place today.

Mrs. DAVIS OF VIRGINIA. I think we all agree, and you all shook your heads and agreed with me earlier that there does need to be some changes. As with anything, and I'm one of the first ones guilty of it, change is scary. It makes people nervous, especially when you're talking about their livelihood. I'm hoping that we can all work together and come up with something that's good for our Federal employees. Because you are an asset to us.

The one thing that I have been very pleased with AFGE in, and with NTEU, is that the times I've spoken to you, we haven't always

agree, but we've always been open and discussed the issues. I'm hoping we can continue that process.

And as always, I thank you all for coming and for being witnesses today for us. Hopefully we can work through this and get some sort of model that will be good for our Federal employees down the road. We're going to have some bumps, and we all know that. I'm hoping that these hearings will make it open and we can get over those bumps without too many injuries along the way.

Anything else?

[No response.]

Mrs. DAVIS OF VIRGINIA. I thank you all for coming, and again thank you for your patience. With that, the hearing is adjourned.

[Whereupon, at 1:05 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional information submitted for the hearing record follows:]

STATEMENT OF THE

NATIONAL BORDER PATROL COUNCIL

OF THE

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

AFL-CIO

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

AND

SUBCOMMITTEE ON THE CIVIL SERVICE AND AGENCY REORGANIZATION

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

NEW HUMAN RESOURCES SYSTEM FOR
THE DEPARTMENT OF HOMELAND SECURITY

ATHE KEY TO HOMELAND SECURITY: THE NEW HUMAN RESOURCES SYSTEM@

SUBMITTED BY

T.J. BONNER
NATIONAL PRESIDENT

FEBRUARY 25, 2004

The National Border Patrol Council represents all 10,000 non-supervisory Border Patrol employees.

If, as some skeptics suggest, the hidden agenda behind the creation of the Department of Homeland Security was the weakening of organized labor through the dilution or elimination of workers= rights and protections, then its advocates are undoubtedly elated with the proposed human resources management system regulations released last week. On the other hand, if the actual goal of the Homeland Security Act was true to its stated purpose of preventing terrorist attacks within the United States and reducing our Nation=s vulnerability to terrorism, then the proposed regulations are cause for great concern.

Contrary to the official title of this hearing, the new human resources system is *not* the key to homeland security. The dedicated and experienced employees of the new Department who constantly place their lives on the line for our Nation are actually the key to homeland security. Without them, it would be impossible to protect our Nation from the threat of terrorism. Any human resources system that deprives these patriots of basic workplace rights and protections will encourage them to leave the public service, and will discourage others from joining, thereby jeopardizing our national security.

Rather than reflecting the Congressional intent to forge a 21st century human resources management system that facilitates the accomplishment of the Department=s vital mission, the proposed regulations are a throwback to a failed 19th century system that allowed patronage, cronyism and corruption to nearly destroy our civil service. The proposal=s vague resemblance to the current civil service system should not deceive anyone. Once the superficial veneer is peeled back, it is obvious that the proposal eliminates or drastically curtails every meaningful employee right and protection.

The proposed regulations fundamentally change the three most basic aspects of the employment relationship: pay, discipline, and a meaningful voice at the workplace. In all three of these areas, they significantly reduce or eliminate long-standing rights and protections.

It appears that the bureaucrats who designed the new human resources system set out to right every perceived wrong that they have suffered since the enactment of the Civil Service Reform Act of 1978, without regard to the effect that these changes will have upon morale or the ability of the Department to attract and retain quality employees.

The proposed pay system is premised upon several false notions. First, it assumes that most employees are mediocre performers at best, and that withholding pay increases from them in order to reward the few outstanding employees will somehow motivate them to improve. In fact, most employees in the Department are already highly motivated and excel in the performance of their work insofar as they are not thwarted by inane bureaucratic policies. Second, it presumes that there is a wide disparity in the qualifications of employees performing the same tasks and that their compensation should therefore be substantially different. Again, this perception is simply not true. Moreover, it must be borne in mind that employees are well aware of how much their co-workers are paid, and that significant differences in pay breed dissatisfaction. Finally, it unrealistically pretends that supervisors are capable of impartially and infallibly distinguishing between very subtle performance gradations.

The two principal problems with the current pay system are not even remotely addressed by the proposed regulations. Existing salaries and benefits are too low to compete with many state and local law enforcement agencies, enabling them to lure away the best and the brightest employees. Dividing up the same inadequate amount in the manner proposed will only serve to accelerate an attrition rate that is already unacceptably high. During the past three years, for instance, attrition in the Border Patrol has averaged over 15%. Additionally, the morale problems caused by the current lack of funding for bonuses to reward outstanding performance will only be exacerbated by the proposal to reward a few favored employees at the expense of many other employees who are contributing just as much, if not more, to the accomplishment of the agency=s mission.

By eliminating the ability of employees to challenge removals and suspensions of 15 days or more in front of impartial arbitrators, the proposed system will destroy a fair and equitable system of checks and balances that has worked well for many years. Managers and supervisors are fallible human beings, not omniscient seers that can somehow peer into the hearts and souls of employees accused of wrongdoing. Pretending that they have that ability will rob the disciplinary process of any credibility. Appeals to the Merit Systems Protection Board (MSPB) are a poor substitute for the unbiased arbitral process, especially since the proposal significantly lowers the agency=s burden of proof and deprives the MSPB of its current ability to mitigate penalties. Even without such limitations, the MSPB upheld agency actions in 93% of the cases that it adjudicated last year. It is unconscionable to deprive the guardians of our democracy of the core rights that keep our Nation free and secure.

To cite but a single example of the deleterious effect that this change will have upon employees and the public good, consider the following recent scenario: Shortly after the terrorist attacks on September 11, 2001, the Immigration and Naturalization Service (I&NS) maintained that it was operating at the highest level of alert and assured the public that it was safe from terrorists. Two Senior Border Patrol agents, Mark Hall and Robert Lindemann, courageously set the record straight. Acting in their capacity as union officials, the pair decried the lack of security along the border between the United States and Canada, pointing out staffing and funding shortages that hampered the agency=s ability to accomplish its mission. As a direct result of that disclosure, Congress authorized a tripling of the number Border Patrol agents, as well as Immigration and Customs Inspectors, along the northern border. An embarrassed I&NS retaliated against the two employees, proposing to suspend them both for 90 days and to demote them two pay grades for one year. The basis for the charge was a Afailure to follow supervisory instructions@ that all media inquiries were to be handled by management and Ausing poor judgement@ by letting the public know about staffing and funding shortages. Under the proposed

regulations, the Merit Systems Protection Board would have been constrained to uphold the penalties, as the employees technically committed the charged Aoffenses.@ Existing whistleblower protection laws will be ineffectual against such retaliatory actions, as the only avenue of appeal in those cases will be to the MSPB under the same lopsided parameters that apply in other disciplinary actions for Department of Homeland Security employees.

The proposed labor relations system would deprive employees of a meaningful voice concerning their working conditions. Front-line employees are in the best position to know how to most effectively accomplish the mission of the agency, and eliminating their ability to meaningfully contribute to such decisions will result in poor policies and a demoralized workforce. The non-obligational consultative process provided for in the proposed regulations is no substitute for collective bargaining. A few examples illustrate the folly of the proposed regulations:

Under the new system, bargaining would have been prevented over a 1998 policy proposal requiring all Border Patrol agents to wear soft body armor (bulletproof vests) at all times, even though agents routinely work in triple-digit temperatures in the desert southwest. In fact, the Bureau of Customs and Border Protection is currently in the process of procuring heavier body armor to issue to all officers. If the above-described policy is implemented, it is anticipated that large numbers of agents will succumb to heat stroke, heat exhaustion, and other serious medical conditions.

The proposed regulations would also allow management to unilaterally implement a proposal, first advanced in 1995, to redefine Astrip searches@ to encompass the removal of *any* article of clothing, including jackets, hats, and other outer garments, and to institute strict supervisory approval and burdensome reporting requirements for conducting such searches. Under such a policy, it will be much more difficult for agents to detect concealed weapons, posing an unnecessary danger to themselves and the public. Since most of the people detained or arrested by the Border Patrol are transported by vehicle,

the horrific consequences of not detecting an armed suspect would be greatly magnified. For example, if a weapon discharged in a vehicle and disabled the driver, the vehicle could hurtle out of control and slam into other vehicles on the highway, potentially injuring or even killing scores of innocent people.

In summary, the proposed new human resources system is fatally flawed, and will weaken our Nation=s defenses against terrorism by discouraging good people from serving in the Department of Homeland Security. This is not mere speculation. Employees in the Department who are now applying for retirement are being advised by the personnel office that there will be considerable delays due to the fact that the number of retirement applications has doubled since the announcement of the proposed regulations. This should alarm everyone who is concerned about protecting our Nation from terrorism. Once experienced employees retire or accept other employment offers, they will never come back. There is no substitute for experience. Ambition and desire may facilitate the acquisition of knowledge, but only many years on the job will temper those qualities into wisdom.

The bureaucrats who designed the proposed system cannot be held responsible for its results, as they merely carried out the wishes of the politicians who authored and passed the Homeland Security Act. Although Congress may legally abdicate its authority to oversee the personnel engaged in the protection of our Nation, it can never escape the ultimate responsibility for such matters. Congress is now faced with three choices: 1) It can pass legislation reasserting its oversight role for the personnel regulations of Department of Homeland Security employees. 2) It can direct the bureaucrats to scrap the current proposal and work in true collaboration with the duly-elected representatives of employees to establish a human resources system that is fair, equitable and attractive to current and prospective employees. 3) It can do nothing and allow the proposed regulations to be implemented, throwing the Department of Homeland Security into a state of chaos and needlessly endangering the security of our Nation. For the sake of current and future generations, please choose wisely.

"The Key to Homeland Security: A New Human Resources Management System"
Subcommittee on Civil Service and Agency Organization
Chairwoman Jo Ann Davis
Questions Submitted For The Record
March 10, 2004

Panel 1: **The Honorable Kay Coles James, Director, Office of Personnel Management. Admiral James Loy (USCG, ret.), Deputy Secretary, Department of Homeland Security**

General

- How has the communication process with key stakeholders and front line employees in the design phase provided DHS leadership with insights as to the approach to be taken in the implementation phase?

- As the largest law enforcement organization, perhaps in the world, how does the design of the personnel system promote the appropriate accountability for both (1) respect for the law, and (2) respect for others in the administration of justice?

- How do these regulations and your approach to their implementation reflect your view of the extent to which DHS needs to operate as a unified department?

- How does the Department plan on eliminating any disparities in pay and benefits given to law enforcement officers?

Labor Relations

- The members of the DHS Labor Relations Board would be appointed by the Secretary and serve for fixed terms, but could be removed by the Secretary for "inefficiency, neglect of duty, or malfeasance." As you stated in your testimony, the Board must be credible to employees for it to operate in the place of the independent Federal Labor Relations Authority. Could you provide further clarification as to how DHS and OPM will ensure the independence of the Board?

- Currently, DHS has the ability to determine what the shift hours will be at a particular port of entry, the number of people on the shift, and the job qualifications of the personnel on that shift. The union representing the employees has the ability to negotiate with the agency once the shift specifications are determined, as to which eligible employees will work which shift based on seniority, expertise, volunteers, or a number of other factors. The proposed regulations impose no duty on the Department to engage in post implementation bargaining with the unions, including in the area of determining work shifts.
    - Please explain why such post-implementation bargaining should not be permissive.
    - Can you please provide specific examples of actual situations in the past where post-implementation bargaining in the area of determining work shifts has prevented management from meeting mission needs?
    - Would the Department be opposed to at least consulting with the unions on post-implementation issues?

Locality Pay

- DHS and OPM are able to establish "locality pay supplements." In DHS, there are just under 25,000 federal law enforcement officers.

    - Considering the retention problems faced by some federal law enforcement agencies, particularly in high cost of living areas, do you intend to provide locality pay adjustments to the DHS federal law enforcement officers placed in high cost of living areas?
    - When will DHS and OPM undertake an evaluation of whether locality pay supplements are necessary? How will that decision be made? What variables will be considered? Who has this authority?

- Subpart C of the proposed regulations would establish annual rate range adjustments and locality pay supplements based on factors such as "labor market conditions," "mission requirements," "pay adjustments received by employees of other Federal agencies and "other relevant factors."

    - When evaluating "labor market conditions" isn't it appropriate for DHS and OPM to consider the range of benefits offered to the comparable local work force, such as overtime pay or enhanced benefits programs?

- In the proposed regulations a variety of bonuses and special pay provisions are described. Specifically, the regulations provide that compensation can be enhanced by using: locality pay supplements; performance bonuses; pay enhancements for special skills or proficiencies; and special pay enhancements to bolster recruitment or retention efforts.

    - What "special skills" do you foresee these "individual pay adjustments" applying to, and for what types of "special assignments" of "greater difficulty or complexity" do you envision this section would apply?

Overall Coverage and Implementation

- In terms of phased implementation of the new personnel system, based on the views of the front line employees, can you offer considerations that DHS should weigh in how they design their phased approach?

- Training managers for the complexities of the new compensation system, including pay banding, performance ratings, labor-management relations, etc. will require a significant dedication by the Department, especially in the initial years. How will DHS make manager training a top priority in the coming months? years?

Pay and Performance Management

- The proposed regulations seem to allow a pass/fail rating system for the entry level band, but require at least a three level system for other bands. Could you explain why you believe that only a two level system is needed for the entry level?

- Will the lack of written expectations make it more difficult for an employee to appeal such a misunderstanding to a review board or in the case if discrimination is alleged, to the EEOC?

- In the performance management system, supervisors will no longer be required to document employee performance expectations in writing in an attempt to minimize an administrative burden. At the same time, you are proposing to lower the standard of evidence required for employee appeals. Without expectations documented and a lowering of the bar of evidence, how

will employees be able to hold managers accountable for inappropriate actions? How will managers have adequate evidence to sustain adverse actions?

Evaluation

- GAO's statement notes that high performing organizations continuously review and revise their human capital management systems. GAO suggests that DHS consider evaluations with the kind of rigor that were applied to the demonstration projects. What role and contribution to the evaluation process do you see for OPM to make in evaluating this and other agency changes to the way the federal workforce is managed?

Adverse Actions and Appeals

- For an employee against whom an adverse action (including mandatory removal) is taken, what additional avenues of redress are available beyond appealing to the MSPB or the internal panel as described in the proposed regulations? Specifically: (1) May an employee go to the Office of Special Counsel with allegations of prohibited personnel practices? (2) May an employee removed under the mandatory procedures file an appeal with the MSPB alleging prohibited personnel practices? (3) May an employee use the EEO complaint process? How will DHS ensure employees are aware of these additional avenues of redress?

- Do you intend to seek legislation that would provide for judicial review of decisions of the DHS Labor Relations Board and the DHS panel for mandatory removal appeals?

- Why has DHS chosen to raise the standard for the payment of attorney fees where an employee prevails on appeal due to harmful error by the Department in the application of agency procedures or due to a finding that the agency action was not in accordance with law? Why are DHS employees expected to pay attorney fees when they otherwise prevail on the merits of their appeal?

- With regard to their adoption of the authority under 5 USC 7532 to suspend/remove employee for national security reasons: Since 5 USC 7531 does not list DHS as a covered agency (just Coast Guard) - doesn't the President need to designate DHS before you can use this authority? Has he done so?

- GAO has found alternative dispute resolution as an effective method for resolving disputes before they enter the formal grievance and appeal process. The regulations do not provide much detail on the use of ADR in the department. Can you please elaborate on your intentions to use ADR in the department? For example, how might you use an ombudsman for employee concerns? Do you have plans to train employees on ADR techniques?

- Time standards for MSPB's processing of a DHS appeal are proposed to be shorter than standards MSPB sets for itself.
  - How will MSPB meet the shorter processing time standards for DHS cases compared with longer processing time standard for non-DHS cases?
  - Will MSPB have to give priority to DHS cases?
  - Could this result in longer processing times for non-DHS cases?
  - If so, does this raise an issue of fundamental fairness?

- The proposed regulations limit to MSPB matters that currently go to either the negotiated grievance procedure or to MSPB.

- What is the rationale for limiting such appeals to MSPB?
- What will be gained as a result?
- In your opinion, what would be the effect on the number of MSPB appeals filed by DHS employees?

- The standard of evidence for an adverse action is proposed to be the lowered to the "substantial" standard instead of the "preponderance" standard specified in title 5. In his testimony before the Subcommittee, without explaining in any detail, Admiral Loy stated that the lower standard is "simpler, faster, fairer" and "simply" "legal, technical mechanics."
  - What is the rationale for proposing the lower standard?
  - What will be gained as a result?
  - In what way has the higher standard impeded or discouraged taking adverse actions?
  - In your opinion, what would be the effect on the number of adverse actions taken against employees should the lower substantial standard be adopted?
  - In your opinion, what would be the effect on the number of MSPB appeals filed by DHS employees?
  - If you foresee an increase in the number of adverse actions taken against employees should the lower substantial standard be adopted, do you see any impact on other redress processes, particularly the EEO complaint process and the process for other prohibited personnel practices, including whistleblower reprisal?

Chairman George Voinovich
Questions Submitted For The Record

- Since the proposed pay system for DHS will provide for pay adjustments to be made by occupation, do you anticipate lower graded occupations receiving smaller adjustments than higher graded occupations in the same locality?

- The regulations note that they only apply to employees currently covered by Title V and, as such, do not include TSA, Coast Guard Academy, Stafford Act Employees, or the Secret Service Uniformed Division. Exactly how many and what types of DHS employees will be included and excluded by these regulations? Please break this down by directorate, agency, and occupation, as appropriate. Are some of these employees not included in one part of the system, but included in another (i.e adverse actions and appeals, performance management, etc.). As a result of this, how many separate personnel systems will exist in DHS (i.e., airport screeners, Administrative law judges, etc.). What plans does DHS have, if any, to extend the DHS Human Capital System to any of these employees?

- It appears from the proposed personnel system that DHS-OPM have relied on applying a private sector model to counterpart occupations within the Department. However, the primary mission of DHS--protecting the nation from terrorist attack--is carried out by law enforcement employees. Positions such as customs and border inspectors, police officers and criminal investigators do not have counterpart occupations in the private sector and are unique to governmental entities. How does DHS intend to determine their pay? Do you think that market related adjustments will close the pay gap for DHS law enforcement officers in high cost of living cities?

- The regulations note that for some of the employees not specifically covered by the proposed regulations, DHS could administratively extend the regulations to these employees. Could you

specifically explain this process? Can the DHS Secretary do this without going through rulemaking?

- The GAO statement notes that DHS officials said that legislation was needed to extend the proposed DHS human capital system to TSA screeners. Could you provide information on why legislation is needed? Do you plan to ask Congress for this legislation?

- Similarly the GAO statement notes that DHS officials have said that legislation is needed to include the uniformed division of the Secret Service under the proposed regulations. Do you plan to ask Congress for this legislation?

- Do you plan to ask Congress for any other new legislation related to the new personnel system at DHS?

- The regulations remove the requirement for collective bargaining over the impact and implementation of core management rights including deployment of personnel, assignment of work, and use of new technology. Can you provide specific examples of actual situations in the past where collective bargaining over these types activities prevented management from meeting mission needs?

- Under action taken by the Transportation Security Administration, airport screeners do not have the right to organize and bargain collectively. The proposed DHS regulations specifically allow employees (many of whom are in sensitive positions in the nation's airports) to organize and bargain collectively. Could you comment on this apparent inconsistency? What actions are you taking to ensure consultation and collaboration with TSA's screeners?

- GAO notes that is important to make meaningful distinctions in performance and notes that some of the demonstration projects have found this challenging. How will DHS encourage managers to avoid the pitfall of providing the majority of employees with top ratings?

- The proposed regulations note that performance expectations are not required to be in writing. How will DHS ensure that employees have clear expectations and avoid potential misunderstandings?

- GAO suggests that the process to stipulate the specific mandatory removal offenses be transparent and involve employees and other key stakeholders. What process do you plan to use to specify the mandatory removal offenses? What types of actions are you considering to be a mandatory removal offense? Do you have specific examples of employees who you have not been able to remove (or whose removal was difficult or cumbersome) that have committed such offenses?

- In the materials you have distributed on the proposed system, you note that collaboration and consultation with the unions is important. The regulations themselves describe consultation as something to be initiated by management at management's discretion. Can the unions request consultation on various matters? If so, why is this not articulated in the regulations?

John Mica
Questions Submitted For The Record

- During the hearing, Congressman Mica asked for information for the record regarding whether any federal jobs had been eliminated as a result of the consolidation. Additionally, he requested figures for the cost of implementing the new human resources system over the coming months and years. Please include this information for the record.

Marsha Blackburn
Questions Submitted For The Record

- Why are Transportation Security Administration (TSA) employees (screeners) not included under the proposed rule?

- On page 8031 of the proposed rule, it states "it is possible for DHS to extend a new pay system designed for employees currently covered by title 5 to TSA employees..."

    - Are these TSA employees subject to the same Adverse Action and Appeals process?
    - Under these proposed rules, DHS' HR system will have the flexibility to correct any breaches of security by TSA employees swiftly, effectively, and efficiently, correct?

Panel 2: The Honorable David Walker, Comptroller General, General Accounting Office

- In your testimony, you indicated that there were safeguards recommended for the personnel system at the Department of Defense that were not included in the Homeland Security Act. What safeguards do you think should be included in the regulations for the DHS personnel system that are not included currently?

- The regulations don't allow collective bargaining on matters that do not "significantly affect a substantial portion of the bargaining unit." What do you think would be a reasonable percentage or number to be considered a "substantial portion"?

- In your testimony you stated concern for the Department of Defense's intention to implement a new personnel system by the Fall of 2004. What do you believe would be an appropriate implementation timetable for the Department of Homeland Security?

- Would you characterize the proposed Labor Relations Board in these regulations as "independent"?

Panel 3: **Colleen Kelley, Nat'l President, National Treasury Employees Union;**
John Gage, Nat'l Pres., American Federation of Gov't Employees;
Mike Randall, President, National Association of Agricultural Employees.

All

- As stated at the hearing, I am very interested in the details of what parts of the personnel system you disagree with. Please provide further clarification as to what sections and language you find objectionable and why.

John Gage

- Your statement says that based on recent discussions with Secretary Ridge you expect substantial changes in the proposed regulations. Can you elaborate? In what areas do you expect these changes, and what changes are you referring to?

- Of the 50,000 employees at DHS who are represented by AFGE, how many are dues paying members?

Colleen Kelley

- In your statement you say you'd prefer that the Department hire more front line employees with the $100 million it has requested for start-up of its new system. However, in the event a new performance management and pay system is established, I trust you'd agree that a lot of training and other work will be needed especially at the outset. Is that right? Isn't it your general view that managers need more training?

- How would you address limitations on bargaining so that management would not be required to bargain collectively on matters that do not affect a substantial number of employees in the bargaining unit, or that are "insignificant"?

"The Key to Homeland Security: A New Human Resources Management System"
Subcommittee on Civil Service and Agency Organization
Chairwoman Jo Ann Davis
Questions Submitted for the Record
March 10, 2004

Panel 1: **The Honorable Kay Coles James, Director, Office of Personnel Management.**
Admiral James Loy (USCG, ret.), Deputy Secretary, Department of Homeland Security

General

How has the communication process with key stakeholders and front line employees in the design phase provided DHS leadership with insights as to the approach to be taken in the implementation phase?

- We concur with DHS's response: As we learned during the design phase, it is imperative that we keep employees and their representatives involved and informed. During the implementation phase – following issuance of the final regulations – we intend to continue that practice. We will ask managers and supervisors, rank and file employees, and employee representatives to provide feedback on implementation concepts. That feedback could take several forms, including challenge sessions, focus groups, and formal consultation. In addition, we will continue to keep open all employee communication lines – an email feedback that we have kept open from very early in the process. And we will provide executives, managers and supervisors, and rank and file employees with material and training to help them understand the decisions that are made.

As the largest law enforcement organization, perhaps in the world, how does the design of the personnel system promote the appropriate accountability for both (1) respect for the law, and (2) respect for others in the administration of justice?

- A key element of the proposed human resources (HR) system is holding individuals accountable and rewarding them for their work. This performance base will include elements which reflect both a respect for the law and for others in the administration of justice.

How do these regulations and your approach to their implementation reflect your view of the extent to which DHS needs to operate as a unified department?

- These proposed regulations will bring all of the legacy organizations under one set of core personnel rules. This is imperative to operating the Department as a single entity; employees will be able to look across the organization and see similar processes and procedures being applied throughout the Department. In particular,

employees should see similar work being evaluated and rewarded in a similar fashion. DHS should also have a better alignment of career paths, which will eliminate some of the disparities which the Congress observed during its debate on the Homeland Security Act.

How does the Department plan on eliminating any disparities in pay and benefits given to law enforcement officers?

- The proposed regulations do not address the disparities in pay and benefits given to law enforcement officers. To a large extent those disparities are evidenced in overtime and premium pay and retirement chapters of title 5, which were not waived in the Homeland Security Act of 2002. We have, however, moved to address two areas where major disparities have impeded our ability to merge legacy workforces:
  - DHS has created a new position, the Customs and Border Protection (CBP) Officer to support their "one face at the border" initiative. This position will merge the responsibilities of the legacy Customs, Immigration, and Agriculture inspectors. DHS has recently published proposed rules which will move this new position under COPRA for overtime and retirement purposes.
  - DHS has also created a new position, the Immigration and Customs Enforcement (ICE) Criminal Investigator, which merges the responsibilities of the legacy Immigration and Customs investigators. The new position will have a single "journeyman" level to address the pay disparity that currently exists between the legacy investigator positions.

Labor Relations

The members of the DHS Labor Relations Board would be appointed by the Secretary and serve for fixed terms, but could be removed by the Secretary for "inefficiency, neglect of duty, or malfeasance." As you stated in your testimony, the Board must be credible to employees for it to operate in the place of the independent Federal Labor Relations Authority. Could you provide further clarification as to how DHS and OPM will ensure the independence of the Board?

- The standard for removal cited is identical to that currently provided for members of the Federal Labor Relations Authority and the Merit Systems Protection Board. We anticipate a similar independence. There would be no evaluation of the Board members by the Secretary, and no review of their decisions by the Secretary except in cases involving national security. Board members would select, supervise, and evaluate any staff needed to support their work.

Currently, DHS has the ability to determine what the shift hours will be at a particular port of entry, the number of people on the shift, and the job qualifications of the personnel on that shift. The union representing the employees has the ability to negotiate with the agency once the shift specifications are determined, as to which eligible employees will

work which shift based on seniority, expertise, volunteers, or a number of other factors. The proposed regulations impose no duty on the Department to engage in post implementation bargaining with the unions, including in the area of determining work shifts.

Please explain why such post-implementation bargaining should not be permissive.

- The proposed regulations allow the Department, at its discretion, to engage in post implementation bargaining on issues such as selection for shift assignments.

Can you please provide specific examples of actual situations in the past where post-implementation bargaining in the area of determining work shifts has prevented management from meeting mission needs?

- According to DHS, the types of situations where bargaining becomes a problem include issues such as shifts in local procedures and rapid changes to avoid predictability; joint operations with local/State/Federal law enforcement; and adapting to changes in border traffic, airline landing rights, and airline/shipping schedules. All of these situations occur on an almost daily basis. To be obligated to bargain each and every time would result in constant bargaining and second guessing of management's actions.

Would the Department be opposed to at least consulting with the unions on post-implementation issues?

- The regulations do encourage consultation with the unions on post-implementation issues.

Locality Pay

DHS and OPM are able to establish "locality pay supplements." In DHS, there are just under 25,000 federal law enforcement officers.

Considering the retention problems faced by some federal law enforcement agencies, particularly in high cost of living areas, do you intend to provide locality pay adjustments to the DHS federal law enforcement officers placed in high cost of living areas?

- We have not made decisions on the application of locality pay supplements, but certainly the issues faced by the DHS workforce in high cost of living areas will be one consideration in making those decisions. Other issues such as recruitment and retention problems will factor into the decisions as well. The "special staffing supplements" authorized by the proposed regulations also could be used to address cost-of-living issues.

When will DHS and OPM undertake an evaluation of whether locality pay supplements are necessary? How will that decision be made? What variables will be considered? Who has this authority?

- In coordination with OPM, DHS will undertake this evaluation as part of the detailed design work for the new pay system and as an ongoing evaluation of the effectiveness of the new system in promoting recruitment and retention. The details on the use of locality pay supplements have not been designed.

Subpart C of the proposed regulations would establish annual rate range adjustments and locality pay supplements based on factors such as "labor market conditions," "mission requirements," "pay adjustments received by employees of other Federal agencies and "other relevant factors."

When evaluating "labor market conditions" isn't it appropriate for DHS and OPM to consider the range of benefits offered to the comparable local work force, such as overtime pay or enhanced benefits programs?

- In developing the procedures for determining annual rate range adjustments, we will consider as many comparable factors as are readily available to us.

In the proposed regulations a variety of bonuses and special pay provisions are described. Specifically, the regulations provide that compensation can be enhanced by using: locality pay supplements; performance bonuses; pay enhancements for special skills or proficiencies; and special pay enhancements to bolster recruitment or retention efforts.

What "special skills" do you foresee these "individual pay adjustments" applying to, and for what types of "special assignments" of "greater difficulty or complexity" do you envision this section would apply?

- Decisions on the application of the full range of pay provisions have not been made. We indicated in the preamble that proficiency in foreign languages or dog-handling were examples of "special skills." Special assignments might include pay to compensate for exceptional work assignments such as scientific research which is cutting edge.

Overall Coverage and Implementation

In terms of phased implementation of the new personnel system, based on the views of the front line employees, can you offer considerations that DHS should weigh in how they design their phased approach?

- We agree that DHS is considering the appropriate issues with regard to phased implementation. As DHS plans the implementation of the new HR system, it will be taking into consideration issues such as:
  - organizational assignment – implementation throughout a given organizational unit prior to adding organizations
  - similarity of positions/responsibilities – employees performing similar positions and at similar levels should probably be phased-in at the same time
  - interaction of employees across organizational lines – employees who interact with their counterparts in other DHS organizations should probably be phased-in at the same time
  - completion of training of managers and supervisors, and
  - completion of training of rank and file employees

Training managers for the complexities of the new compensation system, including pay banding, performance ratings, labor-management relations, etc. will require a significant dedication by the Department, especially in the initial years. How will DHS make manager training a top priority in the coming months? years?

- The Department is committed to ensuring that managers – and rank and file employees – are trained in the new personnel system both before it becomes effective and as it is phased-in across the organization. To that end, DHS has established a training and communication team responsible for ensuring that we develop and deliver training and materials to all managers and employees. For example, DHS recently provided executives, managers, and supervisors with "tool kits" which explain the proposed rules and provide those individuals with answers to many of the frequently asked questions. DHS is also sending fundamental information to all employees to augment the information provided each week in DHSToday. DHS's budget request for FY2005 includes monies to support the development and delivery of the required training.

Pay and Performance Management

The proposed regulations seem to allow a pass/fail rating system for the entry level band, but require at least a three level system for other bands. Could you explain why you believe that only a two level system is needed for the entry level?

- While no final decisions have been made regarding the performance rating system(s), we believe that the progress and measure of achievement for many entry and developmental positions is an assessment of learning and demonstrating the ability to perform a particular skill. In this situation, we believe the appropriate rating is either a pass (the individual has learned the necessary skill and can proceed in his or her development) or fail (the individual may need to repeat some of the training to ensure that he or she can become proficient in the necessary skill).

Will the lack of written expectations make it more difficult for an employee to appeal such a misunderstanding to a review board or in the case if discrimination is alleged, to the EEOC?

- The lack of written expectations should not make it more difficult for an employee to appeal to the Merit Systems Protection Board. The requirement for written expectations only exists now with regard to actions taken for unacceptable performance under 5 USC Chapter 43. No such requirement currently exists for actions based on misconduct or unacceptable performance when action is taken under 5 USC Chapter 75. Under that law, where expectations are not written, which is rare, employees are free to argue that they did not understand what was expected. They will be able to make similar arguments under the proposed regulations. As to allegations of discrimination, we have not changed procedures associated with protected personnel practices, so there should be no effect on employees alleging discrimination to the EEOC.

In the performance management system, supervisors will no longer be required to document employee performance expectations in writing in an attempt to minimize an administrative burden. At the same time, you are proposing to lower the standard of evidence required for employee appeals. Without expectations documented and a lowering of the bar of evidence, how will employees be able to hold managers accountable for inappropriate actions? How will managers have adequate evidence to sustain adverse actions?

- The reason for permitting DHS to communicate its performance expectations and assignments in a variety of ways throughout the appraisal period is not simply or even primarily to promote administrative convenience. It is to make the performance system more adaptable and to conform it to the reality of the modern workplace with its rapidly changing mission requirements. This benefits all employees because they may be rated and assessed based on what they actually accomplish instead of their ratings being tightly linked to pre-written static standards that often are generic. If a performance based action occurs, an employee's supervisor will still be required to show by substantial evidence that assignments or expectations were communicated to employees either in writing or orally. This is the case under the current system in which supervisors are allowed to flesh out generic standards through assignments throughout the appraisal period. The difference is that actions will no longer be reversed based upon hypertechnical parsing of pre-established standards that may have become obsolete during the appraisal period.

Evaluation

GAO's statement notes that high performing organizations continuously review and revise their human capital management systems. GAO suggests that DHS consider evaluations with the kind of rigor that were applied to the demonstration projects. What role and

contribution to the evaluation process do you see for OPM to make in evaluating this and other agency changes to the way the federal workforce is managed?

- We subscribe to the notion of rigorous and continual reviews/evaluations of the human capital system – and to making adjustments as necessary as a result of those reviews. DHS will consult with OPM and others on the best evaluation tools. And DHS will continue to work with OPM on improvements to the system.

Adverse Actions and Appeals

For an employee against whom an adverse action (including mandatory removal) is taken, what additional avenues of redress are available beyond appealing to the MSPB or the internal panel as described in the proposed regulations? Specifically: (1) May an employee go to the Office of Special Counsel with allegations of prohibited personnel practices? (2) May an employee removed under the mandatory procedures file an appeal with the MSPB alleging prohibited personnel practices? (3) May an employee use the EEO complaint process? How will DHS ensure employees are aware of these additional avenues of redress?

- As we have pledged, we are not changing employee rights with respect to prohibited personnel practices or issues involving discrimination. All the avenues of redress cited above will be available to DHS employees to the same extent that they are currently available. In addition to publicizing the availability of these avenues, DHS will make sure that all training on the adverse action system will emphasize these alternatives.

Do you intend to seek legislation that would provide for judicial review of decisions of the DHS Labor Relations Board and the DHS panel for mandatory removal appeals?

- DHS is still reviewing the comments on the proposed regulations, where DHS asked for specific comments on the alternatives available without legislation.

Why has DHS chosen to raise the standard for the payment of attorney fees where an employee prevails on appeal due to harmful error by the Department in the application of agency procedures or due to a finding that the agency action was not in accordance with law? Why are DHS employees expected to pay attorney fees when they otherwise prevail on the merits of their appeal?

Employees may recover attorney fees if the action of the Department is reversed in its entirety and the Department's action constituted a prohibited personnel practice or was taken in bad faith or without any basis in fact and law. As explained in the supplementary information of the proposed regulations, requiring the Department to pay attorney fees simply because some of its charges were not sustained would deter the Department from taking action in appropriate cases and have a chilling effect on the Department's ability to carry out its mission.

With regard to their adoption of the authority under 5 USC 7532 to suspend/remove employee for national security reasons: Since 5 USC 7531 does not list DHS as a covered agency (just Coast Guard) - doesn't the President need to designate DHS before you can use this authority? Has he done so?

- DHS is not actually adopting section 7532 but is establishing a parallel provision under its authority to modify chapter 75. Thus, there is no need for the President to designate DHS as a covered agency for purposes of section 7532 because DHS is not relying on the section 7532 authority.

GAO has found alternative dispute resolution as an effective method for resolving disputes before they enter the formal grievance and appeal process. The regulations do not provide much detail on the use of ADR in the department. Can you please elaborate on your intentions to use ADR in the department? For example, how might you use an ombudsman for employee concerns? Do you have plans to train employees on ADR techniques?

- No specific decisions have been made on the use of ADR; however, the Department intends to develop its alternative dispute resolution process based on best practices in both the public and private sector. This would include appointment of ombudsmen for employee concerns and actions to ensure that employees are adequately trained on ADR techniques.

Time standards for MSPB's processing of a DHS appeal are proposed to be shorter than standards MSPB sets for itself.

How will MSPB meet the shorter processing time standards for DHS cases compared with longer processing time standard for non-DHS cases?
Will MSPB have to give priority to DHS cases?
Could this result in longer processing times for non-DHS cases?
If so, does this raise an issue of fundamental fairness?

- The proposed MSPB processing standards were developed through extensive consultations between members and staffs of MSPB, DHS, and OPM. These questions are better answered by the Board.

The proposed regulations limit to MSPB matters that currently go to either the negotiated grievance procedure or to MSPB.

What is the rationale for limiting such appeals to MSPB?

The actions which are appealable, and not grievable, are significant adverse actions (suspension of 15 days or more, demotions, removals, etc.) We agree with DHS that the appellate process is more appropriate for these significant actions in that there are established standards and precedents within that process for determining the outcome. Arbitration, which is the end result of a grievance, is not subject to the

same rigorous standards and precedents and may result in disparate treatment for similar situations.

What will be gained as a result?

- This assures consistency of third-party review without compromising fairness, and discourages forum shopping.

In your opinion, what would be the effect on the number of MSPB appeals filed by DHS employees?

- We are not in a position to judge the number of appeals which might be filed by DHS employees with MSPB as a result of our proposed changes.

The standard of evidence for an adverse action is proposed to be the lowered to the "substantial" standard instead of the "preponderance" standard specified in title 5. In his testimony before the Subcommittee, without explaining in any detail, Admiral Loy stated that the lower standard is "simpler, faster, fairer" and "simply" "legal, technical mechanics."

What is the rationale for proposing the lower standard?

- No final decisions have been made on changing the standard of proof. We continue to review this issue while the regulatory process is pending.

What will be gained as a result?

- No final decisions have been made on changing the standard of proof. We continue to review this issue while the regulatory process is pending.

In what way has the higher standard impeded or discouraged taking adverse actions?

- The substantial evidence standard has applied to performance-based actions for a quarter of a century and has not unfairly impacted employees challenging an action. We believe that it will serve well for all actions, whether conduct-based or performance-based. This standard pays heed to the critical mission of the agency and encourages managers to take reasonable and justified actions.

In your opinion, what would be the effect on the number of adverse actions taken against employees should the lower substantial standard be adopted?

- We do not have a way to judge the number of actions taken against employees; we do believe that this may give managers confidence in taking legitimate actions sooner.

In your opinion, what would be the effect on the number of MSPB appeals filed by DHS employees?

If you foresee an increase in the number of adverse actions taken against employees should the lower substantial standard be adopted, do you see any impact on other redress processes, particularly the EEO complaint process and the process for other prohibited personnel practices, including whistleblower reprisal?

- We concur with DHS's response: While we can only speculate, we do not anticipate a substantial change in the number of MSPB appeals filed by DHS employees. The proposed regulations retain the right of a fair hearing before an impartial third party, assuming there are material facts in dispute. We believe that employees will continue to seek and obtain review of actions taken. However, the regulations are designed to significantly speed up the processing of such appeals, and so both employees and managers will have such challenges resolved sooner. Since there is no change to the other redress processes, we do not anticipate any significant impact on such processes.

Chairman George Voinovich
Questions Submitted for the Record

Since the proposed pay system for DHS will provide for pay adjustments to be made by occupation, do you anticipate lower graded occupations receiving smaller adjustments than higher graded occupations in the same locality?

- We are not in a position to predict the outcome of the pay adjustments at this time. However, we believe it is more likely that the distinctions in adjustments will be between occupations in a given location than between levels of work within the same occupation.

The regulations note that they only apply to employees currently covered by Title V and, as such, do not include TSA, Coast Guard Academy, Stafford Act Employees, or the Secret Service Uniformed Division. Exactly how many and what types of DHS employees will be included and excluded by these regulations? Please break this down by directorate, agency, and occupation, as appropriate. Are some of these employees not included in one part of the system, but included in another (i.e adverse actions and appeals, performance management, etc.). As a result of this, how many separate personnel systems will exist in DHS (i.e., airport screeners, Administrative law judges, etc.). What plans does DHS have, if any, to extend the DHS Human Capital System to any of these employees?

- DHS will be able to provide figures on coverage under separate cover. DHS plans to extend the DHS Human Capital System administratively where possible. At this time, DHS has no plans to ask for any new legislation related to the new HR system.

It appears from the proposed personnel system that DHS-OPM have relied on applying a

private sector model to counterpart occupations within the Department. However, the primary mission of DHS--protecting the nation from terrorist attack--is carried out by law enforcement employees. Positions such as customs and border inspectors, police officers and criminal investigators do not have counterpart occupations in the private sector and are unique to governmental entities. How does DHS intend to determine their pay? Do you think that market related adjustments will close the pay gap for DHS law enforcement officers in high cost of living cities?

- No specific decisions have been made on the counterpart occupations, but it is certainly our intention to include both private sector (if applicable) and other public sector (local and State governments, for example) employers when modeling questions of compensation.

The regulations note that for some of the employees not specifically covered by the proposed regulations, DHS could administratively extend the regulations to these employees. Could you specifically explain this process? Can the DHS Secretary do this without going through rulemaking?

- Several categories of personnel currently employed at DHS, including as an example Stafford Act employees in Emergency Preparedness and Response and TSA non-screeners, are appointed under HR systems outside of title 5. DHS can direct that those HR systems align administratively with the DHS system except to the extent that aspects of the system conflict with the statutory provisions of the non-title 5 systems. The Secretary may do this without going through rulemaking.

The GAO statement notes that DHS officials said that legislation was needed to extend the proposed DHS human capital system to TSA screeners. Could you provide information on why legislation is needed? Do you plan to ask Congress for this legislation?

- TSA screeners are employed outside of the provisions of title 5 of the United States Code. Pursuant to section 111(d) of the Aviation and Transportation Security Act (ATSA), the terms and conditions of employment of TSA screeners may be established "notwithstanding any other provision of law."
- The DHS HR system will be established pursuant to authority codified in section 9701 of title 5. This authority does not extend to HR systems or rules established under authority outside of title 5.
- Legislation would be needed to apply to screeners those aspects of the system which currently conflict with the statutory authority applicable to TSA screeners.

- At this time, we have no plans to ask for any new legislation related to the new HR system at DHS.

Similarly the GAO statement notes that DHS officials have said that legislation is needed to include the uniformed division of the Secret Service under the proposed regulations. Do you plan to ask Congress for this legislation?

- At this time, we have no plans to ask for any new legislation related to the new HR system at DHS.

Do you plan to ask Congress for any other new legislation related to the new personnel system at DHS?

- At this time, we have no plans to ask for any new legislation related to the new HR system at DHS.

The regulations remove the requirement for collective bargaining over the impact and implementation of core management rights including deployment of personnel, assignment of work, and use of new technology. Can you provide specific examples of actual situations in the past where collective bargaining over these types activities prevented management from meeting mission needs?

- The types of situations where bargaining presents particular difficulties include issues such as shifts in local procedures and rapid changes to avoid predictability; joint operations with local/State/Federal law enforcement; and adapting to changes in border traffic, airline landing rights, and airline/shipping schedules. All of these situations occur on an almost daily basis. To be obligated to bargain each and every time would result in constant bargaining and second guessing of management's actions.

Under action taken by the Transportation Security Administration, airport screeners do not have the right to organize and bargain collectively. The proposed DHS regulations specifically allow employees (many of whom are in sensitive positions in the nation's airports) to organize and bargain collectively. Could you comment on this apparent inconsistency? What actions are you taking to ensure consultation and collaboration with TSA's screeners?

- When Congress enacted ATSA, it provided the Under Secretary of Transportation for Security exclusive personnel authority to set the terms and conditions of screener employment "notwithstanding any other provision of law." This authority in section 111(d) of ATSA includes the exclusive discretion to determine matters that under the provisions of title 5 would be subject to collective bargaining.

- Congress granted this authority to provide maximum flexibility in establishing the terms and conditions of screener employment to best meet the agency's national security mission.
- The Homeland Security Act did not repeal this authority.
- As part of the design process prior to the issuance of the regulations, we included TSA screeners in town hall and focus group meetings and had TSA represented on the team itself. DHS continues to include TSA in deliberations, and will ensure that TSA screeners are included in additional outreach on the parts of the proposed regulations which may be applied to them.

GAO notes that is important to make meaningful distinctions in performance and notes that some of the demonstration projects have found this challenging. How will DHS encourage managers to avoid the pitfall of providing the majority of employees with top ratings?

- As the preamble to the regulations notes, DHS will create Performance Review Boards to oversee the management of the performance evaluation and rating system. These Boards will ensure consistent application of the performance management system across the Department. DHS plans to invest significant amounts in training managers and employees in the application of the new performance management system, emphasizing the importance of making meaningful distinctions between and among employees.

The proposed regulations note that performance expectations are not required to be in writing. How will DHS ensure that employees have clear expectations and avoid potential misunderstandings?

- While DHS will not require that all performance expectations be written, many of those expectations take the form of standard operating procedures, training manuals, etc.
- The regulations continue to require that managers establish and communicate performance expectations to employees. Managers may establish them through written standards or expectations. But they may also establish and communicate performance expectations through specific work assignments or by disseminating standard operating procedures or manuals as long as they are communicated to employees. This is currently permitted. The regulations maintain the obligation to communicate but afford the agency more flexibility to change expectations to meet arising mission-related needs. DHS managers will be thoroughly trained in the application of the new performance management system. A critical element of this training will be to stress that managers should communicate clearly the expectations of employee performance and that employees must ask for clarification when it is needed. This two-way communication will help to avoid potential misunderstandings.

GAO suggests that the process to stipulate the specific mandatory removal offenses be transparent and involve employees and other key stakeholders. What process do you plan to use to specify the mandatory removal offenses?

- DHS has asked for comment on the process for specifying mandatory removal offences.

What types of actions are you considering to be a mandatory removal offense?

- Actions which have a direct and substantial impact on the ability of the Department to protect homeland security, such as accepting a bribe that would compromise border security or willfully disclosing classified information, are being considered by DHS.

Do you have specific examples of employees who you have not been able to remove (or whose removal was difficult or cumbersome) that have committed such offenses?

- We do not have specific examples.

In the materials you have distributed on the proposed system, you note that collaboration and consultation with the unions is important. The regulations themselves describe consultation as something to be initiated by management at management's discretion. Can the unions request consultation on various matters? If so, why is this not articulated in the regulations?

- The unions can request consultation. The fact that this is not articulated is an oversight.

John Mica
Questions Submitted for the Record

During the hearing, Congressman Mica asked for information for the record regarding whether any federal jobs had been eliminated as a result of the consolidation. Additionally, he requested figures for the cost of implementing the new human resources system over the coming months and years. Please include this information for the record.

- No Federal jobs have been eliminated as a result of the consolidation. The Department's strategic plan includes an organizational excellence element which will stress the importance of achieving efficiencies through functional alignment and eliminating redundant work.

- DHS is projecting costs of $102.5m for system implementation this year. The component performance pools could come from existing salary and expense funding spent on within-grade and quality step increases. Future years funding decisions have not been made at this time.

Marsha Blackburn
Questions Submitted for the Record

Why are Transportation Security Administration (TSA) employees (screeners) not included under the proposed rule?

- TSA screeners are employed outside of the provisions of title 5 of the United States Code. Pursuant to section 111(d) of the Aviation and Transportation Security Act, the terms and conditions of employment of TSA screeners may be established "notwithstanding any other provision of law."
- The DHS HR system will be established pursuant to authority codified in section 9701 of title 5. This authority does not extend to HR systems or rules established under authority outside of title 5.
- While as a matter of law this system will not reach TSA screeners, DHS can direct that the TSA screener HR system align administratively with the DHS system except to the extent that aspects of the system conflict with the statutory authority applicable to TSA screeners.
- Other employees at TSA (i.e., non-screeners) would be covered by proposed HR system provisions replacing chapter 75 (dealing with labor relations). DHS can direct that TSA administratively adopt the other HR system provisions dealing with classification, pay, performance, and adverse actions for TSA employees who are not screeners.

On page 8031 of the proposed rule, it states "it is possible for DHS to extend a new pay system designed for employees currently covered by title 5 to TSA employees..."

Are these TSA employees subject to the same Adverse Action and Appeals process?

- While final decisions have not been made, DHS may extend administratively the adverse action provisions to TSA employees. However, there is no authority to extend MSPB appeal rights to TSA screeners. TSA non-screeners have MSPB appeal rights pursuant to 49 U.S.C. 114(n) and 40122(g) and thus would be covered by subpart G (Appeals) in the proposed regulations.

Under these proposed rules, DHS' HR system will have the flexibility to correct any breaches of security by TSA employees swiftly, effectively, and efficiently, correct?

- This ability exists now under the authority provided TSA under the Aviation and Transportation Act.

"The Key to Homeland Security: A New Human Resources Management System"
Subcommittee on Civil Service and Agency Organization
Chairwoman Jo Ann Davis
Questions Submitted For The Record
March 10, 2004

Panel 1: **The Honorable Kay Coles James, Director, Office of Personnel Management.**
Admiral James Loy (USCG, ret.), Deputy Secretary, Department of Homeland Security

General

- **How has the communication process with key stakeholders and front line employees in the design phase provided DHS leadership with insights as to the approach to be taken in the implementation phase?**

  - As we learned during the design phase, it is imperative that we keep employees and their representatives involved and informed. During the implementation phase – following issuance of the final regulations – we intend to continue that practice. We will ask managers and supervisors, rank and file employees and employee representatives to serve provide feedback on implementation concepts. That feedback could take several forms including challenge sessions, focus groups, and formal consultation. In addition, we will continue to keep open the all employee communication lines – an email feedback that we have kept open from very early in the process. And, we will provide executives, managers and supervisors, and rank and file employees with material and training to help them understand the decisions that are made.

- **As the largest law enforcement organization, perhaps in the world, how does the design of the personnel system promote the appropriate accountability for both (1) respect for the law, and (2) respect for others in the administration of justice?**

  - A key element of the proposed personnel system is holding individuals accountable and rewarding them for their work. This performance base will include elements which reflect both a respect for the law and for others in the administration of justice.

- **How do these regulations and your approach to their implementation reflect your view of the extent to which DHS needs to operate as a unified department?**

- These proposed regulations will bring all of the legacy organizations under one set of core personnel rules. This is imperative to operating the Department as a single entity – employees will be able to look across the organization and see similar processes and procedures being applied throughout the Department. In particular, employees should see similar work being evaluated and rewarded in a similar fashion. We should also have a better alignment of career paths which will eliminate some of the disparities which the Congress observed during its debate on the Homeland Security Act.

- **How does the Department plan on eliminating any disparities in pay and benefits given to law enforcement officers?**

  - The proposed regulations do not address the disparities in pay and benefits given to law enforcement officers – to a large extent those disparities are evidenced in overtime and premium pay and retirement, chapters of title 5 which were not waived in the Homeland Security Act of 2002. We have, however, moved to address two areas where major disparities have impeded our ability to merge legacy workforces:
    - We have created a new position, the Customs and Border Protection (CBP) Officer to support our "one face at the border" initiative. This position will merge the responsibilities of the legacy Customs, Immigration, and Agriculture inspectors. We have recently published proposed rules which will move this new position under COPRA for overtime and retirement purposes.
    - We have also created a new position, the Investigation and Criminal Enforcement (ICE) Investigator which merges the responsibilities of the legacy Immigration and Customs investigators. The new position will have a single "journey" level to address the pay disparity that currently exists between the legacy investigator positions.

Labor Relations

- **The members of the DHS Labor Relations Board would be appointed by the Secretary and serve for fixed terms, but could be removed by the Secretary for "inefficiency, neglect of duty, or malfeasance." As you stated in your testimony, the Board must be credible to employees for it to operate in the place of the independent Federal Labor Relations Authority. Could you provide further clarification as to how DHS and OPM will ensure the independence of the Board?**

  - The standard for removal cited is identical to the criteria currently provided for members of the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board (MSPB). We anticipate a similar independence. There would be no evaluation of the Board members by the Secretary, and no

review of their decisions by the Secretary. Board members would select, supervise, and evaluate any staff needed to support their work.

- **Currently, DHS has the ability to determine what the shift hours will be at a particular port of entry, the number of people on the shift, and the job qualifications of the personnel on that shift. The union representing the employees has the ability to negotiate with the agency once the shift specifications are determined, as to which eligible employees will work which shift based on seniority, expertise, volunteers, or a number of other factors. The proposed regulations impose no duty on the Department to engage in post implementation bargaining with the unions, including in the area of determining work shifts.**
    - **Please explain why such post-implementation bargaining should not be permissive.**

- The proposed regulations allow the Department, at its discretion to engage in post implementation bargaining on issues such as selection for shift assignments.

    - **Can you please provide specific examples of actual situations in the past where post-implementation bargaining in the area of determining work shifts has prevented management from meeting mission needs?**

- The types of situations where bargaining becomes a problem include issues such as shifts in local procedures and rapid changes to avoid predictability; joint operations with local/state/Federal law enforcement; and adapting to changes in border traffic, airline landing rights, airline/shipping schedules. All of these situations occur on an almost daily basis. To be obligated to bargain each and every time would result in constant bargaining and second guessing of management's actions.

    - **Would the Department be opposed to at least consulting with the unions on post-implementation issues?**

- The regulations do encourage consultation with the unions on post-implementation issues.

Locality Pay

- **DHS and OPM are able to establish "locality pay supplements." In DHS, there are just under 25,000 federal law enforcement officers.**

    - **Considering the retention problems faced by some federal law enforcement agencies, particularly in high cost of living areas, do**

you intend to provide locality pay adjustments to the DHS federal law enforcement officers placed in high cost of living areas?

- We have not made decisions on the application of locality pay supplements, but certainly the issues faced by all the DHS workforce in high cost of living areas will be one consideration in making those decisions. Other issues such as recruitment and retention problems will factor into the decisions as well. The "special staffing supplements" authorized by the proposed regulations also could be used to address cost-of-living issues.

  - **When will DHS and OPM undertake an evaluation of whether locality pay supplements are necessary? How will that decision be made? What variables will be considered? Who has this authority?**

- DHS will undertake this evaluation as part of the detailed design work for the new pay system and as an ongoing evaluation of the effectiveness of the new system in promoting recruitment and retention. The details on the use of locality pay supplements have not been designed.

- **Subpart C of the proposed regulations would establish annual rate range adjustments and locality pay supplements based on factors such as "labor market conditions," "mission requirements," "pay adjustments received by employees of other Federal agencies and "other relevant factors."**

  - **When evaluating "labor market conditions" isn't it appropriate for DHS and OPM to consider the range of benefits offered to the comparable local work force, such as overtime pay or enhanced benefits programs?**

- In developing the procedures for determining annual rate range adjustments, we will consider as many comparable factors as are readily available to us.

- **In the proposed regulations a variety of bonuses and special pay provisions are described. Specifically, the regulations provide that compensation can be enhanced by using: locality pay supplements; performance bonuses; pay enhancements for special skills or proficiencies; and special pay enhancements to bolster recruitment or retention efforts.**

  - **What "special skills" do you foresee these "individual pay adjustments" applying to, and for what types of "special assignments" of "greater difficulty or complexity" do you envision this section would apply?**

- Decisions on the application of the full range of pay provisions have not been made. We indicated in the preamble that proficiency in foreign languages or

dog-handling were examples of "special skills". Special assignments might include pay to compensate for exceptional work assignments such as scientific research which is cutting edge.

Overall Coverage and Implementation

- **In terms of phased implementation of the new personnel system, based on the views of the front line employees, can you offer considerations that DHS should weigh in how they design their phased approach?**

  - As DHS plans the implementation of the new personnel system, we will be taking into consideration issues such as:
    - organizational assignment – implementation throughout a given organizational unit prior to adding additional organizations
    - similarity of positions/responsibilities – employees performing similar positions and at similar levels should probably be phased-in at the same time
    - interaction of employees across organizational lines – employees who interact with their counterparts in other DHS organizations should probably be phased-in at the same time
    - completion of training of managers and supervisors, and
    - completion of training of rank and file employees

- **Training managers for the complexities of the new compensation system, including pay banding, performance ratings, labor-management relations, etc. will require a significant dedication by the Department, especially in the initial years. How will DHS make manager training a top priority in the coming months? years?**

  - The Department is committed to ensuring that managers – and rank and file employees are trained in the new personnel system both before it becomes effective and as it is phased-In across the organization. To that end, we have established a training and communication team responsible for ensuring that we develop and deliver training and materials to all managers and employees. For example, we have recently provided executives and managers and supervisors with "tool kits" which explain the proposed rules and provide those individuals with answers to many of the frequently asked questions. We are also sending fundamental information to all employees to augment the information provided each week in DHSToday. Our budget request for FY2005 includes monies to support the development and delivery of the required training.

Pay and Performance Management

- **The proposed regulations seem to allow a pass/fail rating system for the entry level band, but require at least a three level system for other bands.**

Could you explain why you believe that only a two level system is needed for the entry level?

- While no final decisions have been made regarding the performance rating system(s), we believe that the progress and measure of achievement for many entry and developmental positions is an assessment of learning and demonstrating the ability to perform a particular skill. In this situation, we believe the appropriate rating is either a pass (the individual has learned the necessary skill and can proceed in their development) or fail (the individual may need to repeat some of the training to ensure that they can become proficient in the necessary skill).

- **Will the lack of written expectations make it more difficult for an employee to appeal such a misunderstanding to a review board or in the case if discrimination is alleged, to the EEOC?**

  - The lack of written expectations should not make it more difficult for an employee to appeal a misunderstanding to the Merit Systems Protection Board. The requirement for written expectations only exists now with regard to actions taken for unacceptable performance under 5 U.S.C. chapter 43. No such requirement currently exists for actions based on misconduct or unacceptable performance when action is taken under 5 U.S.C. chapter 75. Under that law, where expectations are not written, which is rare, employees are free to argue that they did not understand what was expected. They will be able to make similar arguments under the proposed regulations. As to allegations of discrimination, we have not changed procedures associated with prohibited personnel practices, so there should be no effect on employees alleging discrimination to the EEOC.

- **In the performance management system, supervisors will no longer be required to document employee performance expectations in writing in an attempt to minimize an administrative burden. At the same time, you are proposing to lower the standard of evidence required for employee appeals. Without expectations documented and a lowering of the bar of evidence, how will employees be able to hold managers accountable for inappropriate actions? How will managers have adequate evidence to sustain adverse actions?**

The reason for permitting DHS to communicate its performance expectations and assignments in a variety of ways throughout the appraisal period is not simply or even primarily to promote administrative convenience. It is to make the performance system more adaptable and to conform it to the reality of the modern workplace with its rapidly changing mission requirements. This benefits all employees because they may be rated and assessed based on what they actually accomplish instead of their ratings being tightly linked to pre-written static standards that often are generic. If a performance based action occurs, an employee's supervisor will still be required to

show by substantial evidence that assignments or expectations were communicated to employees either in writing or orally. This is the case under the current system in which supervisors are allowed to flesh out generic standards through assignments throughout the appraisal period.

Evaluation

- **GAO's statement notes that high performing organizations continuously review and revise their human capital management systems. GAO suggests that DHS consider evaluations with the kind of rigor that were applied to the demonstration projects. What role and contribution to the evaluation process do you see for OPM to make in evaluating this and other agency changes to the way the federal workforce is managed?**

  - We subscribe to the notion of rigorous and continuous reviews/evaluations of the human capital system – and to making adjustments as necessary as a result of those reviews. We will consult with OPM and others on the best evaluation tools. And, we will continue to work with OPM on improvements to the system.

Adverse Actions and Appeals

- **For an employee against whom an adverse action (including mandatory removal) is taken, what additional avenues of redress are available beyond appealing to the MSPB or the internal panel as described in the proposed regulations? Specifically: (1) May an employee go to the Office of Special Counsel with allegations of prohibited personnel practices? (2) May an employee removed under the mandatory procedures file an appeal with the MSPB alleging prohibited personnel practices? (3) May an employee use the EEO complaint process? How will DHS ensure employees are aware of these additional avenues of redress?**

  - As we have pledged, we are not changing employee rights with respect to prohibited personnel practices or issues involving discrimination. All the avenues of redress cited above will be available to employees. In addition to publicizing the availability of these avenues, we will make sure that all training on the adverse action system will emphasize these alternatives.

- **Do you intend to seek legislation that would provide for judicial review of decisions of the DHS Labor Relations Board and the DHS panel for mandatory removal appeals?**

  - We are still reviewing the comments on the proposed regulations where we asked for specific comments on the alternatives available without legislation.

- **Why has DHS chosen to raise the standard for the payment of attorney fees where an employee prevails on appeal due to harmful error by the Department in the application of agency procedures or due to a finding that the agency action was not in accordance with law? Why are DHS employees expected to pay attorney fees when they otherwise prevail on the merits of their appeal?**

  - Employees may recover attorney fees if the action of the Department is reversed in its entirety and the Department's action constituted a prohibited personnel practice or was taken in bad faith or without any basis in fact and law. As explained in the supplementary information of the proposed regulations, requiring the Department to pay attorney fees simply because some of its changes were not sustained would deter the Department from taking action in appropriate cases and have a chilling effect on the Department's ability to carry out its mission.

- **With regard to their adoption of the authority under 5 USC 7532 to suspend/remove employee for national security reasons: Since 5 USC 7531 does not list DHS as a covered agency (just Coast Guard) - doesn't the President need to designate DHS before you can use this authority? Has he done so?**

- DHS is not actually adopting section 7532 but is establishing a parallel provision under its authority to modify chapter 75. Thus, there is no need for the President to designate DHS as a covered agency for purposes of section 7532 because DHS is not relying on the section 7532 authority

- **GAO has found alternative dispute resolution as an effective method for resolving disputes before they enter the formal grievance and appeal process. The regulations do not provide much detail on the use of ADR in the department. Can you please elaborate on your intentions to use ADR in the department? For example, how might you use an ombudsman for employee concerns? Do you have plans to train employees on ADR techniques?**

  - No specific decisions have been made on the use of ADR; however, the Department intends to develop its alternative dispute resolution process based on best practices in both the public and private sector. This would include appointment of ombudsmen for employee concerns and ensure that employees are adequately trained on ADR techniques.

- **Time standards for MSPB's processing of a DHS appeal are proposed to be shorter than standards MSPB sets for itself.**
  - **How will MSPB meet the shorter processing time standards for DHS cases compared with longer processing time standard for non-DHS cases?**

- **Will MSPB have to give priority to DHS cases?**
- **Could this result in longer processing times for non-DHS cases?**
- **If so, does this raise an issue of fundamental fairness?**

- The proposed MSPB processing standards were developed through extensive consultations between members and staffs of MSPB, DHS, and OPM. These questions are better answered by the Board.

- **The proposed regulations limit to MSPB matters that currently go to either the negotiated grievance procedure or to MSPB.**
  - **What is the rationale for limiting such appeals to MSPB?**

- The actions which are appealable, and not grievable, are significant adverse actions (suspension of 15 days or more, demotions, removals, etc.) We believe that the appellate process is more appropriate for these significant actions in that there are established standards and precedent within that process for determining the outcome. Arbitration, which is the end result of a grievance, is not subject to the same rigorous standards and precedent and may result in disparate treatment for similar situations.

  - **What will be gained as a result?**

- This assures consistency of third-party review without compromising fairness, and discourages forum shopping.

  - **In your opinion, what would be the effect on the number of MSPB appeals filed by DHS employees?**

- We are not in a position to judge the number of appeals which might be filed by DHS employees with MSPB as a result of our proposed changes.

- **The standard of evidence for an adverse action is proposed to be the lowered to the "substantial" standard instead of the "preponderance" standard specified in title 5. In his testimony before the Subcommittee, without explaining in any detail, Admiral Loy stated that the lower standard is "simpler, faster, fairer" and "simply" "legal, technical mechanics."**
  - **What is the rationale for proposing the lower standard?**

- Changing the standard of proof to a single, lower standard regardless of the nature of the actions simplifies the appeal process and grants appropriate deference to DHS officials in recognition of the critical nature of the agency mission.

  - **What will be gained as a result?**

- This assures consistency without compromising fairness.

- **In what way has the higher standard impeded or discouraged taking adverse actions?**

- The substantial evidence standard has applied to performance-based actions for a quarter of a century and has not unfairly impacted employees challenging an action. We believe that it will serve well for all actions, whether conduct-based or performance-based. This standard pays heed to the critical mission of the agency and encourages managers to take reasonable and justified actions.

  - **In your opinion, what would be the effect on the number of adverse actions taken against employees should the lower substantial standard be adopted?**

- We do not have a way to judge the number of actions taken against employees; we do believe that this may give managers confidence in taking legitimate actions sooner.

  - **In your opinion, what would be the effect on the number of MSPB appeals filed by DHS employees?**
  - **If you foresee an increase in the number of adverse actions taken against employees should the lower substantial standard be adopted, do you see any impact on other redress processes, particularly the EEO complaint process and the process for other prohibited personnel practices, including whistleblower reprisal?**

- While we can only speculate, we do not anticipate a substantial change in the number of MSPB appeals filed by DHS employees. The proposed regulations retain the right of a fair hearing before an impartial third party, assuming there are material facts in dispute. We believe that employees will continue to seek and obtain review of actions taken. However, the regulations are designed to significantly speed up the processing of such appeals and so both employees and managers will have such challenges resolved sooner. Since there is no change to the other redress processes, we do not anticipate any significant impact on such processes.

Chairman George Voinovich
Questions Submitted For The Record

- **Since the proposed pay system for DHS will provide for pay adjustments to be made by occupation, do you anticipate lower graded occupations receiving smaller adjustments than higher graded occupations in the same locality?**

  - We are not in a position to predict the outcome of the pay adjustments at this time. However, we believe it is more likely that the distinctions in adjustments will be between occupations in a given location than between levels of work within the same occupation.

- **The regulations note that they only apply to employees currently covered by Title V and, as such, do not include TSA, Coast Guard Academy, Stafford Act Employees, or the Secret Service Uniformed Division. Exactly how many and what types of DHS employees will be included and excluded by these regulations? Please break this down by directorate, agency, and occupation, as appropriate. Are some of these employees not included in one part of the system, but included in another (i.e. adverse actions and appeals, performance management, etc.). As a result of this, how many separate personnel systems will exist in DHS (i.e., airport screeners, Administrative law judges, etc.). What plans does DHS have, if any, to extend the DHS Human Capital System to any of these employees?**

  - Please see the attached table on coverage of the proposed rules.
  - As we have indicated, we plan to extend the DHS Human Capital System administratively where possible. At this time, we have no plans to ask for any new legislation related to the new personnel system at DHS.

- **It appears from the proposed personnel system that DHS-OPM have relied on applying a private sector model to counterpart occupations within the Department. However, the primary mission of DHS--protecting the nation from terrorist attack--is carried out by law enforcement employees. Positions such as customs and border inspectors, police officers and criminal investigators do not have counterpart occupations in the private sector and are unique to governmental entities. How does DHS intend to determine their pay? Do you think that market related adjustments will close the pay gap for DHS law enforcement officers in high cost of living cities?**

  - No specific decisions have been made on the counterpart occupations – but it is certainly our intention to include both private sector (if applicable) and other public sector (local and State governments for example) employers when modeling questions of compensation.

- **The regulations note that for some of the employees not specifically covered by the proposed regulations, DHS could administratively extend the regulations to these employees. Could you specifically explain this process? Can the DHS Secretary do this without going through rulemaking?**

  - Several categories of personnel currently employed at DHS, including as an example Stafford Act employees in Emergency Preparedness and Response and TSA non-screeners, are appointed under personnel systems outside of title 5. DHS can direct that those personnel systems align administratively with the DHS system except to the extent that aspects of the system conflict with the statutory provisions of the non-title 5 systems. The Secretary may do this without going through rulemaking.

- **The GAO statement notes that DHS officials said that legislation was needed to extend the proposed DHS human capital system to TSA screeners. Could you provide information on why legislation is needed? Do you plan to ask Congress for this legislation?**

  - TSA screeners are employed outside of the provisions of title 5 of the United States Code. Pursuant to section 111(d) of the Aviation and Transportation Security Act (ATSA), the terms and conditions of employment of TSA screeners may be established "notwithstanding any other provision of law."
  - The DHS HR system will be established pursuant to authority codified in section 9701 of title 5. This authority does not extend to personnel systems or rules established under authority outside of title 5.
  - Legislation would be needed to apply to screeners those aspects of the system which currently conflict with the statutory authority applicable to TSA screeners.
  - At this time, we have no plans to ask for any new legislation related to the new personnel system at DHS.

- **Similarly the GAO statement notes that DHS officials have said that legislation is needed to include the uniformed division of the Secret Service under the proposed regulations. Do you plan to ask Congress for this legislation?**

  - At this time, we have no plans to ask for any new legislation related to the new personnel system at DHS.

- **Do you plan to ask Congress for any other new legislation related to the new personnel system at DHS?**

  - At this time, we have no plans to ask for any new legislation related to the new personnel system at DHS.

- **The regulations remove the requirement for collective bargaining over the impact and implementation of core management rights including deployment of personnel, assignment of work, and use of new technology. Can you provide specific examples of actual situations in the past where collective bargaining over these types activities prevented management from meeting mission needs?**

  - The types of situations where bargaining becomes a problem include issues such as shifts in local procedures and rapid changes to avoid predictability; joint operations with local/state/Federal law enforcement; and adapting to changes in border traffic, airline landing rights, airline/shipping schedules. All of these situations occur on an almost daily basis. To be obligated to bargain each and every time would result in constant bargaining and second guessing of management's actions.

- **Under action taken by the Transportation Security Administration, airport screeners do not have the right to organize and bargain collectively. The proposed DHS regulations specifically allow employees (many of whom are in sensitive positions in the nation's airports) to organize and bargain collectively. Could you comment on this apparent inconsistency? What actions are you taking to ensure consultation and collaboration with TSA's screeners?**

  - When Congress enacted the ATSA, it provided the Under Secretary of Transportation for Security exclusive personnel authority to set the terms and conditions of screener employment "notwithstanding any other provision of law." This authority in section 111(d) of ATSA includes the exclusive discretion to determine matters that under the provisions of Title 5 would be subject to collective bargaining.
  - Congress granted this authority to provide maximum flexibility in establishing the terms and conditions of screener employment to best meet the agency's national security mission
  - The Homeland Security Act did not repeal this exclusive personnel authority.
  - As part of the design process prior to the issuance of the regulations, we included TSA screeners in town hall and focus group meetings and had TSA represented on the team itself. We continue to include TSA in deliberations, and will ensure that TSA screeners are included in additional outreach on the parts of the proposed regulations which may be applied to them.

- **GAO notes that is important to make meaningful distinctions in performance and notes that some of the demonstration projects have found this challenging. How will DHS encourage managers to avoid the pitfall of providing the majority of employees with top ratings?**

- As the preamble to the regulations note, DHS will create Performance Review Boards to oversee the management of the performance evaluation and rating system. These Boards will ensure consistent application of the performance management system across the Department. DHS plans to invest significant amounts in training managers and employees in the application of the new performance management system; emphasizing the importance of making meaningful distinctions between and among employees.

- **The proposed regulations note that performance expectations are not required to be in writing. How will DHS ensure that employees have clear expectations and avoid potential misunderstandings?**

  - While DHS will not require that all performance expectations be written, many of those expectations take the form of standard operating procedures, training manuals, etc.
  - The regulations continue to require that managers establish and communicate performance expectations to employees. Managers may establish them through written standards or expectations. But they may also establish and communicate performance expectations through specific work assignments or by disseminating standard operating procedures or manuals as long as they are communicated to employees. This is currently permitted. The regulations maintain the obligation to communicate but afford the agency more flexibility to change expectations to meet arising mission-related needs. DHS managers will be thoroughly trained in the application of the new performance management system. A critical element of this training will be to stress that managers should communicate clearly the expectations of employee performance and that employees must ask for clarification when it is needed. This two-way communication will help to avoid potential misunderstandings.

- **GAO suggests that the process to stipulate the specific mandatory removal offenses be transparent and involve employees and other key stakeholders. What process do you plan to use to specify the mandatory removal offenses?**

  - We have asked for comment on the process for specifying mandatory removal offences.

  What types of actions are you considering to be a mandatory removal offense?

  - Actions which have a direct and substantial impact on the ability of the Department to protect homeland security such as accepting a bribe that would compromise border security or willfully disclosing classified information.

Do you have specific examples of employees who you have not been able to remove (or whose removal was difficult or cumbersome) that have committed such offenses?

- We do not have specific examples.

- **In the materials you have distributed on the proposed system, you note that collaboration and consultation with the unions is important. The regulations themselves describe consultation as something to be initiated by management at management's discretion. Can the unions request consultation on various matters? If so, why is this not articulated in the regulations?**

  - The unions can request consultation. The fact that this is not articulated is an oversight.

John Mica
Questions Submitted For The Record

- **During the hearing, Congressman Mica asked for information for the record regarding whether any federal jobs had been eliminated as a result of the consolidation. Additionally, he requested figures for the cost of implementing the new human resources system over the coming months and years. Please include this information for the record.**

  - No federal jobs have been eliminated as a result of the consolidation. The Department's strategic plan includes an organizational excellence element which will stress the importance of achieving efficiencies through functional alignment and eliminating redundant work.
  - We are projecting costs of $408.5m to support full system implementation. Major components of this figure include the $102.5m for system implementation, $10m for Coast Guard performance pool, an estimated $165m for other component performance pools, and a 6-year life cycle cost of $131m for human resources information technology. Some of the component performance pools could come from existing salary and expense funding spent on within grade and quality step increases.

Marsha Blackburn
Questions Submitted For The Record

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  - Other employees at TSA (i.e., non-screeners) would be covered by proposed personnel system provisions replacing chapter 75 and chapter 77 (dealing with labor relations and appeals respectively), subject to approval by the Secretary or designee under proposed section 9701.102. DHS can direct that TSA administratively adopt the other personnel system provisions dealing

with classification, pay, performance, and adverse actions for TSA employees who are not screeners.]

- **On page 8031 of the proposed rule, it states "it is possible for DHS to extend a new pay system designed for employees currently covered by title 5 to TSA employees..."**
    - **Are these TSA employees subject to the same Adverse Action and Appeals process?**
- While final decisions have not been made, DHS may extend administratively the adverse action provisions to TSA employees. However, there is no authority to extend MSPB appeal rights to TSA screeners. TSA nonscreeners have MSPB appeal rights pursuant to 49 U.S.C. 114(n) and 40122(g) and thus would be covered by subpart G (Appeals) in the proposed regulations.
    - **Under these proposed rules, DHS' HR system will have the flexibility to correct any breaches of security by TSA employees swiftly, effectively, and efficiently, correct?**
- This ability exists now under the authority provided TSA under the Aviation and Transportation Act.

Senator Daniel K. Akaka
Questions for the Record
"The Key to Homeland Security: the New Human Resources System"
February 25, 2004

Questions for Admiral Loy, Department of Homeland Security

1. During the hearing, union representatives testified that while they were pleased with their level of participation in the process which developed the proposed regulations, they were disappointed that none of their proposals relating to labor-management relations and employee appeals were included. Why did you choose the proposals reflected in the regulations and why were none of the proposals submitted by the unions related to appeals and labor-management included in the proposed regulations?

The Department has several goals for the new human resource system – the primary goal is to create a system that is, first and foremost, mission-centered. The most important objective of the new system must be to serve and advance the Department's critical homeland security mission. The proposed system achieves this goal in that it enables DHS to act swiftly and decisively in response to mission needs while recognizing and rewarding performance.

The proposed system is an amalgam of the options presented to the Secretary and the Director by the Senior Review Committee. Elements of many options – including those developed by union representatives on the Design Team – show up in the proposals.

2. In implementing the Department's pay-for-performance system, I understand that several groups of employees, including military personnel, administrative law judges, and employees in the Office of the Inspector General would be excluded. However, I am aware that the Coast Guard would be one of the first groups to participate in the pay-for-performance system. Due to the civilian and military roles of the Coast Guard and the support civilian Coast Guard employees provide to military missions, are there any special issues that arise in implementing a pay-for-performance system or measuring the performance for these individuals?

The most important issue that we have identified to date with the Coast Guard is the cycle for performance evaluations. As a result of military rotations, USCG has a performance cycle that runs from April 1 thru March 31 of each year. This is in contrast to the cycle which most of DHS is following which runs with the fiscal year. The challenge facing DHS will be to introduce a new performance management system that matches the USCG cycle – and allows sufficient time in the first year for adequate evaluations.

3. The proposed regulations state that the Department would implement a new internal appeals panel to handle aggravated offenses which would result in mandatory firings. The regulations state that this proposal was chosen since it would provide greater efficiency and deference to the agency's mission. However, the regulations also restrict the ability of the Merit Systems Protection Board (MSPB) to reduce penalties, reduce the burden of proof for the Department to win cases before the MSPB, and require a review of the streamlined process to determine if the MSPB has given the Department's critical mission "due weight and deference" in decisions.

Due to these proposed changes at the MSPB, why do you believe that mandatory firing offenses must be reviewed by an internal appeals panel?

The independent DHS panel will allow management to act swiftly to address and resolve misconduct or unacceptable performance that would be most harmful to the Department's critical mission. This independent panel will be convened only when mandatory removal offenses are being heard and will be able to respond immediately to the priority of resolving these actions.

4. In 1996, Congress granted the Federal Aviation Administration (FAA) the authority to create its own personnel system. As a result, the FAA created an internal appeals panel to hear employee adverse appeal cases. However, Congress reinstated MSPB appeal rights in 2000 amid concerns that the internal process was unfair. One of the reasons for the perception of unfairness at FAA was the issue of the applicability of MSPB precedent to the internal appeals system. Do you believe MSPB precedent will apply to the mandatory removal appeals panel? If so, will you state this in the regulations?

We have not determined the applicability of MSPB precedent to the internal appeals panel – the panel will establish its own procedures and rules independent of DHS.

5. As a member of the Senior Review Committee, you were intimately involved in the development of this personnel proposal. The Department has requested $102.5 million to implement its human resources system. Could you comment on the budget request, citing sources relied upon in determining the amount of the budget request, and discuss whether additional funds will be needed in the future to complete the implementation of the new human resources system?

Costing for design and deployment of the new HR system was identified based on independent government cost estimates that were developed to plan for the anticipated systems integration contract. Other agencies of similar size and complexity, notably Treasury, were benchmarked in projecting team size and skill levels and associated labor rates.

We are projecting costs of $408.5m to support full system implementation. Major components of this figure include the $102.5m for system implementation, $10m for Coast Guard performance pool, an estimated $165m for other component performance pools, and a 6-year life cycle cost of $131m for human resources information technology. Some of the component performance pools could come from existing salary and expense funding spent on within grade and quality step increases.

6. As part of its FY05 budget request, the Department has requested $42 million for the human resources system design and implementation support. This amount includes funding for the new labor-management and appeals system. Can you provide additional detailed information on the funding request for the new internal boards?

The $42 million will cover detailed systems design and implementation support (business process reengineering, compensation expertise, etc.) as well as funding to "stand-up" the internal boards. We envision a small permanent staff for the Labor Board – including the Board members – and "on call" members of the MRO Panel. The Federal staff will be supplemented as needed by contractor assistance. The total costs should be less than $5 million.

7. I understand that under the proposed regulations the Secretary could remove members of the internal appeals panel for inefficiency. What is the definition of inefficiency?

Neither the regulation, nor the statutes on which it is based, which apply to removal of FLRA members and members of other Federal Boards and Commissions, defines this term. However, it is a high standard and removal actions have seldom been taken under this provision.

8. I understand that the new pay-for-performance system will have no impact on employees paid under the Federal Wage System and those who receive a non-foreign area cost-of-living allowance. Can you confirm this and note if any changes are being considered for compensating these employees in the future?

As explained in the "Supplementary Information" section of the preamble to the proposed regulations issued jointly by DHS and OPM on February 20, 2004:

> "All DHS employees currently covered by the job evaluation and pay systems established under chapter 51 or 53 of title 5, United States Code, are eligible for coverage under [the new] job evaluation and pay system at the discretion of DHS, in coordination with OPM, except for (1) Executive Schedule officials (who, by law, remain covered by subchapter II of chapter 53) and (2) administrative law judges paid under 5 U.S.C. 5372." (69 FR 8037)

Since the job evaluation and pay system for Federal Wage System (FWS) employees is established under subchapter IV of chapter 53, FWS employees would be *eligible* for coverage under the proposed new DHS job evaluation and pay system. Nevertheless, the ASupplementary Information@ expresses DHS= intent to cover Aonly GS employees and employees in senior-level (SL) and scientific or professional (ST) positions.@ DHS does not plan to cover FWS employees under the proposed new job evaluation and pay system at this time. However, the proposed regulations would allow DHS to cover FWS employees under the proposed new DHS performance management system to be established under subpart D of the proposed new part 9701 without covering them under the proposed new job evaluation and pay system established under subparts B and C.

General Schedule (GS) employees and employees in SL/ST positions who receive nonforeign area cost-of-living allowances (COLAs) under 5 U.S.C. 5941 also would be eligible for coverage under the new DHS job evaluation and pay system described in the proposed regulations. However, these employees will continue to receive COLAs under existing provisions of law and regulation. The Homeland Security Act does not authorize DHS or OPM to waive or modify the statutory or regulatory provisions governing those allowances. The proposed regulations anticipate the possibility that employees who receive COLAs might be covered by the proposed new system by specifically authorizing DHS to provide Arate range adjustments@ for these employees that differ from the adjustments made to employees within the 48 contiguous States (who do not receive COLAs under 5 U.S.C. 5941). The proposed regulations further provide that DHS must take COLAs into account in determining the amount of any rate range adjustment provided under the proposed new system. (See ' 9701.322(d) of the proposed regulations.)

9. The General Accounting Office (GAO) testified that the Department should continue to build in safeguards to ensure transparency and accountability. What is your assessment of GAO's recommendation?

We generally agree with GAO's recommendation to build in safeguards to ensure transparency and accountability.

10. During the hearing, your testimony seemed to suggest that the burden of proof for MSPB appeals was lowered for the Department out of fairness. Can you provide a clearer explanation as to why the Department believes there needs to be a lower the burden of proof in MSPB cases which would treat DHS employees differently than other federal employees?

Overall, we believe that appeals of adverse actions from DHS employees warrant different MSPB appellant procedures from those applied to other federal agencies because of the critical nature of DHS' mission. The lower standard of proof, in particular, grants appropriate deference to DHS officials in recognition of this mission.

11. The proposed regulations limit the Secretary's discretion to engage in post implementation bargaining. I believe that it is important to allow such bargaining as it would enable the Department to run more efficiently with the input of front line personnel who are tasked with performing the missions of DHS. Could you please comment on the reasons for limiting post implementation bargaining?

The regulations permit post implementation bargaining over procedures and appropriate arrangements at management discretion. The types of situations where post implementation bargaining becomes a problem include issues such as shifts in local procedures and rapid changes to avoid predictability; joint operations with local/state/Federal law enforcement; and adapting to changes in border traffic, airline landing rights, airline/shipping schedules. All of these situations occur on an almost daily basis. To be obligated to bargain each and every time would result in constant bargaining and second guessing of management's actions.

12. I am concerned with the proposal to move many of the responsibilities of the Federal Labor Relations Authority to the internal labor-management relations panel. Could you more clearly explain your views on the problems you perceive with the current labor-management structure and discuss what could be done, such as shortening deadlines, to make the process more efficient and still allow for an independent body to decide disputes?

There were two major factors that led us to the conclusion to establish a separate Labor Relations Board focused on the DHS mission which is completely independent of the Department. The first is that FLRA, which administers a government-wide labor relations program for over 1 million Federal employees, is less likely than an independent DHS Labor Relations Board to develop the mission-focus and homeland security expertise that the Department and its unions will need, nor will it be able to dedicate its resources to prioritize DHS cases. The second, and equally compelling reason, is that under the current system there is a division of critical adjudicatory functions among FLRA's Office of General Counsel, the FLRA itself, and the Federal Service Impasses Panel. This division causes excessive delays and repeated litigation and contributes significantly to the cost of collective bargaining. Neither one of these issues can be sufficiently relieved by shortening deadlines or making other processed more efficient.

13. Please define the phrase "substantial impact on a significant portion of the bargaining unit" as it relates to the Department's obligation to bargain with employee representatives.

The term relieves parties of potentially lengthy negotiations over matters that are limited in scope and effect – the appropriate interpretation of this phrase will be made by the Homeland Security Labor Board.

14. The proposed regulations note that for some of the employees not specifically covered by the regulations, DHS could administratively extend the regulations to these employees. Could you explain this process? Can the Secretary do this without going through notice and comment rulemaking?

Several categories of personnel currently employed at DHS, including as an example Stafford Act employees in Emergency Preparedness and Response and TSA non-screeners, are appointed under personnel systems outside of title 5. DHS can direct that those personnel systems align administratively with the DHS system except to the extent that aspects of the system conflict with the statutory of the non-title 5 systems. This authority derives from the fact that the procedures in those systems were established administratively not legislatively, and can therefore be modified administratively.

15. The proposed regulations raise the standard for the payment of attorney fees where an employee prevails on appeal due to harmful error by the Department in the application of agency procedures or due to a finding that the agency action was not in accordance with the law. Why are DHS employees expected to pay attorneys fees when they otherwise prevail on the merits of the appeal? Do you believe it will make it harder for employees to obtain legal representation and appeal agency actions?

Under current law, employees in agencies that are now part of DHS who appealed agency actions to MSPB do not receive attorney fees simply because they prevail. Rather, the employee must satisfy both criteria of a two-part test. The employee must prevail, but he or she also must demonstrate that payment by the agency "is warranted in the interest of justice." 5 U.S.C. 7701(g). (In cases arising under the Civil Rights Act of 1964, DHS and OPM's proposed regulations retain the statutory standard unchanged.)

The proposed regulations do not change the overarching principle in current law that recovery of fees is the exception -- not the rule -- when an employee prevails. Still, under current law, a significant percentage of employees appealing agency actions are represented by counsel, although representation by an attorney is not required to appeal.

Therefore, nothing in the proposed regulations would make it more difficult to appeal agency actions. It is difficult to know whether, or to what extent, the proposed clarified standard might have a chilling effect on an employee's willingness to obtain legal representation.

16. Can you please elaborate on the intended use of alternative dispute resolution (ADR) procedures in the Department? For example, has the Department considered establishing an employee ombudsman?

No specific decisions have been made on the use of ADR; however, the Department intends to develop its alternative dispute resolution process based on best practices in both the public and private sector. This would include appointment of ombudsmen for employee concerns and ensure that employees are adequately trained on ADR techniques.

QUESTIONS FOR SENATOR FRANK R. LAUTENBERG
GOVERNMENT AFFAIRS HEARING ON
DHS HUMAN RESOURCE PLAN
Wednesday, February 25, 2004

Q: I am concerned about the planned "pay for performance" plan and whether too much discretion will be given to individual managers to make a subjective determination of an employee's performance. One of the reasons we instituted the General Schedule (GS) system to pay federal employees was to prevent political biases affecting federal salaries. What are the safeguards in the new system to prevent such manipulations by employers?

There are many safeguards proposed in the new system to address these issues. We have proposed establishing Performance Review Boards to provide oversight of the pay for performance system and to review the performance standards and evaluations across the organization to specifically look for issues of bias or inappropriate application of the standards. We will be investing significant dollars in the development of the new performance management system and training both managers and employees in the application of the system to day-to-day performance on the job. In addition, because of the linkage between rating results and pay increases, we have provided that employees may grieve ratings. Also, we have provided that any adverse action based on an unacceptable performance rating is appealable.

Q. Admiral Loy, prior to your current position, you headed the Transportation Security Administration (TSA). We know that TSA screeners are central members of our homeland security workforce. Why are they, along with other Department of Homeland Security (DHS) personnel exempt from the new human resources system?

TSA screeners are employed outside of the provisions of title 5 of the United States Code. Pursuant to section 111(d) of the Aviation and Transportation Security Act, the terms and conditions of employment of TSA screeners may be established "notwithstanding any other provision of law." The DHS HR system will be established pursuant to authority codified in section 9701 of title 5. This authority does not extend to personnel systems or rules established under authority outside of title 5. While as a matter of law this system will not reach TSA screeners, DHS can direct that the TSA screener personnel system align administratively with the DHS system except to the extent that aspects of the system conflict with the statutory authority applicable to TSA screeners. Similar reasoning applies to other personnel in the Department who are exempt from these regulations but might be covered administratively.

Q. The new proposed pay system includes wide banks that are open and based on local market rates. Within each cluster, promotion to another band (e.g. full performance to senior expert) requires assessment and/or competition. The annual rate of adjustments are based on labor market conditions, mission and availability of funds, the level of pay adjustments received by employees of other Federal agencies and other factors. Could you explain how local labor market rates will determine the pay bands and why you think that private sector salaries should affect DHS employees' salaries?

The proposed annual rate adjustments will be determined in coordination with OPM after DHS has conducted local and national market surveys by occupation and/or skills needed to perform the DHS duties. As a result of those surveys, DHS will be informed on the salary ranges paid on average across the country for similar positions (like the current GS system) and the salaries paid in local markets for similar positions. Although no final decisions on the specifics have been made, we plan to make additional adjustments within local markets to account for issues such as local cost of living, our ability to recruit and retain the highly skilled workforce we need for our mission. Surveys will take into account both public and private sector salaries, in some instances there are direct correlations between the work of DHS employees and the private sector and in other instances the correlation is much stronger with other public sector positions.

ORG	NUMBER OF EMPLOYEES[1]	PAY	CLASSI-FICATION	PERFORMANCE MANAGEMENT	LABOR MANAGEMENT RELATIONS[2]	ADVERSE ACTIONS[3]	APPEALS[3]
DHS HQRS	778	Yes	Yes	Yes	Yes	Yes	Yes
IAIP	729	Yes	Yes	Yes	Yes	Yes	Yes
S&T	160	Yes	Yes	Yes	Yes	Yes	Yes
HSARPA	20	No	No	Yes	Yes	Yes	Yes
EP&R	4,780	Yes	Yes	Yes	Yes	Yes	Yes
Stafford Act	8,000	Admin	Admin	Admin	Admin	Admin	Admin
BTS	131	Yes	Yes	Yes	Yes	Yes	Yes
CBP	40,047	Yes	Yes	Yes	Yes	Yes	Yes
WageGrade	29	No[4]	No[4]	Yes	Yes	Yes	Yes
ICE	14,614	Yes	Yes	Yes	Yes	Yes	Yes
WageGrade	135	No[4]	No[4]	Yes	Yes	Yes	Yes
FLETC	889	Yes	Yes	Yes	Yes	Yes	Yes
WageGrade	45	No[4]	No[4]	Yes	Yes	Yes	Yes
TSA *Non-Screeners*	5,820	Admin	Admin	Admin	Yes	Admin	Yes
TSA *Screeners*[5]	46,600						
FAMs[6]							
USCG	4,954	Yes	Yes	Yes	Yes	Yes	Yes
WageGrade	1,463	No[4]	No[4]	Yes	Yes	Yes	Yes
Academy Faculty	69	No	No	No	Yes	Yes	Yes
USSS	4,941	Yes	Yes	Yes	No[7]	Yes	Yes
Uniformed Division	1,423	No	No	Yes	No[7]	Yes	Yes
Wage Grade	17	No[4]	No[4]	Yes	No[7]	Yes	Yes
CIS	9,795	Yes	Yes	Yes	Yes	Yes	Yes

[1]Members of uniformed military service, administrative law judges, and presidential appointees, and office of inspector general excluded. SES included but not being covered at this time.
[2]Labor Management Relations not applicable to supervisors or management officials.
[3]Adverse action and appeals not covered for employees during initial service period, demotion of supervisor or manager under 5 U.S.C. 3321, termination of temporary or term promotion or appointments, SES, or confidential/policy positions.
[4]Wage Grade not being covered at this time.
[5]Under section 111(d) of the Aviation and Transportation Security Act, TSA screeners are employed outside the provisions of title 5, United States Code. Thus, they cannot be covered by the DHS HR system established under 5 U.S.C. 9701. However, DHS can direct that the TSA screener personnel system align administratively with the DHS system except to the extent that aspects of the system conflict with the statutory authority applicable to TSA screeners.
[6]Federal Air Marshals (FAMs) are currently TSA employees and have the same status as other TSA nonscreeners, even though they are detailed to ICE. If FAM positions are moved from TSA to ICE, these employees would be covered by all the regulations issued under 5 U.S.C. 9701, subject to approval by the Secretary or designee. See special transitional rules for FAMs in proposed sections 9701.232 and 9701.374 (dealing with job evaluation and pay).
[7]Excluded by Executive Order 12171 dated November 17, 1979.

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

March 22, 2004

The Honorable George V. Voinovich
Chairman
The Honorable Richard Durbin
Ranking Minority Member
Subcommittee on Oversight of Government
Management, the Federal Workforce, and the
District of Columbia
Committee on Governmental Affairs
United States Senate

The Honorable Jo Ann Davis
Chairwoman
The Honorable Danny Davis
Ranking Minority Member
Subcommittee on Civil Service and
Agency Organization
Committee on Government Reform
United States House of Representatives

Subject: *Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*

On February 25, 2004, I testified before your subcommittees at a hearing entitled "The Key to Homeland Security: The New Human Resources System."[1] This letter responds to your request that I provide answers to posthearing questions. The questions and responses follow.

1. **In your testimony, you indicated that there were safeguards recommended for the personnel system at the Department of Defense that were not included in the Homeland Security Act. What safeguards do you think should be included in the regulations for the DHS personnel system that are not included currently?**

We have proposed an initial list of safeguards based on our extensive body of work looking at the performance management practices used by leading public sector organizations both in the United States and in other countries, as well as our own

[1]U.S. General Accounting Office, *Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations*, GAO-04-479T (Washington, D.C.: Feb, 25, 2004).

experiences at GAO in implementing a modern performance management system. These safeguards include:

- Assure that the agency's performance management systems (1) link to the agency's strategic plan, related goals, and desired outcomes, and (2) result in meaningful distinctions in individual employee performance. This should include consideration of critical competencies and achievement of concrete results. As I noted in my testimony, DHS plans to align individual performance management with organizational goals.

- Involve employees, their representatives, and other stakeholders in the design of the system, including having employees directly involved in validating any related competencies, as appropriate. In September 2003 we reported that DHS's personnel system design effort provided for collaboration and employee participation.[2] Employees were provided multiple opportunities to be included in the design process, including participation in the Core Design Team, the Town Hall meetings, the field team, the focus groups, an e-mail mailbox for employee comments, and now through the public comment period on the proposed system.

- Assure that certain predecisional internal safeguards exist to help achieve the consistency, equity, nondiscrimination, and nonpoliticization of the performance management process (e.g., independent reasonableness reviews by Human Capital Offices and/or Offices of Opportunity and Inclusiveness or their equivalent in connection with the establishment and implementation of a performance appraisal system, as well as reviews of performance rating decisions, pay determinations, and promotion actions before they are finalized to ensure that they are merit-based; internal grievance processes to address employee complaints; and pay panels whose membership is predominately made up of career officials who would consider the results of the performance appraisal process and other information in connection with final pay decisions). DHS is proposing Performance Review Boards (PRBs) to review ratings in order to promote consistency and provide general oversight of the performance management system to ensure it is administered in a fair, credible, and transparent manner. While much remains to be determined about how the DHS PRBs will operate, we believe that the effective implementation of such a board is important to assuring that predecisional internal safeguards exist to help achieve consistency and equity, and assure nondiscrimination and nonpolitization of the performance management process.

- Assure reasonable transparency and appropriate accountability mechanisms in connection with the results of the performance management process. This can include reporting periodically on internal assessments and employee survey results relating to the performance management system and publishing overall results of performance management and individual pay decisions while protecting individual confidentiality. Publishing the results in a manner that protects individual confidentiality can provide employees with the information they need to better understand the performance management system. As we recently

[2]U.S. General Accounting Office, *Human Capital: DHS Personnel System Design Effort Provides for Collaboration and Employee Participation*, GAO-03-1099 (Washington, D.C.: Sept. 30, 2003).

reported, several of OPM's personnel demonstration projects publish information for employees on internal Web sites about the results of performance appraisal and pay decisions, such as the average performance rating, the average pay increase, and the average award for the organization and for each individual unit.[3]

There are also important safeguards in areas other than performance management. For example, I noted in my testimony that, as an additional safeguard, DHS should consider identifying mandatory removal offenses in regulations as a means to ensure appropriate due process. I also believe that the independence of the panel to hear appeals of violations of the mandatory removal offenses could be strengthened. As we note in the response to question 4 below, the independence of the DHS labor relations board deserves serious consideration.

2. The regulations don't allow collective bargaining on matters that do not "significantly affect a substantial portion of the bargaining unit." What do you think would be a reasonable percentage or number to be considered a "substantial portion?"

As I noted in my testimony, leading organizations involve employees and unions in major changes such as redesigning work processes, changing work rules, or developing new job descriptions. Such involvement can avoid misunderstandings, speed implementation, and more expeditiously resolve problems that occur. I also noted that DHS employees suggested having informal mechanisms in place to resolve issues before escalating them to the formal process. However we do not have a specific percentage to recommend for this provision.

3. In your testimony you stated concern for the Department of Defense's intention to implement a personnel system by the Fall of 2004. What do you believe would be an appropriate implementation timetable for the Department of Homeland Security?

We have found that a key practice for successful transformations is to set implementation goals and establish a timeline to build momentum and show progress from day one.[4] A transformation, such as the one being undertaken by DHS, is a substantial commitment that could take years before it is completed, and therefore must be carefully and closely managed. As a result, it is essential to establish and track implementation goals and establish a timeline to pinpoint performance shortfalls and gaps so that midcourse corrections can be made.

According to DHS's proposed regulations, the labor relations, adverse actions, and appeals provisions will be effective 30 days after issuance of the interim final regulations later this year. DHS plans to implement the job evaluation, pay, and

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[3]U.S. General Accounting Office, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, D.C.: Jan. 23, 2004).
[4]U.S. General Accounting Office, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, GAO-03-669 (Washington, D.C.: July 2, 2003).

performance management system in phases to allow time for final design, training, and careful implementation. Although we do not recommend a specific implementation timetable for DHS, we strongly support a phased approach to implementing major management reforms. A phased implementation approach recognizes that different organizations will have different levels of readiness and different capabilities to implement new authorities. Moreover, a phased approach allows for learning so that appropriate adjustments and midcourse corrections can be made before the regulations are fully implemented organizationwide. However, it is important to note that the proposed regulations do not apply to nearly half of all DHS civilian employees, including more than 50,000 screeners in the Transportation Security Administration (TSA). Based on the department's progress in implementing the system and any appropriate modifications made based on their experience, DHS should consider moving all of its employees under the new human capital system.

4. Would you characterize the proposed Labor Relations Board in these regulations as "independent"?

I did not directly comment on this matter in my statement. However, in my statement I did raise independence concerns about a separate panel to be created to hear appeals for mandatory removal offenses. Members of that panel are appointed by the DHS Secretary for three-year terms and may be removed by the Secretary "only for inefficiency, neglect of duty, or malfeasance." These appointment and removal procedures are identical to the appointment and removal provisions for the members of the proposed DHS Labor Relations Board. As I noted in my statement with regard to the mandatory removal offense panel, removal of the panel members by the Secretary may potentially compromise the real or perceived independence of the panel's decisions. We suggested, as an alternative, that the Department should consider having members of the panel removed only by a majority decision of the panel. We also said that DHS might wish to consider staggering the terms of the members to ensure a degree of continuity on the board. Such changes might also strengthen the independence of the Labor Relations Board.

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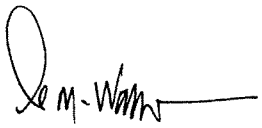
We are sending copies of this report to the Chair and Ranking Minority Member, Senate Committee on Governmental Affairs; the Chairman and Ranking Minority Member, House Committee on Government Reform; the Chairman and Ranking Minority Member, House Select Committee on Homeland Security; and other interested congressional parties. We will also send copies to the Secretary of the Department of Homeland Security and the Director of the Office of Personnel Management. Copies will be made available at no charge on the GAO Web site at http://www.gao.gov. For additional information on our work on federal agency transformation efforts and strategic human capital management, please contact me on (202) 512-5500 or J. Christopher Mihm, Managing Director, Strategic Issues, on (202) 512-6806 or at mihmj@gao.gov.

Sincerely,



David M. Walker
Comptroller General
of the United States

(450312)

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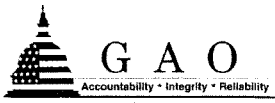

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

April 30, 2004

The Honorable George V. Voinovich
Chairman
The Honorable Richard Durbin
Ranking Minority Member
Subcommittee on Oversight of Government
Management, the Federal Workforce, and the
District of Columbia
Committee on Governmental Affairs
United States Senate

The Honorable Jo Ann Davis
Chairwoman
The Honorable Danny Davis
Ranking Minority Member
Subcommittee on Civil Service and
Agency Organization
Committee on Government Reform
United States House of Representatives

Subject: *Additional Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*

On February 25, 2004, I testified before your subcommittees at a hearing entitled "The Key to Homeland Security: The New Human Resources System."[1] I provided responses to an initial set of questions in correspondence dated March 22, 2004.[2] This report responds to your request that I provide answers to additional posthearing questions posed by Senator Akaka and Senator Lautenberg. The questions and responses follow.

Questions from Senator Akaka

1. **In your written testimony, you recommend giving members of the internal appeals panel, rather than the Secretary, the authority to remove their fellow panel members for inefficiency. However, you are silent on the**

[1]U.S. General Accounting Office, *Human Capital: Preliminary Observations on Proposed DHS Human Capital Regulations*, GAO-04-479T (Washington, D.C.: Feb. 25, 2004).
[2]U.S. General Accounting Office, *Posthearing Questions Related to Proposed Department of Homeland Security (DHS) Human Capital Regulations*, GAO-04-570R (Washington, D.C.: Mar. 22, 2004).

same issue for the internal labor-management board. What recommendations do you have for improving the impartiality of the proposed labor-management board at the Department of Homeland Security (DHS)?

As you noted, I raised independence concerns about the panel to be created to hear appeals for mandatory removal offenses. Members of that panel are appointed by the Department of Homeland Security (DHS) Secretary for 3-year terms and may be removed by the Secretary "only for inefficiency, neglect of duty, or malfeasance." These appointment and removal procedures are identical to the appointment and removal provisions for the members of the proposed DHS Labor Relations Board. As I noted in my statement with regard to the mandatory removal offense panel, removal of the panel members by the Secretary may potentially compromise the real or perceived independence of the panel's decisions. We suggested, as an alternative, that the department should consider having members of the panel removed only by a majority decision of the panel. Such changes might also strengthen the independence of the Labor Relations Board. We also said that DHS might wish to consider staggering the terms of the members to ensure a degree of continuity on the board.

2. **The General Accounting Office (GAO) has been active in reviewing and making recommendations regarding new personnel flexibilities in the federal government. As you know, DHS has requested $102.5 million for the implementation of its new personnel system. Based on GAO research and your own experience with the personnel system at GAO, is the department's request sufficient to adequately implement the system? How much do you expect the financial cost of the system to be in the long term?**

As you note, the administration has requested for fiscal year 2005 $102.5 million to fund training, the development of the performance management and compensation system, and contractor support. In addition, the fiscal year 2005 budget requests over $10 million for a performance pay fund in the first phase of implementation (affecting about 8,000 employees) to recognize those who meet or exceed expectations and about $20 million to fund the development of a departmental human resources information technology system. The training costs do not include employees' time during training or expenses of the internal training resources that already exist within DHS.

We have reported that based on the data that the Office of Personnel Management's (OPM) personnel demonstration projects provided us, direct costs associated with salaries, training, and automation and data systems were the major cost drivers of implementing their pay for performance systems. The demonstration projects reported other direct costs, such as evaluations and administrative expenses. We described a number of approaches they used to manage the direct costs of implementing and maintaining their pay for performance systems.[3]

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[3]U.S. General Accounting Office, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, D.C.: Jan. 23, 2004).

While we do not have an estimate of additional implementation costs, clearly, further funding will be required as the system is rolled out to additional DHS personnel. In addition, ongoing training is essential to reinforce the considerable cultural change that is needed to continue to implement a new performance management system. DHS is recognizing that there are up-front costs and that its components are starting from different places regarding the maturity and capabilities of their performance management systems. While the investments are important to the ultimate success of DHS's efforts, it is equally important that certain costs are one-time in nature and, therefore, should not be built into the base of DHS's budget for future years.

3. **The GAO has conducted extensive reviews of personnel reform in other countries and at other federal agencies. In the case of the FAA, Congress granted certain flexibilities but then reinstated the current labor-management relations system found in chapter 71 and appeals to the MSPB. I also understand that other countries, which initially moved from a centralized system to an individual agency personnel system, have since returned to a form of centralization. What are the lessons learned from personnel reform efforts both here and abroad and, in your opinion, has DHS incorporated these best practices?**

Since the United States is not alone in experiencing challenges in managing its human capital, we reviewed other countries' experiences in our August 2002 report on performance management.[4] For example, Australia devolved almost all human capital management responsibilities to individual departments and agencies whose chief executives may negotiate compensation with individuals or groups of employees. Australia's Public Service Commission was to remain responsible for promoting high-quality human capital management and its Department of Employment and Workplace Relations plays a key role in helping agencies develop workplace relations that are consistent with a high performing public service. We have not updated our work to identify if there have been any changes in their responsibilities.

As we noted in our statement, we strongly support the need for government transformation and the concept of modernizing federal human capital policies. To help the new DHS, we convened a forum of a cross-section of leaders who have had experience managing large-scale organizational mergers, acquisitions, and transformations, and identified key practices and implementation steps that can help agencies implement successful transformations of their own.[5] While no two efforts are exactly alike, the "best" approach for any given effort depends upon a variety of factors specific to each context. Last September, we reported that DHS's design of its human capital system generally reflects these elements of effective transformation.[6]

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[4]U.S. General Accounting Office, *Results-Oriented Cultures: Insights for U.S. Agencies from Other Countries' Performance Management Initiatives*, GAO-02-862 (Washington, D.C.: Aug. 2, 2002).
[5]U.S. General Accounting Office, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, GAO-03-669 (Washington, D.C.: July 2, 2003); and *Highlights of a GAO Forum: Mergers and Transformation: Lessons Learned for a Department of Homeland Security and Other Federal Agencies*, GAO-03-293SP (Washington, D.C.: Nov. 14, 2002).
[6]U.S. General Accounting Office, *Human Capital: DHS Personnel System Design Effort Provides for Collaboration and Employee Participation*, GAO-03-1099 (Washington, D.C.: Sept. 30, 2003).

Our work has also shown that changes to human capital management should be implemented only when an agency has the institutional infrastructure in place. This institutional infrastructure includes, at a minimum, a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program goals and mission and desired outcomes; the capabilities to develop and implement a new human capital system effectively; and a modern, effective, and credible performance management system that includes adequate safeguards to prevent abuse of employees. We have issued several products that discuss this framework in more detail.[7]

As you noted, the Federal Aviation Administration (FAA) is managing its personnel under one of the most flexible human capital management environments in the federal government. This is a result of 1995 legislation that granted the agency broad exemptions from laws governing federal civilian personnel management found in title 5 of the United States Code. Congress provided these flexibilities in response to FAA's position that the inflexibility of federal personnel systems was one of the most important constraints to the agency's ability to be responsive to the airline industry's needs and to increase productivity in air traffic control operations. In a report issued last year, we noted that FAA had not fully incorporated elements that are important to effective human capital management into its overall reform effort.[8] These elements include data collection and analysis, performance goals and measures, and linkage of reform goals to program goals. FAA human resource management officials said that the agency should have spent more time to develop baseline data and performance measures before implementing the broad range of reforms, but that establishing these elements was a complex and difficult task. We additionally reported that FAA had also not gone far enough in establishing linkage between reform goals and the overall program goals of the organization. Clearly, FAA did not have the institutional framework in place that could have helped to maximize its personnel flexibilities.

Consistent with the institutional infrastructure described above, agencies in other countries are placing a greater emphasis on achieving alignment between individual and organizational results. A first step towards this end is to align the performance expectations of top leadership with organizational goals and then cascade those expectations down to lower levels and then to align performance expectations between agencies and with governmentwide priorities.

The proposed DHS regulations state the department's interest in the alignment of individual performance expectations with the mission and strategic goals, but do not yet detail how individual performance expectations will be aligned with the department's mission and strategic goals. The release of the DHS Strategic Plan can enable this alignment. In addition, the proposed regulations describe a phased approach to implementation and a commitment to an ongoing evaluation of the

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[7]U.S. General Accounting Office, *Human Capital: Key Principles for Effective Strategic Workforce Planning*, GAO-04-39 (Washington, D.C.: Dec. 11, 2003); *Human Capital: Effective Use of Flexibilities Can Assist Agencies in Managing Their Workforces*, GAO-03-2 (Washington, D.C.: Dec. 6, 2002); and *Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success*, GAO-03-488 (Washington, D.C.: Mar. 14, 2003).

[8]U.S. General Accounting Office, *Human Capital Management: FAA's Reform Effort Requires a More Strategic Approach*, GAO-03-156 (Washington, D.C.: Feb. 3, 2003).

effectiveness of the human capital system. A phased approach recognizes that different organizations will have different levels of readiness and different capabilities to implement the new authorities. Moreover, a phased approach allows for learning so that midcourse corrections can be made before the regulations are fully implemented organizationwide. Likewise, evaluations of the system's success will ensure that these system revisions are based on data-driven lessons learned.

4. **According to the proposed regulations, law enforcement officers are not among the list of individuals excluded from the personnel system. As the Department plans to implement a pay-for-performance system, I am concerned over the method by which law enforcement officers are judged on their performance and whether a pay-for-performance system could increase civil rights abuses. Due to your extensive experience in studying, as well as implementing, pay-for-performance systems, what are the best practices on how to measure the performance of law enforcement officers?**

While we have reported on local police forces' experiences in recruiting and retaining officers after the terrorist attacks of September 11, 2001, we have not reviewed how to measure the performance of law enforcement officers.[9] However, high-performing organizations use validated core competencies to examine individual contributions to organizational results. Competencies define the skills and supporting behaviors that individuals are expected to exhibit to carry out their work effectively and can provide a fuller picture of an individual's performance and contribution to organizational goals.[10] With regard to law enforcement, a focus on competencies would entail identifying and validating those competencies that are critical to successful law enforcement efforts. This approach should include a range of factors, including achieving results and protecting individual constitutional rights and civil liberties. A related pay for performance approach would center on creating incentives for—and rewarding—demonstrated proficiencies in the validated core competencies.

Question from Senator Lautenberg

1. Could you explain how local labor market rates will determine the pay bands and why you think that private sector salaries should affect DHS employees' salaries?

A competitive compensation system can help organizations attract and retain a quality workforce. To begin to develop such a system, organizations assess the skills and knowledge they need; compare compensation against other public, private, or nonprofit entities competing for the same talent in a given locality; and classify positions along levels of responsibility. While one size does not fit all, organizations generally structure their competitive compensation systems to separate base salary—which all employees receive—from other special incentives, such as retention allowances or performance awards.

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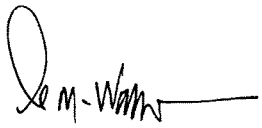
[9]U.S. General Accounting Office, *Federal Uniformed Police: Selected Data on Pay, Recruitment, and Retention at 13 Police Forces in the Washington, D.C., Metropolitan Area*, GAO-03-658 (Washington, D.C.: June 13, 2003).
[10]GAO-03-488.

Similar to many other aspects of DHS's proposal, important elements of the new pay system have not been determined. Under the proposed regulations, DHS, after coordination with OPM, may consider factors such as labor market conditions, among other things, in setting and adjusting ranges of basic pay for bands. We have reported that OPM's personnel demonstration projects have considered the labor market in determining how much to budget for pay increases.[11] For example, the Naval Sea Systems Command Warfare Center at Newport uses regional and industry salary information compiled by the American Association of Engineering Societies when determining how much to set aside for pay increases and awards. Specifically, in response to higher external engineer, scientist, and information technology personnel salaries, Newport funded pay increases and awards at a higher level in fiscal year 2001 than in fiscal year 2000.

We are sending copies of this report to the Chair and Ranking Minority Member, Senate Committee on Governmental Affairs; the Chairman and Ranking Minority Member, House Committee on Government Reform; the Chairman and Ranking Minority Member, House Select Committee on Homeland Security; and other interested congressional parties. We will also send copies to the Secretary of the Department of Homeland Security and the Director of the Office of Personnel Management. Copies will be made available at no charge on the GAO Web site at http://www.gao.gov. For additional information on our work on federal agency transformation efforts and strategic human capital management, please contact me on (202) 512-5500 or J. Christopher Mihm, Managing Director, Strategic Issues, on (202) 512-6806 or at mihmj@gao.gov.



David M. Walker
Comptroller General
of the United States

(450318)

[11]GAO-04-83.

Response to Questions for the Record
"The Key to Homeland Security: the New Human Resources Systems"
February 25, 2004

John Gage
National President
American Federation of Government Employees, AFL-CIO
80 F Street, NW
Washington, DC 2001

Panel 3: **Colleen Kelley, Nat'l President, National Treasury Employees Union;**
John Gage, Nat'l Pres., American Federation of Gov't Employees;
Mike Randall, President, National Association of Agricultural Employees.

All

- As stated at the hearing, I am very interested in the details of what parts of the personnel system you disagree with. Please provide further clarification as to what sections and language you find objectionable and why.

John Gage

- Your statement says that based on recent discussions with Secretary Ridge you expect substantial changes in the proposed regulations. Can you elaborate? In what areas do you expect these changes, and what changes are you referring to?

- Of the 50,000 employees at DHS who are represented by AFGE, how many are dues paying members?

Colleen Kelley

- In your statement you say you'd prefer that the Department hire more front line employees with the $100 million it has requested for start-up of its new system. However, in the event a new performance management and pay system is established, I trust you'd agree that a lot of training and other work will be needed especially at the outset. Is that right? Isn't it your general view that managers need more training?

- How would you address limitations on bargaining so that management would not be required to bargain collectively on matters that do not affect a substantial number of employees in the bargaining unit, or that are "insignificant"?

March 10, 2004

Senator Daniel K. Akaka
Questions for the Record
"The Key to Homeland Security: the New Human Resources System"
February 25, 2004

Question for John Gage, American Federation of Government Employees

1. As the experience at the Federal Aviation Administration demonstrated, collective bargaining and the right to appeal decisions to the Merit System Protection Board is imperative. The fact that Congress reinstated those rights shows that every review process, whether in the context of labor relations management or employee appeals, must not only be fair, but also perceived as fair in order to be credible. What recommendations do you have to improve the actual and perceived fairness of the internal appeals and the internal labor management relations panels? What recommendations did you submit to the Department of Homeland Security and Office of Personnel Management on this issue?

2. With passage of the Civil Service Reform Act of 1978, Congress found that the statutory protection of the right of employees to organize and bargain collectively safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and their employers. However, it appears that the proposed regulations undermine this basic foundation of federal employment law by effectively stripping the bargaining rights of federal employees. Please comment on how the proposed regulations correspond with the concept that labor unions and collective bargaining are in the public interest?

3. The proposed regulations leave open the question of judicial review for the internal labor relations board and the internal appeals panel. What is your recommendation on the two judicial review options laid out in the regulations and do you have other suggestions?

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1. ***As stated at the hearing, I am very interested in the details of what parts of the personnel system you disagree with. Please provide further clarification as to what sections and language you find objectionable and why.***

To respond to the question, I am attaching a copy of the Joint Comments and Recommendations Submitted by NTEU, AFGE, and NAAE dated March 22, 2004.

2. ***Your statement says that based on recent discussions with Secretary Ridge you expect substantial changes in the proposed regulations. Can you elaborate? In what areas do you expect these changes, and what changes are you referring to?***

Based on my meetings with the Secretary, I do not believe that he personally has a desire to harm employees or their representatives. At this time, I cannot speculate further because we are soon to meet to discuss ground rules for the reconciliation phase of this process.

3. **Of the 50,000 employees at DHS who are represented by AFGE, how many are dues paying members?**

Although AFGE's membership penetration varies significantly from occupation to occupation, and from component to component, our average membership penetration is approximately 40%.

4. ***As the experience at the Federal Aviation Administration demonstrated, collective bargaining and the right to appeal decisions to the Merit Systems Protection Board is imperative. The fact that Congress reinstated those rights shows that every review process, whether in the context of labor management relations or employee appeals, must not only be fair, but also perceived as fair in order to be credible. What recommendations do you have to improve the actual and perceived fairness of the internal appeals and internal labor management relations panels? What recommendations did you submit to the Department of Homeland Security and Office of Personnel Management on this issue?***

Whenever two parties have a dispute and wish to submit it to a third party for resolution, the fairness and impartiality of that third party must be vouchsafed. If either of the parties to the dispute loses confidence in the neutrality of the

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decision maker, then the system is doomed to failure. Parties who do not believe that they will have a chance to succeed will seek an alternative forum or other means to press their case. Even the perception of bias or conflict of interest is enough to destroy the credibility of the adjudicator. An adjudicator without credibility is also without value.

In the proposed changes to the labor management relations system and system for adverse actions and appeals in the Department of Homeland Security, DHS and OPM have lost sight of this principle. The proposed regulations would create a Homeland Security Labor Relations Board to be made up entirely of individuals appointed by the Secretary of DHS. This Board would perform duties that are currently performed by the Federal Labor Relations Authority (FLRA), Federal Service Impasses Panel (FSIP), and Federal Mediation and Conciliation Service (FMCS) under Chapter 71 of the Title 5. For a group of as-yet-unspecified "mandatory removal offenses," employee appeals would be heard only by an internal DHS panel and not by the MSPB or an arbitrator. These internal panels would be inherently untrustworthy to employees and their representatives. The employer not only determines who will be passing judgement on its actions, but what rules the adjudicator will have to follow. No reasonable observer could consider this to be fair. We urged DHS and OPM to delete both these provisions from their regulations.

The DHS Labor Relations Board (the Board) would determine appropriate bargaining units for employees, including determining individual bargaining unit eligibility; resolve issues relating to scope of bargaining and duty to bargain; resolve unfair labor practice complaints concerning the duty to bargain good faith, and strikes or other work stoppages; resolve information request disputes; resolve exceptions to arbitration awards; and resolve negotiation impasses. The Board would not be considered credible by employees or labor organizations. The employer would have appointed all of its members unilaterally. This would be "the Boss's Board." Any assurances of its neutrality or impartiality would not be believed. In our extensive comments of March 22, we opposed the establishment of the Board and recommended that the current authority of the FLRA, FMCS, and FSIP be preserved.

The unfairness of this proposal is compounded by DHS's and OPM's failure or inability to describe the type of judicial review or enforcement that would follow Board actions. With limited exceptions, a person can appeal a final decision of the FLRA to the Unite States court of appeals in which the affected person resides or to the U.S. Court of Appeals for the District of Columbia. The FLRA may also petition any appropriate United States court of appeals for the enforcement of any order of the FLRA and for appropriate temporary relief or restraining order. Judicial review and enforcement of executive action have been a hallmark of the American justice system for centuries. The proposed regulations fail to even affirm the right of judicial review of Board actions, much

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less offer a description of how review or enforcement of Board actions would occur. This uncertainty further detracts from the Board's legitimacy.

Our union worked extensively with DHS and OPM representatives for many months as we considered what changes in the labor relations and adverse actions and appeals systems might be made for the new Department. While we were not convinced that the FLRA and FSIP needed replacement, we offered the option of using tri-partite boards to perform all or some of the functions of those agencies. These would be comprised of a representative appointed by the Secretary, a representative appointed by the unions and a third member chosen by the first two. Such a body would be perceived as fair and impartial, since both parties to a dispute would have an equal role in selecting the adjudicator. We continue to be ready to work with DHS and OPM to discuss the issues and work to find solutions that meet the needs of the agency, the employees and the public.

DHS and OPM also proposed extensive changes to the current system for taking adverse actions against employees and the rights to appeal such actions. During the Design Team's work, there was no evidence presented that the time period for employees to respond to charges made against them interfered with the ability to protect the homeland, or was in any way unfair to management. No cases were offered in which either the MSPB or an arbitrator made an erroneous decision. While there was support expressed in the Town Hall Meetings and the focus groups for speeding up the adverse action and appeals system, there was no support for biasing it in favor of management or otherwise reducing the likelihood of fair and accurate decisions. Surely, none of the research the Design Team conducted showed conclusive evidence that any alternatives to the current systems in Chapters 75 and 77 of Title 5 enhanced greater productivity, elicited significant cost savings or better served the agency, the employees or the public. Yet, sweeping changes from the *status quo* were offered in the proposed regulations.

The proposal retained the jurisdiction of the Merit Systems Protection Board (MSPB) to hear adverse action appeals. However, the proposed regulations would deny the MSPB the power to mitigate the penalty meted out by DHS. This would discard all notions of progressive discipline and fairness. For example, an employee with an outstanding record over 30 years of employment could be removed for committing a minor infraction that warrants no more than a reprimand or counseling session. Under the proposed regulations, if the agency proved the underlying misconduct, the MSPB would be barred from considering the reasonableness of the removal penalty. This will undermine the legitimacy of MSPB review. We recommended to DHS and OPM that the regulations preserve MSPB's authority to review the reasonableness of a penalty.

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The proposal also denies employees the right to have adverse actions heard through a negotiated grievance procedure ending in arbitration. The ability to grieve and arbitrate severe disciplinary actions is one of the most fundamental rights in the collective bargaining relationship. Allowing these matters to be challenged through the grievance and arbitration process in no way interferes with an employer's right to impose timely discipline on its employees. It simply requires the employer to demonstrate to a labor organization, and, perhaps, to an arbitrator, that its actions were justified. DHS should not shy away from this most basic employer obligation, which is activated only after the employer imposes an adverse action. We recommended that the right of employees to have adverse actions reviewed under grievance and arbitration procedures be preserved.

The bias of DHS and OPM against grievance and arbitration procedures is evident in the proposal to give the proposed DHS Labor Relations Board the authority to conduct *de novo* review of interpretations of collective bargaining agreements in arbitration awards. Accordingly, "the Boss's Board" would have the right to evaluate evidence and substitute its judgement for that of arbitrators who decided cases regarding minor disciplinary matters that could not be appealed to MSPB. This is squarely at odds with the settled legal principle, in both the private and federal sectors, that a reviewing body should not substitute its judgement for the factual conclusions reached by an arbitrator. It undermines the very integrity of the grievance and arbitration process. We oppose this attack on the grievance and arbitration process. Our recommendation to DHS and OPM was that the proposed Board not be established and that the FLRA's authority be preserved.

Finally, DHS and OPM proposed establishment of a group of "mandatory removal offenses." At some time in the future, the Secretary would, at his complete discretion, designate a list of offenses that have a "direct or substantial impact on homeland security" for which removal is the only penalty that could be imposed. Appeals of these actions would be heard by an internal Panel within DHS. The Panel could not review the penalty imposed. Only the Secretary may mitigate the penalty.
In our comments to DHS and OPM, we urged that this provision be deleted from the regulations.

It is a principle of American justice that the more serious the offense one is charged with, the more procedural protections the accused is given and the greater the burden of the government to prove its case. An allegation that an employee of the Department of Homeland Security has committed an offense described above is the most serious there can be. Surely, such an offense would end the career of that employee. No other employer would ever trust him or her in any position of responsibility. Here, the proposed regulations would transfer consideration of such charges from a body that has credibility and acceptance as a neutral adjudicator to a body that is entirely the creation of the charging party.

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Despite any claims to the contrary, this proposed Panel would never be accepted by employees as being fair or independent. In his appearance before the Design Team, retired Virginia Supreme Court Judge John Charles Thomas chided the group for its options that included only internal appeals panels. He told the group that this was unacceptable in America because we reject the idea of judge, jury and prosecutor rolled into one entity. This is true whatever the nature of the charges against the accused. It is even more critical when the charges allege harm to our homeland security.

An employee accused of committing such serious offenses should have the ability to challenge management's action before the MSPB or an arbitrator, with judicial review available, as well.

One of the justifications used by DHS and OPM for creating the internal panels is the claimed need for knowledge of the agency's mission. We are not entirely convinced that such knowledge is essential for an adjudicator. For decades arbitrators have served parties in numerous industries and district court judges have had to decide cases in vastly diverse fields of law. However, to the extent that knowledge of DHS and its mission are important, an internal panel is not the only way to meet this need. For example, Judge Thomas told the Design Team that the American Arbitration Association could assemble lists of arbitrators who have knowledge and experience in any specific matter, including arbitrators with necessary security clearances. The agency's stated need for knowledge of the agency's mission could be met while still empowering adjudicators who are fair and impartial.

5. ***With passage of the Civil Service Reform Act of 1978, Congress found that the statutory protection of the right of employees to organize and bargain collectively safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlement of disputes between employees and their employers. However, it appears that the proposed regulations undermine this basic foundation of federal employment law by effectively stripping the bargaining rights of federal employees. Please comment on how the proposed regulations correspond with the concept that labor unions and collective bargaining are in the public interest?***

The proposed regulations issued by DHS and OPM do not share the beliefs Congress pronounced about collective bargaining in the Civil Service Reform Act (CSRA). The Homeland Security Act specifically required that the regulations

> ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions

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which affect them, subject to any exclusion from coverage or limitation on negotiability established by law.

The Department and OPM have tread as carefully as they could to demolish collective bargaining while still appearing to meet this Congressional mandate. The proposal would make the following serious deviations from the Congressionally established system of collective bargaining:

- Limit the scope of bargaining by prohibiting bargaining on things that they say are both too important to management, and too unimportant.
- Eliminate resolution of bargaining disputes by an independent third party, substituting an internal labor relations board, whose members are appointed entirely by the Secretary.
- Eliminate impasse resolution for mid-contract bargaining entirely, instead allowing the agency to implement its last proposal after some arbitrary limit on the number of days of bargaining.
- Prohibit bargaining over any matter addressed in DHS-level regulations.
- Limit bargaining over changes arising from the exercise of management rights to changes that "significantly affect a substantial portion of the bargaining unit." The definitions do not define "significantly affect" or "substantial portion." Thus it is impossible to know what would remain to bargain after the proposed "boss's Board" would interpret these provisions.
- Reject the "flagrant misconduct" standard for judging when behavior on the part of an employee acting as a union representative is subject to discipline by the employer. This is a bald faced attempt to intimidate employees from the free exercise of their rights.
- Eliminate the ability to bargain over procedures for the implementation of management rights and over appropriate arrangements for adversely affected employees. The proposal would substitute discretionary, nonbinding "consultation."
- Eliminate the right to appeal serious adverse actions under the negotiated grievance procedure.
- Limit the union's right to information necessary for collective bargaining.
- Evade a series of court decisions by barring union representatives from EEO discussions.
- Curtail the scope of bargaining by declaring all matters relating to the proposed pay, performance and classification systems off the bargaining table.

Taken in sum, the proposed regulations are at odds with the concept that labor unions and collective bargaining are in the public interest. We have told the representatives of DHS and OPM from the outset that we are willing to work with them to improve collective bargaining in the new department, but that the basic premises of the system must remain. These would include a scope of bargaining that reaches the substantive issues that matter to the employees in the

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performance of their work; resolution of bargaining disputes by independent third parties; and a commitment to reach swift conclusion of negotiations while allowing both parties the flexibility to craft resolutions that meet the interests of all. We hope that we will be able to pursue those goals in the next phase of the process.

6. The proposed regulations leave open the question of judicial review for the internal labor relations board and the internal appeals panel. What is your recommendation on the two judicial options laid out in the regulations and do you have other suggestions?

Initially, in largely replacing the Federal Labor Relations Authority by establishing a Homeland Security Labor Relations Board with DHS, the independence and impartiality of the administrative review process for labor relations disputes have been severely compromised. We have the same objection to the DHS Panel that will adjudicate "mandatory removal offenses." It is particularly important, therefore, that judicial review be available. The current available options for judicial review are (1) to remain silent in the regulations and (2) to retain the current statutory judicial review provisions by permitting FLRA and MSPB to review decisions of the Board and Panel. Option (1) is unacceptable. To remain silent is to open the door to a holding that no judicial review is available due to the lack of such review in the statutory and regulatory schemes. Option (2) retains the judicial review currently available pursuant to 5 U.S.C. §§ 7123 and 7703, respectively, and is the only means to assure ultimate review by an independent authority.

JOINT COMMENTS AND RECOMMENDATIONS SUBMITTED BY THE NATIONAL PRESIDENTS OF THE NATIONAL TREASURY EMPLOYEES UNION (NTEU), THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE) AND THE NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES (NAAE)

HAND DELIVERED and POSTED ELECTRONICALLY

March 22, 2004

OPM Resource Center
Room B469
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C.

Re: Department of Homeland Security Human Resources Management System
DOCKET NUMBER DHS-2004-001; RIN NUMBER 3206-AK31

Dear Mr. Secretary and Madame Director:

Pursuant to 5 U.S.C. 9701(e), the National Treasury Employees Union (NTEU), American Federation of Government Employees (AFGE), and the National Association of Agriculture Employees (NAAE) submit the following joint comments and recommendations concerning the proposed Department of Homeland Security Human Resources Management System. We expect that, as required by the Homeland Security Act (Act), you will give these comments and recommendations full and fair consideration in deciding whether or how to proceed with the proposal. We also stand ready, as required by the Act, to meet and confer with you in an effort to reach agreement over the many disputed areas we discuss below.

Introduction and Summary

We are extremely disappointed by your proposed personnel system. Indeed, taken as a whole, the proposed system fails to advance the public's interest in protecting homeland security. Accordingly, we are compelled to object to the system in its entirety and strongly recommend that it not be implemented until the many serious defects described below have been corrected.

The unions offered several "options" during the design process that would have changed and enhanced current procedures without sacrificing important employee rights safeguarded by the Act. Unfortunately, those options were rejected. We make additional recommendations below. We urge you, again, to consider all of these alternatives to the highly objectionable system that DHS/OPM have proposed.

For example, we have indicated our willingness to speed up the discipline and adverse action process. While we have very strong concerns about a pay for performance system, we have offered to negotiate over pay and new pay system that would provide for the three separate components that DHS has discussed: 1) a nationwide component to keep all employees comparable with the private sector; 2) a locality component to keep all employees comparable with the private sector and living costs; and 3) a performance component with fixed percentages tied to performance levels. We have offered to speed up the

timeframes for bargaining, consider the new concept of post-implementation bargaining when necessary to protect homeland security, and the introduction of quick mediation-arbitration processes by mutually selected independent arbitrators to quickly resolve any bargaining disputes. We believe these changes alone would allow DHS to succeed in implementing new processes that would enhance the mission of the agency.

A. The Act protects the right of employees to organize, bargain collectively, and to participate through labor organizations of their own choosing in decisions that affect them. Despite this congressional mandate, you have proposed to:

1. Eliminate bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of core operational management rights.

2. Eliminate bargaining over otherwise negotiable matters that do not significantly affect a substantial portion of the bargaining unit.

3. Eliminate a union's right to participate in formal discussions between bargaining unit employees and managers.

4. Drastically restrict the situations during which an employee may request the presence of a union representative during an investigatory examination.

5. Eliminate mid-term impasse resolution procedures, which would allow agencies to unilaterally implement changes to conditions of employment.

6. Set and change conditions of employment and void collectively bargained provisions through the issuance of non-negotiable departmental regulations.

7. Assign authority for resolving many labor-management disputes to the Homeland Security Labor

> Relations Board, composed exclusively of members appointed by the Secretary.
>
> 8. Grant broad new authority to establish an entirely new pay system, and to determine each employee's base pay and locality pay, and each employee's annual increase in pay, without requiring any bargaining with exclusive representatives.

The apparent design of your plan is to minimize the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. When it enacted provisions to protect collective bargaining rights, Congress could not have intended those rights to be eviscerated in the manner that you propose.

The Act requires any new system to be "contemporary." The labor relations and performance management proposals are, however, remarkably regressive. By proposing to silence front-line employees and the unions that represent them, DHS/OPM appear to have decided that employees and their unions can make no contribution to the accomplishment of the essential mission of protecting the homeland. This backwards-thinking approach is at odds with contemporary concepts of labor relations. As the General Accounting Office recognized in recent congressional testimony:

> [L]eading organizations involve unions and incorporate their input into proposals before finalizing decisions. Engaging employee unions in major changes, such as redesigning work processes, changing work rules, or developing new job descriptions, can help achieve consensus on the planned changes, avoid

> misunderstandings, speed implementation, and more expeditiously resolve problems that occur. These organizations engaged employee unions by developing and maintaining an ongoing working relationship with the unions, documenting formal agreements, building trust over time, and participating jointly in making decisions.

Preliminary Observations on Proposed DHS Human Capital Regulations, Statement of David M. Walker, Comptroller General of the United States, Before Subcommittees of the Senate Committee on Governmental Affairs and the House Committee on Government Reform, GAO-04-479T (Feb. 25, 2004) at pp. 14-15. Instead of proposing a system that would, as suggested by the GAO, maximize opportunities for employees and their unions to contribute to the accomplishment of the mission, DHS/OPM have proposed to eliminate those opportunities.

The performance management system breaks no new ground either. Except for the elimination of employee procedural safeguards, the proposed system repeats many of the current system's themes. Agencies have been struggling to attain credible performance systems for decades. Nothing in this proposal suggests that DHS will be able to avoid the credibility problems that have plagued federal employers. These problems are even more pronounced in view of the proposal to link employee pay more closely to their performance ratings.

B. The Act also records Congress's determination that DHS employees be afforded due process and be treated fairly in

appeals they bring with respect to their employment. The Act further authorizes DHS/OPM to modify existing appellate procedures only to the extent that modifications are designed to "further the fair, efficient, and expeditious resolution" of such matters. Notwithstanding these clear congressional directions, you have proposed to:

1. Bar the Merit Systems Protection Board from reducing or otherwise modifying any penalty selected by DHS, which would deprive employees of a chance to challenge excessive or unreasonable penalties.

2. Eliminate the right of a union to submit serious adverse actions imposed against bargaining unit employees to an arbitrator.

3. Reduce an employer's burden of proof in adverse actions cases to a standard that would require DHS's decisions to be upheld even if they are more likely than not to have been improper.

4. Establish a list of mandatory removal offenses that can be appealed only to a panel appointed by the Secretary, with no identified opportunity for judicial review.

5. Impose a higher standard of review (the "arbitrary and capricious" standard) for an employee to prevail in a grievance challenging a performance rating, which is used as a determinant of an employee's pay under the new system.

When it mandated that employees be treated fairly and afforded the protections of due process, and authorized only limited changes to current appellate processes, Congress could not have envisioned the drastic reductions in employee rights that you propose.

These proposals appear to be based more on some political philosophy than on a demonstrated need for changes that would enhance the agency's ability to perform its mission. No evidence shows that current employee due process protections or the decisions of an arbitrator or the MSPB jeopardize homeland security. While there was support expressed in Town Hall meetings and focus groups for speeding up the adverse action and appeals process, there was no support for biasing the process in favor of management or otherwise reducing the likelihood of fair and accurate decisions. No research shows that the drastic changes proposed to Chapters 75 and 77 of Title 5 will further the agency mission. Yet, sweeping changes from the status quo are offered here. It appears that DHS/OPM have made these proposals simply because they believe they can.

Indeed, the proposal to establish a list of mandatory removal offenses is contrary to the direction taken by Congress and the Administration in H.R. 1528, a bill that would repeal statutory mandatory termination offenses currently applicable to Internal Revenue Service employees. H.R. 1528, drafted by the Administration, has passed the House with strong bipartisan support.[1] If implemented, DHS/OPM's proposal would have the same

[1] The President's FY 2005 Budget Proposal (p. 260 of the Analytical Perspective Section) explains the Administration's position. The bill " . . . modifies employee infractions subject to mandatory termination and permits a broader range of

negative effect as the IRS legislation targeted for repeal in H.R. 1528. This proposal must be dropped.

Ideally, a new human resource management system would promote *esprit-de-corps* so as to enhance the effectiveness of the workforce. These proposals fall far short of that ideal. Instead, they will result in a demoralized workforce composed of employees who feel as if they have been relegated to second-class citizenship. This system will encourage experienced employees to seek employment elsewhere and will deter qualified candidates from considering a career in DHS. It will put DHS at a competitive disadvantage.

C. You have also proposed to implement a radical change to pay and classification systems, and to increase the linkage between pay and performance. No reliable information exists to show that this system will enhance the efficiency of DHS operations and promote homeland security. Indeed, most of the key components of the system have yet to be determined. For example, the proposed regulations do not identify such critical matters as the grouping of jobs into occupational clusters, which positions will be in each pay band, the minimum and maximum pay rates of each band, or the pay point values which govern performance-based pay progression within each band.

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available penalties. It strengthens taxpayer privacy while reducing anxiety resulting from unduly harsh discipline or

One thing, however, is clear. The proposed system would be complex and costly to administer. A new bureaucracy would be created, and it would be dedicated to making the myriad, and yet-to-be identified, pay-related decisions that the new system would require. Our country would be better served if the resources associated with implementing and administering these ill-conceived proposals were dedicated more directly to protecting the homeland.

Until these and other important details of the new system have been determined and piloted, the proposed changes cannot be evaluated in any meaningful way. Employees and their unions are, however, being forced into the position of commenting on what is, at best, a "rough draft" or skeletal plan. If these proposed regulations are adopted, then the unions will have been forced to exercise their statutory collaboration rights on vague outlines, with no fair opportunity to consult on the "real" features of the new classification, pay and performance system. This would circumvent the congressional intent for union involvement in the development of any new systems, as expressed in the Act.

The pilot pay, performance, and classification system described in the explanatory information preceding the draft regulations provides no assurance that the proposed system

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unfounded allegations."

merits department-wide implementation. The brief period of time between the conclusion of the pilot and proposed department-wide implementation is insufficient to study the pilot results and decide whether the system ought to be expanded, modified, or terminated. Instead of taking a measured, objective approach to changing systems governing employee pay, DHS/OPM's announced decision to implement the new system department-wide shows that the pilot has been declared a success before it has even begun. DHS employees and the American taxpayers deserve better.

Accordingly, we recommend that the pay, performance, and classification proposal be withdrawn in its entirety and published for comment and recommendations only when: 1) DHS/OPM are willing to disclose the entire system to DHS employees, affected unions, Congress, and the American public; and 2) DHS/OPM devise a more reasonable approach to testing these radical new designs before they are implemented on any wide-spread basis. We simply cannot accept systems that establish so few rules and leave so much to the discretion of current and future officials. As the representatives of DHS employees, it is our responsibility to protect them from vague systems, built on discretionary authority that is subject to abuse.

Regardless of the ultimate configuration of the pay proposal, several key deficiencies are already clear. The proposed system lacks the transparency and objectivity of the

General Schedule. Critical decisions on pay rates for each band, annual adjustments to these bands and locality pay supplements and adjustments will no longer be made in public forums like the U.S. Congress or the Federal Salary Council, where employees and their representatives can witness the process and have the opportunity to influence its outcome. Rather, these decisions would now be made behind closed doors by a group of DHS managers (sometimes in coordination with OPM) and their consultants. Not only will employees be unable to participate in or influence the process, there is not even any guarantee that these decisions will be driven primarily by credible data, or that any data used in the decision-making process will be available for public review and accountability, as the data from the Bureau of Labor Statistics is today. A compensation board, like the Federal Salary Council, should be considered to address issues that may not, as we recommend, ultimately be subject to collective bargaining.

If the proposed system is implemented, employees will therefore have no basis to accurately predict their salaries from year to year. They will have no way of knowing how much of an annual increase they will receive, or whether they will receive any annual increase at all, despite having met or exceeded all performance expectations identified by the Department. The "pay-for-performance" element of the proposal

will pit employees against each other for performance-based increases.[2] Making DHS employees compete against each other for pay increases will undermine the spirit of cooperation and teamwork needed to keep our country safe from terrorists, smugglers, and others who wish to do America harm.

In fashioning the proposed pay and classification system, you have also disregarded the wishes of the overwhelming majority of dedicated DHS employees who urged you, in Town Hall meetings and focus groups held all over the country, to retain the core features of the General Schedule. Most of the problems associated with the current system could be fixed with better training, adequate funding, or better use of tools currently available to recognize and reward superior performance.

During the design process, options were also offered by the unions to provide further improvements, including the ability for DHS to strengthen the linkage between pay and performance. Instead of adopting those options, you have proposed to make sweeping, radical changes that will be highly disruptive to the workforce and to the accomplishment of the mission, apparently simply for the sake of change. You intend to seek $100 million to fund the implementation of this ill-conceived program. These

[2] This element of the proposal does not really qualify as a "pay for performance" system. Employees performing at an outstanding level could not, under the proposal, ever be certain that they

resources would be better spent on additional staffing and equipments to protect the homeland.

D. We are disappointed that, to date, you have chosen to reject options offered by union-appointed members of the Design Team in favor of needlessly radical reductions in employee rights. During a good part of last year, AFGE, NTEU and NAAE participated in developing options for the new personnel system on a Design Team along with staff from DHS and OPM. Over the six months that the group operated, it heard from experts in personnel system design from academic institutions, federal agencies, and private companies.

Members of the Design Team read from the extensive body of literature on human resource systems and contacted organizations in the public and private sector to learn more about their personnel systems. Last summer, members of the Design Team and top DHS, OPM and union officials traveled to eight cities around the country to hold town hall meetings and focus groups with DHS employees. The Team heard over and over again, from both management and non-management employees, that if the current system were properly funded and implemented, it could achieve everything the advocates of change say they want.

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would actually receive pay commensurate with their level of performance.

Employees in the town hall meetings and focus groups made it clear that they did not believe that there were terrible problems that could only be solved by radical change. If anything, DHS employees said they feared that problems and disruption would result from, not be resolved by, such change. Employees said it would harm morale and recruitment for workers to have no stability in their income. The vast majority of workers did not believe their appraisal systems or their managers could do a fair and accurate job of paying good employees different amounts based on their performance. They feared that such a system would create a cutthroat environment, pitting employee against employee to win the prize of a higher payout, and harm the Department's ability to carry out its mission.

In the focus groups, the overwhelming majority of comments from employees, including many managers, also urged the agency not to diminish the system of collective bargaining and union representation. In fact, several employees said that the problem with the current labor-management relations system was insufficient enforcement of the unions' and employees' rights when management did not comply with the law. Employees made it clear that they wanted to be protected from erroneous or arbitrary management actions against them. There was absolutely no

call from the employees the Design Team heard from, nor evidence in the research the Team did, to justify making the radical changes found in these proposals.

That is why we are so deeply disappointed with the outcome of the process to date. This disappointment goes beyond our fundamental disagreement with many of the concepts that made their way into the proposed regulations. We also are disappointed that the proposed regulations simply do not reflect the research that was done by the Design Team, the views and preferences of the overwhelming majority of Town Hall and focus group participants, or the bulk of academic research in this field.

The Design Team was not permitted to develop criteria to determine jointly the characteristics of a "successful" system. There was no process, rigorous or otherwise, to check the facts or conduct any independent studies. Instead, various members of the Design Team captured information from literature, interviews, presentations, etc., on templates designed by the team, in most cases without any attempt to analyze the information or even answer all of the questions posed by the template. The Design Team's research does not reflect what most "successful" companies or public agencies do because it did

not research most companies or public agencies. The Design Team picked and chose what was interesting to it.

The unions represented on the Design Team wanted to spend time actually analyzing the research before options were developed, but adequate time was not provided to do this. In fact, there was not even any requirement that the options reflect the research that was done. For example, we challenge DHS, OPM, DHS employees, or members of the public to find anything in the Design Team research that supports the notion that pay-for-performance would be a good thing to implement in DHS -- it is not there. Instead, there are numerous reasons that pay-for-performance is the wrong choice for law enforcement and other employees in the Department.

Accordingly, the collaborative process really ended with the fact-finding. Members of the Design Team continued to work together in a cordial manner. Team members, however, developed options independently without regard to whether the research, including the Town Hall meetings, focus groups, and site visits, showed that particular systems were better than others or more suited to the DHS workforce than others -- there was no such analysis of the research.

The Design Team was not permitted to decide which options were desirable or even viable. Instead, we were told that any option any member of the Design Team wanted to go forward would go forward. Similarly, while the Senior Review Committee (SRC), which included the three National Union Presidents, was permitted to debate the options, it was not permitted to pare them down to those that made the most sense. DHS/OPM made the decision that all 52 options would go forward to the Secretary and Director no matter what happened in the October 2003 SRC meeting. The Design Team and the SRC worked hard. But, it is unfair to characterize their work as supportive of these proposed regulations.

There was no collaboration or consultation with the unions while these proposals were being developed. They were both a surprise and a disappointment when they finally came out in February 2004. The great majority of the Design Team, management and union representatives alike, felt that DHS employees should not be worse off than they would have been had the department not been created. Instead, in almost every section of these proposed regulations, employees lose -- they lose pay stability; employment stability; protections from erroneous, discriminatory, or arbitrary management actions; and a

meaningful voice in their work place through collective bargaining.

During the statutorily prescribed consultation process, we will attempt, again, to work with you to devise a human resource system that meets legitimate management needs without sacrificing important employee rights. Such a system should, at a minimum, include the following elements:

1. It should provide for collective bargaining over the design of the pay, performance, and classification systems. Such bargaining is common in the public and private sectors, including federal components not covered by the General Schedule pay and classification system. Bargaining would in no way negatively impact the agency's ability to accomplish its mission. Instead, it would enhance the effectiveness of the system by providing greater fairness, credibility, accountability and transparency.

2. It should ensure that employees are not disadvantaged by the implementation of any new pay system. That is, employees must, at a minimum, be entitled to the same pay increases and advancement potential under a new system that is available under the General Schedule.

3. It should retain the provisions of 5 U.S.C. Chapter 43 and 5 C.F.R. Part 430, governing performance management.

4. It should provide, as does the current system, for a choice between the Merit Systems Protection Board and the negotiated grievance/arbitration procedure for serious adverse actions.

5. It should provide for impartial review of labor relations disputes by an independent entity like the Federal Labor Relations Authority.

6. It should protect, as the Act requires, the right of employees to organize and bargain collectively over workplace decisions that affect them. For example, employees should have the right to bargain over procedures and appropriate arrangements related to the exercise of management's right to assign work, deploy personnel, and use technology.

To require such bargaining would not prevent management from exercising its rights. Instead, it would allow agreements to be reached over such things as fair and objective methods of assigning employees to shifts and work locations. It would allow agreements to be reached over fair and objective methods of reassigning employees on short notice to new posts of duty that may be thousands of miles from home and family. It would allow agreements to be reached over training and safety issues related to the use of new technology by employees whose jobs put their lives at risk on a daily basis.

7. It should encourage, not suppress, the pre-implementation participation of employees and their unions in mission-related decisions. Front-line employees and their unions want to help DHS accomplish its mission, and they have the expertise to do it. They should not be shut out of mission-related decisions.

8. It should, as the Act requires, protect the due process rights of employees and provide them with fair treatment. Employees must have the right to a full and fair hearing of adverse actions appeals before an impartial and independent decision-maker like an arbitrator or the MSPB. DHS should be required to prove, by the preponderance of the evidence, that adverse actions imposed against employees promote the efficiency of the service. An impartial and independent decision maker must have the authority to mitigate excessive penalties.

We hope the statutory collaboration process will be a success. We are determined, however, to protect the rights of DHS employees and will use all appropriate means to challenge the implementation of any system that does not comport with law, needlessly reduces employee rights, or amounts to a waste of our nation's resources.

Particularly troubling in this regard are DHS/OPM's proposals to establish a Homeland Security Labor Relations Board and a mandatory removal offense panel with no identified avenues

for judicial review. We recommend that no system containing these new entities be implemented until this essential component has been identified, the entire system is published as a proposal, and the resulting comments and recommendations are fully considered before system finalization.

In addition to the general comments and recommendations offered above, comments and recommendations concerning specific sections of your proposal follow.

Subpart A - General Provisions

9701.103 Definitions

Coordination: The scope of the role of the Office of Personnel Management to participate in many important decisions regarding the design of the new human resources system is unduly circumscribed and appears to run contrary to the requirements of the Homeland Security Act. As noted above, the proposed regulations provide only a skeletal framework for the new pay, performance and classification systems, and provide that most of the important details of these systems will be subsequently developed by DHS in "coordination" with OPM. However, under this section's definition of "coordination," OPM is not a full partner in this decision-making process. Under this proposed regulation, DHS provides notice of a proposed action, and OPM may only delay the proposed action if it indicates that the

matter has "Governmentwide implications or consequences." This standard unnecessarily, and inappropriately, limits OPM's role in a manner not contemplated by the Homeland Security Act, which requires joint decision-making by DHS and OPM, through the issuance of these regulations. However, since these proposed regulations do not provide any meaningful details on how these systems will actually be designed, implemented and applied, the definition of "coordination" has given OPM a reduced, subservient role in the process through which these critical decisions will ultimately be made. We therefore recommend deletion of the requirement that OPM indicate that the proposed action has Governmentwide implications or consequences, and we recommend that it be replaced by language reflecting the Act's requirement that the regulations be developed jointly by DHS and OPM and through Section 9701(e)'s collaboration process.

Subpart B - Job Evaluation

9701.205 Relationship to other provisions:

We are recommending that the definition of "conditions of employment" in 9701.504 be modified, so that matters pertaining to pay, classification and job evaluations would not be excluded. We therefore recommend that 9701.205(b) be eliminated. In order for the new job evaluation program to have any credibility with employees, and to maximize transparency and

accountability, it is crucial that employee representatives be directly involved in designing this new system. Collective bargaining of job evaluation systems is common throughout the private sector.

9701.211 Occupational clusters

We recommend that this section be modified to indicate that the establishment of occupational clusters for bargaining unit positions is subject to collective bargaining. The grouping of positions into occupational clusters is a key first step in establishing the new pay system, and employees must have full confidence that positions have been grouped properly. The list of factors included in this section will provide the appropriate framework to ensure that proper grouping of positions occurs through the collective bargaining process.

9701.212 Bands

Within a particular occupational cluster, there is some question as to the need for, or appropriateness of the four bands identified: Entry/Developmental, Full Performance, Senior Expert and Supervisory. The Full Performance, Senior Expert and Supervisory band levels would all appear to correspond to positions with distinct grade levels within the existing GS classification system, so it does not appear that the

establishment of a band system will generally have any real impact on these positions (i.e., the new "bands" will just correspond to the old "grades"). It appears that the primary impact will be to combine multiple, distinct grade levels currently included in an employee's "career ladder" into a single, Entry/Developmental band.

However, no compelling need or evidence has been presented to make the case for this change. If the primary (or sole) goal is to allow DHS to bring new employees in at a higher grade than under the current rules, then there are less radical changes that could be implemented to achieve this goal; one of these, giving DHS greater authority over the application of the current grade/classification system, was offered as an option by the unions during the design process.

At a minimum, we recommend that this section be modified to indicate that the establishment of bands within each occupational cluster that includes bargaining unit positions is subject to collective bargaining. The establishment of these bands, and the distinctions between them, are key elements of the new pay system, and the involvement of employee representatives through collective bargaining is essential to provide credibility, transparency and accountability for these determinations. There is an enormous potential for claims by employees alleging violation of the equal pay requirements of 5

U.S.C. section 2301(b)(3), if employees do not believe that those in similar jobs are treated fairly with respect to the establishment of occupational clusters and pay bands.

9701.221 Job evaluation requirements

We recommend that subsection (b)(2) be modified to indicate that the assignment of bargaining unit positions to appropriate occupational clusters and bands, using the criteria of 9701.211 and 9701.212, would be accomplished as part of the collective bargaining process. This will ensure credibility, transparency and accountability for these determinations, which will be lacking if these decisions are made unilaterally by management representatives.

9701.222 Reconsidering job evaluation decisions

Although this proposed regulation provides that an employee may request reconsideration of the assignment of his or her position to an occupational series or pay system, there is no independent review of this determination, and no review of any type for other job evaluation determinations, such as an employee's placement in a band or cluster. The absence of an independent review and appeal procedure will undermine the credibility and accountability of such determinations to affected employees. We therefore recommend that this section

be modified to provide that bargaining unit employees may challenge any job evaluation determination through the negotiated grievance procedure. This is consistent with our recommendation that the definition of "conditions of employment" be expanded, which would also make these matters grievable.

9701.231 Conversion

We recommend that this section be modified to provide that the policies and procedures for converting bargaining unit positions to a band upon initial implementation of the new DHS job evaluation system are subject to collective bargaining. This will ensure credibility, transparency and accountability for these policies and procedures.

Subpart C - Pay and Pay Administration

9701.305 Bar on collective bargaining

As noted earlier, we are recommending that the definition of "conditions of employment" in 9701.504 be modified, so that matters pertaining to pay, classification and job evaluations would not be excluded. We therefore recommend that section 9701.305 be eliminated so that any program established under authority of this subpart will be subject to collective bargaining, including coverage decisions, the design of the pay structures, the setting and adjustment of pay levels, pay

administration rules and policies, and administrative procedures and arrangements.

Collective bargaining over the design, implementation and application of an Employer's pay system is common throughout the public and private sector. Although DHS employees have not previously been able to bargain over basic pay, this was due solely to the exclusion from collective bargaining of matters governed by federal statute, since their pay was established by the laws governing pay for all General Schedule employees. Within the federal sector, there are a number of agencies whose employees are not covered by the GS pay system that, as a result, engage in collective bargaining over pay with federal unions, without any evidence that these agencies are in any way impeded in accomplishing their missions.

However, even in the absence of collective bargaining, DHS employees and their representatives have had the opportunity to influence the pay determinations made by their congressional representatives through the political process. The proposed regulations have removed DHS employees from the General Schedule, and from the pay-setting authority of the Congress, but have failed to provide <u>any</u> opportunity for employees to be involved in or to influence these decisions, which vitally affect their careers and very livelihoods.

While the Department of Homeland Security's mission is of critical importance to the security of our nation, collective bargaining over the DHS pay system will not impede this mission. Even when this nation was mobilized to fight world wars, collective bargaining was never suspended nor constrained - processes such as binding arbitration were put in place simply to speed dispute resolution and avoid work stoppages. These protections remain available today.

In fact, the mission and needs of every Employer is always a critical factor that must be taken into account in the collective bargaining process. To the extent that DHS believes that there are mission-critical factors unique to DHS that need to be taken into account, these factors can be explicitly identified under these regulations (as they have been in many of the sections of these proposed regulations). Furthermore, under the existing statutory and case law applying management's rights, any bargaining and subsequent agreements would necessarily be subject to the availability of funds to implement the terms of these agreements, which serves as a natural and appropriate constraint on the bargaining process. But collective bargaining is the only mechanism to ensure that there is credibility, transparency and accountability for these pay determinations.

9701.311 Major features

We recommend that this section be modified to indicate that the establishment of the DHS pay system is subject to collective bargaining.

9701.313 DHS Responsibilities

We recommend that this section be modified to add new subsections, providing that DHS responsibilities in implementing this subpart include: (1) the duty to bargain in good faith with employee representatives, and to provide employee representatives with all information and data relevant to implementing this subpart; (2) the requirement that any new pay system is faithful to the merit system principles, including the principle that equal pay should be provided for work of equal value; and (3) to ensure compliance with laws, rules and regulations protecting employees against discrimination, by conducting adverse impact studies prior to the implementation of any changes under this subpart.

9701.321 Structure of Bands

We recommend that this section be modified to indicate that the establishment of rate ranges and control points are subject to collective bargaining. This is essential to provide

fairness, credibility and transparency to the design of these important features.

Under section 9701.372, below, we are recommending that the initial rate ranges must provide rates of basic pay that equal or exceed the rates which employees receive under the General Schedule.

We are particularly concerned about the potential abuse of control points within the new pay system. Although one of the options proposed by the unions during the design process included control points, these control points were set within each salary range at a point roughly equivalent to the current Step 10 of each GS grade level. Under this option, the pay ranges were expanded to provide the opportunity for additional, higher pay for employees, but only those employees with "outstanding" performance or certified expertise would have been eligible to move past the control point and into this expanded area of the pay range. However, nothing in the proposed regulations provides any guidance or constraints on the use of control points under the new pay system, and we are therefore extremely concerned that DHS could implement control points that prevent employees who are meeting or even exceeding performance expectations from achieving, at some point in time, the same level of pay that they can under the current system. Such a result would have an extremely negative effect on employee

morale and would seriously undermine the credibility of the pay system. Collective bargaining on the establishment of any such control points would provide credibility, transparency and accountability to these determinations.

9701.322 Setting and adjusting pay ranges

We recommend that this section be modified to indicate that setting and adjusting rate ranges is subject to collective bargaining. As noted above, collective bargaining is necessary to ensure credibility, transparency and accountability for these important decisions affecting the pay of every DHS employee.

We recommend that subsection (a) be modified to provide that the amount of the rate range adjustment (or the average of the increase to the minimum and maximum rate of a rate range, if these are different) will be at least equal to either the increase to the national Employment Cost Index (ECI) or to the appropriate ECI for a particular occupational cluster.

We also recommend that subsection (b) be modified to provide that rate ranges will be adjusted annually, and will normally be effective no later than the first pay period each January.

9701.323 Eligibility for pay increase associated with a rate range adjustment

We recommend that subsection (a) be modified to provide that an employee who meets or exceeds expectations (i.e., has a rating of record above the unacceptable performance level) must receive an increase in pay equal to either the percentage value of any increase in the minimum rate in the employee's band resulting from a rate range adjustment under 9701.322, or the percentage value equal to the average of the increase in the minimum rate and the increase in the maximum rate of the employee's band, whichever is greater.

We also recommend that subsection (d) be modified to indicate that the adoption of policies under which an employee may receive a delayed increase is subject to collective bargaining. Among other things, we believe such a delayed increase must be retroactive in the case of an error on the part of management in assigning the unacceptable rating or where the rating is overturned on appeal.

9701.332 Locality pay supplements

We recommend that this section be modified to indicate that establishing locality pay supplements and setting locality pay boundaries are subject to collective bargaining.

Locality pay rates for DHS employees currently under the GS system are determined under a process established by the Federal Employees Pay Comparability Act (FEPCA). Locality pay rates are calculated using published data on public and private sector salaries collected by the Bureau of Labor Statistics. These rates, as well as the boundaries for locality pay areas, are reviewed and approved by the President's Pay Agent based on recommendations from the Federal Salary Council, an advisory group that includes full participation by federal employee unions. The process by which these rates are currently determined is therefore transparent and credible.

The most significant criticisms of the FEPCA locality pay process have been (1) the requirement under FEPCA to identify a single locality pay rate for each area, which necessitates an averaging of pay gaps for various diverse occupations; and (2) the failure to fund the program to eliminate the identified pay gaps. Although the failure to fully fund the program may be related to the criticism of the pay gaps being based on these homogenized averages, there are solutions to these concerns that are far less drastic than your proposal to scrap the current system in its entirety and start from scratch. In fact, several of the options offered by the unions during the design process would have retained most elements of the current locality pay program, but would have allowed DHS to identify separate

locality pay rates for each position or occupation within a locality pay area, simply by using the same data collected and compiled by BLS before this data is averaged. This would allow DHS to address the problem and identify pay gaps specific for each occupational cluster.

However, by disassociating DHS from the FEPCA process and the BLS data on which it is based, these proposed regulations would eliminate the credibility and transparency inherent in the current system. Under the proposed DHS regulations, there is no requirement that locality pay rates be established based on a comprehensive sample of published data collected and compiled by an agency of the federal government. To the extent that DHS will endeavor to obtain and analyze such data, it will be duplicating work already performed by the Bureau of Labor Statistics, an apparent waste of valuable time and resources. DHS would also be able to deviate from the locality pay boundaries established by the President's Pay Agent based on recommendations of the Federal Salary Council.

We believe that 1) collecting data to determine federal compensation matters is inherently governmental because the findings would obligate the government to expend its funds, and 2) that DHS should fund BLS to gather data for the department as it would fund a contractor, rather than complaining that the understaffed and under-funded BLS has poor data.

Moreover, the unions are given no role in any of these decisions. Such a system will not be transparent and will have no credibility with DHS employees. It will only raise their anxieties about what they will be paid, and whether it is fair, and is likely to detract from their ability to focus on the agency's crucial mission.

9701.333 Special pay supplements

We recommend that this section be modified to indicate that establishing special pay supplements, and the rules necessary to implement such supplements, are subject to collective bargaining. Collective bargaining will ensure that the special pay supplements are fair, transparent and credible. At a minimum, DHS should establish the same rules that are currently used by OPM in implementing the special rates program.

9701.334 Setting and adjusting locality and special pay supplements

We recommend that this section be modified to indicate that setting and adjusting locality and special pay supplements, and determining the effective date of such changes, are subject to collective bargaining. As noted above, union involvement through collective bargaining is necessary to ensure that these programs are fair, transparent and credible.

9701.335 Eligibility for a pay increase associated with a supplemental adjustment

We recommend that subsection (b) be modified to indicate that there will be collective bargaining over the method used by DHS to withhold a pay increase from an employee who has an unacceptable rating of record.

We also recommend that subsection (d) be modified to indicate that the adoption of policies under which an employee may receive a delayed increase is subject to collective bargaining.

9701.342 Performance pay increases

We recommend that subsection (b) be modified to provide that no monies will be allocated or budgeted for performance pay pools in any year unless full funding has been allocated and budgeted for rate range adjustments and associated pay increases under sections 9701.322 and 9701.323, and for adjustments to locality pay supplements and special pay supplements and pay increases associated with these adjustments under sections 9701.334 and 9701.335.

We feel very strongly that money for performance-based pay increases should not be diverted from, or at the expense of, the full funding for pay increases associated with changes to the

base pay rates, to locality pay or to special pay supplements. The pay increases associated with the changes to the base pay structure, locality pay rates and special pay supplements are all based, in various ways, on changes to pay rates in the relevant job markets. Such changes will also be reflective, to a large extent, of changes to the cost-of-living. It is imperative that the DHS fully fund such increases so that both employees and the Department keep pace with changes in the labor market, and that employees and the agency do not fall further behind. If these elements of the pay system are not fully funded, and money is diverted to performance-based pay, there is a serious risk that a significant number of employees, who are successful in their jobs and are meeting all required performance expectations, will fall further behind the rest of the labor market and be unable to keep pace with increases to the cost of living. Such a result would be extremely damaging to employee morale, as well as to recruitment and retention efforts. If the Department cannot afford pay-for-performance in any given year, it should not be allowed to do it.

The idea of unknown payments through pay pools is incompatible with true pay for performance. Therefore, every rating of successful or better should have a fixed percentage assigned it. The percentage could be different for each level and should be determined through collective bargaining.

9701.344 Special within-band increases for certain employees in the Senior Expert band

We recommend that this section be modified to provide that the criteria for establishing eligibility for these special within-band increases for bargaining unit employees in the Senior Expert band, based on exceptional skills or exceptional contributions, are subject to collective bargaining. We fear that this could be come a license to siphon money from good employees to pay management favorites large increases. Further definition is required as to what constitutes "exceptional skills" or "exceptional contributions" for any particular occupation, and the involvement of the unions in the development of these definitions and criteria is necessary to ensure fairness, transparency and credibility.

9701.345 Developmental pay adjustments

We recommend that this section be modified to indicate that the policies and procedures for adjusting the pay of bargaining unit employees in the Entry/Developmental band be subject to collective bargaining.

We also recommend that this section be modified to require that, in establishing specific increments of pay progression, those increments be linked to clearly identified levels of knowledge, competencies, skills, attributes or behaviors.

The proposed Entry/Developmental band essentially replaces the current career ladder system, under which employees receive one or more successive promotions from one grade to another, usually on an annual basis, until the employee reaches the "journey" or "full performance" grade level for his/her position. Employees currently receive significant pay increases associated with these grade-level promotions. It is imperative that comparable pay increases be available under the pay progression rules for the new Entry/Developmental band, that these increases be available on at least an annual basis, and that the criteria for receiving these increases be perceived by employees as fair and credible. Collective bargaining will ensure that these system features are designed in a manner that results in fairness, transparency and credibility. It will also keep favoritism from resulting in certain employees getting the training and assignments needed to demonstrate competency while the movement of other employees in a band is delayed.

9701.351 Setting an employee's starting pay

We recommend that this section be modified to indicate that establishing policies governing the starting rate for bargaining unit employees is subject to collective bargaining. To ensure fairness and credibility, employees need to be assured that new

employees are not brought into the Department at higher pay than current employees with similar skills.

9701.353 Setting pay upon promotion

We recommend that subsection (b) be modified to indicate that the rules for providing for an increase other than in the amounts specified in 9701.353(a) are subject to collective bargaining.

We recommend that subsection (d) be modified to provide that the circumstances under which, and the extent to which, any locality pay or special pay supplements are treated as basic pay in applying the promotion increase rules in this section are subject to collective bargaining.

9701.354 Setting pay upon demotion

We recommend that this section be modified to provide that the rules governing how to set an employee's pay when he or she is demoted are subject to collective bargaining.

9701.355 Setting pay upon movement to a different organizational cluster

We recommend that this section be modified to provide that the rules governing how to set an employee's pay when he or she

moves to a position in a different organizational cluster are subject to collective bargaining.

9701.356 Pay retention

We recommend that this section be modified to provide that the policies governing the application of pay retention are subject to collective bargaining.

9701.357 Miscellaneous

While we do not object to the concept that an employee with an unacceptable rating may be denied an annual adjustment, we cannot accept this section as proposed. This must be part of a fair, impartial, collectively bargained system.

We recommend that subsection (d) be modified to indicate the rules governing the movement of employees to or from a band rate range that is augmented by a special pay adjustment are subject to collective bargaining.

9701.361 Special skill payments

We recommend that this section be modified to indicate that the amount of payments and conditions for eligibility for these special skill payments are subject to collective bargaining. This is necessary to ensure fairness, transparency, credibility and accountability for any such payments.

9701.362 Special assignment payments

We recommend that this section be modified to indicate that the amount of payments and conditions for eligibility for these special assignment payments are subject to collective bargaining. This is necessary to ensure fairness, transparency, credibility and accountability for any such payments.

9701.363 Special staffing payments

We recommend that this section be modified to indicate that the amount of payments and conditions for eligibility for these special staffing payments are subject to collective bargaining. This is necessary to ensure fairness, transparency, credibility and accountability for any such payments.

9701.372 Creating initial pay ranges

We recommend that subsection (a) be modified to indicate that establishing initial band rate ranges is subject to collective bargaining.

We also recommend that subsection (a) be further modified to require that "for all employees previously covered by the GS system, the initial ranges must provide rates of basic pay that equal or exceed the rates of basic pay these employees received under the GS system (taking into account any applicable special rates and locality payments or supplements)." This principle

has been incorporated in subsection (b), applicable to law enforcement officers, and there is no reason why this should not apply to all employees.

9701.373 Conversion of employees to the DHS pay system

As a matter of simple fairness and good faith, we strongly believe that current employees should not be disadvantaged by the implementation of any new DHS pay system. Therefore, current employees should be provided the same level of pay increases and earnings potential available under the GS system. Failure to provide this protection at the time of their conversion will lead many employees to feel betrayed by the system and by those who run it, and will undermine building the type of loyalty and *esprit de corps* that will promote accomplishment of the mission.

With this in mind, we recommend that subsection (e) be amended to read as follows: "DHS will provide a one-time pay adjustment at the time of their conversion to the DHS pay system for GS and prevailing rate employees whose rating of record is acceptable (or its equivalent) or higher when they are converted to the DHS pay system, to compensate for time already accrued toward a scheduled within-grade increase. Subject to collective bargaining requirements, DHS may prescribe rules governing any such pay adjustments, including rules governing employee

eligibility, pay computations and the timing of any such pay adjustment." Failure to provide such pay adjustments would be extremely unfair, as an employee might otherwise have virtually completed the requirements for earning his or her next within-grade increase, but would get no credit for this service.

We also recommend that subsection (f) be amended to read as follows: "DHS must convert GS employees in noncompetitive career ladder paths to the pay progression plan established for the Entry/Developmental band to which the employee is assigned under the DHS pay system. DHS will provide, at the time of their conversion to the DHS pay system, a one-time pay adjustment for GS and prevailing rate employees whose rating of record is acceptable (or its equivalent) or higher when they are converted, to compensate for time already accrued toward a career ladder promotion. Subject to collective bargaining requirements, DHS may prescribe rules governing any such pay adjustments, including rules governing employee eligibility, pay computations and the timing of any such pay adjustment." As with employees who may have almost completed the requirements for earning their next within-grade increase, employees who are between career ladder promotions will permanently lose pay if an adjustment is not provided. DHS and OPM have indicated, in the introductory section preceding the draft regulation, that

employees must be converted in this way. They should not, therefore, hesitate to insert that commitment into regulations.

9701.374 Special transition rules for Federal Air Marshals: Any changes in the pay system for Federal Air Marshal employees must be made within the procedures established in the Act. Mere coordination with OPM is not sufficient. When DHS develops regulations and policies for these matters, we expect them to be negotiated for bargaining unit members. Accordingly, this section should be deleted.

Subpart D - Performance Management

9701.403 Waiver

We oppose the waiver of 5 U.S.C. chapter 43 and 5 CFR part 430, which provide important criteria, standards and procedures governing the performance management system. No compelling evidence has been presented as to the need to eliminate these provisions, which protect employees from arbitrary and unfair treatment in the evaluation of their performance. Relaxing the standards imposed on management for conducting employee evaluations, in the name of greater flexibility for supervisors to set or modify performance standards for employees, will not promote the effort to enhance homeland security. Rather, it will only lead to greater uncertainty about what is expected of

employees, which will result in misunderstandings, disruptions, and inefficiencies in performance.

9701.406 Setting and communicating performance expectations

We recommend that subsection (a) be modified by adding: "Performance expectations will be provided to employees in writing and discussed with employees at the beginning of the rating period. When expectations are added or clarified, these must also be provided in writing; when expectations must be given during the rating period or modified orally, they shall be confirmed in writing within a reasonable time thereafter."

The proposed regulations are seriously flawed, in that they do not require that performance expectations be provided to employees in writing. While it may be true that performance expectations can take many forms, some of which may already be set forth in existing standard operating procedures, regulations or manuals, there should never be a need to rely on performance expectations that are not provided in writing. To the extent that performance expectations are only conveyed orally, and not provided in writing, this loose process will likely lead to a great number of misunderstandings and disputes between supervisors and employees as to how the expectation was expressed or understood, or whether it was even expressed as a performance expectation. If only as a means of self-protection,

employees are likely to want to memorialize these conversations in a written document, and seek the supervisors' confirmation of the accuracy of this account, so there is not likely to be a reduction in paperwork or an increase in efficiency through adoption of these more "flexible" performance standards. Fairness requires that all performance expectations be clearly communicated to employees in advance, and some form of written document or instruction is clearly the most efficient and effective way to clearly convey these expectations. To the greatest extent possible, we should try to keep performance management (and pay determinations based on performance) from being a game of "he said/she said." Subsection (a), unless modified, will only foster such disputes.

We recommend that subsection (b) be modified to add the following: "Performance expectations must, to the maximum extent feasible, permit the accurate evaluation of job performance based on objective criteria." This recommendation incorporates a current requirement for performance standards under 5 U.S.C. 4302(b)(1).

We recommend that subsection (d) be modified to read as follows: "Employees should seek clarification and/or additional information when they do not understand their performance expectations." This recommended change in language will help clarify that the primary responsibility for clearly

communicating performance expectations lies with supervisors. Employees will likely see the need to write up their understanding of their supervisors' expectations and request written responses of confirmation or clarification. Supervisors should be trained to expect such inquiries and to understand the need to respond to them. We expect to negotiate over procedures that communicate performance expectations for bargaining unit employees.

We recommend that subsection (e) be modified to read as follows: "Supervisors must involve employees, and their exclusive representatives, insofar as practicable, in the development of their performance expectations. In this regard, supervisors shall solicit input and feedback from employees as to the appropriate performance expectations for each position, and shall fully consider such input and discuss it with the affected employee(s). However, final decisions regarding performance expectations are within the discretion of the agency, subject to the requirement that performance expectations for employees in the same occupational cluster and pay band will be equivalent or comparable. Employees will not be held responsible for performance expectations until they have been clearly and expressly communicated."

These recommended changes will help provide an appropriate level of employee involvement in developing performance

expectations. The change in the last quoted sentence recognizes the agency's authority to assign work and identify associated performance expectations, while at the same time ensuring fairness and eliminating possible favoritism in the developing of performance expectations. This is especially important when evaluation of employee performance against these expectations will be used as a determining factor in providing pay increases. To ensure fairness and credibility, the bar needs to be set at the same level for all employees in the same occupational cluster and pay band, so that all employees have an equal chance at earning performance-based pay increases.

We recommend that supervisors be required to meet with the employees they supervise at the beginning of the appraisal period and at scheduled times thereafter during the appraisal period. At these meetings, performance expectations can be communicated. We also recommend that, should priorities or expectations change during the appraisal year, those changed circumstances be communicated to employees pursuant to collectively bargained procedures.

9701.407 Monitoring performance

We recommend that subsection (b) be modified to read as follows: "Provide regular, ongoing feedback to employees on their actual performance as compared to their performance

expectations, including one or more formal interim performance reviews during each appraisal period." "Periodic" feedback, as proposed in the regulations, is not sufficient, as it is too amorphous and allows large gaps of time and numerous instances of performance between periodic updates. Regular and ongoing feedback on performance is not only the most effective way to properly manage employee performance, but it is the only fair and credible way to do so when the results are being used as a central component of the Department's pay system. Procedures for monitoring performance should be negotiated.

9701.408 Developing performance

We recommend that subsection (a) be modified by deleting "subject to budgetary and organizational constraints . . . ." Providing employees with the proper tools and technology to do the job, and facilitating employee development to enhance their ability to perform are not optional; these are imperative if DHS is to be successful in performing its mission, and therefore should not be subject to budgetary and operational constraints. Also, procedures for providing these resources should be negotiated.

We recommend that subsection (b)(1) be modified by adding the following: "However, an employee will be provided a reasonable opportunity to improve performance before an adverse

action is initiated, except in the most extreme case of a performance deficiency which endangers national security or otherwise seriously compromises accomplishment of the agency's mission."

9701.411 Performance Review Boards

We object to the establishment of Performance Review Boards. They appear to be an inefficient and overly bureaucratic mechanism to review the performance ratings assigned by supervisors, a function currently performed by second-level supervisors, who are much more likely to have direct knowledge of a particular employee's performance. They are not needed to monitor the rating system. That should be done by means of procedures negotiated with exclusive bargaining representatives.

The PRB would be another cumbersome layer in the performance process. Also, if members of a PRB come from outside the occupation or organizational unit, they are likely to know little about employees' performance. If they come from within the occupation or organizational unit, they will be unlikely to question or contradict managers they know. It would also be unfair for the PRB to change an outstanding rating of an employee simply because it determines that the employee's

supervisor gave to many high appraisals or the unit did not perform as well as other units.

If these PRBs are to be retained under the final regulations, we recommend that subsection (a)(3) be modified to read as follows: "Remand ratings of record for additional review." Performance Review Boards should not have the authority to change individual ratings, as there is no requirement that PRB members have direct knowledge or observation of each employee's performance. Rather, their role should be limited to identifying systemic issues, such as where the ratings distribution for a particular group is widely divergent from the norm for that occupation, and/or where the distribution pattern is widely divergent from the operational results produced by that group.

We recommend that subsection (c) be modified by adding: "The procedures for establishing PRBs and for selecting PRB members are subject to collective bargaining." Collective bargaining over these matters will substantially enhance the transparency and credibility of the PRB review process.

9701.412 DHS Responsibilities

We recommend that subsection (c) be modified to read as follows: "In coordination with the exclusive representatives of bargaining unit employees, to evaluate its performance

management system(s) for effectiveness and compliance with this subpart, internal DHS regulations and policies, applicable collective bargaining agreements and the provisions of 5 U.S.C. chapter 23 that set forth the merit system principles and prohibited personnel practices." The evaluation of the effectiveness of the performance management system should be an ongoing, joint undertaking of DHS management and the unions serving as exclusive representatives of DHS employees. This will provide greater transparency, accountability and credibility to the evaluation process. We also recommend that DHS commit to fund ongoing training of supervisors, managers, and employees who are affected by the new system. The training should not be limited to first year start-up training.

Subpart E-Labor-Management Relations

9701.501 Purpose: We recommend that DHS/OPM incorporate the congressional findings of 5 U.S.C. 7101(a), which Congress has never disavowed, into these regulations. Recognizing, in this manner, that labor organizations and collective bargaining are in the public interest is consistent with the Act's requirement that the right of DHS employees to organize and bargain collectively be protected. We also recommend that the second sentence of this section be modified, as we recommend in the

following section, to recognize that mission accomplishment and the protection of employee statutory rights are both important.

9701.502 Rule of Construction: We recommend that the statutory rights of employees be acknowledged in any rule governing the construction of the regulations. As drafted, the "rule of construction" recognizes only the "swift, effective day-to-day accomplishment" of mission.

The Act, however, requires that the new system ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions that affect them. The Act also requires that employees be treated fairly and be accorded the protections of due process. Congress saw fit to codify these rights in statute, so DHS/OPM should not object to recognizing their importance in a rule governing the construction of regulations.

This section also accords "great deference" to interpretations of the regulations by the Secretary or designee and the Director. The term "great deference" is undefined in the proposal. No greater deference should be accorded to these interpretations than would be permitted under established principles of administrative law. Accordingly, we recommend that the regulation provide that no deference be accorded an interpretation that --

1. is inconsistent with the Constitution, the Homeland Security Act, or other applicable statute;

2. frustrates the congressional policy underlying the Homeland Security Act or other applicable statute;

3. pertains to an unambiguous regulation;

4. is plainly erroneous, or inconsistent with these regulations;

5. amounts to a departure from a previous interpretation; or

6. is unsupported by a reasonable explanation.

9701.504 Definitions:

1. We recommend that the definition of "conditions of employment" be modified by deleting subparagraph 2, pertaining to classification and job evaluation determinations, and subparagraph 3, pertaining to pay matters, from the list of topics excluded from the definition.

The Act gives DHS the discretion to depart from the requirements of Chapter 51 (Classification) and Chapter 53 (Pay Rates and Systems). We recommend that this discretion be exercised through collective bargaining. By deleting subsections 2 and 3 from the list of matters excluded from the definition of "conditions of employment," collective bargaining over these topics would be required.

As recognized in the proposed definition of "collective bargaining," the obligation to bargain collectively "does not compel either party to agree to a proposal or to make a concession."[3] Collective bargaining would simply require the merits of classification, job evaluation, or pay proposals submitted by the agency or the exclusive representative to be demonstrated in the bargaining process. In so doing, a fairer and more effective pay and classification system would undoubtedly result. Employees would also, undoubtedly, have more confidence in a new pay and classification system that is the product of bargaining than one imposed on them through unilateral employer action.

2. We also recommend that subsection 4 of the proposed definition of "conditions of employment" be revised to read as follows:

> Any matters specifically provided for by Federal statute or by Executive Order or matters in conflict with a government-wide rule or regulation, except that a government-wide rule or regulation issued after the effective date of a collective bargaining agreement in conflict with the regulation (other than a rule or regulation implementing 5 U.S.C. 2302) does not render the collective bargaining agreement unenforceable.

This modification to the proposal would preclude DHS from unilaterally setting and changing conditions of employment

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[3] We do not object to the proposed definition of "collective bargaining."

through the issuance of non-negotiable department-wide regulations. Currently, only government-wide regulations can bar negotiations over proposals that conflict with those regulations. DHS/OPM have offered no rationale to support such an expansion of the employer's right to avoid negotiations over otherwise negotiable conditions of employment.

This proposal is particularly troubling when viewed together with other proposed regulations that, if implemented, would drastically reduce collective bargaining rights. There is simply no way of predicting whether DHS will issue personnel regulations governing matters otherwise within the scope of bargaining. We therefore recommend that no provision be adopted that would make DHS regulations binding over collective bargaining agreements or bargaining responsibilities.

3. We recommend that the current definition of "confidential employee" be retained. DHS/OPM have not justified the proposed expansion of the definition, which could result in inappropriate exclusions from bargaining units.

4. We recommend that the definition of "grievance" contained in 5 U.S.C. 7103(a)(9) be retained. DHS/OPM has offered insufficient justification for the proposed elimination of the right of an employee or labor organization to file a grievance over "any matter relating to the employment of the employee." The grievance procedure is an efficient and

effective forum for these types of complaints. If, as proposed, employees and labor organizations are denied the right to grieve the full scope of employment-related matters, disputes will necessarily be addressed in other "outside" forums, such as the courts, the media, and Congress. We prefer to offer employers and labor organizations the chance to resolve these matters together through the grievance and arbitration process and retain that process as an impartial means of promoting government accountability.

5. We also object to the proposal to remove adverse actions appealable to the Merit Systems Protection Board from the coverage of the negotiated grievance procedure. The ability to grieve and arbitrate severe disciplinary actions is one of the most fundamental rights in the collective bargaining relationship.

Allowing these matters to be challenged through the grievance and arbitration process in no way interferes with an employer's right to impose timely discipline on its employees. It simply requires the employer to demonstrate to a labor organization, and, perhaps, to an arbitrator, that its actions were justified. DHS should not shy away from this most basic employer obligation, which is activated only <u>after</u> the employer imposes an adverse action. The negotiated grievance and arbitration procedure also provides an important means of

ensuring, as the Act requires, that employees are treated fairly and that their due process rights are protected. This role should be preserved.

9701.505 Coverage: We recommend that, except as otherwise excluded by this subpart, all DHS employees, including TSA screeners, are covered by these regulations.

9701.506 Impact on Existing Agreements: The proposal would make unenforceable any provision of a collective bargaining agreement that is inconsistent with these regulations. Providing DHS with the authority to simply repudiate provisions of existing agreements is both unfair and unnecessary.

DHS/OPM cannot reasonably claim that all collectively bargained provisions that conflict with these regulations should be eliminated because they will adversely affect the agency mission. It is far more likely that most provisions, negotiated under a statute that already provides ample protection to management mission-related rights, could continue, either intact or with slight modifications, and pose no threat to homeland security.

Accordingly, we recommend that collective bargaining provisions in conflict with these regulations continue in full force and effect until they expire unless the employer shows

that they adversely affect homeland security. In those instances, the employer and the affected labor organization would be required to engage in bargaining over modifications to the existing agreements. After the expiration of existing agreements, proposals that conflict with these regulations and adversely affect homeland security would be non-negotiable.

9701.508-509 Homeland Security Labor Relations Board: We strongly object to the establishment of the Homeland Security Labor Relations Board (Board) proposed in the regulations and recommend that the current authority of the Federal Labor Relations Authority (FLRA), Federal Mediation and Conciliation Service (FMCS), and Federal Service Impasses Panel (FSIP) be preserved.

Independent and impartial decision-makers currently make decisions involving 1) the appropriateness of bargaining units; 2) the eligibility of employees for inclusion in bargaining units; 3) the scope of bargaining; 4) the duty to bargain in good faith; 5) the duty to provide information needed to bargain; 6) impasse resolution; and 7) exceptions to arbitration awards.

We believe there is value in eliminating the current negotiability process and having all bargaining issues decided in a single independent and impartial forum. DHS/OPM propose,

however, to transfer authority over these important matters to a Board composed exclusively of members hand-picked by the Secretary. A management-appointed Board, then, would assume the functions of the independent FLRA, FMCS, and FSIP in deciding labor-management disputes. The unfairness and one-sided nature of this arrangement is obvious. Employees and labor organizations will have no confidence in the Board's impartiality. The Board is not credible.

Additionally, the Board would be a poor expenditure of public money. Other federal entities, with trained and experienced officials and staff, already exist to perform the functions slated for the Board. Its establishment as a redundant administrative entity amounts to a waste of funds.

The proposal is made worse by DHS/OPM's failure or inability to describe the type of judicial review or enforcement that would follow Board actions. With limited exceptions, a person can appeal a final decision of the FLRA to the United States court of appeals in which the affected person resides or to the U.S. Court of Appeals for the District of Columbia. The FLRA may also petition any appropriate United States court of appeals for the enforcement of any order of the FLRA and for appropriate temporary relief or restraining order.

The proposed regulations, on the other hand, fail to affirm the right of judicial review, much less offer a description of

the judicial review or enforcement that could follow Board actions. Perhaps the Secretary and the Director have proposed a system that they do not fully understand. Perhaps DHS/OPM would oppose efforts to seek appropriate judicial review of the actions of its management-appointed Board.

In either case, the uncertainty surrounding questions of judicial review and enforcement of Board decisions further detracts from the Board's legitimacy. As stated above, no system incorporating the Board should be implemented until such time as these questions are resolved through the public notice and comment process.

Moreover, DHS/OPM propose to invest the Board with powers disproportionate to its intended function. Under the proposal, the Board would be empowered to conduct de novo reviews of interpretations of collective bargaining agreements in arbitration awards. Accordingly, it would have the right to evaluate evidence and substitute its judgment for that of arbitrators. This novel authority is squarely at odds with the settled legal principle, in both the private and federal sectors, that a reviewing body should not substitute its judgment for the factual conclusions reached by an arbitrator. It undermines the very integrity of the grievance and arbitration process.

The Board would also be empowered to assert jurisdiction over any matter submitted to the independent FLRA if the Board determines that homeland security is affected. This authority seems designed to strip the labor relations dispute resolution process of any semblance of impartiality. Neither the Act nor any other provision of law authorizes DHS/OPM to interfere with the functioning of the FLRA in this manner.

9701.510 Powers and Duties of the FLRA: As described above, the proposed Board has serious deficiencies. Accordingly, we recommend that the FLRA and FSIP retain their current authority in its entirety.

9701.511 Management Rights:

1. We recommend that DHS/OPM retain the current authority to bargain, at the election of the agency, over the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work. It is conceivable that, upon recognizing the value of collective bargaining, a DHS employer may wish to bargain over these topics with a labor organization. DHS/OPM should allow its components the flexibility to do so. There is also no reason not to allow

DHS the flexibility to bargain over other topics, such as those currently described in 5 U.S.C. 7106(a).

2. We recommend that DHS/OPM retain an agency's current right to take actions necessary to carry out the agency mission during emergencies. The proposed expansion of this right, in subsection (a)(2), to actions that may be essential to carrying out the mission goes too far, particularly in the absence of any meaningful definition of "essential." Continuing the current right strikes a fairer balance between the agency's interest in accomplishing the mission during emergencies and the employees' interest in being able to negotiate over changes to conditions of employment that do not constitute emergencies.

3. We recommend that DHS/OPM retract its proposal in paragraph (b) to eliminate all bargaining over procedures and appropriate arrangements for employees adversely affected by the exercise of the significant group of management rights described in paragraphs (a)(1) and (a)(2). When exercised, these core operational management rights, concerning assignment of work, deployment of personnel, and the use of technology, have a profound effect on employees. The exercise of these rights determines the work that employees do, where and when they do that work, and the conditions under which that work is performed.

This proposal makes it clear that DHS/OPM want to prevent front-line employees and their unions from having any bargaining rights concerning these matters. Current law already insulates management from having to bargain over the substance of decisions it makes concerning these topics. That is, under current law, agencies retain the absolute right to implement a change arising out of one of these rights, regardless of the merit of the change. Subject to an agency's ability to act without bargaining in emergencies, a union is currently permitted to bargain only over procedures and appropriate arrangements for employees adversely affected by change implemented pursuant to these management rights.

Under the guise of needing flexibility to protect the homeland, DHS/OPM now propose to eliminate all union input in this area.[4] We recognize that, to protect the homeland, there may be instances when the agency needs to take actions immediately, without first completing bargaining over procedures and appropriate arrangements. It cannot reasonably be said, however, that every exercise of management rights falls into this exigent category. Indeed, there will be countless occasions, as there have been in the past, when management will

[4] As described above at pp. 3-4, this "management knows best" philosophy is contrary to GAO's conclusion that successful modern employers involve their employees and their unions in decision-making.

decide to make routine changes to things like work schedules, staffing patterns, or work locations that do not require immediate implementation.

Accordingly, we recommend that this regressive proposal to eliminate bargaining be replaced with a system that strikes a fairer balance between management rights and the right of employees to bargain. The current bargaining process could be modified to allow immediate implementation in instances when necessary to protect homeland security. In these exceptional cases, pre-implementation consultation would be required, as would, upon request by the union, post-implementation bargaining over procedures and appropriate arrangements.

In other instances, where homeland security does not require immediate implementation, the current bargaining process should be retained. We would not object to placing some reasonable time limit on this type of bargaining so that, if agreement is not reached, impasses could be referred to the FMCS and FSIP promptly.

Unlike the proposal, the approach recommended here comports with contemporary concepts of labor relations.
It recognizes the value that comes from interacting with employees and their unions <u>before</u> implementing mission-related decisions. Instead of muzzling employees, this proposal would

permit them to have a say without interfering with management's right to implement immediately when necessary.

9701.512 Consultation: We strongly object to DHS/OPM's proposal to substitute discretionary pre-implementation "consultation" for the current right of labor organizations to bargain over procedures and appropriate arrangements for employees adversely affected by the exercise of management rights. We recommend that the current collective bargaining rights be retained, as modified in the manner described in the recommendations pertaining to the preceding section.

Labor-management consultation over mission-related matters does, however, offer a useful supplement to formal collective bargaining rights. Through their unions, front-line employees can provide valuable mission-related information to management. Employee input into matters that are otherwise non-negotiable can be assimilated into management programs and decision-making to make DHS more effective.

Few would disagree with the notion that an effective modern employer should tap into its workforce's expertise by forming work groups, quality improvement teams, and other types of mission-related collaborative committees. Still, DHS/OPM offer no proposal to create such groups. We urge that this deficiency be corrected and recommend the creation of mandatory mission-

related collaborative committees at the local, regional, and national levels.

9701.513 Exclusive Recognition of Labor Organizations: We recommend that you permit the Secretary to voluntarily recognize a labor organization, or two or more labor organizations jointly, as the exclusive representative of an appropriate unit if the Secretary and labor organization(s) agree that the labor organization, or two or more labor organizations jointly, represent no fewer than the majority of employees in the unit. As in the private sector, it should be possible for the Secretary to voluntarily recognize an exclusive representative without the need of certification by a third party. This would streamline the process of designating an exclusive representative by eliminating the requirement for protracted, formal procedures over matters that are not in dispute.

9701.514 Determination of Appropriate Units for Labor Organization Representation:

As noted above, we object to the establishment of the Board. Accordingly, we recommend that bargaining unit determinations remain within the jurisdiction of the FLRA. Bargaining unit determinations, balancing the interests of employees and employers, are particularly suited for decision by

an independent and impartial third party. We also rec
that these decisions continue to be made by the FLRA i
accordance with the provisions of current law. DHS is
argue, under current law, that a unit is not appropriate because
it would not promote effective dealings or efficient operations
of the agency or would not result in unit employees sharing a
clear and identifiable community of interest.

9701.515 Representation Rights and Duties:

1. We strongly object to the proposal in subsection (a)(2)(i) to eliminate the right of unions to represent employees who are subject to investigatory examinations conducted by DHS's Office of Inspector General, Office of Security, or Office of Internal Affairs. Under current law, this "Weingarten" right applies to interviews conducted by <u>any</u> representative of the agency. We urge DHS/OPM to retain this right in its entirety.

Preservation of the current right will not interfere with any legitimate exercise of an agency's right to conduct an examination. A union representative serves the important role of protecting employees against abusive or illegal interview techniques. The representative also provides reassurance and guidance to employees, most of who are unaware of their rights and responsibilities during an interview. Denial of a

representative, on the other hand, will result in more frequent disputes over perceived abusive or illegal conduct by the investigating officials, forcing these disputes into forums such as the courts, Congress, and the media.

Maintaining the union representative as a safeguard against abusive or illegal interviews does not, in any way, jeopardize homeland security. The elimination of this fundamental right, which has been affirmed by the Supreme Court in both the private and federal sectors, cannot be reconciled with the Act's protection of collective bargaining rights and its requirement that employees be treated fairly.

2. We also object to DHS/OPM's proposal to eliminate a union's current right to be represented at a formal discussion between one or more representatives of the employer and one or more bargaining unit employees concerning grievances, personnel matters, or other general conditions of employment. We strongly recommend that subsection (a)(2)(ii) be revised to continue this right.

The proposed elimination of the "formal discussion" requirement is yet another effort to undermine the ability of unions to effectively represent bargaining unit employees. It is another example of a recurring theme in the regulations: unions are viewed as an impediment to the accomplishment of DHS's mission. We respectfully disagree. Union participation

in formal discussions enhances the effectiveness of agency operations by allowing the free exchange of views. DHS should affirmatively seek the views of front-line employees, offered through their exclusive representative, not suppress them.

3. For the same reasons, we object to subsection (a)(3)'s proposal to bar union representatives from discussions concerning EEO matters. We recommend that it be deleted from the regulations. Unions wish to retain their court-affirmed right to participate in these discussions, which can have a drastic effect on working conditions.

4. We object to subsection (a)(5)'s proposal to chill union representatives in the exercise of their protected rights. In the explanatory material, DHS/OPM explain that this proposal is designed to reject the "flagrant misconduct" standard that currently governs labor-management interactions.

DHS/OPM have not explained, however, how stifling robust labor-management debate, which has been sanctioned in the private and public sector for decades, promotes any legitimate mission-related objective. Instead, the proposal appears to be another attempt to silence the expression of dissenting views.

Accordingly, we recommend that the proposal be deleted from the regulations and the current "flagrant misconduct" standard be retained. Under this standard, union officials are provided latitude in expressing their views, but are not immunized from

discipline based on outrageous conduct. We believe the current standard strikes the proper balance between an employer's interest in maintaining an orderly workplace and the union's interest in being able to represent employees vigorously.

5. The use of the phrase "or appropriate component(s) of the Department" in subsection (a)(6) is confusing. We recommend that it be clarified to preserve collective bargaining rights as the Act requires. As described above, we recommend that the roles of the FMCS and FSIP in resolving impasses be preserved. Accordingly, we also recommend that subsection (a)(6)'s reference to the rules of the Board be revised to refer to current impasse resolution procedures. Also, we recommend that parties to a bargaining impasse be permitted to seek assistance from a private neutral without first having to get approval from the FSIP. This would expedite the resolution of disputes.

6. Currently, employees have the right to present grievances on their own behalf or be represented by a union representative in the negotiated grievance procedure. In subsection (a)(7), DHS/OPM appears to propose to permit employees to be represented in these procedures by attorneys or other representatives of their own choosing.

The negotiated grievance and appeals procedures are products of bargaining between the employer and the exclusive representative. The union should retain its stewardship over

the procedure that it negotiates. Moreover, allowing other representatives to participate will undoubtedly bring uncertainty and unpredictability to the proceedings. The stability of the labor-management relationship could be disrupted through the participation of representatives who are not parties to that relationship. Accordingly, we recommend that this subsection be revised to continue the exclusivity of the union's role in negotiated grievance and appeals procedures.

7. We object to subsection (b)(4)'s proposal to narrow a union's current right to data that it needs to fulfill its duties as exclusive representative. Changes from the current language of 5 U.S.C. Section 7114(b)(4), and particularly the new exemption for disclosure of information if "adequate alternative means exist" for obtaining it, will only lead to an increase in disputes and litigation. The best way to ensure efficient, effective and informed decision-making, whether in negotiations, the grievance process, or other matters affecting conditions of employment, is to require that all relevant and necessary information be provided to the exclusive representative. We therefore recommend that the standards and language currently set forth in 5 U.S.C. 7114(b)(4) be retained, so that the Department will continue to follow the current rules and relevant case law governing compliance with a request for information by an exclusive representative.

8. We recommend that that the "appropriate component" phrase be clarified to protect collective bargaining rights as required by the Act and that "authorized agency official" be changed to "Secretary" in subsection (c)(1). We strongly urge that subsection (c)(5) be amended to allow management officials to refuse to enforce provisions of collective bargaining agreements only if they are contrary to law or Executive Order or government-wide regulations in effect prior to the effective date of the agreements. Allowing agreements to be voided because they conflict with Department regulations makes a mockery of the collective bargaining process.

9701.516 Allotments to Representatives: We recommend that subsection (a) be modified to also allow the assignment and allotment of other financial assessments of the exclusive representatives. We recommend that the following sentence be added to subsection (a): "After the one year period has passed, an employee may revoke his or her union dues allotments on the anniversary date of his or her enrollment or on a date specified in a collective bargaining agreement."

9701.517 Unfair Labor Practices: Because we object to the establishment of the Board, we recommend that references to the Board in subsections (a)(5), (a)(6), (b)(5) and (b)(6) be

deleted. We also recommend that provisions currently contained in 5 U.S.C. 7116(a)(7) be retained. An agency should not be permitted to enforce a rule or regulation that is in conflict with a collective bargaining agreement if the agreement was in effect prior to the issuance of the rule or regulation.

9701.518 Duty to Bargain in Good Faith

1. We object to the proposed regulation's attempt to remove matters covered by these regulations or Department-wide regulations from the duty to bargain in good faith. DHS should not be permitted to avoid bargaining over otherwise negotiable topics simply by choosing to address those topics in Department regulations. Neither should it be permitted to simply eradicate negotiated agreements by means of regulatory edict. This proposed authority is inconsistent with the Act's preservation of collective bargaining rights. We recommend that subsection (a)(1) be revised to read as follows: "There is no duty to bargain over any matters that are inconsistent with law, government-wide rule or regulation, or Executive Order."

2. As discussed in the recommendation pertaining to Sec. 9701.511, we recommend that current bargaining requirements be modified to permit immediate implementation following consultation, followed by post-implementation bargaining, in the exceptional situations where immediate implementation is

required to protect homeland security. In situations where immediate implementation is not required to protect homeland security, the current requirement to bargain over procedures and appropriate arrangements should continue. Accordingly, we recommend that subsection (a)(2) be modified to reflect these bargaining principles.

3. Subsection (a)(3) purports to limit the duty to bargain over changes arising from the exercise of management rights to changes that "significantly affect a substantial portion of the bargaining unit." Because the regulations do not define "significantly affect" or "substantial portion of the bargaining unit," the effect of the proposal cannot be evaluated. The only certainty attached to this proposal is that it will create yet another area of dispute. Accordingly, we recommend that this vague proposal be withdrawn and not be republished for comment until such time as DHS/OPM explains what it means.

In the interim, we assume that DHS/OPM intends to modify, in some unspecified way, current law that requires an agency to bargain over procedures and appropriate arrangements concerning changes that have more than a de minimis effect on conditions of employment. Historically, the FLRA has considered a number of well-settled factors to determine whether a change is more than

de minimis.[5] We believe those factors fairly balance the interests of the parties and recommend that they be retained. DHS/OPM's proposal, on the other hand, could result in employees being subjected to changes to conditions of employment without bargaining.

4. We recommend that subsection (a)(4)(i) be revised to read as follows: "Concern matters reasonably encompassed by the express language of an existing negotiated agreement, or matters inseparably bound with a subject expressly covered by the agreement, or matters the parties intended to remain unchanged during the term of the agreement." Subsection (a)(4)(ii) would further erode current collective bargaining rights by eliminating bargaining over any proposal that does not significantly affect a substantial portion of the bargaining unit. Presumably, this would mean that an agency would be relieved of any obligation to bargain over conditions of employment that are substantively negotiable unless the department's undefined threshold has been met. Until very recently, the FLRA has not applied a de minimis test to matters that are substantively negotiable. We recommend that this approach, consistent with the Act's preservation of collective

[5] The FLRA has considered the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment and other equitable considerations. The number of

bargaining rights, be retained. DHS/OPM's proposal, which would dramatically reduce substantive bargaining rights, is unreasonable.

5. Because we object to the establishment of the Board, we recommend that subsection (a)(5) be revised to remove any reference to the Board. Impasses should be referred to the FMCS and the parties should be entitled, by mutual agreement, as a matter of right, to have bargaining impasses referred to an independent mediator/arbitrator as an alternative to the FSIP. We do not object to setting a reasonable time limit for the completion of bargaining over an initial collective bargaining agreement or successor agreement, but recommend that the time limit be increased to a more realistic 120 days before a dispute is referred to FMCS.

6. We strongly object to the proposal, in subsection (a)(6), to eliminate the use of impasse resolution procedures for mid-term bargaining disputes. We would not object to a 30-day time limit for completing such bargaining before a dispute is referred to FMCS. Neither would we object to an expedited procedure at FMCS and/or FSIP. There must, however, be a process for resolving impasses. Unilateral implementation by

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employees involved has not been, in and of itself, a controlling factor.

management is contrary to the Act's requirement that collective bargaining rights be ensured.

7. Because we object to the establishment of the Board, we recommend that disputes concerning the duty to bargain be referred to the FLRA. We recommend that subsection (b) be revised accordingly.

9701.519 Negotiations Impasses: Because we object to the establishment of the Board, we recommend that negotiations impasses continue to be referred to the FMCS and the FSIP. As described above, we would not object to placing reasonable time limits on the negotiations process.

9701.520 Grievance Procedure:

1. We recommend that subsection (b)(2) be revised to retain an arbitrator's current authority to stay a personnel action, in the same manner as the MSPB, if a prohibited personnel practice is involved. There is no reason for DHS/OPM to deprive its employees of this type of protection from illegal personnel practices.

2. We recommend that DHS/OPM delete subsection (f), which removes adverse actions appealable to the MSPB from the scope of the negotiated grievance procedure. Access to the grievance/arbitration process is a fundamental element of the

statutory right to organize into bargaining units. DHS/OPM's proposal to deprive employees of this basic right further undermines the right of DHS employees to bargain collectively. Current provisions permitting an election between the MSPB and the negotiated grievance procedure should be retained.

3. We recommend that DHS/OPM delete subsection (g), which purports to limit an employee's right to grieve a performance rating. There is no basis for the proposal to extinguish an employee grievance over a performance rating upon the filing of an appeal with the MSPB. Moreover, the proposal that would require an arbitrator to sustain a rating of record unless the grievant proves that it was arbitrary or capricious is an unreasonable reduction of employee rights. Currently, an arbitrator can cancel a rating upon a showing of a violation of applicable law or the provisions of a collective bargaining agreement. That authority should be preserved.

9701.522 Exceptions to Arbitration Awards: Because we object to the establishment of the Board, we recommend that the FLRA retain its current authority to decide exceptions to arbitration awards.

9701.525 Regulations of the Board: If the Board is created, we recommend that its proposed procedural rules and regulations be

published in the Federal Register for public comment and then published in final form before they are implemented.

Subpart F - Adverse Actions

9701.603 Definitions: We object to the proposal to create an "initial service period" of not less than one year and not more than two years. Extending the evaluation period to two years would allow an employee to be removed, without full adverse action rights, after working as many as 729 days. We recommend that the current probationary period of one year be retained because it provides a sufficient period of time during which to evaluate employees.

9701.604 Coverage:

1. Subsection (a)(1) denies adverse action rights to an employee during an "initial service period," but requires competitive service employees in an initial service period to be removed in accordance with the provisions of 5 C.F.R. 315.804 and 315.805. Those regulations provide limited procedural and MSPB appeal rights to probationary employees. But proposed Sec. 9701.704(c) accords those rights to employees removed during their first year of service only. This proposal would have the anomalous effect of providing less protection to employees in the second year of their "initial service period" than they enjoy in the first. That is, during their first year, they

would be entitled to rights under Chapter 315, but during their second year, they would have no adverse action rights at all. When it directed that employees be treated fairly and be accorded the provisions of due process, Congress could not have intended this bizarre result. This provides further support for our recommendation to retain the one-year probationary period.

2. We recommend that subsection (d)(1) be amended to preserve the current rights of employees who are subject to adverse actions prior to the expiration of their time-limited appointment.

3. We recommend that subsection (d)(2) be revised to provide the same protection proposed for preference eligible employees to all employees. All DHS employees are equally deserving of full due process rights.

9701.605 Standard for Action: We recommend that the current "such cause as will promote the efficiency of the service" standard be retained. This statutory standard, intended to protect employees from unjust personnel actions, has been in place for nearly a century and is well understood. If, as claimed in the introductory materials preceding the regulations, DHS/OPM really intend to make no substantive change to the standard, it should not be altered.

9701.606 and 9701.707 Mandatory Removal Offenses: We object to the establishment of the mandatory removal offense scheme in its entirety and recommend that these two sections be deleted from the regulations. It is not possible to evaluate the impact of this proposal fully because the offenses are not listed. Instead, the Secretary is given unfettered discretion to identify offenses, subject only to the vague and overly broad requirement that they have a direct or substantial impact on homeland security. This could cover virtually anything and could result in a list containing offenses for which removal is, as judged by any impartial reviewer, too harsh a penalty.

The inability of an employee to have the penalty mitigated upon review by an independent reviewer and the uncertain availability of judicial review further undermines the process's credibility. Employees will have no confidence that their due process rights will be protected in this process. It appears that the outcome of appeals hearings will be pre-determined. An impartial and disinterested tribunal will not hear their cases. Instead, as proposed in Section 9701.707, a panel hand-picked by the same employer that imposed the penalty will decide these cases, using an inappropriate "substantial evidence" burden of proof.

Despite any claim to the contrary, this proposed panel will never be accepted by employees as being fair and independent.

In his appearance before the Design Team, retired Virginia Supreme Court Justice John Charles Thomas cautioned the group against options that included only internal appeals panels. He told the group that this was unacceptable in America because we reject the idea of judge, jury and prosecutor rolled into one entity. This is true, whatever the nature of the charges against the accused. It is even more critical when the charges allege harm to our homeland security.

Additionally, the proposal does not specify the type of judicial review that could follow a panel decision. This approach is particularly inappropriate for the types of serious offenses contemplated by these sections. The more serious the offense, the more important it is for employees to have access to a fair and impartial appellate process, including impartial judicial review.

9701.607 Procedures: We recommend that the current notice and reply requirements (30 days written notice and not less than 7 days to answer for serious adverse actions and advance written notice and a reasonable time to answer proposed suspensions of 14 days or less) be retained. Having adequate notice and a reasonable chance to answer are essential components of due process.

By proposing to reduce the notice and reply periods in subsections (a)(1) and (b)(1), DHS/OPM seek to deprive DHS employees of precious time that is required to consider the charges against them, obtain representation, gather information, and prepare their answers. The modest acceleration of the disciplinary process that DHS would realize from this change is outweighed by the harm that would be done to the employees' opportunity to defend themselves fully and fairly.

9701.609 National Security Suspension and Removal: We recommend that this proposal be deleted. 5 U.S.C. 7531 and 7532, upon which this proposal is based, reflect Congress' determination that certain agencies should have access to special procedures to suspend and remove certain employees in the interests of national security. DHS is not among those agencies. Until such time as Congress determines that DHS is covered by these special procedures, the agency should not be empowered to use them.

Subpart G - Appeals

9701.702 Waivers: In this section, DHS/OPM purport to supersede MSPB appellate procedures that are inconsistent with these regulations. DHS/OPM also purport to direct MSPB to follow these regulations until MSPB issues its own conforming regulations. Nothing in the Act or any other law gives DHS/OPM

such authority over the MSPB. Accordingly, we recommend that this proposal be deleted from the regulations.

9701.705 Alternative Dispute Resolution: We endorse the concept of alternative dispute resolution (ADR) in disciplinary matters. We recommend that ADR procedures, including those contained in negotiated grievance/arbitration procedures, continue to be subject to collective bargaining.

9701.706 MSPB Appellate Procedures:

1. We recommend that DHS be required to prove, by the preponderance of the evidence, that adverse actions taken against employees promote the efficiency of the service.[6] The preponderance of the evidence standard predominates in civil actions in the United States. It currently applies to all federal adverse actions other than those taken for unacceptable performance under Chapter 43. It predominates in other public and private sector employee appellate procedures.

The primacy of this standard is not surprising. Requiring an employer to prove that it is more likely true than not true that an employee has been justly disciplined comports with the

[6] We do not object to the definition of "preponderance of the evidence" proposed in Section 9701.703: " . . . the degree of relevant evidence that a reasonable person, considering the

fundamental notions of fairness and due process that the Act requires DHS/OPM to protect.

In subsection 9701.706(d), on the other hand, DHS/OPM propose to limit an employer's burden of proof to a lesser standard, substantial evidence. This standard is currently applicable only to the very few performance cases appealed to the MSPB.[7] Congress saw fit to impose this lesser burden of proof in conjunction with Chapter 43's special procedures to address performance issues. Actions taken under Chapter 43 must currently be preceded by a performance improvement period, commonly known as a "PIP," in which employees must be notified of performance deficiencies and given the opportunity to improve.

DHS/OPM now want to apply this exceptional lesser standard to all adverse actions, the vast majority of which must currently be proven by the preponderance of the evidence. An agency decision to remove an employee for alleged misconduct, supported only by substantial evidence, would have to be sustained, even if it were more likely true than untrue that the removal was not justified. This outrageous, upside-down result

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record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."

[7] The MSPB's Annual Report for Fiscal Year 2002, at p. 22, shows that only 2% of the appeals it decided in FY 02 were performance cases. On the other hand, 48% of MSPB appeals involved other types of adverse actions. Ibid.

cannot be reconciled with the Act's requirements. If, as proposed by DHS/OPM, the PIP requirement is eliminated, the lesser substantial evidence standard would not even be appropriate for performance-based actions.

2. We object to subsection (d)(2)'s proposal to exempt DHS from procedural standards applicable to all other federal employers that are aimed at protecting employee rights. We recommend that this proposal be deleted and DHS continue to be bound to the same requirements as other federal employers.

3. We object to subsection (h)'s proposal to reduce an employee's current right to recover reasonable attorney fees in MSPB cases. Currently, reasonable fees can be ordered if the employees is the prevailing party and the MSPB determines that payment of fees by the agency is in the interest of justice, including any case in which a prohibited personnel practice was committed or any case in which the agency action was clearly without merit.

DHS/OPM propose to limit an employee's ability to recover fees to cases where an action is reversed in its <u>entirety</u> and <u>only</u> if MSPB determines the action constituted a prohibited personnel practice, was taken in bad faith, or is without any basis in fact or law.

The assertion in the introductory material accompanying the draft regulations that the current "prevailing party" test has a

chilling effect on agency actions is unsupportable. The proposal's unwarranted effect will be to chill the willingness of employees to exercise their rights to appeal unjust agency decisions. It will also serve as a disincentive for representatives to initiate meritorious class actions or multi-employee consolidated actions. The result will be uneconomical, piecemeal litigation before the MSPB.

Moreover, this drastic reduction of employee rights is unnecessary. Arbitrators and the MSPB have the authority today to award reduced attorney fees when the prevailing party is only partially successful, commensurate with the employee's level of success. This proposal, obviously aimed at making it more difficult for employees to mount challenges to unjust agency actions, is unreasonable and beyond the authority given to DHS/OPM by the Act.

Requiring the employer to pay the attorney fees for successful appellants is in the interest of justice. The federal government has vast resources compared to those of individual employees. It is incumbent upon managers to take actions against employees only when their conduct or performance warrant it. If managers take unjustified actions against employees, the employee should have access to reasonable attorney fees. We strongly recommend that current fee

provisions, standing as a deterrent to unjustified actions, be retained.

4. Because DHS/OPM have no legal authority to modify MSPB's appellate procedure, we recommend that subsection (k) be deleted from the regulations and that all current MSPB procedures be retained. Subsection (k)(6), in which DHS/OPM purport to strip MSPB of its ability to reduce or otherwise modify an agency-imposed penalty, is particularly offensive to notions of fairness and due process and warrants further discussion.[8]

If implemented, this proposal would deprive employees of a full hearing before the MSPB. Employees would be prevented from arguing that an agency-imposed penalty is excessive. All notions of progressive discipline and fairness would be discarded. For example, an employee with an outstanding record over 30 years of employment could be removed for committing a minor infraction that warrants no more than a reprimand or counseling session. Under this proposal, if the agency proved the underlying misconduct, the MSPB would be barred from

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[8] Not only would such a drastic step be unreasonable and contrary to the Act, it would also be unnecessary. Under current law, the MSPB does not simply substitute its judgment for that of agencies that impose penalties. Instead, the MSPB reviews agency-imposed penalties to determine whether they exceed the bounds of reasonableness. Accordingly, penalties are rarely mitigated. The MSPB Annual Report for Fiscal Year 2002,

considering the reasonableness of the removal penalty. In the Act, Congress directed that employees be treated with fairness, that their due process rights be protected, and that appellate procedures should be subject to only limited modifications. A system that would require this extraordinarily harsh and unreasonable result is plainly at odds with those principles.

Conclusion

The fundamental bases for the proposed system are unacceptably flawed, and we object to the proposed system in its entirety. Accordingly, we do not acquiesce to the implementation of any part of the system and you should consider any individual proposal not expressly accepted in these comments and recommendations to have been rejected. We recommend that all current provisions of law be retained until such time as all of the numerous defects of this proposal can be cured.

Respectfully submitted,

Colleen M. Kelley
National President, NTEU

John Gage
National President, AFGE

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at p. 23, shows that only 3% of case adjudicated on the merits

Michael Randall
National President, NAAE

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resulted in mitigated penalties.

Senator Daniel K. Akaka
Questions for the Record
"The Key to Homeland Security: the New Human Resources System"
February 25, 2004

Questions for Colleen Kelley, National Treasury Employees Union

1. As the experience at the Federal Aviation Administration demonstrated, collective bargaining and the right to appeal decisions to the Merit System Protection Board is imperative. The fact that Congress reinstated those rights shows that every review process, whether in the context of labor relations management or employee appeals, must not only be fair, but also perceived as fair in order to be credible. What recommendations do you have to improve the actual and perceived fairness of the internal appeals and the internal labor management relations panels? What recommendations did you submit to the Department of Homeland Security and Office of Personnel Management on this issue?

In the area of due process for DHS employees the proposed personnel regulations make drastic changes. NTEU strongly objects to the establishment of the Homeland Security Labor Relations Board (Board) proposed in the regulations and recommends that the current authority of the Federal Labor Relations Authority (FLRA), Federal Mediation and Conciliation Service (FMCS), and Federal Service Impasses Panel (FSIP) be preserved.

Also included in the proposed regulations are provisions that bar the Merit Systems Protection Board from reducing or otherwise modifying any penalty selected by DHS, which would deprive employees of a chance to challenge excessive or unreasonable penalties. The proposed regulations eliminate the right of a union to submit serious adverse actions imposed against bargaining unit employees to an arbitrator, and the proposed regulations would reduce the agency's burden of proof in adverse action cases to a standard that would require DHS's decisions to be upheld even if they are more likely than not to have been improper.

NTEU believes there is value in eliminating the current negotiability process and having all bargaining issues decided in a single independent and impartial forum. The proposed regulations, however, propose to transfer authority over bargaining matters to a Board composed exclusively of members hand-picked by the Secretary. A management-appointed Board, then, would assume the functions of the independent FLRA, FMCS, and FSIP in deciding labor-management disputes. The unfairness and one-sided nature of this arrangement is obvious. Employees and labor organizations will have no confidence in the Board's impartiality. The Board would simply not be credible in the eyes of employees.

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Additionally, the Board would be a poor expenditure of public money. Other federal entities, with trained and experienced officials and staff, already exist to perform the functions slated for the Board. Its establishment as a redundant administrative entity amounts to a waste of funds. To that end, NTEU recommends that the FLRA and FSIP retain their current authority in its entirety.

When Congress mandated that DHS employees be treated fairly and afforded the protections of due process, and authorized only limited changes to current appellate processes, Congress could not have envisioned the drastic reductions in employee rights that are in the proposed DHS personnel regulations. No evidence shows that current employee due process protections or the decisions of an arbitrator or the MSPB jeopardize homeland security. While there was support expressed in Town Hall meetings and focus groups for speeding up the adverse action and appeals process, there was no support for drastically altering the process in favor of management or otherwise reducing the likelihood of fair and accurate decisions.

The final DHS personnel system, should, as the Act requires, protect the due process rights of employees and provide them with fair treatment. Employees must have the right to a full and fair hearing of adverse actions appeals before an impartial and independent decision-maker like an arbitrator or the MSPB. DHS should be required to prove, by the preponderance of the evidence, that adverse actions imposed against employees promote the efficiency of the service. An impartial and independent decision maker must have the authority to mitigate excessive penalties.

2. With passage of the Civil Service Reform Act of 1978, Congress found that the statutory protection of the right of employees to organize and bargain collectively safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and their employers. However, it appears that the proposed regulations undermine this basic foundation of federal employment law by effectively stripping the bargaining rights of federal employees. Please comment on how the proposed regulations correspond with the concept that labor unions and collective bargaining are in the public interest.

NTEU is extremely disappointed by the proposed DHS personnel system as it relates to collective bargaining. Despite the congressional mandate to protect an employee's right to collectively bargain, the proposed DHS personnel regulations are drafted to minimize the influence of collective bargaining so as to undermine the statutory right of employees to organize and bargain collectively. When Congress included provisions in the Homeland Security Act to protect employees' collective bargaining rights, Congress could not have intended those rights to be gutted as they are in the proposed regulations.

For example, the proposed regulations eliminate bargaining over otherwise negotiable matters that do not significantly affect a substantial portion of the bargaining unit without defining the terms, they eliminate a union's right to participate in formal discussions between bargaining unit employees and managers, and they drastically restrict the situations during which

an employee may request the presence of a union representative during an investigatory examination.

In addition, the proposed regulations allow for the setting and changing of conditions of employment as well as providing DHS with the ability to void collectively bargained provisions of employment through the issuance of non-negotiable departmental regulations. The proposed regulations also assign authority for resolving many labor-management disputes to the Homeland Security Labor Relations Board, composed exclusively of members appointed by the Secretary. Lastly, the proposed regulations grant broad new authority to establish an entirely new pay system that will determine each employee's base pay, locality pay, and annual increase in pay without requiring any bargaining with employee representatives.

3. The proposed regulations leave open the question of judicial review for the internal labor relations board and the internal appeals panel. What is your recommendation on the two judicial review options laid out in the regulations and do you have other suggestions?

The proposed regulations fail to describe or identify the type of judicial review or enforcement that would follow the Homeland Security Labor Relations Board actions. Currently, with limited exceptions, an employee can appeal a final decision of the FLRA to the United States court of appeals in which the affected person resides or to the U.S. Court of Appeals for the District of Columbia. The FLRA may also petition any appropriate United States court of appeals for the enforcement of any order of the FLRA and for appropriate temporary relief or restraining order.

The proposed regulations, on the other hand, fail to affirm the right of judicial review, much less offer a description of the judicial review or enforcement that could follow Board actions. In any case, the uncertainty surrounding questions of judicial review and enforcement of Board decisions further detracts from the Board's legitimacy. No system incorporating the Board should be implemented until such time as these questions are resolved through the public notice and comment process.

Moreover, the proposed DHS/OPM personnel regulations propose to invest the Board with powers disproportionate to its intended function. Under the proposal, the Board would be empowered to conduct reviews of interpretations of collective bargaining agreements in arbitration awards. Accordingly, it would have the right to evaluate evidence and substitute its judgment for that of arbitrators. This new authority is squarely at odds with the settled legal principle, in both the private and federal sectors, that a reviewing body should not substitute its judgment for the factual conclusions reached by an arbitrator. It undermines the very integrity of the grievance and arbitration process.

The Board would also be empowered to assert jurisdiction over any matter submitted to the independent FLRA if the Board determines that homeland security is affected. This authority seems designed to strip the labor relations dispute resolution process of any semblance of impartiality. Neither the Act nor any other provision of law authorizes DHS/OPM to interfere with the functioning of the FLRA in this manner.

RESPONSES TO SENATOR AKAKA ON SUPPLEMENTAL QUESTIONS SUBMITTED REGARDING THE STATEMENT OF MICHAEL E. RANDALL, PRESIDENT, NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION AND THE SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA DELIVERED FEBRUARY 25, 2004

APRIL 1, 2004

1. As the experience at the Federal Aviation Administration demonstrated, collective bargaining and the right to appeal decisions to the Merit System Protection Board is imperative. The fact that Congress reinstated those rights shows that every review process, whether in the context of labor relations management or employee appeals, must not only be fair, but also perceived as fair in order to be credible. What recommendations do you have to improve the actual and perceived fairness of the internal appeals and the internal labor management relations panels? What recommendations did you submit to the Department of Homeland Security and Office of Personnel Management on this issue?

A1. It is impossible to predict whether the DHS internal appeals and internal panels as proposed will result in a fair, equitable, and credible appeals system, but NAAE remains highly skeptical. Our inability to predict goes to the very heart of what is wrong with the DHS proposed regulations. Those proposals provide no detail about the procedures, rules, and regulations pursuant to which DHS's proposed Labor Relations Board will function or the criteria it will employ in making decisions. As a result, the union comments upon this aspect of the proposed system necessarily had to attack it as too abstract, amorphous.

One thing is clear, however: the Board's operations will be subject to strong political influence, an atmosphere in which the unions and the employees they represent are likely to receive short shrift. With the Secretary of DHS given unqualified authority to hand-pick two of the three members of the Board with the third member coming from FLRA, designated by FLRA's Chairperson, the Board clearly will be stacked against the employee and the unions. Procedurally, the Board will be free to impose its own set of governing protocol, further undermining employee confidence.

The one specific "procedure" DHS did propose will make it virtually impossible to overturn an Agency decision: the Agency must only show that its action was based upon "substantial evidence." The current standard requires the Agency to prove its action was justified by the "preponderance of the evidence," a far more difficult standard.

NAAE believes appeals from DHS actions should be heard by a totally independent entity. The FLRA and MSPB are independent, specialize in handling Agency appeals, function pursuant to well understood rules and regulations, are well funded and adequately staffed, and, more importantly, possess a vast array of experience and expertise. In contrast, the proposed Board will have to develop its own set of rules, hope to attract competent employees, establish a new infrastructure, and hope Congress sufficiently funds its operations. The Board, nevertheless, will be unable to operate without a perceived conflict of interest -- its members will be hand-selected by DHS and its top management. Under these conditions, providing for full judicial review of all Board decisions is a must.

If there is to be an internal appeals panel or Board, it should be as independent and neutral as possible. Its members should be selected from outside DHS, and the selection process totally free of political influence. Either Congress or a bipartisan union-management committee should select the Board members. Alternatively, DHS management should select one member, the union a second member, and the two selectees the third member. The current proposal, a management-appointed Board, presents a picture of unfairness and one-sided decision-making that can only engender lack of confidence in the Board's impartiality. Exacerbating this perception is the uncertainty surrounding the question of judicial review and enforcement of Board decisions.

For these reasons, NAAE has joined AFGE and NTEU in recommending that the FLRA, MSPB, and FSIP retain their current authority in its entirety and no DHS Board be established to resolve appeals.

2. With passage of the Civil Service Reform Act of 1978, Congress found that the statutory protection of the right of employees to organize and bargain collectively safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and their employers. However, it appears that the proposed regulations undermine this basic foundation of federal employment law by effectively stripping the bargaining rights of federal employees. Please comment on how the proposed regulations correspond with the concept that labor unions and collective bargaining are in the public interest?

A2. The proposed regulations totally defeat collective bargaining as that concept has been known since the passage of the Civil Service Reform Act of 1978. DHS seeks effectively to silence the DHS employees and their unions. The proposed regulations preclude any collective bargaining, including over the impact and implementation or procedures associated with implementing any proposed change, regarding a Management action associated with the

deployment of employees, the application of new technology with which they accomplish their work, and the implementation of a Department-wide regulation. These three potentially sweeping categories of conditions of employment, all of which are currently subject to bargaining of one form or another, will be outside the realm of collective bargaining under the DHS proposal. Broadly interpreted -- and DHS has already indicated an intent to interpret the concepts as broadly as possible -- there will remain very little of significance for unions and the employees they represent to bargain with Management.

DHS asserts it needs the flexibility, given its mission of protecting the national security of this country, to be able to act in these broad areas quickly, without notice to the union or securing the employees' views. That very flexibility threatens this country's agriculture. NAAE represents a unique component of DHS -- the 2,000 former USDA employees charged with protecting the country against the invasion of pests and diseases that would attack American agriculture. These pests and diseases often enter the country undetected, but not because some foreign agent seeks to infest American agriculture. Rather, the infestations usually result from the inadvertent introduction of inappropriate animal and plant materials. The Agency's Legacy Customs dominated management has already demonstrated an insensibility to, as well as a scientific ignorance about, this unique mission of Agriculture Inspectors wearing the new CBP uniforms. Without an avenue through the normal channels of collective bargaining, with notice and the right to negotiate in advance of implementation, DHS Agriculture Inspectors will have no opportunity to present their views and to express their concerns for the agriculture mission, also an integral part of the CBP mission.

NAAE fully recognizes there will be times when DHS asserts a national emergency or a national security threat requires immediate action. In those situations, situations NAAE believes to be far and few between, NAAE would expect Management to be able to implement first and then negotiate with the unions. That level of flexibility is not, however, what the proposed regulations contemplate. They simply propose to grant Management complete unfettered authority to act upon and implement -- no notice and no opportunity to negotiate at any time -- any change arguable encompassed within any of the three broad areas outside the narrowly defined "conditions of employment," deployment, new technology, and Department-wide regulations. DHS offers no rationale to justify such an expansion of employer rights, expect the desire to avoid negotiations with unions at all costs so as to preserve its absolute discretion.

Further curtailing the right of employees to bargain is another novel DHS proposal, limiting collective bargaining to those situations where a proposed change will have a substantial impact upon a significant number of employees. For a union such as NAAE, representing only a relatively small number of

employees widely dispersed throughout the country, including Hawaii, Alaska, and Puerto Rico, this new narrow test of what is negotiable can only prevent NAAE from effectively representing the interests of its bargaining unit. Because DHS does not address what constitutes a "substantial number," NAAE fears its membership may already fall beneath that threshold, thus disenfranchising the employees it currently represents, particularly with respect to any local issues that arise.

In effect, DHS has, through its proposed regulations addressing the nature and scope of future collective bargaining, turned the intent of Congress on its head. Collective bargaining is no longer in the public interest, to the extent it applies to employees of the Department of Homeland Security. This result is exactly the opposite of what Congress intended, we believe.

3. The proposed regulations leave open the question of judicial review for the internal labor relations board and the internal appeals panel. What is your recommendation on the two judicial review options laid out in the regulations and do you have other suggestions?

A3. With all due respect, your query regarding judicial review begs the question. It presupposes there will be some form of judicial review. That is not at all clear. DHS, in its proposed regulations, carefully avoids conveying any such inference. Because Congress has left the issue of judicial review of DHS and MSPB decisions (involving DHS employees) silent in the Homeland Security Act, NAAE fears some appellate court will conclude that no judicial review is available, at least in the absence of a strong, express endorsement and affirmative statement of intent from DHS that there be judicial review.

NAAE does not believe Congress intended to create a judicial review void. Accordingly, NAAE strongly urges DHS, in its final regulations, expressly to state the intent of DHS is to provide for judicial review and then to adopt regulations setting forth the specific procedures a prospective appellant must follow in order timely to appeal decisions of DHS, its panels and Board, and MSPB.

NAAE favors a process that in effect preserves the right of judicial review as it currently exists with respect to any decision of FLRA, MSPB, or the Agency. With limited exceptions, an employee or union should be able to appeal a final decision to the United States Court of Appeals in which the affected person resides or to the U.S. Court of Appeals for the District of Columbia. DHS, in its proposed regulations, offers no justification for not adopting such a plan. Similarly, NAAE believes, along with AFGE and NTEU, that DHS does not have the statutory authority to modify MSPB's appellate procedures, including the procedures for judicial review of its decisions, even those pertaining to DHS and its employees.

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