

Status Quo Enhanced [44]

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

Summary Description:

This option retains many existing statutory provisions relating to disciplinary actions and appeal rights but includes changes that should expedite and simplify actions without compromising the current system's fairness and due process. It also incorporates the contemporary concepts of mediation, alternative remediation, and a pre-decisional review process, which are aimed at reducing the number of final agency decisions that are actually appealed. While the MSPB can be retained, the option allows for the possibility of the creation of a DHS Personnel Review Board (PRB) to review actions taken against DHS employees. It also allows for the possibility of the PRB using a simpler and less adversarial process than is currently used in MSPB appeals. Regardless of the forum, judicial review of a final MSPB or PRB decision would be essential.

Key Features:

Changes to Streamline and Simplify the Process

- Conduct-based actions and performance-based actions would be combined into a single process; the agency would be required to prove, by the preponderance of the evidence, that an action is for such cause as promotes the efficiency of the service; a full range of penalties/mitigation would be allowed in both performance and conduct cases.
- Requirements for a "performance improvement period" (PIP) would continue, but agencies would be allowed to rely on instances of unacceptable performance for up to 2 years if the employee had previously been on a PIP for poor performance in the same critical element.
- An employee who performs unacceptably after moving to a new position would have the chance to return to his/her previous position in lieu of adverse action.
- The same notice and reply timeframes would apply to all covered actions.
- Agencies would be required to provide all documents/evidence relied on (both inculpatory and exculpatory) to the employee at the time an action is proposed and would be required to consider the concepts of progressive discipline and the "Douglas factors" in proposal and decision letters.
- The MSPB could be retained or a DHS Personnel Review Board (PRB) could be created to hear appeals; the PRB could adopt a less adversarial hearing; the concept of progressive discipline and the "Douglas factors" would be incorporated into regulatory standards for reviewing actions at the MSPB or the PRB; judicial review of the MSPB or PRB decisions would be essential.
- The "mixed-case" process would be eliminated. Employees with appealable actions involving discrimination would select from among the EEOC process, MSPB/PRB, or the negotiated grievance/arbitration processes.

Changes to Reduce the Number of Appeals

- Employees would be given the chance to have a pre-decisional hearing or to have proposed actions mediated.
- Employees subject to suspensions of 14 days or less would be eligible for appropriate alternative remediation instead of unpaid time off.

Sub-Options:

- Described below.

Relation to Other Options:

- Should work well with all other options.

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

Possible Advantages/Benefits

- The MSPB process has more than 20 years of decisions/case law to guide participants. The PRB would also be guided by MSPB case law until the PRB creates its own.
- The MSPB or PRB system meets the Homeland Security Act's requirements of fair treatment and due process.
- It contains an expedited process for effecting an adverse action against an employee when there is reasonable cause to believe that the employee has committed a crime for which imprisonment may be imposed.
- The system relies on the "preponderance of the evidence" standard, which is widely-accepted in administrative proceedings.
- It guarantees an appellant a hearing if jurisdictional requirements are met.
- The hearing is conducted by an independent third party, which could give the imprimatur of neutrality.
- The system has well-developed standards with respect to discovery, evidence and witnesses.
- The MSPB relies on self-imposed timeliness standards to issue initial decisions expeditiously. The PRB would also be subject to reasonable decision-making deadlines.
- An MSPB administrative judge/PRB hearing examiner can direct the attendance of a government witness.
- An appellant is entitled to a representative of his/her own choosing and may recover attorney fees.
- Final MSPB or PRB decisions would be precedential, providing guideposts to participants.
- There is judicial review of MSPB decisions. Judicial review would also be an essential part of the PRB process.
- Requiring the production of all evidence with a proposal letter could accelerate the processing of an action by obviating the need for a formal information request and response.
- Requiring a statement re: consideration of progressive discipline principles and the "Douglas factors" in agency proposals and decisions could encourage more thorough and better-explained agency decision-making, and could reduce the number of challenged decisions.
- Combining performance and conduct-based actions into one system and having the same notice and reply period for all actions could simplify the process by eliminating confusion over applicable rules
- A pre-decisional hearing would allow all evidence and arguments to be considered in advance of the final agency decision. This could promote a fairer decision and one that is more likely to withstand challenge, thereby decreasing the chances of appeal.
- Allowing the mediation of actions could result in many disputes being settled, thereby reducing the

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number of appeals.

- Might lead to complete and defensible decisions.
- Informal setting might be a more effective process for the employee to present his/her case.
- Requiring different proposing and deciding officials for adverse actions might enhance system credibility and objective decision-making.
- Alternative forms of discipline for lesser offenses achieve management objectives while not punishing employees economically.

Possible Problems/Challenges

- The system can be complex and confusing (e.g., mixed-case process). Changes described herein could simplify and streamline the process.
- There can be delays in getting decisions from the full MSPB after the filing of a petition for review. If the PRB concept is adopted, the timing of PRB decisions could be controlled.
- The system has become legalistic and intimidating to many employees. Changes described herein could make the system easier to understand and administer.
- Representatives have become, by necessity, specialist advocates.
- The process can be very expensive for an appellant. If a non-adversarial appeals system is adopted, employee and agency expense might be reduced.
- The process is based on an adversarial-type process. A less adversarial appeals process is offered as a sub-option.
- Cases often require large expenditures of staff hours by agencies and employee representatives.
- Administrative judges might be reluctant to consider the provisions of negotiated agreements.
- Because of complex procedures and a high percentage of decisions upholding agency actions, the process is perceived by some employees as being "agency friendly." If the PRB concept is adopted, PRB members can be selected in a manner that might reduce this perception.
- Agencies and employee representatives have no direct role in selecting administrative judges or the Board.
- Eliminating distinction between probationary and non-probationary employees could weaken the concept of probation. Allowing probationers to appeal removals for "bad faith" is a very broad standard that conceivably opens probationary separation for appeal. The purpose of the probationary or trial period is to ensure that employees are fit for public service. Many employees in DHS serve probationary periods beyond one year because the time needed to train new employees in these positions makes it impracticable to determine their fitness for the position in one year (e.g. Secret Service employees assigned to protect the President of the United States). Shortening or effectively eliminating this trial period by providing extended appeal rights could limit management's ability to deal effectively new employees who are not well suited to this type of position.
- It may be difficult in many cases to determine which actions are appealable, e.g., whether a reassignment results in lost overtime opportunities, for components with rapidly changing mission needs.
- This option might violate certain statutory requirements to impose discipline (e.g., for misuse of a Government owned or leased vehicle), by placing a time limit on the period within which the agency must propose action.
- Non unit employees might be concerned if a union member was on the panel.
- Unit employees might be concerned because management has two members on the panel.
- The expanded coverage provided by the option could require a hearing in a wide range of matters without regard to severity.

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- The provision to end mixed case review of EEO cases by requiring employees to select either the MSPB, PRB, EEO or arbitration might not be binding on the EEOC. After having not prevailed in one of the other forums, an employee might still be able to file a discrimination complaint with the EEOC thereby greatly extending a final decision on an appeal.
- Expanding appeal coverage to include involuntary changes to working conditions that negatively affects pay and involuntary reassignments or changes in duty stations could create operational difficulties for management.
- Employee option to return to prior position after performance drops to unacceptable level in a new position might require management to create an unneeded position or involuntarily reassign another employee.
- Employee eligibility to receive alternative remediation when subject to a suspension 14 days or less could dilute the impact of discipline and create morale problems among the rest of the workforce.
- Permitting the MSPB to mitigate a performance action could impinge upon management's authority to determine an appropriate response to poor performance.
- Changing the standard of proof to preponderance (from substantial) with respect to taking performance actions might discourage supervisors from addressing poor performance issues.
- Requiring that employees be given a choice of a pre-decisional hearing or to have proposed actions mediated will add time to the process and undermine supervisory authority to take actions. Using employees as mediators might present an appearance that mediators cannot be completely neutral.
- Alternative forms of discipline may be difficult to compare to traditional penalties when trying to ensure consistency for similar offenses.

Other Implications

- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- There would be some costs associated with training a cadre of employee mediators. There would also be costs associated with staffing a PRB. There would be no additional costs associated with retaining the MSPB.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- The current system was originally designed to support the mission of nearly all Federal agencies, including those have national security related functions and with the exception of TSA, all of the various organizations that now make up DHS.
- The current system covers many if not most employees of a number of agencies regarded as having successfully achieved their missions in recent years: NSA, FBI, DOD, and Secret Service.

Performance Focused

- The current system contains provisions specifically focused on enabling agencies to address poor performance on the part of employees and when combined with either the current or a modified performance management system, can be used to hold employees accountable for performance.

Contemporary and Excellent

- While originally designed 25 years ago, the current system is sufficiently flexible to accommodate changes in the workforce and mission.

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- When organizations such as GAO and FAA have been given an opportunity over the intervening time to design new adverse action and appeal systems, they have generally adopted most of the key features of the current system, particularly such key elements as cause of action, advance notice, and burden of proof.

Generate Trust and Respect

- Notwithstanding the apparent complexity in its details, the fundamental elements of the current system, including the right to advance notice, opportunity to respond, and review by an impartial adjudicator – are understood by employees and there is general acceptance that the current system is an effective guard against arbitrary, unjustified personnel action.

Based on Merit System Principles and Fairness

- The current system came into being simultaneous with the codification in statute of the merit systems principles and was designed to operate in concert with those principles.
- Over the 25 years since its creation, a number of statutory amendments have been carefully crafted and enacted to strengthen perceived weaknesses in this area. Examples include the Whistleblower Protection Act, the Due Process Amendments, the OSC Reauthorization, and USERRA. Taken together with the original language, these modifications create a system which ensures consistent adherence both the statutory merit system principles as well as the fundamental concept of fairness.

Transition & Implementation:

- No transition necessary if the MSPB is retained. If the PRB is adopted, all cases previously filed in other forums would continue to conclusion. New appeals could be filed with the RPB, EEOC, or under the negotiated grievance procedure.

**Detailed Description
By System Component and System Element**

D		Discipline/Adverse Action System
System elements:	Summary description:	
<p>1</p> <p>Coverage</p> <ul style="list-style-type: none"> - Employees - Actions - Probationary/ trial period 	<p><i>Employee Coverage:</i> Most employees are covered but a number of criteria determine whether and when a specific individual is covered. These criteria include but are not limited to whether the employee's position is in the competitive or excepted service, whether they are entitled to veterans preference, the nature of their appointment (temporary, term, or not time limited), and whether their position is specifically excluded by separate statute or OPM regulation. Probationary employees would be added to the list of covered employees.</p> <p><i>Action Coverage:</i> All conduct-based or performance-based actions would be taken using processes currently contained in 5 USC Chapter 75, as modified herein, and actions covered include removal, any reduction in grade or pay, suspension, and furlough. Involuntary changes to working conditions that negatively affect the pay of an employee (e.g., a change that results in lost overtime opportunities) and involuntary reassignments or changes in duty station (except those made pursuant to a collective bargaining agreement) would be added to the list of covered actions.</p>	
<p>2</p> <p>Basic Process</p> <ul style="list-style-type: none"> - Advance notice - Reply opportunity - Rep. right - Decision - Timeframes - Cause 	<p><i>Advance notice:</i> Except where an agency has reasonable cause to believe a serious crime has been committed, employees are entitled to 30 (or 21) days advance notice prior to an agency effecting a covered action. Such notice must be in writing and must state the specific reasons for the proposed action. In the case of actions taken for unacceptable performance, such notice must be preceded by a period during which an employee is given an opportunity to improve their performance to an acceptable level.</p> <p><u>Notice Option 1:</u> Would require a 30-day notice period for all actions. <u>Notice Option 2:</u> Would require a 21-day notice period for all actions.</p> <p>Agencies would be required to provide copies of all documents/evidence (both inculpatory and exculpatory) to the employee as part of the advance notice and would be required to respond substantively to all reasonable employee information requests within 2 work days of receiving such requests.</p> <p>Agencies would be required to consider the principle of progressive discipline and the "Douglas factors" when proposing <u>and deciding</u> an action. The results of this consideration would be a required element of the advance notice.</p> <p><i>Reply opportunity:</i> Employees are entitled to a reasonable time but not less than 7 (or 5) days to respond orally and or in writing to the above advance notice. With the consent of the employer, employees could respond both orally and in writing. If the employee elects to respond orally and the appropriate official is unavailable for a face-to-face meeting, the reply may be made telephonically.</p> <p><u>Reply Option 1:</u> Would require a 7-day reply period for all actions. <u>Reply Option 2:</u> Would require a 5-day reply period for all actions.</p>	

D Discipline/Adverse Action System	
System elements:	Summary description:
	<p>Representation: Employees are entitled to be represented by an attorney or other representative.</p> <p>Decision: The agency must issue a written decision containing the reasons for its action prior to the effective date of such action. In the case of removals, reductions in grade, furloughs, or suspensions of more than 14 days, such decision must be concurred in by an agency official at a higher level than the official who issued the advance notice. The decision letter would have to be issued within 21 days of the reply, or if mediation is selected (see Option 2 below), within 10 days of the initiation of a mediation.</p> <p><u>Pre-decision Option 1:</u> Employees could elect a pre-decisional hearing, with a representative of his/her choosing, before a 3-member internal review board of agency employees. One member of the board would be appointed by the union, one member would be a manager, and the third would be a labor/employee relations specialist. The board would be empowered to make a recommendation to the deciding official.</p> <p>The internal review board's conclusions and processes would be confidential and would not be made part of the record of any appeals process. In the event that no action is taken against an employee, management would not be permitted to reissue the proposal after using the board process to "discover" information.</p> <p><u>Pre-decision Option 2:</u> A cadre of agency employee/mediators would be trained in adverse actions and dispute resolution techniques. After the employee replies, he/she may elect to have the matter presented to a mediator. The employee, his/her representative, management designees, and the mediator would attempt to reach a settlement. Pledges of confidentiality and non-precedence would apply to the process. If the mediation produces a settlement, the employee cannot appeal. If the mediation does not produce a settlement within 10 days of the first mediation session, the agency issues the decision letter.</p> <p>Timeframes: Performance-based actions must be based on performance which occurred within the year preceding the advance notice except that agencies would be allowed to rely on instances of unacceptable performance during the 2- year period preceding the advance notice if the employee had previously been on a PIP for unacceptable performance in the same critical element during that 2-year period.</p> <p>Notice of proposed conduct-based actions would have to be issued within 12 months of the alleged wrongful act (except if the charge would constitute a crime if proved in court).</p> <p>Employees whose performance during the one-year period following their movement into a new position drops to an unacceptable level would be given the opportunity to voluntarily return to their prior position and grade in lieu of an adverse action.</p>

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D		Discipline/Adverse Action System
System elements:		Summary description:
		<p>Cause: All actions taken "for such cause as promotes the efficiency of the service," which may include misconduct or unacceptable performance. Performance-based actions must be based on a determination of unacceptable performance as measured against pre-established, objective performance standards</p> <p><i>Other:</i> A separate, very rarely used provision (5 USC 7531-33) authorizes the immediate suspension and expedited removal where a determination is made that such action is in the interests of national security. Some but not most DHS positions are covered by this statutory provision.</p> <p>An employee who is subject to a suspension of 14 days or less would be eligible for appropriate alternative remediation (e.g., counseling/training or community service) instead of unpaid time off.</p>
3	Evaluation	2002 Federal Human Capital Survey data: Fewer than half of Federal employees believe that in their organization, steps are taken to deal with poor performers who can't or won't improve.

A		Appeals System
System elements:		Summary description:
1	<p>Coverage</p> <ul style="list-style-type: none"> - Employees - Actions - Probationary/trial period 	<p>Employee Coverage: With a few exceptions, same as above under Discipline/Adverse Action.</p> <p>Action Coverage: With the principal exception of suspensions of 14 days or less, generally same as above under Discipline/Adverse Action. Involuntary changes to working conditions that negatively affect the pay of an employee (e.g., a change that results in lost overtime opportunities) and involuntary reassignments or changes in duty station (except those made pursuant to a collective bargaining agreement) would be appealable actions.</p> <p>Probationary/trial period: Employees who are removed while during probation do have very limited appeal rights to MSPB under 5 CFR Part 315. In addition to these rights, they would also be able to appeal bad-faith removals.</p> <p>Other: <u>All</u> Federal employees can pursue allegations of discrimination via the EEO complaint process and allegations of other prohibited personnel practices via the Office of Special Counsel. Such allegations can also be raised as affirmative defenses in an appeal of any performance or conduct-based action.</p>
2	<p>Reviewer</p> <ul style="list-style-type: none"> - Composition - Authority 	<p><i>MSPB:</i> Independent Federal agency headed by three Presidential appointees ("the full Board") which employs administrative judges (AJ) to conduct initial review of appeals. MSPB has established a two-level system of review with initial AJ decisions appealable to the full Board. MSPB has authority to reverse agency actions and order the employee restored to the status, in terms of position and pay, that they would have had had no action been taken. This includes the authority to order back pay with interest. In all actions, MSPB would have</p>

A Appeals System	
System elements:	Summary description:
	<p>authority to mitigate any penalty imposed. MSPB is a quasi- judicial agency whose jurisdiction is limited to review of certain personnel actions taken by Federal agencies against employees.</p> <p>Arbitration: If an employee is covered by a negotiated grievance procedure (NGP), and that procedure has not excluded covered actions, such employee (in concert with their union) may pursue review of an action taken via the NGP which may lead to review of the action by an arbitrator. Arbitrators are not Federal employees but rather private individuals, are selected by the agency and the union in accordance with the terms of the NGP, and generally have authority similar to that described above for MSPB. By its nature, arbitration generally involves a single level of review as compared to the two levels of review under MSPB.</p> <p><u>Authority Sub-option 1:</u> MSPB functions to be performed by a 3-member DHS Personnel Review Board (PRB); 1 member would be selected by the Secretary, 1 member would be selected by the 3 largest DHS unions, and 1 member would be selected by the other two members (or from a list of arbitrators with relevant experience prepared by FMCS with names struck by Secretary and the unions). The PRB would have authority like the MSPB and would be guided by decisions of the MSPB, EEOC, and courts until it creates its own case law. The PRB would employ well-qualified hearing examiners, who would be authorized to decide appeals and required to issue initial decisions within 90 days of the filing of an appeal. Initial decisions would become final unless appealed to the PRB within 30 days.</p> <p><u>Authority Sub-option 2:</u> 3-member PRB to be appointed by the President and confirmed by the Senate. No more than 2 of the members can be adherents of the same political party.</p> <p><u>NOTE:</u> Judicial review of the PRB's final decisions, whether the PRB is configured under Sub-option 1 or Sub-option 2, would be essential to the PRB concept.</p> <p><u>Sub-option for arbitrators:</u> In order to be included on a panel for selection, arbitrators would have to go through training on DHS work practices and missions. This training would be provided jointly by unions and management. Retired DHS employees who become arbitrators may have the training requirement waived upon request.</p>
3	<p>Review Process</p> <ul style="list-style-type: none"> - Components - Timeframe <p>MSPB: Employees must file appeals within 30 days of the action. Employees have a right to a full evidentiary hearing. Prior to such hearing, both the employee and the agency may engage in discovery and will under supervision of the AJ, discuss settlement and exchange witness lists. Employees have the right to be represented at such hearings, which are conducted like judicial trials, although slightly less formal. A transcript of such hearings is kept. Upon completion of the hearing, and consideration all evidence submitted by both parties, the administrative judge will issue a written "initial decision" which, unless review by</p>

A Appeals System	
System elements:	Summary description:
	<p>the full Board is sought by either party, becomes final 30 days after issuance. Initial decisions are nonprecedential. The majority of initial decisions are issued within 95 days of an appeal being filed. If a petition for review by the full Board is filed, such review is done on the record (no hearing). The full Board may decline to grant such petition but if and it grants such petition and issues a decision, in most cases such decision will be precedential. Full Board decisions are typically issued within 180 days of a petition being filed.</p> <p><u>Process sub-option:</u> As an alternative to the MSPB "adversarial" system, well-qualified PRB hearing examiners could be responsible for developing the record, including requiring parties to produce evidence/witnesses, holding hearings, and establishing the record through questioning witnesses and assembling documents. The examiner could compel any government witness to appear. In lieu of the current MSPB discovery process, parties would make requests re: evidence needed and the examiner would decide what evidence is required to adjudicate the appeal.</p> <p>Arbitration: Proceedings before an arbitrator are less formal, are conducted in accordance with the procedures agreed to by the parties. While involving an evidentiary hearing, arbitration proceedings typically do not involve discovery and do not require that a transcript be kept. Arbitrators are required by law to apply the same standard of proof used by the MSPB. No central records are kept on the length of time from the filing of a grievance to issuance of an arbitration award and individual cases can involve as little as 90 days or as long as a year.</p>
4	<p>Decision</p> <ul style="list-style-type: none"> - Precedential? - Burden of proof - Standard of proof - Judicial review <p>Decisions by the full MSPB (or PRB) are precedential and are binding on administrative judges (or PRB hearing examiners).. Arbitration awards are non-precedential absent agreement by the parties and if so agreed, are only binding on the parties. Regardless of the forum, the burden of proof is on the agency to justify its action. In all actions taken, the agency must show by preponderance of the evidence that the action promotes the efficiency of the service. Except in actions involving allegations of discrimination, judicial review of MSPB decisions and arbitration awards may be sought before the U.S. Court of Appeals for the Federal Circuit. MSPB decisions and arbitration awards involving an allegation of discrimination are subject to additional review involving MSPB, EEOC, and U.S. District Court.</p> <p>Judicial review would be essential to the PRB concept.</p> <p>The principle of progressive discipline and the "Douglas factors" would be incorporated into regulatory standards for reviewing agency actions., either by the MSPB or the PRB.</p>
5	<p>Other Appeals Systems</p> <ul style="list-style-type: none"> - Discrimination <p>Separate avenues have been established in statute to ensure review of allegations of discrimination and other prohibited personnel practices. As noted above, all Federal employees can pursue allegations of discrimination via the EEO complaint</p>

A		Appeals System
System elements:		Summary description:
	<ul style="list-style-type: none"> - Prohibited personnel practices 	<p>process and allegations of other prohibited personnel practices via the Office of Special Counsel. Where there is an appealable action which also involves an allegation of discrimination or other prohibited practice, these avenues can overlap and intersect. The mixed-case procedure would be eliminated. Employees with appealable actions involving discrimination would select the EEOC process, this appeals process, or the negotiated grievance procedure.</p> <p>Independent Right of Action for Whistleblower Reprisal: An employee who alleges that an appealable action is based in whole or in part on reprisal for whistleblowing may initially file a complaint with the Office of Special Counsel (OSC). That agency can pursue such complaint before the MSPB on behalf of the employee. Alternatively, the employee can raise the allegation as an affirmative defense in an appeal to the MSPB or a grievance filed under an applicable negotiated grievance procedure. While the employee can only gain individual relief before MSPB, the OSC can seek and obtain an order imposing disciplinary action against the agency officials who engaged in the reprisal.</p>
6	Evaluation	GAO, MSPB, and other organizations periodically conduct studies of the current appeals system.