

Joint Labor Management Panel [49]

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 generally retains the current external review process but creates a new permanent panel to replace MSPB. The panel would consist of three members jointly appointed by DHS management and labor unions, each of whom would serve a set term of several years. Possible panel members could be former DHS senior managers, former higher level union officials, and distinguished private sector arbitrators. The panel would appoint arbitrators from the private sector to perform the role now handled by MSPB administrative judges (and by arbitrators when reviewing grievances of adverse action).

Key Features:

- All DHS employees who are covered by the DHS adverse action system have the right to appeal any action covered by this system.
- Initial review, involving a full evidentiary hearing, would be conducted by an arbitrator appointed by the DHS Joint Management-Labor Panel (JMLP).
- All initial decisions by such arbitrators would be subject to review by the JMLP.
- One member of the JMLP would be appointed by the Secretary of DHS and one member by agreement amongst all DHS unions – these two members would appoint the third member of the panel.
- The JMLP, as well as arbitrators appointed by the JMLP, would have authority similar to that currently granted MSPB (reverse the appealed action and return the employee to status quo ante) but would be able to mitigate the penalty in all actions.
- While the cost of the JMLP panel and staff would be paid for by DHS, the cost of arbitrators would be shared by DHS management and unions for bargaining unit employees and shared by DHS management and individual employees for non-bargaining unit employees.
- The burden would be on the agency to show in all actions that the action promotes the efficiency of the service.
- The standard of proof in all actions would be preponderance of the evidence.

Sub-Options:

- The costs of arbitration, instead of being shared, might be assigned to the party or individual who failed to prevail in the proceeding, or might be otherwise apportioned by the arbitrator according to the extent that one side prevailed.

Relation to Other Options:

- This option might work well with any Labor Relations option which established a single panel to address LR issues (e.g., bargaining disputes, grievances of actions other than adverse actions, ULP's). The Joint Management Labor Panel established under this option might also handle such LR issues.

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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

- Would establish a new administrative body dedicated to hearing DHS appeals; decisions from such body would reflect the unique DHS mission, culture, and practices.
- Arbitrators could be appointed as necessary to meet workload demands and since the cost would be shared, the number of frivolous appeals would likely decline.
- Should be viewed as fair because it is independent and its members are jointly selected by labor and management.

Possible Problems/Challenges

- This system would cover employees who are not part of a bargaining unit; they might not feel comfortable with a panel selected in part by labor unions.
- Non-bargaining unit employees might be reluctant to use the panel if they are potentially responsible for the cost of the any arbitration.
- The broad and extensive use of arbitrators places the primary responsibility for adjudication of adverse action appeals in the hands of non-Federal employees.
- The two-step appeal process (arbitration then review by JLMP) may not be any faster than today's two-step MSPB appeals process.

Other Implications

- Would have to get DHS's many unions to agree on appointing a particular panel member.
- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- Possible cost reduction since cost of arbitration would be shared.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- The single focus of the JMLP would be on adjudication of DHS matters.
- The operating practices and priorities established by this new body would reflect the DHS culture and mission.

Performance Focused

- The use of private sector arbitrators would facilitate the processing of appeals in an efficient manner with additional assignments given to arbitrators whose decisions were issued in a timely manner.

Contemporary and Excellent

- Arbitration is commonly used in the private sector.

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Generate Trust and Respect

- Employees, through their union, would have a substantial role in selecting the members of the JMLP; the system and decisions would more likely be accepted by employees as fair and impartial.

Based on Merit System Principles and Fairness

- The JMLP would have the same authority as the current MSPB to enforce full adherence to the merit system principles and to issue fair decisions.

Transition & Implementation:

- There would need to be a period of transition as the new body was created, hired staff, and developed lists of available arbitrators.
- As a starting point, most of the current regulations and practices of the MSPB could be adopted and then modified as necessary to ensure the expeditious processing of cases.

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

A		Appeals System
System elements:		Summary description:
1	Coverage - Employees - Actions - Probationary/ trial period	<ul style="list-style-type: none"> • Covered employees and covered action are the same as provided for under the DHS adverse action system (All DHS employees who are covered by the DHS adverse action system have the right to appeal any action covered by such system).
2	Reviewer - Composition - Authority	<ul style="list-style-type: none"> • Two level system overseen by 3-member Joint Management-Labor Panel. • One member of the JMLP would be appointed by the Secretary of DHS and one member by agreement amongst all DHS unions – these two members would appoint the third member of the panel. • Initial review, involving a full evidentiary hearing, would be by an arbitrator appointed by the DHS Joint Management-Labor Panel (JMLP). • All initial decisions by such arbitrators would be subject to review by JMLP. • The JMLP, as well as arbitrators appointed by the JMLP would have authority similar to that currently granted MSPB (reverse the appealed action and return the employee to status quo ante) but would be able to mitigate the penalty in all actions.
3	Review Process - Components - Timeframe	<ul style="list-style-type: none"> • Similar to current system although JMLP would have authority to modify current MSPB regulations and practices to achieve more expeditious processing of cases.
4	Decision - Precedential - Burden of proof - Standard of proof - Judicial review	<ul style="list-style-type: none"> • All decisions of the JMLP would be precedential. • The burden in all cases would be on the agency to show by clear and convincing evidence that the action promotes the efficiency of the service. • All final JMLP decisions, including those involving allegations of discrimination, would be subject to judicial review by the Federal Circuit.
5	Other Appeals Systems - Discrimination - Prohibited personnel practices	<ul style="list-style-type: none"> • Similar to current system except that employees would be required to elect to pursue any allegations of discrimination either via the above process or via an EEO complaint process leading to possible review by EEOC and District Court. • Allegations involving prohibited personnel practice other than discrimination could (as under the current system) be raised before the arbitrator.
6	Evaluation	<ul style="list-style-type: none"> • Response of employees, supervisors, and managers to annual survey which includes such questions as: <ul style="list-style-type: none"> ○ "The new system appropriately provides a fair process for employee to

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A		Appeals System
System elements:		Summary description:
		<p>challenge adverse actions.”</p> <ul style="list-style-type: none">• Cost of taking adverse actions, including cost of resolving any challenge to such action.