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5 CFR Chapter XCVII and Part 9701

Department of Homeland Security Human Resources Management System; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Chapter XCVII and Part 9701

RIN 3206–AK31/1601–AA–19

Department of Homeland Security Human Resources Management System

AGENCY: Department of Homeland Security; Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Department of Homeland Security (DHS) and the Office of Personnel Management are issuing proposed regulations to establish a new human resources management system within DHS, as authorized by the Homeland Security Act of 2002. The affected subsystems include the systems governing basic pay, classification, performance management, labor relations, adverse actions (*e.g.*, disciplinary actions), and employee appeals. These changes are designed to ensure that DHS' human resources management system aligns with the Department's critical mission requirements and protects the civil service rights of its employees.

DATES: Comments must be received on or before March 22, 2004.

ADDRESSES: You may submit comments, identified by docket number DHS–2004–001 and/or RIN number 3206-AK31, by any of the following methods:

- E-Docket Web Site: *http://www.epa.gov/edocket.* Follow the instructions for submitting comments at that web site.
- Mail: DHS/OPM HR System Public Comments, P.O. Box 14474, Washington, DC 20044–4474.
- Hand delivery/Courier: OPM Resource Center, Room B469, Office of Personnel Management, 1900 E Street, NW., Washington, DC. Delivery must be made between 10 a.m. and 2 p.m., Monday through Friday, except Federal holidays.
- Federal Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking. The online e-docket system is DHS/OPM's preferred method for receiving comments. Mailed or hand-delivered comments must be in paper form. No mailed or hand-delivered comments in electronic form (CDs, floppy disk, or other media) will be accepted. All comments received, whether mailed, hand-delivered, or submitted online, will be posted without change or omission to the e-docket at: *http://www.epa.gov/edocket.* For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' and ''Electronic Access and Filing'' headings in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the e-docket to read background documents, submit comments, and read comments received, go to *http://www.epa.gov/edocket.* To read the hard-copy originals of mailed and hand-delivered comments, visit the OPM Resource Center, Room B469, Office of Personnel Management, 1900 E Street, NW., Washington, DC, between 10 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: At OPM: Ronald P. Sanders, (202) 606–9150; at DHS: Melissa Allen, (202) 692–4272.

SUPPLEMENTARY INFORMATION: The Department of Homeland Security (DHS or ''the Department'') and the Office of Personnel Management (OPM) are proposing to establish a new human resources (HR) management system within DHS under 5 U.S.C. 9701, as enacted by section 841(a)(2) of the Homeland Security Act of 2002 (Public Law 107–296, November 25, 2002). The following information is intended to provide interested parties with relevant background material about (1) the Homeland Security Act, (2) the process used to design options for a new HR system, (3) a summary of the options developed and the review of those options by the DHS Human Resource Management System Senior Review Advisory Committee, (4) an evaluation of the design process, (5) a description of the proposed new HR system, and (6) an analysis of the costs and benefits of the proposed system.

The Homeland Security Act of 2002

Background

On November 25, 2002, President George W. Bush signed Public Law 107–296, the Homeland Security Act, which established DHS. On March 1, 2003, more than 20 organizations and functions previously assigned to other Federal agencies were merged officially into the new Department, making this the most significant reorganization in the executive branch of the Federal Government in more than 50 years. DHS was created with the overriding mission of protecting the Nation against further terrorist attacks. DHS analyzes threats and intelligence, guards our borders and airports, protects our critical infrastructure, coordinates the response of our Nation to emergencies, and implements other security measures. DHS also is committed to enhancing public services such as natural disaster assistance.

Authority To Establish a New HR System

In creating the new Department, Congress provided a historic opportunity to design a 21st century HR management system that is mission-centered, fair, effective, and flexible. One of the most important features of the Homeland Security Act was the authority granted jointly to the Secretary of Homeland Security and the Director of OPM under 5 U.S.C. 9701(a) to establish a new HR management system within the Department. By law, this authority is to be exercised through the issuance of regulations prescribed jointly by the Secretary and the Director.

Through this authority, DHS may establish a modern, flexible HR system to support its mission and improve employee and organizational performance. In granting this authority, Congress gave DHS flexibility to create an HR system that supports the agency's primary mission of protecting Americans from terrorist attack without compromising fundamental employee rights. In so doing, DHS has the authority to waive or modify the following provisions of title 5, United States Code:

- The rules governing performance appraisal systems established under chapter 43;
- The General Schedule classification system established under chapter 51;
- The pay systems for General Schedule employees, Federal Wage System employees, Senior Executive Service members, and certain other employees, as set forth in chapter 53;
- The labor relations system established under chapter 71;
- The rules governing adverse actions taken under chapter 75; and
- The rules governing the appeal of adverse actions and certain other actions under chapter 77.

The ''section 9701 authority'' does not extend to systems or rules established under an authority outside the above-listed title 5 chapters. (*See* 5 U.S.C. 9701(b) and (c).) For example, the authority does not reach to DHS employees covered by a basic pay system authorized by an authority outside title 5 (*e.g.*, Secret Service Uniformed Division officers, Coast Guard military personnel, Coast Guard

Academy faculty members, Transportation Security Administration employees, and employees of the DHS Emergency Preparedness and Response Directorate appointed under the Robert T. Stafford Disaster Relief and Emergency Assistance Act).

In some cases, however, laws authorizing separate pay and classification systems for certain DHS employees not covered by title 5 provide considerable administrative discretion for modification of those systems. For example, the Transportation Security Administration (TSA) generally must adopt the system established for Federal Aviation Administration (FAA) employees, but the Administrator of TSA is authorized to modify that system consistent with 49 U.S.C. 40122. Similar discretionary authority applies to the pay systems for Stafford Act employees and to employees of the U.S. Coast Guard Academy. Thus, it is possible for DHS to extend a new pay system designed for employees currently covered by title 5 to TSA employees, Stafford Act employees, and/or employees of the Coast Guard Academy by administrative action. In contrast, the basic pay system established under the DC Code for Secret Service Uniformed Division (SSUD) officers cannot be altered administratively. Legislative action would be required to modify the basic pay system for SSUD officers.

Also, the section 9701 authority does not cover systems or rules in other title 5 chapters, such as the employment provisions in chapters 31 and 33, the premium pay provisions in chapter 55, or the retirement systems in chapters 83 and 84. However, section 881 of the Homeland Security Act does require DHS to review the pay and benefits plans applicable to its employees, identify possible disparities, and submit a plan for eliminating any unwarranted disparities. DHS provided a preliminary report to Congress on possible pay and benefits disparities on March 5, 2003, and continues to review these issues.

DHS' authority to modify or waive the six chapters of title 5 cited above (and the associated implementing regulations) is subject to certain limitations set forth in section 9701 of title 5 and elsewhere in the Homeland Security Act. These limitations are designed to ensure that fundamental merit system principles and employee protections are preserved. The limitations include the following:

- Any new or modified system must be consistent with the merit system principles in 5 U.S.C. 2301. Similarly, protections against prohibited personnel practices (*e.g.*, reprisal against whistleblowing or discrimination) remain in force.
- The section 9701 regulations may not modify regulations implementing nonwaivable laws.
- DHS may not modify the pay system for Executive Schedule officials, even though that system is authorized under chapter 53.
- DHS employees remain subject to the aggregate limitation on pay established under 5 U.S.C. 5307, and the annual rate of pay for employees covered by the pay system proposed here may not exceed the rate for level I of the Executive Schedule.
- DHS must ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusion from coverage or limitation on negotiability established by law.
- Any modification of chapter 77 appeals procedures must be consistent with the requirements of due process, must provide for expeditious handling of DHS cases to the maximum extent practicable, and must make modifications only insofar as those modifications are designed to further the fair, efficient, and expeditious resolution of DHS cases.
- DHS and OPM may not issue new regulations under the section 9701 authority after the 5-year period following the 12-month transition period beginning on the effective date of the Homeland Security Act. Since the Act became effective on January 24, 2003, the section 9701 regulatory authority sunsets on January 23, 2009. Any section 9701 regulations issued before that date will remain in effect.

Collaboration With Employee Representatives

Section 9701 also prescribes certain procedural requirements in connection with the exercise of the joint DHS/OPM regulatory authority. Section 9701(e) sets forth provisions to ensure collaboration with employee representatives in the planning, development, and implementation of any new or modified HR system. These provisions are described in detail in the ''Next Steps'' section of this

SUPPLEMENTARY INFORMATION.

In addition to the procedural requirements related to consultation with employee representatives, the Homeland Security Act also requires the Secretary and the Director to consult with the Merit Systems Protection Board (MSPB) before issuing regulations modifying the appeals procedures under chapter 77.

Designing Options for a New HR System

Design Team Membership and Purpose

With the enactment of the Homeland Security Act of 2002, DHS Secretary Tom Ridge and OPM Director Kay Coles James made a commitment that the Department's new HR system would be the result of a collaborative and inclusive process involving managers, employees, the Department's largest unions, and a broad array of stakeholders and experts from the Federal sector and private industry. This commitment went far beyond the strict requirements of the Homeland Security Act, as described above, because the Secretary and the Director felt it was critical to involve employees, the unions that represent them, and DHS managers in a direct and meaningful way throughout the entire design process—not just at the end of the process, as required by law.

In April 2003, the Secretary and the Director established a DHS/OPM HR Systems Design Team composed of DHS managers and employees, HR experts from DHS and OPM, and professional staff from the agency's three largest Federal employee unions (the American Federation of Government Employees, the National Treasury Employees Union, and the National Association of Agriculture Employees). The 48 team members were assigned to one of two sub-teams: (1) pay, performance, and classification or (2) labor and employee relations. Each sub-team had two co-leaders, one from DHS and one from OPM.

The team was not asked to reach agreement on a single solution or the best approach in any of the six areas where DHS was given flexibility. Instead, the team's mission was to develop a wide-ranging set of options for a new HR system at DHS. To help in this effort, the team conducted extensive research into human capital practices in the public and private sectors, talked with many leading human resources experts, heard directly from DHS employees and managers through a series of town hall meetings and focus groups, and gathered insights from a Field Team composed of DHS managers and local union officials who were asked to provide feedback and a front-line perspective to the Design Team. The lessons learned through these outreach and research efforts helped the Design Team develop a total of 52 options that addressed one or more of the six HR areas under consideration. The options were presented to the DHS Human Resource Management Senior Review Advisory

Committee on October 20–22, 2003. (The Senior Review Committee and its review of the options are described in detail below.)

Guiding Principles

During the Design Team's inaugural meeting in April 2003, Secretary Ridge, Director James, and the presidents of the three largest Federal employee unions at DHS discussed the fundamental elements of a model HR system for the Department. They stated, for example, that any new system must be responsive to the mission of the agency, that it must be performance-based, that it must be a 21st century system agile enough to respond to 21st century threats, and that it must be credible and fair.

Building on these requirements, the Design Team developed a set of ''guiding principles'' that were reviewed by the Field Team and approved by the Senior Review Committee. The Senior Review Committee agreed that options for a new HR system must, first and foremost, be mission-centered. The new system must be performance-focused, contemporary, and excellent. It must generate respect and trust; it must be based on the principles of merit and fairness embodied in the statutory merit system principles; and it must comply with all other applicable provisions of law. In addition, the Design Team and the Senior Review Committee agreed that the process for developing HR options must be collaborative, reflecting the input of managerial and non-managerial employees at all levels in DHS and of employee unions. These guiding principles served as the basis for conducting research and outreach activities and, later, for evaluating options for a new HR system.

Research and Outreach Activities

The research phase of the design process took place from April until July 2003. The pay, performance, and classification (PPC) sub-team focused its work on those chapters of title 5 which cover pay systems, performance management, and classification. The labor relations/employee relations (LR/ER) sub-team focused its research on those chapters of title 5 dealing with labor relations, adverse actions, and appeals. Both sub-teams researched promising and successful practices and systems in their respective areas. Both also sought to understand the reasons for less-than-successful practices and systems. The two sub-teams followed the same methodology in conducting research by identifying sources of information and devising and implementing methods of collecting, categorizing, and storing the information so that it was available to the entire team. In addition, the Design Team collected and analyzed statistical information about the DHS workforce. To understand what employees thought about the current systems, team members also attended DHS town hall meetings and employee focus groups at various locations around the country, as described in greater detail below.

The PPC sub-team identified 25 areas of interest and assigned groups to research each area. The areas of interest included the structure of pay ranges, methods for categorizing types of work, and different appraisal and rating methods. The PPC sub-team identified research sources from State and local governments, international organizations, non-profit organizations, other Federal agencies with different pay systems, and private sector organizations. These sources were asked to give presentations to the sub-team or full team, as appropriate. Some sources, who could not meet with the Design Team, were interviewed by team members.

The LR/ER sub-team followed similar practices and identified similar groups. However, since Federal sector labor relations are conducted differently than in the private sector and in State and local governments, few outside sources were identified by the LR/ER sub-team as suitable models in the labor relations area. Instead, the LR/ER sub-team identified experts in the field of Federal sector labor relations to be interviewed or to give presentations to the sub-team. There were, however, a number of sources in the private sector and in State and local governments that had innovative or promising processes for handling adverse actions and appeals.

Both sub-teams made an effort to ensure that their fact-finding and data-gathering activities were balanced. For instance, in the labor relations area, the LR/ER sub-team identified organizations with strong labor relations programs, as well as those with restricted programs or no labor relations programs at all. The Design Team also conducted a literature review to identify articles, reports, and other publications, which added to the body of information on current HR practices. Altogether, the Design Team contacted and received information from almost 200 individuals. A summary of the research conducted by the Design Team can be found at *http://www.epa.gov/edocket.*

Town Hall Meetings and Focus Groups

As noted above, Design Team members, along with senior DHS and OPM officials, attended a series of town hall meetings and focus groups sponsored by DHS. Consistent with the team's collaborative approach, these meetings were planned jointly with employee representatives and were conducted to inform employees about the design process and to solicit employees' perceptions of current HR policies.

To ensure that each town hall meeting and focus group meeting was attended by a diverse group of DHS employees, careful consideration was given to participant selection methodology. Diverse representation was sought and achieved by DHS component; geographic location; job/series; bargaining unit and non-bargaining unit status; and age, gender, and ethnicity demographics.

Town hall meetings with DHS employees were held between May and July 2003 in El Paso, Texas; Los Angeles, California; Seattle, Washington; Detroit, Michigan; New York, New York; Norfolk, Virginia; Miami, Florida; and Atlanta, Georgia. Senior DHS and OPM officials, including Janet Hale, DHS' Under Secretary for Management, Asa Hutchinson, Under Secretary for Border and Transportation Security, and Mike Brown, Under Secretary for Emergency Preparedness and Response, presided over each town hall meeting, with senior union officials joining them in some locations. Concurrent with the town hall meetings, 54 focus groups—44 with non-supervisory employees and 10 with supervisors—were held in the same 8 locations, as well as in Baltimore and Washington, DC. One of the Baltimore focus groups was composed entirely of blue-collar (''wage grade'') employees. In addition, two focus groups were conducted with DHS HR professionals. In total, more than 2,000 DHS employees participated in these town hall meetings and focus groups.

Each focus group was professionally facilitated and included several Design Team members as observers, note takers, and/or technical experts. For each of the six HR areas under review, focus group participants were asked, among other things, what they thought worked well in the current HR systems and what they thought should be changed. The information received from focus group participants was summarized and made a part of the Design Team's research. A comprehensive and detailed report on the focus group process and findings can be found at *http://www.epa.gov/edocket.*

Communications Strategy

A comprehensive communications strategy is essential for designing and implementing a new HR system. DHS

therefore developed a communications strategy in order to build and sustain high levels of respect and trust among DHS employees—one of the guiding principles for the design process—and to gain insight and support and address the concerns of stakeholders inside and outside of DHS. The objectives of DHS' communications strategy were to (1) raise awareness, disseminate information, and promote a clear understanding of the purpose for designing a new HR system; (2) manage stakeholder expectations and address their concerns; (3) provide opportunities for two-way dialogue between the Design Team and the stakeholders; and (4) generate a flow of timely, accurate, and consistent messages.

DHS identified channels for disseminating relevant, timely, and consistent information (including a wide variety of print and electronic media, e-mail, town hall meetings, focus groups, speeches, and briefings) and developed an action plan for communicating with each stakeholder. The Design Team also developed key messages to include in stakeholder communications to reinforce the guiding principles of the DHS HR systems design process. Finally, the Design Team developed mechanisms for providing feedback to ensure an on-going two-way dialogue between the design team and its stakeholders and to evaluate the effectiveness of communication activities in meeting the communication strategy objectives.

Outreach to Stakeholders

In addition to reaching out to DHS employees and to organizations and individuals of interest to the Design Team as part of its research activity, the Design Team reached out to stakeholders who were thought to be keenly interested in the design of new HR systems for DHS. As part of the communications strategy developed by DHS, the Design Team invited selected stakeholders to participate in two stakeholder briefings held at OPM in late August 2003.

The first stakeholder briefing was for Federal employee unions not represented on the Design Team. Seven individuals representing six employee unions attended this briefing. The second stakeholder briefing was for other stakeholders identified by DHS through its communications strategy. About 20 individuals representing 13 organizations or other Federal agencies participated in the second briefing. Attendees at both briefings received background information about the Homeland Security Act, an update on the Design Team's work plan, a presentation on the guiding principles developed by the Design Team, and updates on the research activities of the team, including town hall meetings and focus groups. Attendees were afforded an opportunity to participate in a question-and-answer session following these presentations.

Both before and after the stakeholder briefings, the Design Team also responded to requests from other stakeholders, including the General Accounting Office and the Coalition for Effective Change (an umbrella organization consisting of more than 30 Federal management associations), to bring them up to date on the team's activities. Design Team leaders also briefed the staff of key congressional committees regarding the progress of the design process, and officials from DHS and OPM testified before the House Committee on Government Reform's Subcommittee on Civil Service and Agency Organization and the Senate Committee on Governmental Affairs.

Options Development Process

The options development process was grounded in the extensive research described above. The resulting product was a set of 52 options that cover a broad range of variations on the six areas of focus.

The options development process was collaborative and inclusive, with ample opportunity for input from employees and their representatives. To ensure that the options reflected the wide range of views and concerns expressed by various entities, the Design Team did not attempt to reach consensus regarding the merits of the options. Consequently, none of the 52 options presented represents a consensus view of the Design Team.

Some of the options integrate approaches to developing new HR systems across two or more of the six subject matter areas under consideration. This is especially true of many of the pay, performance, and classification options, which were intended to illustrate how various pay, performance, and classification system elements might work in combination. The pay, performance, and classification options also tended to cluster around several distinct themes, such as ''time-focused'' options, ''performance-focused'' options, and ''competency-focused'' options.

The initial draft options were reviewed by the Field Team to capture feedback prior to finalizing them for submission to the Senior Review Committee. The options presented to the Senior Review Committee do not exhaust all of the possible combinations of subsystems, nor were the options intended to imply that there might not be other possible ways of combining the approaches incorporated in the different options. In addition, the Secretary and the Director remain free to suggest and adopt other ways of combining various design elements to establish a new HR system for DHS.

Summary and Review of Options

Overview of Pay, Performance Management, and Classification Options

The pay, performance, and classification sub-team developed a total of 27 options. The majority of these options attempted to present an integrated set of proposals across the pay, performance management, and classification areas. Among these options, four were traditional, time-focused graded systems under which pay progression would be based primarily on time in grade. Under these options, any general adjustments to the pay structure would be passed on automatically to all employees whose performance is at least acceptable. (The status quo General Schedule option provides across-the-board and locality pay increases to all employees, regardless of performance.)

The eight performance-focused options would link individual base pay and bonuses to individual, team, and/or organizational performance. Several of these options do not provide for any automatic pay increases. They usually (but not always) make use of a streamlined classification and paybanding system that groups similar occupations together in ''clusters'' that contain up to four pay bands each.

The four competency-focused options would make use of a set of competencies (*i.e.*, knowledge, skills, and abilities) developed for specific positions or occupations as a key component in classifying jobs, setting basic pay, and managing performance. Each of these options would use competencies to some degree, but most also would have a strong performance component, with pay progression based on the acquisition and application of competencies or the evaluation of performance.

Among the remaining pay, performance management, and classification options, there was one ''rank-in-person'' option that would make use of a person-based, rather than position-based, pay and classification system (similar to military or Foreign Service systems) and one collective bargaining option, under which all aspects of pay, performance

management, and classification systems would be subject to collective bargaining for all DHS bargaining unit employees. Finally, the pay, performance, and classification sub-team developed five ''stand-alone'' performance management or classification options and four ''plug-and-play'' options. A ''stand-alone'' option is one that provides a self-contained alternative to one of the three major components of an integrated pay/performance management/classification option. For example, a ''stand-alone'' performance management option could be substituted in its entirety for the performance management portion of an integrated option. A ''plug-and-play'' option, in contrast, generally addresses only one feature or aspect of a pay/performance management/classification system and cannot be substituted in its entirety for any of the major components of an integrated option. For example, a gainsharing/goalsharing program could be added to an integrated pay/performance management/classification option without altering the basic character of that option

Overview of Labor Relations, Adverse Action, and Appeals Options

Labor Relations

The labor and employee relations sub-team developed seven labor relations options that describe, among other things, the parties' bargaining obligations and how the labor relations program would be administered. One of the options would retain the status quo as codified in chapter 71 of title 5, United States Code, which sets out the rights and obligations of labor and management and authorizes the three-member Federal Labor Relations Authority (FLRA) to administer the labor relations program.

Some of the labor relations options proposed to narrow the scope of bargaining and/or place additional limitations on when the duty to bargain would arise. Some also would place time limits on bargaining over term and mid-term agreements. All of the options (except for the status quo) would replace FLRA and the Federal Service Impasses Panel with an internal DHS labor relations panel or administrator that would assume all or some of the functions performed by those two bodies. All of the options also would, for homeland security reasons or to meet operational needs, permit DHS management to act quickly with no bargaining at all or bargaining only after the action is taken.

Adverse Actions and Appeals

The sub-team developed 16 adverse action and/or appeals options, including a status quo option. The current adverse action process is found in chapter 75 of title 5, U.S. Code, which identifies the procedures for proposing and taking adverse actions against certain categories of employees. The current appeals process is found in chapter 77 of title 5, which identifies the procedure that covered employees must follow to appeal certain adverse actions to MSPB.

Some of the adverse action options would provide protections to more employees than are covered today under chapter 75, while others would narrow employee coverage. Similarly, some options would expand the range of matters that would be considered adverse actions (*e.g.*, any suspension) while others would narrow that range (*e.g.*, adverse actions limited to removals and suspensions of more than 30 days). All options (except the status quo) would replace the two current statutory processes for handling misconduct and poor performance with a single process.

Some of the appeals options would provide appeal rights to more employees than have such protections today (*e.g.*, appeal rights for probationary employees), while other options provide appeals rights to fewer employees (*e.g.*, appeal rights only for employees who complete 2 years or more of Federal service). Some of the options would replace MSPB with an internal DHS panel that would adjudicate adverse action appeals. Some options would raise management's burden or standard of proof required to win an appeal, while other options would lower that burden.

There were also two ''plug-and-play'' LR/ER options. One provides for a bargaining impasse standard that third parties would use to resolve impasse disputes between management and labor, and the other would establish alternative dispute resolution programs to address employee claims arising from adverse actions.

Review of Options by Senior Review Committee

In June 2003, DHS appointed 13 individuals to the DHS Human Resource Management System Senior Review Advisory Committee, which was chartered as a Federal advisory committee under the Federal Advisory Committee Act (FACA). Members included six top officials from DHS, four top officials from OPM, and the presidents of the three largest employee unions representing DHS employees. In addition, five non-Federal experts in public administration were designated as technical advisors to the Senior Review Committee. A complete listing of Senior Review Committee members and technical advisors follows:

Members From the Department of Homeland Security:

Janet Hale, Under Secretary for Management (Co-Chair);
Robert Bonner, Commissioner of Customs and Border Protection;
James Loy, Administrator, Transportation Security Administration;
Eduardo Aguirre, Director, Bureau of Citizenship and Immigration Services;
J. Michael Dorsey, Chief of Administrative Services;
Ralph Basham, Director, United States Secret Service.

Members From the Office of Personnel Management:

Steven R. Cohen, Senior Advisor for Homeland Security (Co-Chair);
Doris L. Hausser, Senior Policy Advisor to the Director and Chief Human Capital Officer;
Ronald P. Sanders, Associate Director for Strategic Human Resources Policy;
Marta B. Perez, Associate Director for Human Capital Leadership and Merit System Accountability.

Members From Unions:

John Gage, President, American Federation of Government Employees;
Colleen Kelley, President, National Treasury Employees Union;
Michael Randall, President, National Association of Agricultural Employees.

Technical Advisors:

Robert Tobias, Distinguished Adjunct Professor, American University;
Patricia Ingraham, Professor of Public Administration, Maxwell School, Syracuse University;
Maurice McTigue, Visiting Scholar, Mercatus Center, George Mason University;
Bernard Rosen, Distinguished Adjunct Professor in Residence Emeritus, American University;
Pete Smith, President and Chief Executive, Private Sector Council.

The Senior Review Committee held its first meeting on July 25, 2003, in Washington, DC. The meeting was open to the public and was conducted in accordance with FACA rules and regulations. At this meeting, the Committee heard presentations from Design Team leaders about the team's research strategy and methods, the guiding principles developed by the

Design Team, and the options development process. The Committee agreed to a slightly modified version of the guiding principles and an options template developed by the Design Team for the purpose of presenting options in a consistent fashion.

The Senior Review Committee held its second and last meeting on October 20–22, 2003, in Washington, DC. Once again, this meeting was open to the public and conducted in accordance with FACA rules and regulations. The purpose of the meeting was to discuss possible options for new HR systems in the areas of pay, performance management, classification, labor relations, adverse actions, and appeals and to express views that would inform decisions to be made subsequently by DHS Secretary Ridge and OPM Director James regarding which systems should be implemented within DHS.

The October 2003 meeting, in downtown Washington, DC, was professionally facilitated and well-attended. Following opening statements on the first day, the Committee members and technical advisors received a presentation from Design Team leaders about the pay, performance management, and classification options developed by the Design Team. The facilitator then asked Committee members for their views on the various categories of options presented. The second day followed a similar pattern, with presentations by Design Team leaders on the labor relations, adverse actions, and appeals options developed by the Design Team, followed by a facilitated discussion of those options. On the final day of the meeting, Committee members and technical advisors were afforded an opportunity to summarize their views for the benefit of the Secretary and the Director.

Over the course of this 3-day meeting, discussion and debate centered on the best design for DHS' HR system. Several topics evoked wide-ranging perspectives, but core areas and principles related to system design and the design process drew a great deal of consensus among the members. For example, the members agreed that—

- Above all else, any new HR system for DHS must be mission-focused, and its design must facilitate mission performance;
- the future system should be fair, transparent, and credible;
- establishing broad general principles as a foundation for the future system will be important to ensure integration, but HR options might have to be tailored to specific parts of DHS;
- employee and union participation, as well as effective communication, will be critical to creating, implementing, and operating a successful HR management system;
- creating a new system will take time and require a substantial investment of resources, including training and development, particularly for managers who must implement the changes in a manner that is seen by employees and the public as fair and credible.

Discussion of the various Design Team options revealed a wide range of opinions, with some options evoking greater discussion than others. A comprehensive summary of the October Senior Review Committee meeting can be found at *http://www.epa.gov/edocket.*

Summary of Public Comments on Options

Comments regarding the options discussed at the October Senior Review Committee meeting were received from a total of 16 organizations and individuals, including 5 employee organizations and 1 organization representing senior executives. Some of these comments were presented orally during the public comment period on October 21. Other comments were submitted to the Senior Review Committee in writing.

The comments reflected a range of views that included strong support for flexibility, as well as some concern for preserving due process for employees. It was suggested that inequities should not be permitted under the guise of national security and that it is not necessary to ''fix'' systems that are working well. At the same time, some comments stressed that DHS would need considerable HR flexibility to carry out its mission efficiently.

Comments also addressed the importance of recognizing and rewarding excellence. Some commenters expressed trepidation about implementing a pay-for-performance system, noting a potential for favoritism which can discourage teamwork. Others expressed support for the concept, while urging that such a system be adequately funded and ample training be provided. The importance of good communication with employees throughout the design and implementation of the new system was also noted.

Evaluation of Design Process

The creation of DHS is the largest undertaking of its kind since the creation of the Department of Defense in the late 1940s. The success of merging more than 20 agency components and more than 180,000 employees into a single organization with a clear mission and focus will depend to a considerable degree on how effectively and efficiently the Department addresses its human capital issues.

Accordingly, the General Accounting Office (GAO) evaluated the DHS/OPM HR systems design process. GAO's findings and recommendations are found in GAO report #GAO–03–1099 (September 2003).

The report praises the collaborative and inclusive process developed for designing new DHS HR systems and for ''reflecting important elements of effective transformation.'' Specifically, the report indicates that the design process incorporated the following essential ingredients to successful transformation:

- Leadership—on-going commitment of both DHS and OPM leadership to stimulate and support the design effort.
- Key Principles—the guiding principles of the design process reflected support for the mission and the employees of the new department, protection of basic merit system principles, and the commitment to incorporate employee accountability for performance.
- Employee Involvement—collaboration with employee representatives and employee involvement through the focus group interviews, town hall meetings, and Field Team participation.

The report further states that the analysis of DHS' effort to design a human capital system ''can be particularly instructive in light of legislative requests for agency-specific human capital flexibilities at the Department of Defense and the National Aeronautics and Space Administration.''

The report also includes some valuable recommendations for ensuring effective implementation of the new system. These recommendations include effective communication characterized by two-way dialogue, integration of the human capital policy into the strategic plan and programmatic goals, and continued employee feedback.

Summary of Proposed HR System for DHS

The Department of Homeland Security was created in recognition of the paramount responsibility to safeguard the American people from terrorist attack and other threats to homeland security. Congress stressed that any HR system established by DHS and OPM must be ''flexible'' and ''contemporary'' (5 U.S.C. 9701(b)(1) and (2)). The Secretary of Homeland Security and the Director of OPM are

determined to create a new HR system for DHS that is, first and foremost, mission-centered. In other words, the most important objective of the new system must be to serve and advance the Department's critical homeland security mission. At the same time, DHS and OPM remain committed to ensuring that the new DHS HR system generates respect and trust and that it is based on the principles of merit and fairness embodied in the statutory merit system principles.

Secretary Ridge and Director James have determined that the best way to achieve these goals is to create a system that is performance-focused, flexible, and contemporary, since these qualities are critical to freeing the DHS workforce to focus on the Department's mission. For example—

- The proposal to establish a pay-for-performance system for DHS is designed to ensure that employees have a clear understanding of their expected performance and to reinforce and reward high-performing employees who advance and support the Department's mission by, for example, guarding our Nation's borders, protecting our Nation's critical infrastructure, and enhancing the security of air travel.
- Providing for greater flexibility in collective bargaining within DHS allows the Department to take action against terrorist threats, secure the Nation's borders and ports of entry, and meet other critical mission needs without unnecessary delay. We have narrowed the duty to bargain over core management rights where flexibility and swift implementation are most critical to achieving the mission, while preserving the right to bargain over important HR polices.
- Authorizing the Secretary to designate offenses that merit mandatory removal and establishing a special independent DHS panel to review such actions is designed to recognize both the harm certain acts of misconduct can inflict on the Department's critical mission and to permit DHS to move quickly to address and resolve very serious misconduct.
- The adoption of a single, lower standard of proof (''substantial evidence'' rather than ''preponderance of the evidence'') for all adverse actions, whether based on performance or conduct, is designed to recognize the appropriate deference that should be granted to DHS officials responsible for overseeing the Department's critical operations and to ensure consistency in the review of all adverse actions involving DHS employees, thus reinforcing the single overarching mission of the new Department.
- The streamlined process for adverse action appeals and the creation of a DHS Labor Relations Board will balance employee rights with critical mission needs.

As explained previously, the Secretary of Homeland Security and the Director of OPM are authorized by the Homeland Security Act of 2002 to waive specified chapters of title 5, United States Code, to create a new HR system for DHS. The Secretary and the Director have reviewed and given full consideration to all of the options developed by the DHS/OPM HR Systems Design Team. In addition, they have given due weight to the views and opinions expressed by DHS employees in the town hall meetings and focus groups hosted by DHS from May to July 2003. They have given special consideration to the thoughtful review of the options conducted by the DHS HRMS Senior Review Advisory Committee in October 2003 and to all public comments received in connection with that meeting. Finally, as required by law, they have consulted with MSPB regarding possible changes in the appeals procedures established under chapter 77 of title 5, United States Code. They also consulted with many other Federal officials and external stakeholders.

The proposed regulations reflect authorities that are extended to the Secretary and the Director through January 23, 2009. During that period, DHS and OPM are committed to conducting an ongoing evaluation of the HR system described here—overall, as well as with regard to its separate elements—to ensure that it is achieving its intended purposes. Further, DHS and OPM are committed to making appropriate modifications to that system as circumstances warrant, particularly with respect to any unanticipated consequences that may emerge during its implementation. To that end, these regulations will be issued in interim final form, so as to provide the Secretary and the Director with sufficient flexibility (subject to appropriate consultation with stakeholders) to make additional changes to the HR system that may result from initial evaluations. Subsequent evaluations may result in further changes in the regulations.

The proposed regulations in part 9701 of title 5, Code of Federal Regulations, are organized into six subparts that correspond to the specific chapters in title 5, United States Code, which DHS and OPM are authorized to waive, plus an opening subpart (subpart A) that sets forth general provisions applicable throughout part 9701. Subpart B sets forth a new job evaluation (classification) system for DHS that waives chapter 51 of title 5 for most purposes. Subpart C sets forth a new pay and pay administration system that waives substantial portions of chapter 53. Subpart D sets forth new performance management provisions that replace chapter 43. Subpart E sets forth new labor-management relations provisions that replace chapter 71. Subpart F sets forth new rules for adverse actions that replace the rules set forth in chapter 75. And subpart G sets forth new rules governing appeals that replace the rules set forth in chapter 77.

General Provisions—Subpart A

Subpart A of the proposed regulations sets forth their purpose, establishes general provisions governing coverage under the new DHS HR system, and defines terms that are used throughout the new part 9701. Part 9701 will apply to DHS employees who are identified under the regulations as eligible for coverage and who are approved for coverage, as of a specified date, by the Secretary of Homeland Security. This will enable DHS to phase in coverage of particular groups of employees or components of the Department. Subpart A also allows DHS to issue internal Departmental regulations that further define the design characteristics of the new HR system. (See the ''Next Steps'' section at the end of this **SUPPLEMENTARY INFORMATION.**) Finally, subpart A clarifies the relationship of these regulations to other provisions of law and regulation outside those that are being waived with respect to DHS.

A New Job Evaluation, Pay, and Performance Management System for DHS

DHS and OPM have determined that a performance-focused job evaluation and pay system best meets the critical operations and mission-focused needs of DHS and that changes are needed in the current performance management provisions to support a new, performance-focused job evaluation and pay system.

DHS and OPM have concluded that the current GS classification and pay system, as a whole, does not focus sufficiently on creating and sustaining a high performance culture within DHS and that other ''time-focused'' options considered during the design process rely too much on longevity and not enough on recognizing and rewarding high performance at all levels of the workforce. DHS and OPM found some aspects of ''competency-focused'' options to be attractive, particularly for employees early in their careers, who are still acquiring the competencies,

skills, and knowledge needed to make significant contributions to the mission of DHS. DHS and OPM agree that a new job evaluation and pay system should focus primarily on encouraging the development of a high performance culture.

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 this 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. At present, DHS plans to cover only GS employees and employees in senior-level (SL) and scientific or professional (ST) positions.

SES members employed by DHS will be eligible for coverage under the new DHS pay system. However, the proposed regulations provide that any new pay system covering SES members must be consistent with the performance-based features of the new Governmentwide SES pay-for-performance system authorized by section 1125 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136, November 24, 2003). If DHS wishes to establish an SES pay system that varies substantially from the new Governmentwide SES pay-for-performance system, DHS and OPM will issue joint authorizing regulations consistent with all of the requirements of the Homeland Security Act, as set forth in 5 U.S.C. 9701. In addition, DHS and OPM will involve SES members and other interested parties in the design and implementation of any new pay system for SES members employed by DHS.

As explained in the ''Background'' section, above, the new job evaluation and pay system proposed in these regulations cannot apply directly to DHS employees covered by a basic pay system authorized by an authority outside title 5. However, it is possible for DHS to extend this job evaluation and pay system by administrative action to Transportation Security Administration (TSA), Stafford Act, Coast Guard Academy, and other similarly situated employees under authorities provided to the Secretary or other DHS officials.

The transitional provisions in subparts B and C include a special authority to deal with the possibility that DHS may transfer Federal Air Marshal Service positions from TSA to another DHS component before a new DHS job evaluation and pay system is in place. This special authority allows DHS to establish a temporary job evaluation and pay system for any such transferred Federal Air Marshal Service positions that parallels the system established for TSA employees. Absent this authority, these transferred positions generally would be covered by the GS classification and pay system. Thus, without the transitional authority in subparts B and C, this would mean that Air Marshals could be moved from the TSA job evaluation and pay system to the GS system, and then to the new DHS system, all in a relatively short period of time. This would be far too disruptive to these critical employees, and the proposed regulations minimize this disruption. The regulations authorize DHS to modify the TSA-parallel system after coordination with OPM. For example, DHS may adjust the rate ranges to be more consistent with the ranges that apply to other employees in the same DHS component.

By necessity and design, the proposed regulations on job evaluation, pay, and performance management provide considerable discretion to design many of the detailed features of the new system, by DHS at its sole and exclusive discretion and/or in coordination with OPM. What follows, therefore, is intended to provide a general description of the system DHS and OPM will establish under the authority provided by 5 U.S.C. 9701 and the regulations set forth in the proposed 5 CFR part 9701. DHS is committed to a high degree of employee involvement in developing the details of the new job evaluation, pay, and performance management system.

Throughout the development and implementation of the new DHS job evaluation, pay, and performance management system, DHS will coordinate with OPM to ensure the flexibilities afforded by the Homeland Security Act are exercised in a manner that takes Governmentwide impact into account. This coordination role is consistent with OPM's institutional responsibility, as codified in 5 U.S.C. chapter 11 and Executive Order 13197 of January 18, 2001, to provide Governmentwide oversight in human resources management programs and practices.

Job Evaluation (Classification)—Subpart B

Subpart B will provide DHS with the authority to replace the current 15-grade structure of the GS classification and qualifications system with a new method of evaluating or classifying jobs to determine their relative value to the organization by grouping them into occupational categories and levels of work for pay and other related purposes. Under this new ''job evaluation'' system, DHS will have the authority to establish qualifications for positions and to assign occupations and positions to broad occupational ''clusters'' and pay levels (or ''bands''). (Note: ''Job evaluation'' is a common term of art used among HR professionals. It is separate and distinct from the evaluation or appraisal of an employee's performance, which is addressed as part of the performance management system established under subpart D of the proposed regulations.)

In coordination with OPM, DHS will establish broad occupational clusters by grouping occupations and positions that are similar in terms of type of work, mission, developmental/career paths, competencies, and/or skill sets. These occupational clusters will serve as the basic framework for the DHS job evaluation system. DHS may elect to phase in the coverage of specific categories of employees or occupations under the new job evaluation and pay system established under these proposed regulations. Within each occupational cluster, DHS (in coordination with OPM) will establish broad salary ranges, commonly referred to as ''bands.'' DHS may use OPM-approved occupational series and titles to identify and assign positions to a particular cluster and band. Occupational clusters typically will include the following bands, each with progressively higher pay ranges:

- Entry/Developmental—Employees in positions assigned to this band focus on gaining the competencies and skills needed to perform successfully at the full performance level.
- Full Performance—Employees in positions assigned to this band have completed all necessary entry-level training and/or developmental activities and have demonstrated they are capable of performing the full range of non-supervisory work required for positions in that occupation. Employees assigned to positions in this band will be evaluated primarily on their contributions to the mission of DHS.
- Senior Expert—Positions assigned to this band will be reserved for a relatively small number of non-supervisory employees who possess an extraordinary level of technical knowledge or expertise upon which DHS relies for the accomplishment of critical mission goals and objectives. Typically, entry will be controlled and/or competitive.
- Supervisory—Positions assigned to this band will be reserved primarily for first-level supervisors of employees in

the same occupational cluster. Typically, entry will be competitive.

This typical structure will provide a clearly-defined career path for each occupation within a cluster. DHS also will establish a separate cluster for higher-level managers. The accompanying table (table 1) illustrates the occupational cluster structure concept.

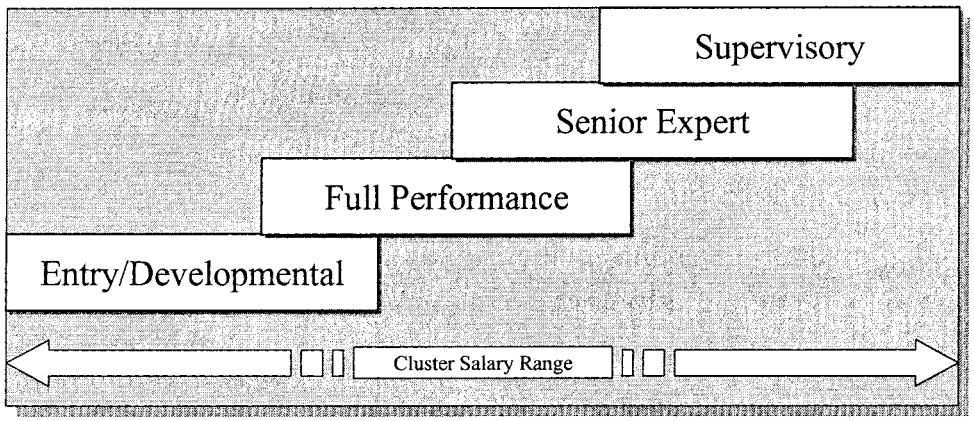

Table 1 **Illustrative Occupational Cluster**

Employees will be permitted to request reconsideration as to whether their job has been placed in the appropriate series or whether their job is covered by the system itself. An employee's assignment to a particular cluster or band within a cluster will not be subject to this reconsideration process.

The new job evaluation system for DHS will result in a streamlined method of evaluating jobs that no longer relies on lengthy classification standards and position descriptions or requires fine distinctions among closely related levels of work, as is now required under the GS classification system, without compromising internal equity and the merit system principle of equal pay for work of equal value. In addition, the system described here, together with the new DHS pay system described below, will provide DHS with greater flexibility to adapt the Department's job and pay structure to meet present and future DHS mission requirements.

Pay and Pay Administration—Subpart C

DHS, in coordination with OPM, will set the minimum and maximum rates for each band in each occupational cluster based on factors such as labor market rates, recruitment and retention information, mission requirements, operational needs, and overall budgetary constraints. The bands will have open pay ranges, with no fixed step rates. OPM will manage cross-agency consistency, competition, and movement within the Federal Government.

Pay adjustments under the new system will fall into three general categories: market-related adjustments comprising annual rate range adjustments and locality pay supplements, annual performance-based pay increases, and other individual adjustments. In keeping with the desire of the Secretary and the Director to achieve and sustain a culture of high performance, the proposed regulations provide that these pay adjustments will be provided only to employees who meet or exceed performance expectations. Under criteria to be developed by DHS, an employee whose performance is unacceptable and who does not receive annual market adjustments may have those adjustments granted prospectively if performance improves to the fully successful level or better.

Annual rate range adjustments and locality pay supplements will be determined by DHS, considering mission requirements, labor market conditions, availability of funds, pay adjustments received by employees in other Federal agencies, and other relevant factors. Annual rate range adjustments and locality pay supplements may differ by occupational cluster or band. DHS will determine locality pay areas in coordination with OPM. DHS will determine the timing of these annual pay adjustments. If DHS finds that recruitment and/or retention efforts are, or are likely to become, significantly handicapped for particular subcategories of employees within a band or cluster because of insufficient pay, DHS may, in coordination with OPM, establish special basic pay supplements that provide higher pay levels for those subcategories of employees.

Employees also will receive annual performance-based pay increases. For employees in a Full Performance or higher band, this pay increase will be based on their rating of record. The performance-based pay increase for a given rating of record will be expressed as a dollar amount or percentage of basic pay, and that amount or percentage will be the same for all employees assigned to a given ''performance pay pool.'' A performance pay pool consists of the money allocated for performance-based pay increases for a defined group of employees. Generally speaking, performance pay pools will be established by occupational cluster and by band within each cluster, but may also be further divided by organizational unit and/or location.

In response to concerns expressed by employees and employee representatives during the DHS HR system design process, managers will not have complete discretion regarding the amount of performance-based pay

increases. Instead, performance-based pay increases will be a function of the amount of money in the performance pay pool, the relative point value placed on performance ratings, and the distribution of performance ratings within that performance pay pool. The relative point value of a performance rating will be established in advance through DHS implementing regulations or instructions.

A performance-based pay increase may be calculated as a dollar amount or as a percentage of basic pay. For example, consider a group of 100 employees for whom the performance pay pool is determined to be $84,390. If 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, then the total number of points for this group would be 194: $(30 \times 1) + (46 \times 2) + (24 \times 3) = 194$. Therefore, the value of 1 point is $435 ($84,390÷194 = $435). In this example, a ''fully successful'' rating would result in a $435 performance-based pay increase ($435 × 1), an ''exceeds fully successful'' rating would result in an $870 pay increase ($435 × 2), and an ''outstanding'' rating would result in a $1,305 pay increase ($435 × 3).

A similar calculation could be made to determine the amount of performance-based pay increases in terms of a percentage of salary. Under this method, employees who receive a specific rating of record would receive the same percentage increase in basic pay, though the actual dollar amount of that increase would vary in proportion to each employee's rate of basic pay. The proposed regulations allow DHS to adopt either of these methods. In addition, DHS could adopt different point values for ratings of record than those used in this example.

If a performance-based pay increase would cause an employee's salary to exceed the band maximum, the proposed regulations allow DHS to grant a lump-sum payment in lieu of that portion of the pay increase that otherwise would exceed the band maximum. In addition, the proposed regulations 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. If a performance-based pay increase would cause an employee's salary to exceed such a control point, DHS could grant a lump-sum payment in lieu of that portion of the pay increase that otherwise would exceed the control point. Lump-sum payments in lieu of a basic pay increase generally will be granted at the same time as performance-based pay increases.

Employees in a Senior Expert band generally will move through the band range by means of the performance-based pay increases described above. In addition to those pay increases, however, DHS reserves the discretion to grant additional pay increases to those employees having specified mission-critical skills or those who make exceptional contributions to the DHS mission. Such additional payments will be limited to employees in the Senior Expert band and will not affect the performance pay pool associated with that band.

Employees in an Entry/Developmental band will receive pay adjustments as they acquire the competencies, skills, and knowledge necessary to advance to the target Full Performance band. The training program and competencies required for a given occupation will not change as a result of the new DHS pay system. Under the new system, DHS will be able to advance an employee through the Entry/Developmental band to the target Full Performance band without regard to the limits and constraints of the GS system, such as time-in-grade restrictions and rigid salary setting rules.

Other individual pay adjustments may be granted by DHS. These payments will not be considered part of basic pay. They include special skills payments for specializations for which the incumbent is trained and ready to perform at all times, such as proficiency in foreign languages or dog-handling; special assignment payments for assignments of greater difficulty or complexity within the same cluster and band; and special staffing payments to address recruitment and retention difficulties in particular occupations and/or locations. Some of these payments may require that employees enter into a service agreement as a condition of receiving additional pay.

Promotion pay increases (from a lower band to a higher band in the same cluster or to a higher band in a different cluster) generally will be fixed at 8 percent of the employee's rate of basic pay or the amount necessary to reach the minimum rate of the higher band, whichever is greater. (This amount is roughly equivalent to the value of a promotion to a higher grade within the GS system.) As with the current system, in the case of a demotion to a lower band for performance or conduct reasons, pay may be set at any lower rate within the lower band at management's discretion. Where pay retention is applicable (*e.g.*, following a reduction in force), the employee's pay will be frozen until such time as the maximum rate of the applicable band catches up to the frozen rate.

Upon implementation of the new system, employees will be converted based on their official position of record. Employees on temporary promotions will be returned to their official position of record prior to conversion. GS employees will be converted at their current rate of basic pay, including any locality payment, adjusted on a one-time, pro-rata basis for the time spent towards their next within-grade increase. Employees in career-ladder positions below the full performance level generally will be placed in the Entry/Developmental band in the appropriate cluster.

The new DHS pay system will provide DHS with an enhanced ability to establish and adjust overall pay levels in keeping with changes in national and local labor markets. It is designed to adjust individual pay levels based on the acquisition and assessment of competencies, skills, and knowledge for employees below the Full Performance band and on the basis of performance or contribution to mission for employees in the Full Performance band or higher. Above all, the new DHS pay system will be capable of adapting to changing circumstances and mission requirements.

Performance Management—Subpart D

DHS and OPM have decided to waive the provisions of chapter 43 of title 5, United States Code, in order to design a performance management system that will complement and support the Department's proposed performance-based pay system described above. The proposed system will also ensure greater employee accountability with respect to individual performance expectations, as well as organizational results.

Over the past 25 years, legal interpretations of the current chapter 43 have produced a system that is procedurally complex, inflexible, and paper-intensive, requiring a manager to set an employee's specific written elements and standards at the beginning of an annual appraisal period. In so doing, the manager must anticipate the myriad work assignments (each potentially with its own unique performance expectations) the employee will receive during the course of that appraisal period. These static, often generic standards make it difficult for managers to adjust performance requirements and expectations in response to the Department's rapidly

changing work environment, hold individual employees accountable for those general and/or assignment-specific work requirements and expectations, and make meaningful distinctions in employee performance as they accomplish those assignments.

The proposed regulations are designed to address these deficiencies. They continue to require that managers establish and communicate performance expectations to employees; however, they no longer require that this be accomplished exclusively through written performance elements and standards set at the beginning of the appraisal period. Instead, they give managers the option of establishing and communicating performance expectations during the course of the appraisal period through specific work assignments or other means (including standard operating procedures, organizational directives, manuals, and other generally established job requirements that apply to employees in a particular occupation and/or unit). However, managers may also continue to use performance plans, elements, and standards.

By providing managers more realistic alternatives for setting employee expectations and assessing their performance against those expectations, the Department will be better able to hold its employees accountable and to recognize and reward those who exceed expectations. By the same token, managers will also be held accountable for clearly and effectively communicating those expectations, giving employees feedback regarding their performance in relation to those expectations, making meaningful performance distinctions in support of the Department's new performance-based pay system, and identifying and addressing unacceptable performance.

Finally, in order to enable managers to make meaningful distinctions in performance, the regulations provide for a single level of unacceptable performance, a fully successful level, and at least one level above fully successful. The regulations do not permit two-level (''pass/fail'') ratings for employees above the entry/developmental level, nor do they allow any type of rating quotas or forced ratings distribution. The regulations also provide for DHS to appoint Performance Review Boards to provide oversight and ensure consistent application of the performance management system.

Further, the regulations provide managers with a broad range of options for dealing with poor performance, including remedial training, an improvement period, reassignment, verbal warnings, letters of counseling, written reprimands, and/or adverse actions as defined in subpart F of the regulations. Adverse actions will include the reduction of an employee's pay within a band, giving managers another means of dealing with poor performance, short of demotion or removal. The proposed regulations also streamline and simplify the procedures involved in taking an adverse action without compromising an employee's right to due process (described below and in subpart F). In this regard, the proposed regulations require a manager to take the nature and consequences of the poor performance into account in deciding among these options.

As provided in subpart C of the proposed regulations, performance ratings of record will be used to make individual pay adjustments under the new DHS pay system. In recognition of these pay consequences, the regulations permit employees to grieve their ratings of record. Non-bargaining unit employees may grieve such ratings through the Department's internal administrative grievance procedure; bargaining unit employees will have access to negotiated grievance procedures. In the latter case, an exclusive representative may seek arbitration of an appraisal grievance, but the rating of record will be sustained unless the union is able to prove that it was arbitrary or capricious. Either party may file exceptions to an arbitration award with the DHS Labor Relations Board established under subpart E of these proposed regulations.

Generally, DHS employees who are currently covered by chapter 43 of title 5, U.S. Code, are *eligible* for coverage under the new performance management provisions in subpart D of the proposed regulations. Therefore, administrative law judges and Presidential appointees will not be eligible for coverage, because they are currently excluded from chapter 43 of title 5. However, certain categories of employees are currently excluded from chapter 43 by OPM administrative action, as authorized by 5 CFR 430.202(d), such as those hired under the Stafford Act; these employees are eligible for coverage under the new DHS performance management provisions. DHS will decide which of those categories of otherwise eligible employees will be covered by the Department's new performance management system or systems. The proposed regulations also allow DHS to develop, implement, and administer performance management systems tailored to specific organizations and/or categories of employees (for example, in a particular occupational cluster).

These proposed regulations lay the foundation for a performance management system that is fair, credible, and transparent, and that holds employees and managers accountable for results. However, a performance management system is only as effective as its implementation and administration. To that end, DHS is committed to providing its employees and managers with extensive training on the new performance management system and its relationship to other HR policies and programs, as well as on effective performance management generally.

A New Labor Relations, Adverse Actions, and Appeals System for DHS

Labor-Management Relations—Subpart E

As noted previously, the Department of Homeland Security was created in recognition of the paramount responsibility to safeguard the American people from terrorist attack and other threats to homeland security. In enacting the Homeland Security Act, Congress stressed that any HR system established by DHS and OPM must be ''flexible'' and ''contemporary,'' enabling a swift response to the ever-evolving threats to our homeland. The labor-management regulations in this part are designed to meet these compelling concerns.

1. Purpose

DHS has a unique mission not duplicated elsewhere in the Federal Government. When Congress passed the Homeland Security Act and created DHS, it could have relied upon the current labor-management relations statute at 5 U.S.C. chapter 71 with respect to the Department's labor relations obligations. However, Congress chose not to maintain the status quo and gave the Secretary and the Director of OPM clear authority to waive or modify the provisions of chapter 71. (*See* 5 U.S.C. 9701(c).) In so doing, Congress provided DHS the option of exploring and implementing new and innovative human resources management systems that would be more responsive to the unique and critical mission of DHS. (*See* 5 U.S.C. 9701(a) and (c).)

These regulations define the purpose of the labor relations system. They implement the requirements of 5 U.S.C. 9701(b) by ensuring the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect

them, subject to the limitations on negotiability established in law, including the authority that Congress delegated to OPM and DHS to promulgate these regulations.

Chapter 71 of title 5, United States Code, enacted in 1978, recognizes that the ''special requirements and needs of the Government'' demand special procedures and that its provisions must be interpreted in a manner consistent with the requirement of ''an effective and efficient Government.'' These regulations state that every provision of this subpart must be interpreted in a way that recognizes the critical mission of the Department, and each must be interpreted to promote the swift, flexible, effective, and efficient day-to-day accomplishment of that mission as defined by the Secretary.

2. Definitions

Unless otherwise provided, these regulations leave intact many of the definitions contained in chapter 71 of title 5. The regulations adopt the following terms and their associated definitions from that chapter and apply them to DHS: ''employee,'' ''labor organization,'' ''exclusive representative,'' ''supervisor,'' ''collective bargaining,'' and ''management official.'' The term ''agency,'' as referenced in chapter 71, will be replaced by the term ''Department'' and refers to the Department of Homeland Security. The term ''components'' applies to the major entities under the Department, *e.g.*, Customs and Border Protection.

The regulations revise other definitions from chapter 71 as they would apply to DHS. The term ''conditions of employment'' has been redefined to exclude matters specifically provided for by Department-wide personnel regulations and to exclude pay, pay adjustments, and job evaluation under subparts B and C. The term ''grievance'' has been modified somewhat to mean any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation only if the law, rule, or regulation was issued for the purpose of affecting the working conditions of employees—not one that does so indirectly or incidentally. To this extent, DHS and OPM adopt the D.C. Circuit's interpretation of what constitutes a ''grievance.''

Chapter 71 of title 5, U.S. Code, defines employees who are excluded from coverage in a bargaining unit. In addition to managers and supervisors, ''confidential employees'' are excluded from coverage under chapter 71 if the employee acts in a confidential capacity with respect to an individual who ''formulates or effectuates management policies in the field of labor relations.'' We believe this definition is drawn too narrowly. There are many management officials who do not formulate labor relations policy but who have labor-management relations responsibilities. For example, officials who resolve grievances at the second or third step of a negotiated grievance procedure or who serve on negotiating teams or help decide the position management takes in negotiating labor agreements. We propose to exclude from coverage any employees who work for such managers in a confidential capacity because of the sensitive nature of the information they might be privy to and the potential for real or perceived conflicts of interest.

3. Administration

The Department will create a Homeland Security Labor Relations Board (Board) composed of three external members appointed to fixed terms. These three members will be appointed by the Secretary, and one member will be nominated by the Chair of the Federal Labor Relations Authority (FLRA) from among the current members of FLRA. Members will be chosen not only for their background in labor-management relations, but also for their knowledge of the DHS mission and their leadership experience in comparable organizations. The Board must interpret the regulations in subpart E and related decisions and policies in a way that recognizes the critical mission of the Department and the need for flexibility.

The Board will issue decisions in the following types of cases: bargaining unit determinations; unfair labor practice claims arising out of the duty to bargain; information request disputes; bargaining impasses and negotiability disputes; and exceptions to arbitration awards. In order to maintain the integrity of the Governmentwide labor relations program and preserve DHS resources, FLRA will continue to supervise and conduct representation elections and retain jurisdiction over the processing of unfair labor practice charges concerning the rights and obligations of individual employees and labor organizations (*i.e.*, 5 U.S.C. 7116 (a)(1)–(4) and (b)(1)–(4)).

In evaluating the merits of a separate Homeland Security Labor Relations Board that would largely replace FLRA, DHS and OPM put a high premium on the Board members' understanding of and appreciation for the unique challenges the Department faces in carrying out its homeland security mission. Given its responsibilities to administer a Governmentwide labor relations program for over 1 million Federal employees, FLRA 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 as able to dedicate its resources to prioritize DHS cases. However, to ensure independence and impartiality, the DHS Labor Relations Board will not report to the Secretary; rather, its members will be appointed to fixed terms and subject to removal only for inefficiency, neglect of duty, or malfeasance.

DHS and OPM also gave great weight to the benefits of a unified, expeditious process to resolve bargaining issues and disputes. Under the current system, a bargaining dispute can be investigated and pursued by FLRA's Office of General Counsel to determine whether there was an obligation to bargain; by FLRA itself to determine whether the matter is within the scope of bargaining; and by the Federal Service Impasses Panel to resolve the bargaining issue on its merits. This division of critical adjudicatory functions causes excessive delays and repeated litigation and contributes significantly to the cost of collective bargaining. OPM and DHS concluded that there are significant advantages to be gained from ''one-stop shopping'' to resolve bargaining disputes.

In sum, we determined that the Department should establish a separate Labor Relations Board focused on the DHS mission but completely independent. In addition, we concluded that the Board should oversee a unified dispute resolution process that will decide bargaining disputes more efficiently and effectively than is possible today under FLRA and chapter 71. However, the fragmentation and overlapping jurisdiction that makes resolving bargaining disputes so complex and protracted is not a problem in the way employee appeals are adjudicated by MSPB. As a single forum with a unified statutory process, MSPB already employs the ''one-stop shop'' approach to adverse action appeals that OPM and DHS will apply to bargaining disputes. That is why OPM and DHS are creating the DHS Labor Relations Board to resolve bargaining matters while preserving MSPB for deciding most employee appeals, subject to streamlined rules and new substantive standards, discussed more fully in the ''Appeals'' section of this Supplementary Information.

OPM and DHS also concluded that an understanding of the Department's mission is essential to resolving bargaining disputes, which involve

general conditions of employment affecting most or all bargaining unit employees. Except for offenses designated as ''mandatory removal offenses'' under subpart G, which will be resolved by an independent DHS panel, an appreciation for the Department's unique mission, while important, is not as essential for resolving individual employee appeals to MSPB.

Both the DHS Labor Relations Board and FLRA must interpret the regulations in subpart E in a way that promotes the swift, flexible, effective, and efficient day-to-day accomplishment of the Department's mission as defined by the Secretary. In addition, the Board is authorized to promulgate its own operating procedures and issue advisory opinions on important issues of law. These opinions will help both labor and management understand how key provisions of the regulations will be interpreted without the time and expense of years of litigation.

Matters that come before the DHS Labor Relations Board may be reviewed de novo, which means that the Board will have the discretion to reevaluate the evidence presented by the record and reach its own independent conclusions with respect to the matters at issue. Under chapter 71, FLRA reviews issues of law de novo. The Board will have the same authority, but it may also employ a de novo review to factual findings and contract interpretation. Given the inherently executive branch nature of decisions relating to homeland security and the Department's unique responsibilities in this area, the Board is authorized to conduct a thorough review of all matters, including factual determinations by its adjudicators or arbitrators, to safeguard the Department's homeland security mission.

Under 5 U.S.C. 7123, the United States courts of appeals have jurisdiction over appeals filed from final orders of FLRA, with limited exceptions. Similar judicial review in the U.S. Court of Appeals for the Federal Circuit exists for MSPB pursuant to 5 U.S.C. 7703. Ideally, these regulations would have applied the same standards and procedures as set forth in 5 U.S.C. 7123 and 7703 to the decisions of the DHS Labor Relations Board and the DHS Panel that will decide ''mandatory removal offenses.'' This would have been the most efficient way in which to accord the right of judicial review to individuals adversely affected or aggrieved by a decision of the Board or the Panel. However, DHS and OPM currently lack the statutory authority to confer jurisdiction to hear such appeals in the United States courts of appeals or the U.S. Court of Appeals for the Federal Circuit. In light of these issues, the proposed regulatory language is silent on judicial review of decisions of the Board or the Panel. DHS and OPM seek comments on available options, including (1) remaining silent on judicial review and (2) retaining the current statutory judicial review provisions by permitting FLRA and MSPB to review decisions of the Board and the Panel.

Option 1. Under this option, DHS and OPM would not include appeal language in the regulation addressing any form of judicial review, but would allow existing governing legal principles to determine the circumstances under which there would be judicial review.

Option 2. Under 5 U.S.C. 7123, the United States courts of appeals have jurisdiction over appeals filed from final orders of FLRA, with limited exceptions. Under this option the final regulations would provide that Board decisions are appealable to the three-member FLRA but with a deferential standard of review appropriate for an appellate procedure of this type. FLRA would be required to decide an appeal from a final decision of the Board within 20 days. All decisions of FLRA, including those decisions on appeals from the Board, would be subject to judicial review in accordance with 5 U.S.C. 7123. Under this option, judicial deference would be given to the decisions of the Board because the Board is charged by regulation with interpreting and implementing the Homeland Security Act and was created to apply its specialized expertise in homeland security matters.

4. Employee Rights

The regulations retain the statement of employee rights enumerated in chapter 71. Employees, as defined in the regulations, will have the right to form, join, or assist any labor organization, or to refrain from any such activity. Each employee will be protected in the exercise of any rights under the regulations through existing FLRA procedures.

5. Union Rights and Obligations

As in chapter 71, these regulations provide that recognized unions are the exclusive representatives of the employees in the unit and act for and negotiate on their behalf, consistent with law and regulation. This section also preserves what has come to be known as the ''Weingarten'' right, which permits union representation at the employee's request when management examines an employee during an investigation and the employee reasonably believes that discipline will follow. The proposed regulations provide that representatives of the Office of the Inspector General, Office of Security, and Office of Internal Affairs are not representatives of the Department for this purpose.

Under current law, a union has the right to send a representative to a ''formal meeting'' called by management to discuss general working conditions with employees. Determining what is and is not a ''formal meeting'' as the FLRA and courts have interpreted that term requires managers to balance numerous factors concerning the relative formality of the meeting and the precise subject matter discussed. Front-line managers and supervisors are expected to be familiar with and know how to apply these complicated, nuanced criteria, and they get it wrong at their legal peril. This can have a chilling effect on discussions between management and employees concerning everyday workplace issues and can inhibit creative thinking and problem solving. This is particularly disruptive to the mission at ports of entry, where there are often multiple unions.

The rights associated with ''formal meetings'' were intended to safeguard against management efforts to bypass the union and deal directly with employees in ways that undermine the union's status as exclusive representative. We agree that such protections are needed, but these regulations eliminate the concept of a formal meeting. Instead, the regulations treat management efforts to bypass the union as a breach of the duty to bargain in good faith and an unfair labor practice. This change does not affect or limit the union's right to attend meetings at which an employee's grievance is discussed.

In conjunction with the regulation concerning grievances, this regulation resolves any uncertainty resulting from litigation about whether unions are entitled to participate in EEO proceedings, including mediation, after a formal EEO complaint has been filed. Under these regulations, unions do not have such a right unless the complainant requests union representation. This change will preserve the informality and confidentiality of the entire EEO complaint process.

Under these regulations, the Department will hold employee representatives to the same conduct requirements as any other DHS employees. The intent is to not bind the Department to FLRA's ''flagrant

misconduct'' standard or any other test developed through case decisions which may immunize union representatives engaged in otherwise actionable misconduct. The regulations clarify that the Department may address the misconduct of any employee, including employees acting as union representatives, as long as the agency does not treat employees more severely because they are engaging in union activity. The regulation is not intended to target the content of ideas; rather, it applies to misconduct in any manner expressed.

6. Information Disclosure

Under chapter 71, a union has the right to information maintained by the agency if the information is necessary and relevant to the union's representational responsibilities. This right is maintained with some modifications under these regulations.

Under the regulations, disclosure of information is not required if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without recourse to the information. This change was made to relieve management of the administrative burden of producing information that can readily be obtained some other way or information that the union does not really need to fulfill its representational obligations. The regulations further provide that information may not be disclosed if the Secretary or his designee determines that disclosure would compromise the Department's mission, security, or employee safety.

The proposed regulations specify that sensitive information such as home addresses, home telephone numbers, e-mail addresses, and other personal identifiers, may not be disclosed to unions without employees' express written consent. While this is not a change in existing statutory interpretation, it is necessary to specify these limitations in the regulations, given the extremely sensitive nature of the Department's mission and the serious consequences if such information fell into the wrong hands.

7. Management Rights

The Department's ability to respond rapidly to a variety of critical challenges, ranging from terrorist threats to natural disasters, is vital. To carry out its wide ranging mission, 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 security; and it must be able to act without unnecessary delay to properly secure the Nation's borders and ports of entry.

Actions such as these involve the exercise of management's reserved rights and lie at the very core of how DHS carries out its mission. Under chapter 71 of title 5, the obligation to notify the union well ahead of any changes in the workplace and complete all negotiations *before* making any changes could seriously impede the Department's ability to meet mission demands. For example, before the Department could redeploy personnel from one border to another, it could be required to bargain over the procedures it would have to follow in deciding how assignments are made, who gets deployed, and for how long. Based on these negotiations, the Department may have to spend valuable time canvassing for volunteers or considering seniority before moving people from one location to another. In the face of a committed and unpredictable enemy, these excessive limitations on the Department's authority to act where and when needed would significantly impede the Department's ability to accomplish its mission.

To ensure that the Department has the flexibility it needs, we propose to revise the management rights provisions of chapter 71. We will expand the list of nonnegotiable subjects in section 7106 to include what are now permissive subjects of bargaining—the numbers, types, and grades of employees and the technology, methods, and means of performing work. The Department will not be required to bargain over the Department's exercise of these rights or over most of the other rights enumerated in chapter 71, including the right to determine mission, budget, organization, and internal security practices, and the right to hire, assign and direct employees, and contract out. The Department can take action in any of these areas without advance notice to the union and without bargaining. After the Department acts, it will have discretion to bargain over procedures and appropriate arrangements. The regulations also provide for consultation with employee representatives both before and after implementation when circumstances permit.

The Department will have the same bargaining obligation it has today concerning the exercise of the remaining management rights in chapter 71. These include the right to lay-off and retain employees, to take disciplinary action, and to promote. With respect to these rights, management will be obligated to bargain over procedures and arrangements prior to implementation, as provided under chapter 71.

These changes were carefully crafted to meet the operational needs of DHS. We focused on those areas where flexibility and swift implementation are most critical to preserving and safeguarding our Nation. We concluded that the Department's mission could not be met merely by setting time limits on how long the Department would have to bargain before taking action or by streamlining the system in other ways. DHS must have flexibility in these core management right areas to respond without delay to an evolving and ever changing threat. We believe these proposed rules accommodate the collective bargaining rights provided by the Homeland Security Act without compromising the Department's paramount responsibility to protect the lives and security of the American people.

8. Bargaining Unit Determinations

In determining bargaining units, the Board will continue to apply the same factors set forth under chapter 71 (*i.e.*, do the employees in a proposed unit have a clear and identifiable community of interest, and does the unit promote effective and efficient dealings with the Department?). However, in applying these criteria, the Board will give the most weight to effectiveness and efficiency and determine bargaining units based on what is ''an appropriate unit consistent with the Department's organizational structure.'' Using this standard will help align the Department's bargaining units as closely as possible with the agency's mission and organizational structure, reduce the threat of fragmented bargaining units, provide for more uniform conditions of employment, and facilitate contract administration, all of which contribute to more efficient and effective agency operations.

9. Duty To Bargain

In order to ensure a consistent approach to managing the Department within a multi-union, multi-bargaining unit environment, the proposed regulations specify that there is no duty to bargain over DHS-wide personnel policies and regulations including the human resources management system established by OPM and DHS (management must bargain over personnel policies and regulations issued by the Department's components). In addition, proposals that do not significantly impact a substantial portion of the bargaining unit are

outside the duty to bargain. This will focus bargaining on those matters that are of significant concern and relieve the parties of potentially lengthy negotiations over matters that are limited in scope and effect.

If parties bargain over an initial term agreement or its successor and do not reach agreement within 60 days, the parties will be able to agree to continue bargaining or either party may refer the matter to the Board for resolution. Mid-term bargaining over proposed changes in conditions of employment must be completed within 30 days or management will be able to implement the change after notifying the union.

As is currently the case, collective bargaining provisions that are contrary to law, regulation, or the exercise of reserved management rights cannot be enforced; the Secretary may disapprove any collective bargaining provision whenever he determines that a provision is contrary to law, regulation, or management rights; and matters reserved to the sole and exclusive discretion of the Secretary or his designee will be non-negotiable.

10. Grievance/Arbitration

DHS' grievance and arbitration process generally follows the contours of chapter 71. Under DHS' system, matters excluded from the grievance procedure under 5 U.S.C. 7121(c) will remain excluded from coverage in the DHS system. However, in order to enhance consistency, discourage forum shopping, and provide for faster and more consistent resolution of appeals, the regulations propose to eliminate those adverse actions that are appealable to MSPB (*e.g.*, removals, suspensions of more than 14 days, and demotions) from the scope of the grievance procedure. To ensure fairness, these actions will be appealable under subpart G. Lesser disciplinary and adverse actions will still be covered by the negotiated grievance procedure. Employees alleging discrimination may file a grievance under a negotiated grievance procedure or a complaint with the Equal Employment Opportunity Commission (EEOC), but not both.

Performance appraisal grievances will be handled in a similar manner. An employee can file a grievance and the union can pursue arbitration regarding a performance rating. However, if management subsequently takes an appealable adverse action based on the rating and the employee files an appeal with MSPB under subpart G, any grievance or arbitration will be merged with the MSPB appeal and adjudicated under subpart G.

Finally, subpart E includes a savings provision to make clear that the procedures established under these regulations will not apply to grievances and other administrative proceedings that were already in progress when the affected employee(s) became covered by subpart E.

Adverse Actions—Subpart F

The regulations propose several revisions and additions to the current adverse actions system. These changes are directed at the cumbersome and restrictive requirements for addressing and resolving unacceptable performance and misconduct. The proposed changes streamline the rules and procedures for taking adverse actions, to better support the mission of the Department while ensuring that employees receive due process and fair treatment guaranteed by the Homeland Security Act.

The following sections identify the major changes proposed by this subpart and briefly describe the purpose of each change.

1. Employees Covered

All DHS employees are eligible for coverage under subpart F of the proposed regulations, except where specifically excluded by law or regulation. For example, employees of the Transportation Security Administration are not eligible for coverage under subpart F because they are excluded from coverage under 5 U.S.C. chapter 75, and 5 U.S.C. 9701 does not allow the joint regulations issued by DHS and OPM to cover such employees.

The regulations provide an ''initial service period'' of one-to-two years for all employees upon appointment to DHS. Prior Federal service counts toward this requirement. Employees who are on time-limited appointments and those serving in an ''initial service period'' are not covered by this subpart. However, so as to ensure that the rights currently granted preference eligible employees are not diminished, all preference eligible employees are covered by the adverse action protections of subpart F after completing one year of an ''initial service period.'' Furthermore, employees who are in the competitive service and who are removed during an ''initial service period'' are covered by the adverse action protections of 5 CFR 315.804 and 315.805. The specific length of the ''initial service period'' will be tied to specific occupations to reflect varying job demands and training needs. For example, certain occupations have long periods of formalized training which impact the ability of management to assess employee job performance. Other occupations require employees to demonstrate skills and competencies that also cannot be adequately measured or assessed within 1 year.

2. Actions Covered

Adverse actions will continue to be defined as they are now in chapter 75 of title 5, U.S. Code, to include removals, suspensions of any length, demotions, and reductions in pay. These regulations propose to change the coverage from furloughs for 30 days or less to furloughs for 90 days or less.

A small number of Federal agencies are covered under the national security provisions of 5 U.S.C. 7532. Under these provisions, an employee may be immediately suspended without pay or removed if the agency head considers the action ''necessary in the interests of national security.'' Before taking such an action, however, the agency head must afford the employee procedural rights as set forth in the statute. An agency head's decision in these cases is not subject to appeal or judicial review. This regulation incorporates the current provisions of the law and makes them applicable to DHS.

3. Mandatory Removal Offenses

This subpart permits the Secretary or designee to identify offenses that have a direct and substantial impact on the ability of the Department to protect homeland security'' for example, accepting or soliciting a bribe that would compromise border security or willfully disclosing classified information. These offenses carry a mandatory penalty of removal from Federal service. This change allows management to act swiftly to address and resolve misconduct or unacceptable performance that would be most harmful to the Department's critical mission. These mandatory removal offenses will be identified in advance and made known to all employees. Employees alleged to have committed these offenses will have the right to advance notice, an opportunity to respond, a written decision, a review by an adjudicating official, and a further appeal to an independent DHS panel, as set forth in subpart G of this part. However, only the Secretary or his or her designee can mitigate the penalty for committing a mandatory removal offense.

The regulations do not list the infractions that will constitute mandatory removal offenses. DHS has not yet identified a list of such offenses, and it is important to preserve the Secretary's flexibility to carefully and narrowly determine the offenses that

will fall into this category and to make changes over time. The absence of this flexibility has been problematic at the Internal Revenue Service (IRS) where the IRS Restructuring Act codified mandatory disciplinary offenses in law and limited the agency's ability to make needed changes. The Department will identify mandatory removal offenses well in advance and make sure that employees know what these offenses are. The Department invites public comment on the best and most effective way to provide such notice to employees.

4. Adverse Action Procedures

This subpart retains an employee's right to representation and a written decision but provides shorter advance notice periods and reply periods than are currently required for appealable adverse actions. Except where a mandatory removal offense is involved, employees are entitled to a minimum of 15 days advance notice. In cases involving a mandatory removal offense, the advance notice period is a minimum of 5 days. In all cases, employees are granted a minimum of 5 days to reply, which runs concurrently with these notice periods. These changes facilitate timely resolution of adverse actions while preserving employee rights.

5. Single Process and Standard for Action for Unacceptable Performance and Misconduct

This subpart establishes a single system for taking adverse actions based on misconduct or unacceptable performance. This change represents a return to a simplified approach that existed prior to the 1978 passage of the Civil Service Reform Act and chapter 43 of title 5, U.S. Code.

Congress enacted chapter 43 in part to create a simple, dedicated process for agencies to use in taking adverse actions based on unacceptable performance. Since that time, however, chapter 43 has not worked as Congress intended. In particular, interpretations of chapter 43 have made it difficult for agencies to take actions against poor performers and to have those actions upheld. As a result, agencies have consistently preferred to use the procedures available under chapter 75 of title 5 rather than chapter 43 when taking actions for unacceptable performance.

The regulations eliminate the requirement for a formal, set period for an employee to improve performance before management can take an adverse action. Management selects employees for their positions because the employees are well qualified. In addition, employees must complete an ''initial service period'' during which they will have learned the specific requirements of their positions. As set forth in subpart D, management must explain to employees what is expected of them when it comes to performance. If an employee fails to perform at an acceptable level, management may use a variety of measures, including training, regular feedback, counseling and, at management's discretion, an improvement period, to address and resolve performance deficiencies. If an employee is still unable or unwilling to perform as expected, it is reasonable for management to take an action against the employee.

We revised the standard for taking an adverse action to require that the Department establish a factual basis for any adverse action and a connection between the action and a legitimate Departmental interest. We replaced the current title 5 ''efficiency of the service'' standard for action to allay any confusion that might arise from case law linking this standard with the authority to review and mitigate penalties, an authority we generally do not provide third parties in adjudicating DHS cases. We intend no substantive change to the efficiency of the service standard.

Appeals—Subpart G

Subpart G of part 9701 covers employee appeals of certain adverse actions taken under subpart F. As is currently the case, these appealable adverse actions include removals, suspensions of 15 days or more, demotions, and reductions in pay. In addition, the regulations provide for appeals of reductions in pay band and substantially increase the length of furloughs that may be appealed. Suspensions shorter than 15 days and other lesser disciplinary measures are not appealable to MSPB, but may be grieved through a negotiated grievance procedure or agency administrative grievance procedure, whichever is applicable. Furthermore, employees who are in the competitive service and who are removed during the first year of an ''initial service period'' are provided the appeal rights found in 5 CFR 315.806.

Section 9701 of title 5, U.S. Code, requires that these new appeal regulations provide DHS employees fair treatment, are consistent with the protections of due process, and, to the maximum extent practicable, provide for the expeditious handling of appeals. The law also specifies that modifications to the current chapter 77 of title 5 should further the fair, efficient, and expeditious resolution of appeals.

This subpart establishes procedures and timeframes for filing appeals with MSPB and modifies rules that MSPB will use to process appeals from DHS employees. These regulations are intended to ensure appropriate deference to the adverse actions taken by DHS and to streamline the way MSPB cases are handled while continuing to preserve and safeguard employee due process protections. In addition, they provide for an internal appeals process for ''mandatory removal offenses.''

As noted earlier in the Supplementary Information, the Secretary and the Director will conduct an ongoing evaluation of the DHS HR system to ensure that it is achieving its intended purposes. As part of this evaluation, the Department and OPM will pay particular attention to the proposed adverse action and appeal procedures established by these regulations. As noted (and discussed in more detail below), those proposed procedures continue to permit employees to appeal most adverse actions to MSPB, despite the fact that DHS and OPM could have established a separate appellate body for all such actions.

In proposing these appellate procedures, the Secretary and the Director were especially mindful of 5 U.S.C. 9701(f)(2), which requires that they consult with MSPB on changes to chapter 77 of title 5. This requirement was met through extensive consultations between members and staffs of MSPB, DHS, and OPM. During those consultations, DHS and OPM officials described specific concerns with existing procedures and discussed the range of appellate options and alternatives that were under consideration. For their part, MSPB officials were particularly constructive in responding to those concerns, offering numerous suggestions to address them, including several modifications to their own rules and regulations.

The appellate procedures proposed below reflect many of those suggestions, as well as the constructive dialogue that gave rise to them. Indeed, the proposal to retain MSPB was predicated on the results of that dialogue. However, the cumulative effect of these changes can be assessed only as they are actually implemented and administered by MSPB. Accordingly, DHS and OPM, with MSPB, intend to conduct a formal evaluation of these appellate procedures after they have been in effect for 2 years in order to determine whether the procedures have given the Department's critical mission due weight and deference and whether additional

modifications to 5 U.S.C. chapter 77 and/or these regulations need to be proposed.

1. Appeals to MSPB

The proposed regulations retain MSPB as the adjudicator of employee appeals of adverse actions, except as described below for mandatory removal offenses. At the same time, the regulations propose new substantive standards that MSPB will apply to DHS cases to improve the appeals process and accommodate and support the agency's critical homeland security mission. The regulations also propose new case-handling procedures to facilitate the efficient and expeditious resolution of appeals.

We gave serious consideration to establishing a DHS internal appeals board to replace MSPB. However, we concluded that the advantages of creating an internal DHS appeals board—greater efficiency of decisionmaking and deference to agency mission and operations among them—could be achieved if MSPB were retained as the appeals body for adverse actions but with substantive and significant procedural modifications. However, for mandatory removal offenses, we decided to establish an internal appeals process that fully preserves due process because we believe that, for these offenses, it is critical that the adjudicator of the appeal be intimately familiar with the mission of DHS in order to understand the particular impact of these offenses on the Department's ability to carry out its mission.

2. Appeals of Mandatory Removal Offenses

An employee will be able to appeal a DHS removal action based on a mandatory removal offense to an adjudicating official, who may conduct a full evidentiary hearing and will issue a written decision. Either party may appeal that decision to an independent DHS Panel.

Option 1

Under this option, DHS and OPM would not include appeal language in the regulation addressing any form of judicial review, but would allow existing governing legal principles to determine the circumstances under which there would be judicial review.

Option 2

We are proposing to adopt the same procedures and standards for review of Panel decisions that we developed for Board decisions. Specifically, under 5 U.S.C. 7703, the United States Court of Appeals for the Federal Circuit has jurisdiction over appeals filed from final orders of MSPB. Under this option the final regulations would provide that Panel decisions are appealable to the three-member MSPB but with a deferential standard of review appropriate for an appellate procedure of this type. MSPB would be required to decide an appeal from a final decision of the Panel within 20 days. All decisions of MSPB, including those decisions on appeals from the Panel, would be subject to judicial review in accordance with 5 U.S.C. 7703. Under this option, judicial deference would be given to the decisions of the Panel because the Panel is charged by regulation with interpreting and implementing the Homeland Security Act and was created to apply its specialized expertise in homeland security matters.

3. MSPB Appellate Procedures

MSPB will continue to have the authority to review and adjudicate actions covered by this subpart (except for mandatory removal offenses) as prescribed in chapter 12 of title 5, U.S. Code. However, these regulations propose to modify certain case processing rules and substantive standards. The initial review and adjudication of adverse action appeals will be governed by current title 5 provisions and MSPB regulations, as well as the modifications identified in this section. The modifications being made to current MSPB requirements will further the mission of DHS without impairing fair treatment and due process protections. Key procedural modifications include the following:

- When there are no material facts in dispute, the adjudicating official must grant a motion for summary judgment without an evidentiary hearing. Currently, appellants are entitled to a hearing.
- The appeal filing deadline, including the deadline for class appeals, is decreased from 30 days to 20 days.
- The adjudicating official's initial decision must be made no later than 90 days after the date on which the appeal is filed. Moreover, if MSPB reviews an initial decision, MSPB must render its final decision no later than 90 days after the close of record. Also, if OPM seeks reconsideration of a final MSPB decision or order, MSPB must render its decision no later than 60 days after receipt of the opposition to OPM's petition in support of such reconsideration.
- Currently, the parties to an appeal may submit unilateral requests for additional time to pursue discovery or settlement. The ability of the parties to unilaterally submit a request for case suspension is eliminated.
- The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion to MSPB, either party can seek to limit any discovery being sought because it is privileged; not relevant; unreasonably cumulative or duplicative; or can be secured from some other source that is more convenient, less burdensome, or less expensive. Discovery can also be limited through such a motion if the burden or expense of providing a response outweighs its benefit. Prior to filing such a motion with MSPB, the parties must confer and attempt to resolve any pending objections. Further, when engaging in discovery, either party can submit only one set of interrogatories, requests for production, and requests for admissions. Additionally, the number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts, and each party may not conduct more than two depositions. However, either party may file a motion requesting MSPB to allow more discovery. A motion will be granted only if MSPB determines that good cause has been shown to justify additional discovery.

All of these modifications will expedite and streamline the appeals process so that both employees and the Department will be able to resolve appeals more quickly and efficiently than is possible today. The proposed regulations also retain due process protections—notice, an opportunity to respond, and a post-action review, either in person or on the record—for removal actions. We provide the same procedural protections for all actions covered in subpart F. Further, these regulations retain the statutory requirement that the appealability of a removal be unaffected by the individual's status under any retirement system.

Section 7701 of title 5, U.S. Code, currently authorizes the Director of OPM to intervene in an MSPB proceeding or to petition MSPB for review of a decision if the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, or regulation under OPM's jurisdiction. Given OPM's responsibility for Governmentwide personnel management, these regulations authorize OPM to intervene in such situations regardless of whether the law, rule or regulation is one that falls under OPM jurisdiction. A similar authority is provided to OPM with

respect to decisions of the independent Panel that will decide appeals of removals based on mandatory removal offenses.

4. Standard of Proof

Currently, actions taken under chapter 75 are sustained if supported by a preponderance of the evidence, and performance actions taken under chapter 43 are sustained if supported by substantial evidence, a lower standard of proof than preponderance. In all cases arising under this subpart, dealing either with performance or conduct, the Department's decision will be sustained if it is supported by substantial evidence. Changing the standard of proof to a single, lower standard regardless of the nature of the action simplifies the appeal process, grants appropriate deference to DHS officials in recognition of the critical nature of the agency mission, and assures consistency without compromising fairness.

5. Affirmative Defenses

The Department's action will not be sustained if MSPB (as is currently the case) determines that (1) a harmful procedural error occurred; (2) the decision was based on any prohibited personnel practice; or (3) the decision was not otherwise in accordance with law. The Board/Panel will defer to OPM and DHS in their interpretation of these regulations and the Homeland Security Act, and will defer to OPM in its interpretation of civil service law.

These regulations require the Department to prove by substantial evidence the factual basis of the charge brought against an employee, but do not permit MSPB or the Panel to reverse the charge based on the way in which the charge is labeled or the conduct is characterized. This will eliminate excessively technical pleading requirements in adverse action proceedings imposed by MSPB and the U.S. Court of Appeals for the Federal Circuit in *King* v. *Nazelrod,* 43 F.3d 663, and similar cases. As long as the employee is on fair notice of the facts sufficient to respond to the allegations of a charge, the Department will have complied with the notice and due process requirements of these regulations.

6. Penalty Review

In all cases arising under this subpart, the penalty selected by the Department may not be reduced or otherwise modified by MSPB or the Panel. This is a significant but necessary departure from current rules permitting MSPB to mitigate penalties in certain circumstances. We have modified the current practice because DHS management is in the best position to determine the penalty that most effectively supports the Department's mission. That decision should not be subject to MSPB or Panel review. However, nothing in these regulations would limit the Secretary or designee's sole and exclusive authority to mitigate any penalty imposed on, or rescind any action taken against, a DHS employee pursuant to subpart F.

7. Attorney Fees

OPM and DHS have simplified the current standard for recovering attorney fees. Under the current two-pronged test set forth in 5 U.S.C. 7701(g), appellants may recover fees if (1) they are prevailing parties and (2) if an award is ''in the interest of justice.'' Much judicial ink has been spilled interpreting both elements of this imprecise standard. Accordingly, in an attempt to clarify the test for recovering attorney fees, the regulations specify that an appellant may recover fees if the action 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. 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.

8. Alternative Dispute Resolution

These regulations encourage the use of alternative dispute resolution procedures (ADR) and provide for DHS, OPM, and MSPB to jointly develop expedited appeals procedures. However, because ADR and settlement efforts are most successful when voluntary, the regulations prohibit MSPB from *requiring* ADR or settlement in connection with any action taken under this subpart. Once either party decides that settlement is not desirable, the matter will proceed to adjudication. Eliminating settlement efforts that are contrary to the expressed wishes of one or both of the parties will speed up the adjudication process and strengthen management decisionmaking authority.

Where the parties agree to engage in settlement discussions, the case will be assigned to an official specifically designated for that sole purpose, rather than the official responsible for adjudication. This is necessary to avoid actual or perceived conflicts of interest on the part of MSPB adjudicating officials.

9. Discrimination Allegations

We have decided to retain the current statutory provisions dealing with the processing of mixed cases, *i.e.*, cases involving allegations of discrimination which are also appealable to MSPB. However, we revised those provisions to reflect the establishment of the DHS Panel.

10. Judicial Review

Decisions of MSPB are subject to review by the U.S. Court of Appeals for the Federal Circuit based on the same standard currently provided for in 5 U.S.C. 7703.

Next Steps

The Homeland Security Act provides that the development and implementation of a new HR system for DHS will be carried out with the participation of, and in collaboration with, employee representatives. The DHS Secretary and OPM Director must provide employee representatives with a written description of the proposed new or modified HR system. The description contained in this **Federal Register** notice satisfies this requirement. The Act further provides that employee representatives must be given 30 calendar days to review and make recommendations regarding the proposal. Any recommendations must be given full and fair consideration. If the Secretary and Director do not accept one or more recommendations, they must notify Congress of the disagreement and then meet and confer with employee representatives for at least 30 calendar days in an effort to reach agreement. The Federal Mediation and Conciliation Service may provide assistance at the Secretary's option or if requested by a majority of employee representatives who have made recommendations.

If a proposal is not challenged, it may be implemented immediately. Similarly, when the Secretary and the Director accept any recommendation from employee representatives, the revised proposal may be implemented immediately. If the Secretary and the Director do not fully accept a recommendation, the Secretary may implement the proposal (including any modifications made in response to the recommendations) at any time after 30 calendar days have elapsed since the initiation of congressional notification, consultation, and mediation procedures. To proceed with implementation in this circumstance, the Secretary must determine (in his sole and unreviewable discretion) that further consultation and mediation are unlikely to produce

agreement. The Secretary must notify Congress promptly of the implementation of any such contested proposal.

The Secretary and the Director must develop a method under which each employee representative may participate in any further planning or development in connection with implementation of a proposal. Also, the Secretary and the Director must give each employee or representative adequate access to information to make that participation productive.

DHS plans to make the new labor relations, adverse actions, and appeals provisions effective 30 days after the issuance of interim final regulations later this year. At this time, DHS intends to implement the new job evaluation, pay, and performance management system in phases. The tentative schedule for implementing these provisions is outlined below.

In the first phase, employees of DHS Headquarters, Science and Technology, and Intelligence Analysis and Infrastructure Protection, as well as GS employees of the Coast Guard, will be converted to the new performance management system in the fall of 2004. These employees will be converted to the new job evaluation and pay system in early 2005. At that time, affected employees will be converted to the new system as described in the above summary, with one-time within-grade buyouts where appropriate. The first performance-based pay increases will become effective in late summer 2005 for affected Coast Guard employees, to coincide with the completion of their performance appraisal cycle. The first annual market adjustments for these employees will be made in early 2006. DHS will determine the timing of pay increases for its Headquarters, Science and Technology, and Intelligence Analysis and Infrastructure Protection employees at a later date.

In the second phase, all remaining GS employees in DHS are expected to be covered by the new performance management system no later than fall 2005. These employees would then be converted to the new job evaluation and pay system in early 2006, with one-time within-grade buyouts where appropriate. DHS anticipates that the first pay increases for these employees under the new system will be made effective no later than early 2007. Transportation Security Administration employees (except screeners), Stafford Act employees, and Coast Guard Academy employees will be converted to a similar or identical job evaluation, pay, and performance management system during the second phase.

The Department will determine whether Secret Service Uniformed Division (SSUD) officers should be covered by a similar or identical system. Legislation would be required to alter the SSUD pay system.

Public Participation

DHS and OPM invite interested persons to participate in this rulemaking by submitting written comments, data, or views. Commenters should refer to a specific portion of the proposal, explain the reason for any recommended change, and include supporting data or information.

All comments received in an approved format will be posted in the e-docket. The e-docket will be available online for public inspection before and after the comment closing date. You may also review the hard-copy originals of mailed and hand-delivered comments by visiting the OPM Resource Center, as explained in the **ADDRESSES** section of this preamble.

Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Electronic Access and Filing

You may access the DHS/OPM e-docket on the Internet at: *http://www.epa.gov/edocket*. This official e-docket will contain the various documents specifically referenced in this Supplementary Information, any public comments received, and other information used by decisionmakers related to the proposed rule. You may use the DHS/OPM e-docket to access available public docket materials online, as well as submit electronic comments during the open comment period.

The U.S. Environmental Protection Agency (EPA) has been designated by the Office of Management and Budget (OMB) as the official Managing Partner in the ''e-Rulemaking Initiative.'' DHS and OPM are pleased to partner with EPA to provide the e-docket for this DHS/OPM proposed rule. As a result of this partnership, you will notice references to EPA when you access the DHS/OPM e-docket.

Public comments will be made available for public viewing in this e-docket system, without change, as DHS/OPM receive them, unless the comment contains copyrighted material, confidential business information, or other information whose public disclosure is restricted by statute. When DHS/OPM identifies a comment containing copyrighted material, we will provide a reference to that material in the version of the comment that is placed in the e-docket.

The e-docket system is DHS/OPM's preferred method for receiving comments. The system is an ''anonymous access'' system, which means DHS/OPM will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. All comments may be viewed electronically on the e-docket; thus, unless a comment is submitted anonymously, the names of commenters will be public information.

You should ensure that your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked ''late,'' and DHS/OPM are not required to consider them in formulating a final decision.

E.O. 12866, Regulatory Review

DHS and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is a significant public interest in revisions of the Federal employment system. DHS and OPM have analyzed the expected costs and benefits of the proposed HR system to be adopted for DHS, and that analysis is presented below.

Integral to the administration of the proposed new DHS pay system is a commitment to ''manage to budget.'' Accordingly, the new pay system carries with it potential implications relative to the base pay of individual employees, depending upon local labor market conditions and individual, team, and organizational performance. However, actual payroll costs under this system will be constrained by the amount budgeted for overall DHS payroll expenditures, as is the case with the present GS pay system. Moreover, assuming that a normal, static population will exist over time, DHS anticipates that accessions, separations, and promotions will net out and, as with the present system, not add to the overall cost of administering the system.

The creation of a new DHS pay and performance management system will, however, result in some initial implementation costs, including some payroll related conversion costs (*e.g.*, the ''buyout'' of within-grade increases). In addition, DHS will incur costs relating to such matters as training (including the cost of overtime pay required to backfill for front-line DHS employees during periods of training), reprogramming automated payroll and HR information systems, developing

and conducting pay surveys to determine future pay adjustments in relation to the labor market, and conducting employee education and communication activities. The extent of these costs will be directly related to the level of comprehensiveness desired by DHS, especially in relation to training in the new system and developing and conducting labor market pay surveys for the wide variety of jobs in DHS.

Programming costs relating to automating the payroll, HR information, and performance management systems and for administering pay in a performance-focused pay system should not be extensive, since such systems already are in use elsewhere in the Federal Government and could be adapted for use by DHS. In some cases, however, DHS could benefit from contracting with outside providers for the development and maintenance of such systems.

DHS estimates the overall costs associated with implementing the new DHS HR system—including the development and implementation of a new pay and performance system, the conversion of current employees to that system, and the creation of the new DHS Labor Relations Board—will be approximately $130 million through FY 2007 (*i.e.*, over a 4-year period); less than $100 million will be spent in any 12-month period.

The primary benefit to the public of this new system resides in the HR flexibilities that will enable DHS to build a high-performance organization focused on mission accomplishment. The new job evaluation, pay, and performance management system provides DHS with an increased ability to attract and retain a more qualified and proficient workforce. The new labor relations, adverse actions, and appeals system affords DHS greater flexibility to manage its workforce in the face of constantly changing threats to the security of our homeland. Taken as a whole, the changes included in these proposed regulations will result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and above all, supports the primary mission of DHS—protecting our homeland.

Regulatory Flexibility Act

DHS and OPM have determined that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

E.O. 12988, Civil Justice Reform

This proposed regulation is consistent with the requirements of E.O. 12988. The regulation: would not preempt, repeal, or modify any Federal statute; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

E.O. 13132, Federalism

DHS and OPM have determined these proposed regulations would not have Federalism implications because they would apply only to Federal agencies and employees. The proposed regulations would not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

Unfunded Mandates

These proposed regulations would not result in the expenditure by State, local, or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

List of Subjects in 5 CFR Part 9701

Administrative practice and procedure, Government employees, Labor management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Department of Homeland Security.

Tom Ridge,

Secretary.

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, under the authority of section 9701 of title 5, United States Code, the Department of Homeland Security and the Office of Personnel Management are proposing to amend title 5, Code of Federal Regulations, by establishing chapter XCVII consisting of part 9701 as follows:

CHAPTER XCVII—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM (DEPARTMENT OF HOMELAND SECURITY—OFFICE OF PERSONNEL MANAGEMENT)

PART 9701—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM

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Authority: 5 U.S.C. 9701.

Subpart A—General Provisions

§ 9701.101 Purpose.

This part contains regulations governing the establishment of a new human resources management system within the Department of Homeland Security (DHS), as authorized by 5 U.S.C. 9701. As permitted by section 9701, these regulations modify or waive various statutory provisions that would otherwise be applicable to affected DHS employees. The modified provisions are designed to establish a modern, flexible system that supports DHS mission requirements and efforts to improve employee and organizational performance, while maintaining merit system principles and employee civil service protections. These regulations are issued jointly by the Secretary of Homeland Security and the Director of the Office of Personnel Management (OPM).

§ 9701.102 Applicability and coverage.

(a) The provisions of this part apply to DHS employees who are in a category—

(1) Eligible for coverage under one or more provisions of subparts B through G of this part; and

(2) Approved for coverage by the Secretary or designee under a specific set of provisions as of a specified effective date, at the Secretary's or designee's sole and exclusive discretion after coordination with OPM.

(b) Any new DHS job evaluation, pay, or performance management system covering Senior Executive Service (SES) members must be consistent with the performance-based features and the pay caps applicable to employees covered by the Governmentwide SES pay-for-performance system authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable implementing regulations issued by OPM. If the Secretary determines that SES members employed by DHS should be covered by job evaluation, pay, or performance management provisions that differ substantially from the Governmentwide SES pay-for-performance system, the Secretary and the Director must issue joint authorizing regulations consistent with all of the requirements of 5 U.S.C. 9701.

(c) The Secretary or designee, at his or her sole and exclusive discretion, may rescind approval granted under paragraph (a)(2) of this section on a prospective basis and prescribe procedures for converting a category of employees to coverage under applicable title 5 provisions.

(d) The regulations in this part do not apply to employees covered by a component of a human resources system established under the authority of a provision outside the waivable chapters of title 5, U.S. Code, identified in § 9701.104. For example, Transportation Security Administration employees, employees appointed under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Secret Service Uniformed Division officers, Coast Guard Academy faculty members, and Coast Guard military members 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. (Please refer to subparts B through G of this part for specific information regarding the coverage of each subpart.)

(e) Notwithstanding paragraph (d) of this section, nothing in this part prevents the Secretary or other authorized DHS official from using an independent discretionary authority to establish a parallel system that follows some or all of the requirements in this part for a category of employees who are not eligible for coverage under the authority provided by 5 U.S.C. 9701.

§ 9701.103 Definitions.

In this part:

Authorized agency official means the Secretary or an official who is authorized to act for the Secretary in the matter concerned.

Coordination means the process by which DHS, after appropriate staff-level consultation, officially provides OPM with notice of a proposed action and intended effective date. If OPM concurs, or does not respond to that notice within 30 calendar days, DHS may proceed with the proposed action. However, in the event that OPM indicates the matter has

Governmentwide implications or consequences, DHS will not proceed until the matter is resolved. The coordination process is intended to give due deference to the flexibilities afforded DHS by the Homeland Security Act and the regulations in this part, without compromising OPM's institutional responsibility, as codified in 5 U.S.C. chapter 11 and Executive Order 13197 of January 18, 2001, to provide Governmentwide oversight in human resources management programs and practices.

Department or *DHS* means the Department of Homeland Security.

Director means the Director of the Office of Personnel Management.

Employee means an employee within the meaning of that term in 5 U.S.C. 2105, except as otherwise provided in this subpart for specific purposes.

General Schedule or *GS* means the General Schedule classification and pay system established under chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code.

OPM means the Office of Personnel Management.

Secretary means the Secretary of Homeland Security or, as authorized, the Deputy Secretary of Homeland Security.

Secretary or designee means the Secretary or a DHS official authorized to act for the Secretary in the matter concerned who—

(1) Reports directly to the Secretary; or

(2) Serves as the Chief Human Capital Officer for DHS.

§ 9701.104 Scope of authority.

Subject to the requirements and limitations in 5 U.S.C. 9701, the provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9701:

(a) Chapter 43, dealing with performance appraisal systems;

(b) Chapter 51, dealing with General Schedule job classifications;

(c) Chapter 53, dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees;

(d) Chapter 71, dealing with labor relations;

(e) Chapter 75, dealing with adverse actions and certain other actions; and

(f) Chapter 77, dealing with the appeal of adverse actions and certain other actions.

§ 9701.105 DHS regulations.

DHS may issue internal Departmental directives to further define the design characteristics of any system established in accordance with this part.

§ 9701.106 Relationship to other provisions.

(a) DHS employees who are covered by a system established under this part are considered to be covered by chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code, for the purpose of applying other provisions of law or Governmentwide regulations outside those chapters to DHS employees, except as specifically provided in this part or in DHS regulations.

(b) Selected examples of provisions that continue to apply to any eligible DHS employees (despite coverage under subparts B through G of this part) include, but are not limited to, the following:

(1) Foreign language awards for law enforcement officers under 5 U.S.C. 4521–4523;

(2) Pay for firefighters under 5 U.S.C. 5545b;

(3) Differentials for duty involving physical hardship or hazard under 5 U.S.C. 5545(d);

(4) Recruitment, relocation, and retention payments under 5 U.S.C. 5753–5754;

(5) Physicians' comparability allowances under 5 U.S.C. 5948; and

(6) The higher cap on relocation bonuses for law enforcement officers established by section 407 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Public Law 101–509).

(c) The following provisions do not apply to DHS employees covered by a DHS job evaluation and pay system established under subparts B and C in place of the General Schedule:

(1) Time-in-grade restrictions that apply to competitive service GS positions under 5 CFR part 300, subpart F;

(2) Supervisory differentials under 5 U.S.C. 5755; and

(3) Law enforcement officer special rates and geographic adjustments under sections 403 and 404 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Public Law 101–509).

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d). Employees and applicants for employment in DHS will continue to be covered by EEOC's Federal sector regulations found at 29 CFR part 1614.

Subpart B—Job Evaluation

General

§ 9701.201 Purpose.

This subpart contains regulations establishing a modified job evaluation structure and rules for covered DHS employees and positions in place of the classification structure and rules in 5 U.S.C. chapter 51 and the job grading system in 5 U.S.C. chapter 53, subchapter IV.

§ 9701.202 Coverage.

(a) This subpart applies to eligible DHS employees and positions listed in paragraph (b) of this section, subject to approval by the Secretary or designee under § 9701.102(a)(2).

(b) The following employees and positions are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376; and

(4) Members of the Senior Executive Service who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9701.102(b).

§ 9701.203 Waivers.

(a) The provisions of 5 U.S.C. chapter 51 and 5 U.S.C. 5346, and related regulations, are waived except as provided in § 9701.106 and paragraph (b) of this section.

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS–15, is not waived or modified.

(c) For the purpose of applying provisions of title 5, U.S. Code, and title 5, Code of Federal Regulations, that are not otherwise waived or modified by this subpart, the term ''job evaluation'' includes ''classification'' and ''reclassification''. (*See also* § 9701.106.)

§ 9701.204 Definitions.

In this subpart:

Band means a work level or pay range within an occupational cluster.

Job evaluation means the process of evaluating or classifying a job or position to determine its relative value to an organization by assigning it to an occupational series, cluster, and band for pay and other related purposes. This term does not refer to the evaluation or appraisal of an employee's performance

under a performance management system established under subpart D of this part.

Occupational cluster means a grouping of one or more associated or related occupations or positions.

Occupational series means the four-digit number OPM or DHS assigns to a group or family of similar positions for identification purposes (for example: 0110, Economist Series; 1410, Librarian Series).

Position or *Job* means the duties, responsibilities, and related competency requirements that are assigned to an employee whom the Secretary or designee approves for coverage under § 9701.202(a).

§ 9701.205 Relationship to other provisions.

(a) Any job evaluation program described under this subpart must be established in conjunction with the pay system described in subpart C of this part.

(b) As provided in the definition of ''conditions of employment'' in § 9701.504, any job evaluation program established under this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the job evaluation program, including coverage determinations, the design of the job evaluation structure, and job evaluation methods, criteria, and administrative procedures and arrangements.

Job Evaluation Structure

§ 9701.211 Occupational clusters.

For purposes of evaluating positions, DHS may establish occupational clusters in coordination with OPM based on factors such as mission; nature of work; qualifications, competencies, or skill sets; typical career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. DHS must document in writing the criteria for grouping occupations or positions into occupational clusters.

§ 9701.212 Bands.

(a)(1) For purposes of identifying relative levels of work and corresponding pay ranges, DHS may establish one or more bands within each occupational cluster in coordination with OPM. Each occupational cluster may include, but is not limited to, the following bands:

(i) Entry/Developmental—involving work that focuses on gaining the competencies and skills needed to perform successfully in a Full Performance band through appropriate formal training and/or on-the-job experience.

(ii) Full Performance—involving work that requires the successful completion of any required entry-level training and/or developmental activities necessary to independently perform the full range of non-supervisory duties of a position in an occupational cluster.

(iii) Senior Expert—involving work that requires an extraordinary level of specialized knowledge or expertise upon which DHS relies for the accomplishment of critical mission goals and objectives; reserved for a limited number of non-supervisory employees.

(iv) Supervisory—reserved primarily for first-level supervisors.

(2) DHS must document the definitions for each band which specify the type and range of difficulty and responsibility; qualifications, competencies, or skill sets; or other characteristics of the work encompassed by the band.

(b) DHS may establish qualification standards and requirements for each occupational cluster, occupational series, and/or band in coordination with OPM.

Job Evaluation Process

§ 9701.221 Job evaluation requirements.

(a) DHS must develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and DHS must make such descriptions and documentation available to affected employees.

(b) An authorized agency official must—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105 and 5346 or by DHS in coordination with OPM; and

(2) Apply the criteria and definitions required by § 9701.211 and § 9701.212 to assign jobs to an appropriate occupational cluster and band.

(c) DHS must establish procedures for evaluating jobs and may make such inquiries or investigations of the duties, responsibilities, and qualification requirements of jobs as it considers necessary for the purposes of this section.

(d) Job evaluation decisions become effective on the date designated by the authorized agency official who makes the decision.

(e) DHS must establish a plan to review the accuracy of job evaluation decisions.

§ 9701.222 Reconsidering job evaluation decisions.

(a) An employee may request that DHS reconsider the occupational series or pay system assignment of the employee's official position of record. An employee may not request that DHS reconsider any other job evaluation determination made under this subpart (*e.g.*, an employee's placement in a band or cluster).

(b) DHS must establish policies and procedures for handling reconsideration requests.

(c) DHS reconsideration decisions made under this section are final.

Transitional Provisions

§ 9701.231 Conversion.

(a) This section describes the transitional provisions that apply when DHS positions and employees are converted to a job evaluation system established under this subpart. Affected positions and employees may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system, as provided in § 9701.202. For the purpose of this section, the terms ''convert,'' ''converted,'' and ''converting'' refer to positions and employees that become covered by the job evaluation system as a result of a coverage determination made under § 9701.102(a)(2) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the DHS system.

(b) DHS must prescribe policies and procedures for converting the GS and prevailing rate grade of a position to a band and for converting SL/ST and SES positions to a band upon initial implementation of the DHS job evaluation system. Such procedures must include provisions for converting an employee who is retaining a grade under 5 U.S.C. chapter 53, subchapter VI, immediately prior to conversion. As provided in § 9701.373, DHS must convert employees without a reduction in an employee's rate of basic pay (taking into account any applicable locality payment, special rate, or other similar supplemental pay).

§ 9701.232 Special transition rules for Federal Air Marshal Service.

Notwithstanding any other provision in this subpart, if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover those positions under a job evaluation system that is parallel to the job evaluation system that was applicable to the Federal Air Marshal Service within TSA. DHS may modify that system after coordination

with OPM. DHS may prescribe rules for converting Federal Air Marshal Service employees to any new job evaluation system that may subsequently be established under this subpart.

Subpart C—Pay and Pay Administration

General

§ 9701.301 Purpose.

This subpart contains regulations establishing pay structures and pay administration rules for covered DHS employees in place of the pay structures and pay administration rules established under 5 U.S.C. chapter 53, as authorized by 5 U.S.C. 9701. These regulations are designed to provide DHS with the flexibility to allocate available funds strategically in support of DHS mission priorities and objectives. Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DHS.

§ 9701.302 Coverage.

(a) This subpart applies to eligible DHS employees in the categories listed in paragraph (b) of this section, subject to approval by the Secretary or designee under § 9701.102(a)(2).

(b) The following employees are eligible for coverage under this subpart:

(1) Employees who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III;

(2) Employees who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376; and

(4) Members of the Senior Executive Service who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9701.102(b).

§ 9701.303 Waivers.

(a) The provisions of 5 U.S.C. chapter 53, and related regulations, are waived except as provided in § 9701.106 and paragraphs (b) through (e) of this section.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived or modified:

(1) Section 5307, dealing with the aggregate limitation on pay;

(2) Sections 5311 through 5318, dealing with Executive Schedule positions; and

(3) Section 5377, dealing with the critical pay authority.

(c) The following provisions of 5 U.S.C. chapter 53 are modified but not waived:

(1) Section 5371 is modified to allow DHS, in coordination with OPM, to apply the provisions of 38 U.S.C. chapter 74 to health care positions covered by section 5371 in lieu of any DHS pay system established under this subpart or the following provisions of title 5, U.S. Code: chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to ''chapter 51'' in section 5371 is deemed to include a job evaluation system established under subpart B of this part.

(2) Section 5373 is modified to raise the limit on certain rates of basic pay fixed by administrative action (including any applicable locality payment or supplement) to the rate for level III of the Executive Schedule. Notwithstanding § 9701.302(a), any DHS employee otherwise covered by section 5373 is eligible for coverage under the modified provisions established under this paragraph, subject to approval by the Secretary or designee under § 9701.102(a)(2).

(3) Section 5379 is modified to allow DHS and OPM to establish and administer a modified student loan repayment program for DHS employees, except that DHS may not make loan payments for any noncareer appointees to the SES (as defined in 5 U.S.C. 3132(a)(7)) or for any employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character. Notwithstanding § 9701.302(a), any DHS employee otherwise covered by section 5379 is eligible for coverage under the modified provisions established under this paragraph, subject to approval by the Secretary or designee under § 9701.102(a)(2).

(d) In approving the coverage of employees who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, DHS may limit the waiver so that affected employees remain entitled to environmental or other differentials established under 5 U.S.C. 5343(c)(4) and night shift differentials established under 5 U.S.C. 5343(f) if such employees are grouped in separate occupational clusters (established under subpart B of this part) that are limited to employees who would otherwise be covered by a prevailing rate system.

(e) Employees in SL/ST positions and SES members who are covered by a basic pay system established under this subpart are considered to be paid under 5 U.S.C. 5376 and 5382, respectively, for the purpose of applying 5 U.S.C. 5307(d).

§ 9701.304 Definitions.

In this part:

48 contiguous States means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

Band has the meaning given that term in § 9701.204.

Band rate range means the range of rates of basic pay (excluding any locality pay supplements or special pay supplements) applicable to employees in a particular band, as described in § 9701.321. Each band rate range is defined by a minimum and maximum rate.

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by law or regulation. For the specific purposes prescribed in §§ 9701.332(c) and 9701.333, respectively, basic pay includes locality pay supplements and special pay supplements.

Control point means a specified rate in a band rate range used to limit initial pay setting or pay progression as described in § 9701.321(d).

Demotion means a reduction to a lower band within the same occupational cluster or a reduction to a lower band in a different occupational cluster under rules prescribed by DHS pursuant to § 9701.355.

Locality pay supplement means a geographic-based addition to basic pay, as described in § 9701.332.

Occupational cluster has the meaning given that term in § 9701.204.

Promotion means an increase to a higher band within the same occupational cluster or an increase to a higher band in a different occupational cluster under rules prescribed by DHS pursuant to § 9701.355.

Rating of record has the meaning given that term in § 9701.404.

SES means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

SL/ST refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term ''SL'' identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term ''ST'' identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

Special pay supplement means an addition to basic pay for a particular category of employees to address staffing problems, as described in

§ 9701.333. A special pay supplement is paid in place of any lesser locality pay supplement that would otherwise apply.

Unacceptable performance has the meaning given that term in § 9701.404.

Unacceptable rating of record means a rating of record indicating unacceptable performance.

§ 9701.305 Bar on collective bargaining.

As provided in the definition of *conditions of employment* in § 9701.504, any pay program established under authority of this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the pay program, including coverage decisions, the design of pay structures, the setting and adjustment of pay levels, pay administration rules and policies, and administrative procedures and arrangements.

Overview of Pay System

§ 9701.311 Major features.

DHS will establish a pay system that governs the setting and adjusting of covered employees' rates of pay. The DHS pay system will include the following features:

(a) A structure of rate ranges linked to various bands for each occupational cluster, in alignment with the job evaluation structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of basic pay ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9701.321 through 9701.322;

(c) Policies regarding the setting and adjusting of supplements to basic pay based on local labor market conditions and other factors, as described in §§ 9701.331 through 9701.334;

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§ 9701.323 and 9701.335;

(e) Policies regarding performance-based pay increases, as described in §§ 9701.341 through 9701.345;

(f) Policies on basic pay administration, including movement between occupational clusters, as described in §§ 9701.351 through 9701.356;

(g) Policies regarding special payments that are not basic pay, as described in §§ 9701.361 through 9701.363; and

(h) Linkages to employees' performance ratings of records, as described in subpart D of this part.

§ 9701.312 Maximum rates.

(a) DHS may not pay any employee an annual rate of basic pay in excess of the rate for level III of the Executive Schedule, except as provided in paragraph (b) of this section.

(b) DHS may establish the maximum annual rate of basic pay for members of the SES at the rate for level II of the Executive Schedule if DHS obtains the certification specified in 5 U.S.C. 5307(d).

§ 9701.313 DHS Responsibilities.

DHS responsibilities in implementing this subpart include the following:

(a) Providing OPM with information regarding the implementation of the programs authorized under this subpart at OPM's request;

(b) Participating in any interagency pay coordination council or group established by OPM to ensure that DHS pay policies and plans are coordinated with other agencies; and

(c) Fulfilling all other responsibilities prescribed in this subpart.

Setting and Adjusting Rate Ranges

§ 9701.321 Structure of bands.

(a) In coordination with OPM, DHS may establish ranges of basic pay for bands, with minimum and maximum rates set and adjusted as provided in § 9701.322. A band may include control points, as described in paragraph (d) of this section. Rates must be expressed as annual rates.

(b) For each band within an occupational cluster, DHS will establish a common rate range that applies in all locations, except as provided in paragraph (c) of this section.

(c) DHS may establish a different rate range for employees in a band who are stationed in locations outside the contiguous 48 States.

(d) DHS may establish control points within a band that limit initial pay-setting or pay progression for specified categories of employees. DHS may require that employees meet certain criteria (*e.g.*, performance rating) before exceeding certain control points.

§ 9701.322 Setting and adjusting rate ranges.

(a) Within its sole discretion, DHS, after coordination with OPM, may set and adjust the rate ranges established under § 9701.321. In determining the rate ranges, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) In coordination with OPM, DHS may determine the effective date of newly set or adjusted band rate ranges. Generally, these rate ranges will be adjusted on an annual basis.

(c) DHS may provide different rate range adjustments for different occupational clusters or for different bands within an occupational cluster.

(d) For a given band, DHS may provide rate range adjustments in locations outside the contiguous 48 States that differ from the adjustments within the contiguous 48 States. DHS must take into account any cost-of-living allowance received by employees stationed outside the contiguous 48 States in determining the appropriate amount of the band rate range adjustment.

(e) DHS may adjust the minimum and maximum rates of a band by different percentages.

§ 9701.323 Eligibility for pay increase associated with a rate range adjustment.

(a) An employee who meets or exceeds performance expectations (*i.e.*, has a rating of record above the unacceptable performance level) must receive an increase in basic pay equal to the percentage value of any increase in the minimum rate of the employee's band resulting from a rate range adjustment under § 9701.322. The pay increase takes effect at the same time as the corresponding rate range adjustment, except as provided in paragraph (d) of this section.

(b) An employee who has an unacceptable rating of record may not receive a pay increase as a result of a rate range adjustment. The denial of this increase is not considered an adverse action under subpart F of this part.

(c) If an employee does not have a rating of record, he or she must be deemed to meet or exceed performance expectations and is entitled to receive an increase based on the rate range adjustment, as provided in paragraph (a) of this section.

(d) DHS may adopt policies under which an employee who is initially denied a pay increase under this section (based on an unacceptable rating of record) may receive, at management's discretion, a delayed increase after demonstrating significantly improved performance and receiving a new rating of record. Any such delayed increase will be made effective prospectively.

Locality and Special Pay Supplements

§ 9701.331 General.

The basic pay ranges established under §§ 9701.321 through 9701.323 may be supplemented by locality and special pay supplements, as described in §§ 9701.332 through 9701.335. These supplements are expressed as a

percentage of basic pay and are set and adjusted as described in § 9701.334.

§ 9701.332 Locality pay supplements.

(a) For each band rate range and in coordination with OPM, DHS may establish locality pay supplements that apply in specified locality pay areas. Locality pay supplements apply to employees whose official duty station is located in the given area. DHS may provide different locality pay supplements for different occupational clusters or for different bands within the same occupational cluster.

(b) In coordination with OPM, DHS may set the boundaries of locality pay areas. If DHS does not use the locality pay areas established by the President's Pay Agent under 5 U.S.C. 5304, it may make boundary changes by regulation or other means. Judicial review of any DHS regulation on boundary changes is limited to whether or not any regulation was promulgated in accordance with 5 U.S.C. 553. A DHS decision to apply the boundaries established under 5 U.S.C. 5304 does not require regulations and is not subject to judicial review.

(c) Locality pay supplements are considered basic pay for the following purposes:

(1) Retirement under 5 U.S.C. chapter 83 or 84;

(2) Life insurance under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority;

(4) Severance pay under 5 U.S.C. 5595;

(5) Other payments and adjustments authorized under this subpart as specified by DHS internal regulations;

(6) Other payments and adjustments under other statutory or regulatory authority that are basic pay for the purpose of locality-based comparability payments under 5 U.S.C. 5304; and

(7) Any provisions for which DHS locality pay supplements must be treated as basic pay by law.

§ 9701.333 Special pay supplements.

In coordination with OPM, DHS may establish special pay supplements that provide higher pay levels for subcategories of employees within an occupational cluster if warranted by current or anticipated recruitment and/or retention needs. DHS may establish rules necessary to implement such supplements. Any special pay supplement must be treated as basic pay for the same purposes as locality pay supplements, as described in § 9701.332(c), and for the purpose of computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.

§ 9701.334 Setting and adjusting locality and special pay supplements.

(a) Within its sole discretion, DHS, after coordination with OPM, may set and adjust locality and special pay supplements. In determining the amounts of the supplements, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and other relevant factors.

(b) In coordination with OPM, DHS may determine the effective date of newly set or adjusted locality and special pay supplements. Generally, established supplements will be reviewed for possible adjustment on an annual basis in conjunction with rate range adjustments under § 9701.322.

§ 9701.335 Eligibility for pay increase associated with a supplement adjustment.

(a) An employee who meets or exceeds performance expectations (*i.e.*, has a rating of record above the unacceptable performance level) is entitled to the pay increase resulting from an increase in any applicable locality or special pay supplement authorized by DHS. This includes an increase resulting from the initial establishment and setting of a special pay supplement. The pay increase takes effect at the same time as the applicable supplement is set or adjusted, except as provided in paragraph (d) of this section.

(b) An employee who has an unacceptable rating of record may not receive a pay increase as a result of an increase in an applicable locality or special pay supplement. DHS may determine the method of preventing a pay increase in this circumstance. If DHS chooses to reduce the employee's rate of basic pay by the amount necessary to prevent an increase, this reduction will not be considered an adverse action under subpart F of this part.

(c) If an employee does not have a rating of record, he or she must be deemed to meet or exceed performance expectations and is entitled to any pay increase associated with a supplement adjustment, as provided in paragraph (a) of this section.

(d) DHS may adopt policies under which an employee who is initially denied a pay increase under this section (based on an unacceptable rating of record) may receive, at management's discretion, a delayed increase after demonstrating significantly improved performance and receiving a new rating of record. Any such delayed increase will be made effective prospectively.

Performance-Based Pay

§ 9701.341 General.

Sections 9701.342 through 9701.345 describe various types of performance-based pay increases that are part of the pay system established under this subpart. Generally, these within-band pay increases are directly linked to an employee's rating of record (as assigned under the performance management system described in subpart D of this part). These provisions are designed to provide DHS with the flexibility to allocate available funds based on performance as a means of fostering a high-performance culture that supports mission accomplishment. While performance measures primarily focus on an employee's contributions (as an individual or as part of a team) in accomplishing work assignments and achieving mission results, performance also may be reflected in the acquisition and demonstration of required competencies.

§ 9701.342 Performance pay increases.

(a) *Overview.* The DHS pay system provides employees in a Full Performance or higher band with increases in basic pay based on individual performance ratings of record as assigned under a system established under subpart D of this part. The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period, except that if an employee's current performance is determined to be inconsistent with that rating, an authorized agency official must prepare a more current rating of record, subject to the requirements of subpart D of this part. The DHS pay system uses pay pool controls to allocate pay increases based on performance points that are directly linked to the employee's rating of record, as described in this section. Performance pay increases are a function of the amount of money in the performance pay pool, the relative point value placed on ratings, and the distribution of ratings within that performance pay pool.

(b) *Performance pay pools.* (1) DHS will establish pay pools to allocate monies budgeted for performance pay increases.

(2) Each pay pool covers a defined group of DHS employees, as determined by DHS.

(3) The Secretary or designee may determine the size of the pay pools and may adjust those amounts based on overall levels of organizational performance or contribution to the Department's mission.

(4) In allocating the monies to be budgeted for performance pay increases, the Secretary or designee must take into account the average value of within-grade and quality step increases under the General Schedule, as well as amounts that otherwise would have been spent on promotions among positions placed in the same band.

(c) *Performance point values.* (1) DHS will establish point values that correspond to the performance rating levels established under subpart D of this part, so that a point value is attached to each rating level. For example, in a four-level rating program, the point value pattern could be 4–2–1–0, where 4 points are assigned to the highest (outstanding) rating and 0 points to an unacceptable rating. Performance point values will determine performance pay increases.

(2) DHS will establish a point value pattern for each pay pool. Different pay pools may have different point value patterns.

(3) DHS must assign zero performance points to any employee with an unacceptable rating of record.

(d) *Performance payout.* (1) DHS will determine the value of a performance point, expressed as a percentage of an employee's rate of basic pay or as a fixed dollar amount.

(2) To determine an individual employee's performance payout, DHS will multiply the point value determined under paragraph (d)(1) of this section by the number of performance points credited to the employee.

(3) To the extent that the adjustment does not cause the employee's rate of basic pay to exceed the maximum rate (or applicable control point) of the employee's band rate range, DHS will pay the performance payout as an adjustment in the employee's annual rate of basic pay. Any excess amount may be granted as a lump-sum payment, which may not be considered basic pay for any purpose.

(4) In coordination with OPM, DHS may determine the effective date of adjustments in basic pay under paragraph (d)(3) of this section.

(e) *Proration of performance payouts.* DHS may establish policies governing the proration of performance payouts for employees who, during the period between performance pay adjustments, are—

(1) Hired or promoted;

(2) In a leave without pay status; or

(3) In other circumstances where proration is considered appropriate.

(f) *Adjustments for employees returning after performing honorable service in the uniformed services.* DHS will establish policies governing how it sets the rate of basic pay prospectively for an employee who leaves a DHS position to perform service in the uniformed services (as defined in 38 U.S.C. 4303 and 5 CFR 353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (*e.g.*, 38 U.S.C. 4316). Those policies must credit the employee with intervening performance pay adjustments based on the employee's last DHS rating of record. For employees who have no such rating of record, DHS policies must prescribe a methodology to be used in applying performance pay adjustments that occurred during the employee's absence.

§ 9701.343 Within-band reductions.

Subject to the adverse action procedures set forth in subpart F of this part, DHS may reduce an employee's rate of basic pay within a band for unacceptable performance or conduct. A reduction under this section may not cause an employee's rate of basic pay to fall below the minimum rate of the employee's band rate range. These reductions may be made effective at any time.

§ 9701.344 Special within-band increases for certain employees in a Senior Expert band.

DHS may approve special within-band basic pay increases for employees within a Senior Expert or equivalent band established under § 9701.212 who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment. Increases under this section are in addition to any performance pay increases made under § 9701.342 and may be made effective at any time.

§ 9701.345 Developmental pay adjustments.

DHS may establish policies and procedures for adjusting the pay of employees in an Entry/Developmental band. Those policies and procedures may use measures that link pay progression to the demonstration of required knowledge, competencies, skills, attributes, or behaviors. DHS may set standard timeframes for progression through an Entry/Developmental band while allowing an employee to progress at a slower or faster rate based on his or her performance, demonstration of required competencies or skills, and/or other factors.

Pay Administration

§ 9701.351 Setting an employee's starting pay.

In coordination with OPM, DHS may establish policies governing the starting rate of pay for an employee, including—

(a) An individual who is newly appointed or reappointed to the Federal service;

(b) An employee transferring to DHS from another Federal agency; and

(c) A DHS employee who moves from a noncovered position to a position already covered by this subpart.

§ 9701.352 Use of highest previous rate.

DHS may establish policies governing the discretionary use of an individual's highest previous rate of basic pay received as a Federal employee or as an employee of a Coast Guard nonappropriated fund instrumentality (NAFI) in setting pay upon reemployment, transfer, reassignment, promotion, demotion, placement in a different occupational cluster, or change in type of appointment. For this purpose, basic pay may include a locality-based payment or supplement under circumstances approved by DHS. If an employee in a Coast Guard NAFI position is converted to an appropriated fund position under the pay system established under this subpart, DHS must use the existing NAFI rate to set pay upon conversion.

§ 9701.353 Setting pay upon promotion.

(a) Except as otherwise provided in this section, upon an employee's promotion, DHS must provide an increase in the employee's rate of basic pay equal to the greater of—

(1) 8 percent; or

(2) The amount necessary to reach the minimum rate of the higher band.

(b) DHS may prescribe rules providing for an increase other than the amount specified in paragraph (a) of this section in the case of—

(1) An employee promoted from an Entry/Developmental band to a Full Performance band (consistent with the pay progression plan established for the Entry/Developmental band);

(2) An employee who was demoted and is then repromoted back to the higher band, if necessary to prevent the employee from receiving a rate of basic pay higher than the rate the employee would have received if he or she had not been demoted; or

(3) Employees in other circumstances specified by DHS internal regulations.

(c) An employee receiving a retained rate (*i.e.*, a rate above the maximum of the band) before promotion is entitled to a rate of basic pay after promotion that is the greater of—

(1) The rate that is 8 percent higher than the maximum rate of the employee's current band;

(2) The minimum rate of the employee's new band rate range; or

(3) The employee's existing rate of basic pay (which may continue as a retained rate if the rate does not fit within the employee's newly applicable band).

(d) DHS may determine the circumstances under which and the extent to which any locality or special pay supplements are treated as basic pay in applying the promotion increase rules in this section.

§ 9701.354 Setting pay upon demotion.

DHS may prescribe rules governing how to set an employee's pay when he or she is demoted. The rules must distinguish between demotions under adverse action procedures (as defined in subpart F of this part) and other demotions (*e.g.*, due to expiration of a temporary promotion or canceling of a promotion during a new supervisor's probationary period).

§ 9701.355 Setting pay upon movement to a different occupational cluster.

DHS may prescribe rules governing how to set an employee's pay when he or she moves voluntarily or involuntarily to a position in a different occupational cluster, including rules for determining whether such a movement is to a higher or lower band for the purpose of setting pay upon promotion or demotion under §§ 9701.353 and 9701.354, respectively.

§ 9701.356 Pay retention.

(a) Subject to the requirements of this section and in coordination with OPM, DHS must prescribe policies governing the application of pay retention. Pay retention prevents a reduction in basic pay that would otherwise occur by preserving the former rate of basic pay within the employee's new band or by establishing a retained rate that exceeds the maximum rate of the new band.

(b) Pay retention must be based on the employee's rate of basic pay in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate must be compared to the range of rates of basic pay applicable to the employee's position.

(c) Under the DHS pay system, a retained rate is a frozen rate that is not adjusted in conjunction with rate range adjustments.

§ 9701.357 Miscellaneous.

(a) Except in the case of an employee with an unacceptable rating of record, an employee's rate of basic pay may not be less than the minimum rate of the employee's band.

(b) Except as provided in § 9701.355, an employee's rate of basic pay may not exceed the maximum rate of the employee's band rate range.

(c) DHS must follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of pay must be converted to hourly rates of pay in computing payments received by covered employees.

(d) DHS may establish rules governing the movement of employees to or from a band rate range that is augmented by a special pay supplement.

(e) For the purpose of applying the reduction-in-force provisions of 5 CFR part 351, DHS must establish representative rates for all band rate ranges.

(f) If a DHS employee moves from the pay system established under this subpart to a higher-level GS position within DHS, DHS may provide for a special increase prior to the employee's movement in recognition that the employee will not be eligible for a promotion increase under the GS system.

Special Payments

§ 9701.361 Special skills payments.

DHS may establish additional payments for specializations for which the incumbent is trained and ready to perform at all times. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special skills payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention or adverse action procedures.

§ 9701.362 Special assignment payments.

DHS may authorize additional payments for employees serving on special assignments in positions placing significantly greater demands on the employee than other assignments within the employee's band. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special assignment payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention provisions or adverse action procedures.

§ 9701.363 Special staffing payments.

DHS may establish additional payments for employees serving in positions for which DHS is experiencing or anticipates significant recruitment or retention problems. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special staffing payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention or adverse action procedures.

Transitional Provisions

§ 9701.371 General.

Sections 9701.371 through 9701.375 describe the transitional provisions that apply when DHS employees are converted to a pay system established under this subpart. An affected employee may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system, as provided in § 9701.302. DHS may prescribe policies and procedures as necessary to implement these transitional provisions. For the purpose of this section and §§ 9701.372 through 9701.375, the terms ''*convert*'' or ''*conversion*'' refer to employees who become covered by the pay system without a change in position (as a result of a coverage determination made under § 9701.102(a)(2)) and excludes employees who are reassigned or transferred from a noncovered position to a position already covered by the DHS system.

§ 9701.372 Creating initial pay ranges.

(a) DHS must set the initial band rate ranges for the DHS pay system established under this subpart in coordination with OPM. The initial ranges may link to the ranges that apply to converted employees in their previously applicable pay system (taking into account any applicable special rates and locality payments or supplements).

(b) For employees who are law enforcement officers as defined in 5 U.S.C. 5541(3) and who were covered by the GS system immediately before conversion, the initial ranges must provide rates of basic pay that equal or exceed the rates of basic pay these officers received under the GS system (taking into account any applicable special rates and locality payments or supplements).

§ 9701.373 Conversion of employees to the DHS pay system.

(a) When a pay system is established under this subpart and applied to a category of employees, DHS must convert employees to the system without a reduction in the employee's rate of basic pay (taking into account any applicable special rate or locality payment or supplement).

(b) If an employee receiving a special rate under 5 U.S.C. 5305 before conversion is converted to an equal rate of pay under the DHS pay system that consists of a basic rate and a locality or special pay supplement, the conversion is not considered an adverse action under subpart F of this part even if the supplement is not normally treated as basic pay for adverse action purposes.

(c) If another personnel action (*e.g.*, promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, DHS must process the other action under the rules pertaining to the employee's former system before processing the conversion action.

(d) An employee on a temporary promotion at the time of conversion must be returned to his or her official position of record prior to processing the conversion. If the employee is temporarily promoted immediately after the conversion, pay must be set under the rules for promotion increases under the DHS system.

(e) The Secretary has discretion to make one-time pay adjustments for GS and prevailing rate employees when they are converted to the DHS pay system. DHS may prescribe rules governing any such pay adjustment, including rules governing employee eligibility, pay computations, and the timing of any such pay adjustment.

(f) DHS must convert entry/developmental 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.

§ 9701.374 Special transition rules for Federal Air Marshal Service.

Notwithstanding any other provision in this subpart, if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover those positions under a pay system that is parallel to the pay system that was applicable to the Federal Air Marshal Service within TSA. DHS may modify that system after coordination with OPM. DHS may prescribe rules for converting Federal Air Marshal Service employees to any new pay system that may subsequently be established under this subpart, consistent with the conversion rules in § 9701.373.

Subpart D—Performance Management

§ 9701.401 Purpose.

(a) This subpart provides for the establishment in the Department of Homeland Security of at least one performance management system as authorized by 5 U.S.C. chapter 97.

(b) DHS' performance management system(s) must—

(1) Be fair, credible, and transparent;

(2) Be designed, implemented, and administered to support the accomplishment of the Departmental and organizational mission and goals;

(3) Promote and sustain a high-performance culture; and

(4) Enable DHS to set mission-sensitive performance expectations, make meaningful distinctions among employees based on performance, address poor performance, and foster and reward excellent performance.

§ 9701.402 Coverage.

(a) DHS employees who would otherwise be covered by 5 U.S.C. chapter 43 are eligible for coverage under this subpart, subject to approval by the Secretary or designee under § 9701.102(a)(2), except as provided in paragraph (b) of this section. Those eligible for coverage include employees who were excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the effective date of this subpart, as determined under § 9701.102(a)(2).

(b) Employees who are not expected to be employed longer than a minimum period (as defined in § 9701.404) during a consecutive 12-month period are excluded from coverage under this subpart.

§ 9701.403 Waivers.

With respect to employees covered by this subpart, 5 U.S.C. chapter 43 and 5 CFR part 430 are waived.

§ 9701.404 Definitions.

In this subpart—

Appraisal means the review and evaluation of an employee's performance.

Appraisal period means the period of time established under a performance management system for reviewing employee performance.

Competencies means the measurable or observable knowledge, skills, abilities, attributes, or behaviors required by the position.

Contribution means a work product, service, output, or result provided or produced by an employee that supports the Departmental or organizational mission, goals, or objectives.

Minimum period means period of time established by DHS during which an employee must perform before receiving a rating of record.

Performance means accomplishment of work assignments or responsibilities.

Performance management means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding employee performance to support the success of the organization and its employees in attaining goals and objectives.

Performance management system means the policies and requirements established under this subpart, as supplemented by internal DHS implementing regulations, for setting and communicating employee performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding employee performance.

Performance measures means observable or verifiable descriptions of quality, quantity, timeliness, cost-effectiveness, or manner of performance (including observable behaviors and attributes).

Rating of record means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties over the applicable period; or

(2) To support a pay determination, including one granted in accordance with subpart C of this part, a within-grade increase granted under 5 CFR 531.404, or a pay determination granted under other applicable rules.

Unacceptable performance means the failure to meet one or more performance expectations.

§ 9701.405 Performance management systems.

(a) DHS may issue internal implementing regulations that establish one or more performance management systems for DHS employees, subject to the requirements set forth in this subpart.

(b) At a minimum, a DHS performance management system or systems must—

(1) Comply with the provisions of 5 U.S.C. chapter 23 that set forth the merit system principles and prohibited personnel practices;

(2) Support and otherwise comport with the Government Performance and Results Act of 1993 (GPRA), and Departmental and organizational

strategic goals and objectives and annual performance plans;

(3) Identify the employees covered and provide a means for their involvement in the design and implementation of the system(s);

(4) In design and application, be fair, credible, and transparent;

(5) Align individual performance expectations with the Departmental or organizational mission, strategic goals, GPRA annual performance plans, or other DHS or organizational objectives and measures;

(6) Promote individual accountability by clearly 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;

(7) Provide for meaningful distinctions in performance to support adjustments in pay, awards, promotions, and performance-based adverse actions;

(8) Specify—

(i) The employees covered by the system(s);

(ii) The minimum period during which an employee must perform before receiving a rating of record;

(iii) Procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance; and

(iv) Criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances.

§ 9701.406 Setting and communicating performance expectations.

(a) Supervisors and managers must establish performance expectations and communicate them to employees.

(b) Performance expectations must align with and support the DHS mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(c) Performance expectations may take the form of—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, administrative manuals, internal rules and regulations, and/or other instructions that are generally applicable and available to the employee;

(3) A particular work assignment, including expectations regarding the quality, quantity, accuracy, timeliness, and/or other expected characteristics of the completed assignment;

(4) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make; or

(5) Any other means, as long as it is reasonable to assume that the employee will understand the performance that is expected.

(d) Employees must seek clarification and/or additional information when they do not understand their performance expectations.

(e) Supervisors must involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of the supervisor.

§ 9701.407 Monitoring performance.

In applying the requirements of the performance management system and its internal implementing regulations, supervisors must—

(a) Monitor the performance of their employees and the organization; and

(b) Provide periodic 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.

§ 9701.408 Developing performance.

(a) Subject to budgetary and organizational constraints, a supervisor must—

(1) Provide employees with the proper tools and technology to do the job; and

(2) Facilitate employee development to enhance employees' ability to perform.

(b) During the appraisal period, if a supervisor determines that an employee's performance is unacceptable, the supervisor must—

(1) Consider the range of options available to address the performance deficiency, such as remedial training, an improvement period, a reassignment, a verbal warning, letters of counseling, written reprimands, and/or an adverse action (as defined in subpart F of this part); and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(c) As specified in subpart G of this part, employees may appeal adverse actions based on unacceptable performance.

§ 9701.409 Rating performance.

(a)(1) Except as provided in paragraph (a)(2) of this section, the DHS performance management system(s) must establish a single rating level of unacceptable performance, a rating level of fully successful performance (or equivalent), and at least one rating level above fully successful performance.

(2) For employees at the entry/developmental level, the DHS performance management system(s) may establish two rating levels, *i.e.*, an unacceptable rating level and a rating level of fully successful (or equivalent).

(b) A supervisor or other rating official must prepare and issue a rating of record after the completion of the appraisal period. An additional rating of record may be issued to support—

(1) A performance pay increase determination under § 9701.342(a);

(2) A within-grade increase determination under 5 CFR 531.404; or

(3) A pay determination under any other applicable pay rules.

(c) A rating of record must assess an employee's performance with respect to his or her performance expectations and/or relative contributions and is considered final when issued to the employee with all appropriate reviews and signatures.

(d) DHS may not impose a quota on any rating level or a mandatory distribution of ratings of record; *i.e.*, forced distributions are prohibited.

(e) A rating of record issued under this subpart is an official rating of record for the purpose of any provision of title 5, Code of Federal Regulations, for which an official rating of record is required.

(f) As provided in Executive Order 5396, DHS may not lower the rating of record of a disabled veteran based on absences from work to seek medical treatment.

(g) A rating of record may be grieved by a non-bargaining unit employee (or a bargaining unit employee when no negotiated procedure exists) through an administrative grievance procedure established by DHS. A bargaining unit employee may grieve a rating of record through a negotiated grievance procedure, as provided in subpart E of this part.

(h) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in the applicable performance management system (*e.g.*, transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

(i) The DHS performance management system(s) must establish policies and procedures for crediting performance in

a reduction in force, including policies for assigning additional retention credit based on performance. Such policies must comply with 5 U.S.C. chapter 35 and 5 CFR 351.504.

§ 9701.410 Rewarding performance.

(a) Ratings of record will be used to make decisions regarding—

(1) Performance pay increases under § 9701.342;

(2) Within-grade and quality step increases under 5 CFR 531.404 and 531.504; and

(3) Pay determinations under other applicable pay rules;

(b) Ratings of record may be used as a basis for issuing awards under any legal authority, including 5 U.S.C. chapter 45, 5 CFR part 451, and a Departmental or organizational awards program.

§ 9701.411 Performance Review Boards.

(a) DHS will establish Performance Review Boards (PRBs) to—

(1) Review ratings of record in order to promote consistency of application;

(2) Provide general oversight of the performance management system(s) to ensure administration in a fair, credible, and transparent manner; and

(3) At the PRB's sole and exclusive discretion and on a case-by-case basis, remand one or more individual ratings of record for additional review and/or, where circumstances warrant, modify a rating or ratings of record.

(b) DHS may establish PRBs for particular organizational units, occupations, and/or locations, or on such basis as it determines appropriate.

(c) DHS may appoint as many PRBs as it deems necessary to carry out their intended function effectively.

(d) When practicable, PRB members may include employees outside the organizational unit, occupation, and/or location of employees whose ratings of record are subject to review by that PRB.

§ 9701.412 DHS responsibilities.

In carrying out its responsibility to design, implement, and apply a performance management system that is fair, credible, and transparent, DHS must—

(a) Provide for training of supervisors, managers, and employees;

(b) Transfer ratings between subordinate organizations and to other Federal departments or agencies;

(c) Evaluate its performance management system(s) for effectiveness and compliance with this subpart, internal DHS regulations and policies, and the provisions of 5 U.S.C. chapter 23 that set forth the merit system principles and prohibited personnel practices; and

(d) Provide OPM with a copy of the Departmental regulations, policies, and procedures that implement these regulations.

Subpart E—Labor-Management Relations

§ 9701.501 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(b) relating to the Department's labor-management relations system. The Department was created in recognition of the paramount interest in safeguarding the American people. For this reason Congress stressed that personnel systems established by the Department and OPM must be flexible and contemporary, enabling the Department to rapidly respond to threats to our Nation. The labor-management regulations in this subpart are designed to meet these compelling concerns and must be interpreted with the Department's mission foremost in mind. The regulations also recognize the rights of DHS employees described below to organize and bargain collectively, subject to any exclusion from coverage or limitation on negotiability established by law, including these regulations.

§ 9701.502 Rule of construction.

This subpart must be interpreted in a way that recognizes the critical homeland security mission of the Department. Each provision of this subpart must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary or designee. The interpretation of these regulations by the Secretary or designee and the Director must be accorded great deference.

§ 9701.503 Waiver.

Except as incorporated with modifications into these regulations, the provisions of 5 U.S.C. 7101 through 7135 are waived.

§ 9701.504 Definitions.

In this his subpart:

Authority means the Federal Labor Relations Authority described in 5 U.S.C. 7104(a).

Board means the Homeland Security Labor Relations Board.

Collective bargaining means the performance of the mutual obligation of the management representative of the Department and the exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

Collective bargaining agreement means an agreement entered into as a result of collective bargaining pursuant to the provisions of this subpart.

Component means any organizational subdivision of the Department.

Conditions of employment means personnel policies, practices, and matters affecting working conditions—whether established by rule, regulation, or otherwise—except that such term does not include policies, practices, and matters relating to—

(1) Political activities prohibited under 5 U.S.C. chapter 73, subchapter III;

(2) The classification of any position, including any determinations regarding job evaluation under subpart B of this part;

(3) The pay of any position, including any determinations regarding pay or adjustments thereto under subpart C of this part; or

(4) Any matters specifically provided for by Federal statute, Executive order, Governmentwide or Departmental regulations, or the regulations in this part.

Confidential employee means an employee who acts in a confidential capacity with respect to an individual who has labor-management relations responsibilities.

Dues means dues, fees, and assessments.

Employee means an individual employed by the Department or whose employment in the Department has ceased because of any unfair labor practice under § 9701.517 and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority, but does not include—

(1) An alien or noncitizen of the United States who occupies a position outside the United States;

(2) A member of the uniformed services;

(3) A supervisor or a management official; or

(4) Any person who participates in a strike in violation of 5 U.S.C. 7311.

Exclusive representative means any labor organization which—

(1) Is certified as the exclusive representative of employees in an appropriate unit consistent with the

Department's organizational structure, pursuant to 5 U.S.C. 7111; or

(2) Held recognition on March 1, 2003, as the exclusive representative of employees in an appropriate unit on the basis of an election, or on any basis other than an election, and continues to be so recognized in accordance with the provisions of the Homeland Security Act.

Grievance means any complaint concerning the effect or interpretation, or a claim of breach, of a collective bargaining agreement or any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment—

(1) By any employee concerning any matter relating to the conditions of employment of the employee;

(2) By any labor organization concerning any matter relating to the conditions of employment of any employee; or

(3) By any employee, labor organization, or the Department; except that this definition does not apply with respect to any matters excluded from grievance procedures under § 9701.521.

Labor organization means an organization composed in whole or in part of Federal employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by an agency; or

(4) An organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

Management official means an individual employed by the Department in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the Department or who has the authority to recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment.

Supervisor means an individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.

§ 9701.505 Coverage.

Subject to approval by the Secretary or designee under § 9701.102(a)(2), all Department employees are covered by these regulations unless otherwise excluded pursuant to 5 U.S.C. 7103(a) or (b), 7112(b) and (c), or any other legal authority.

§ 9701.506 Impact on existing agreements.

The provisions of this subpart take precedence over any inconsistent provision contained in a collective bargaining agreement covering Department employees. Any such inconsistent provision in a collective bargaining agreement is unenforceable.

§ 9701.507 Employee rights.

Each employee has the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee must be protected in the exercise of such right. Except as otherwise provided under this subpart, such right includes the right—

(a) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and

(b) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this subpart.

§ 9701.508 Homeland Security Labor Relations Board.

(a) The Homeland Security Labor Relations Board is composed of three members, each of whom is appointed for a term not to exceed 3 years, except as provided in paragraph (d)(2) of this section. Members may be removed by the appointing official only for inefficiency, neglect of duty, or malfeasance.

(b) The members of the Board are appointed by the Secretary. The Secretary will designate one of these members to serve as Chairman. Members will be chosen for their expertise in labor-management relations and their knowledge of the Department's mission.

(c) The Secretary will appoint one member of the FLRA to serve as a member of the Board. The Chair of the FLRA will recommend a Board member to the Secretary from among the existing members of the FLRA. This member may serve on the Board only as long as he or she is a member of the FLRA.

(d)(1) An individual chosen to fill a vacancy will be appointed for the unexpired term of the member who is replaced.

(2) The term of any member may be extended beyond 3 years when necessary to provide for an orderly transition.

(e) Any two members of the Board constitute a quorum. A vacancy in the Board may not impair the right of the remaining members to exercise all of the powers of the Board.

§ 9701.509 Powers and duties of the Board.

(a) The Board may, to the extent provided in this subpart and in accordance with regulations prescribed by the Board—

(1) Determine an appropriate unit consistent with the Department's organizational structure for labor organization representation under § 9701.514;

(2) Determine issues of individual bargaining unit eligibility under 5 U.S.C. 7112(b) and (c) and 6 U.S.C. 412(b)(2);

(3) Resolve issues relating to the scope of bargaining and the duty to bargain in good faith under § 9701.518 and conduct hearings and resolve complaints of unfair labor practices concerning—

(i) The duty to bargain in good faith; and

(ii) Strikes, work stoppages, slowdowns, and picketing, or condoning such activity by failing to take action to prevent or stop such activity.

(4) Resolve information request disputes;

(5) Resolve exceptions to arbitration awards;

(6) Resolve negotiation impasses in accordance with § 9701.519;

(7) Conduct de novo review of legal conclusions and the interpretation of collective bargaining agreements;

(8) Have discretion to evaluate the evidence presented in the record and reach its own independent conclusions with respect to the matters at issue; and

(9) Assert jurisdiction over any matter concerning Department employees that has been submitted to the FLRA if the Board determines that the matter affects homeland security.

(b) The Board may issue Department-wide advisory opinions with the force and effect of decisions on matters concerning—

(1) The appropriateness and composition of the Department's bargaining units;

(2) The labor-management relations obligations of both the Department and exclusive representatives, including the scope of bargaining, the duty to bargain, consultation, and the rights and duties of employees and exclusive representatives; and

(3) The administration of the use of official time by employee representatives.

(c) In issuing advisory opinions under paragraph (b) of this section, the Board may elect to consult with the Authority.

§ 9701.510 Powers and duties of the Federal Labor Relations Authority.

The Federal Labor Relations Authority may, to the extent provided in this subpart and in accordance with regulations prescribed by the Authority, make the following determinations with respect to the Department:

(a) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of 5 U.S.C. 7111 relating to the according of exclusive recognition to labor organizations; and

(b) Conduct hearings and resolve complaints of unfair labor practices under § 9701.517(a)(1) through (4) and (b)(1) through (4).

§ 9701.511 Management rights.

(a) Subject to paragraphs (b) and (c) of this section, nothing in this subpart may affect the authority of any management official or supervisor of the Department—

(1) To determine the mission, budget, organization, number of employees, and internal security practices of the agency;

(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which agency operations may be conducted; to determine the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; and to take whatever other actions may be essential to carry out the Department's mission; and

(3) To lay off and retain employees, or to suspend, remove, reduce in grade, band, or pay, or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

(b) Management has no duty to bargain over the exercise of any authority under paragraph (a)(1) or (2) of this section. Management may elect, in its sole and exclusive discretion, to bargain over—

(1) Procedures that it will observe in exercising these authorities; and

(2) Appropriate arrangements for employees adversely affected by the exercise of these authorities.

(c) At the request of an exclusive representative, management will bargain over—

(1) Procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

(2) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section.

§ 9701.512 Consultation.

(a) Before making any substantive change in conditions of employment through the exercise of a management right in § 9701.511(a)(1) or (2), management may request the exclusive representative to present its views and recommendations regarding the impact of the proposed change on bargaining unit employees.

(b) After exercising any authority under § 9701.511(a)(1) or (2), if management determines not to bargain with the exclusive representative, the exclusive representative may present its views and recommendations regarding the impact of the exercise of authority on bargaining unit employees. Management must consider those views and recommendations.

§ 9701.513 Exclusive recognition of labor organizations.

The Department must accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit consistent with the Department's organizational structure, as determined by the Board, who cast valid ballots in the election.

§ 9701.514 Determination of appropriate units for labor organization representation.

(a) In determining the appropriateness of any unit, the Board must determine in each case whether the proposed unit is an appropriate unit consistent with the Department's organizational structure. The Board must determine in each case whether the unit will be established on a Department, component, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will promote effective dealings with and efficiency of the operations of the Department. The Board may also consider whether the unit will ensure a clear and identifiable community of interest among the employees in the unit.

(b) A unit may not be determined to be an appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor may a unit be determined to be an appropriate if it includes—

(1) Except as provided under 5 U.S.C. 7135(a)(2), any management official or supervisor;

(2) A confidential employee;

(3) An employee engaged in personnel work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subpart;

(5) An employee excluded from a unit under 6 U.S.C. 412(b)(2); or

(6) Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

(1) Which represents other individuals to whom such a provision applies; or

(2) Which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units for which a labor organization is the exclusive representative may, upon petition by the Department or labor organization, be consolidated with or without an election into a single larger unit if the Board considers the larger unit to be an appropriate unit consistent with the Department's organizational structure. The Board must certify the labor

organization as the exclusive representative of the new larger unit.

§ 9701.515 Representation rights and duties.

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative must be given the opportunity to be represented at—

(i) Any examination of a bargaining unit employee by a representative of the Department other than its Office of Inspector General, Office of Security, or Office of Internal Affairs in connection with an investigation if—

(A) The employee reasonably believes that the examination may result in disciplinary action against the employee, and

(B) The employee requests such representation; and

(ii) Any discussion between one or more agency representatives and one or more bargaining unit employees concerning any grievance filed under the negotiated grievance procedure.

(3) Nothing in paragraph (a)(2) of this section provides a right for the exclusive representative to be represented at any discussion between one or more agency representatives and one or more bargaining unit employees involving an EEO complaint, unless the employee(s) specifically requests representation from the exclusive representative.

(4) The Department must annually inform its employees of their rights under paragraph (a)(2)(i) of this section.

(5) Employee representatives are subject to the same standards of conduct as any other employee, whether they are serving in their representative capacity or not.

(6) The Department or appropriate component(s) of the Department and any exclusive representative in any appropriate unit in the Department, through appropriate representatives, must meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. In addition, the Department or appropriate component(s) of the Department and the exclusive representative may determine appropriate techniques, consistent with the operational rules of the Board, to assist in any negotiation.

(7) The rights of an exclusive representative under this section may not be construed to preclude an employee from—

(i) Being represented by an attorney or other representative of the employee's own choosing, other than the exclusive representative, in any grievance or appeal action; or

(ii) Exercising grievance or appellate rights established by law, rule, or regulation, except in the case of grievance or appeal procedures negotiated under this subpart.

(b) The duty of the Department or appropriate component(s) of the Department and an exclusive representative to negotiate in good faith under paragraph (a) of this section includes the obligation—

(1) To approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) To be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) To meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) In the case of the Department or appropriate component(s) of the Department, to furnish to the exclusive representative involved, or its authorized representative, upon request and to the extent not prohibited by law, existing reasonably available information, normally maintained by the Department or appropriate component(s) of the Department and demonstrated by the exclusive representative to be necessary in order to represent an employee in grievance or appeal proceedings, or the bargaining unit in negotiations. Disclosure of such information does not include the following:

(i) Disclosure prohibited by law or regulations, including, but not limited to, the regulations in this part, Governmentwide and Departmental rules and regulations, and Executive orders;

(ii) Disclosure of information if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without recourse to the information;

(iii) Internal agency guidance, counsel advice, or training for managers and supervisors relating to collective bargaining;

(iv) Any disclosures where an authorized agency official has determined that disclosure would compromise the Department's mission, security, or employee safety; and

(v) Home addresses, telephone numbers, email addresses, or any other information not related to an employee's work.

(5) If agreement is reached, to execute on the request of any party to the negotiation, a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between Department or appropriate component(s) of the Department and the exclusive representative is subject to approval by an authorized agency official.

(2) The authorized agency official must approve the agreement within 30 days after the date the agreement is executed if the agreement is in accordance with the provisions of these regulations and any other applicable law, rule, or regulation.

(3) If the authorized agency official does not approve or disapprove the agreement within the 30-day period specified in paragraph (c)(2) of this section, the agreement must take effect and is binding on the Department or component(s), as appropriate, and the exclusive representative, but only if consistent with law and the regulations in this part, Governmentwide and Departmental rules and regulations, and Executive orders.

(4) A local agreement subject to a national or other controlling agreement at a higher level may be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the Department.

(5) Provisions in existing collective bargaining agreements are unenforceable if an authorized agency official determines that they are contrary to law and the regulations in this part, Governmentwide and Departmental rules and regulations, and Executive orders.

§ 9701.516 Allotments to representatives.

(a) If the Department has received from an employee in an appropriate unit a written assignment which authorizes the Department to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the Department must honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment must be made at no cost to the exclusive representative or the employee. Except as provided under paragraph (b) of this section, any such

assignment may not be revoked for a period of 1 year.

(b) An allotment under paragraph (a) of this section for the deduction of dues with respect to any employee terminates when—

(1) The agreement between the Department or Department component and the exclusive representative involved ceases to be applicable to the employee; or

(2) The employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (c)(2) of this section, if a petition has been filed with the Board by a labor organization alleging that 10 percent of the employees in an appropriate unit in the Department have membership in the labor organization, the Board must investigate the petition to determine its validity. Upon certification by the Board of the validity of the petition, the Department has a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(i) The provisions of paragraph (c)(1) of this section do not apply in the case of any appropriate unit for which there is an exclusive representative.

(ii) Any agreement under paragraph (c)(1) of this section between a labor organization and the Department or Department component with respect to an appropriate unit becomes null and void upon the certification of an exclusive representative of the unit.

§ 9701.517 Unfair labor practices.

(a) For the purpose of this subpart, it is an unfair labor practice for the Department—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) To sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities on an impartial basis to other labor organizations having equivalent status;

(4) To discipline or otherwise discriminate against an employee because the employee has filed a complaint or petition, or has given any information or testimony under this subpart;

(5) To refuse, as determined by the Board, to consult or negotiate in good faith with a labor organization, as required by this subpart;

(6) To fail or refuse, as determined by the Board, to cooperate in impasse procedures and impasse decisions, as required by this subpart; or

(7) To fail or refuse otherwise to comply with any provision of this subpart.

(b) For the purpose of this subpart, it is an unfair labor practice for a labor organization—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this subpart;

(3) To coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) To discriminate against an employee with regard to the terms and conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) To refuse, as determined by the Board, to consult or negotiate in good faith with the Department as required by this subpart;

(6) To fail or refuse, as determined by the Board, to cooperate in impasse procedures and impasse decisions as required by this subpart;

(7)(i) To call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations; or

(ii) To condone any activity described in paragraph (b)(7)(i) of this section by failing to take action to prevent or stop such activity; or

(8) To otherwise fail or refuse to comply with any provision of this subpart.

(c) Notwithstanding paragraph (b)(7) of this section, informational picketing which does not interfere with the Department's operations will not be considered an unfair labor practice.

(d) For the purpose of this subpart, it is an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by the labor organization, except for failure to meet reasonable occupational standards uniformly required for admission or to tender dues uniformly required as a condition of acquiring and retaining membership. This does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this subpart.

(e) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Where an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(f) The expression of any personal view, argument, opinion, or the making of any statement which publicizes the fact of a representational election and encourages employees to exercise their right to vote in such an election, corrects the record with respect to any false or misleading statement made by any person, or informs employees of the Government's policy relating to labor-management relations and representation, may not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions—

(1) Constitute an unfair labor practice under any provision of this subpart; or

(2) Constitute grounds for the setting aside of any election conducted under any provision of this subpart.

§ 9701.518 Duty to bargain in good faith.

(a)(1) Subject to paragraph (a)(2) of this section, there is no duty to bargain over any matters that are inconsistent with law or the regulations in this part, Governmentwide and Departmental rules and regulations, and Executive orders.

(2)(i) There is no duty to bargain when management exercises any of the authorities under § 9701.511(a)(1) and (2). Management may elect, in its sole and exclusive discretion, to bargain over procedures that it will observe in exercising these authorities and over appropriate arrangements for employees adversely affected by the exercise of these authorities.

(ii) At the request of an exclusive representative, management will bargain over—

(A) Procedures it will observe in exercising any authority under § 9701.511(a)(3); and

(B) Appropriate arrangements for employees adversely affected by the exercise of any authority under § 9701.511(a)(3).

(3) There is no duty to bargain changes in conditions of employment due to the exercise of any authority under § 9701.511 when such actions do not significantly affect a substantial portion of the bargaining unit.

(4) There is no duty to bargain on proposals that—

(i) Concern matters covered by an existing negotiated agreement; or

(ii) Do not significantly affect a substantial portion of the bargaining unit.

(5) If bargaining over an initial collective bargaining agreement or any successor agreement is not completed within 60 days after such bargaining begins, the parties can mutually agree to continue bargaining or either party can refer the matter to the Board for resolution.

(6) If the parties bargain during the term of an existing collective bargaining agreement over a proposed change in conditions of employment and no agreement is reached within 30 days after such bargaining begins, management may implement the proposed change after notifying the union.

(b) Except in any case to which paragraph (a)(2)(i) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Board in accordance with provisions established by the Board.

§ 9701.519 Negotiation impasses.

(a) If the Department and exclusive representative are unable to reach an agreement under § 9701.515, either party may submit the disputed issues to the Board for resolution.

(b) The Board will publish procedures that will govern the resolution of negotiation impasses under this subpart.

(c) If the parties do not arrive at a settlement after assistance by the Board, the Board may take whatever action is necessary and not inconsistent with this subpart to resolve the impasse.

(d) Notice of any final action of the Board under this section must be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 9701.520 Standards of conduct for labor organizations.

Standards of conduct for labor organizations are those prescribed under 5 U.S.C. 7120.

§ 9701.521 Grievance procedures.

(a)(1) Except as provided in paragraph (a)(2) of this section, any collective bargaining agreement must provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in paragraphs (d), (f), and (g) of this section, the procedures must be the exclusive administrative procedures for grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in paragraph (a) of this section must be fair and simple, provide for expeditious processing, and include procedures that—

(i) Assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) Assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) Provide that any grievance not satisfactorily settled under the negotiated grievance procedure is subject to binding arbitration, which may be invoked by either the exclusive representative or the Department.

(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (b)(1)(iii) of this section must allow the arbitrator to order the Department to take any disciplinary action identified under 5 U.S.C. 1215(a)(3) that is otherwise within the authority of the Department to take.

(3) Any employee who is the subject of any disciplinary action ordered under paragraph (b)(2) of this section may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding paragraphs of this section do not apply with respect to any grievance concerning—

(1) Any claimed violation of 5 U.S.C. chapter 73, subchapter III (relating to prohibited political activities);

(2) Retirement, life insurance, or health insurance;

(3) A suspension or removal under § 9701.609;

(4) Any examination, certification, or appointment; and

(5) The classification of any position which does not result in the reduction in grade or pay of an employee.

(d) To the extent not already excluded by existing collective bargaining agreements, the exclusions contained in paragraph (c) of this section apply upon the effective date of this subpart, as determined under § 9701.102(a)(2).

(e)(1) An aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. 2302(b)(1) which also falls under the coverage of the negotiated grievance procedure may raise the matter under the applicable statutory procedures, or the negotiated procedure, but not both.

(2) An employee is deemed to have exercised his or her option under paragraph (e)(1) of this section to raise the matter under the applicable statutory procedures, or the negotiated procedure, at such time as the employee timely initiates an action under the applicable statutory or regulatory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(f) Matters covered under subpart G of this part may be raised only under the appellate procedures in subpart G of this part.

(g) An employee may grieve a performance rating of record that has not been raised in connection with an action appealable under subpart G of this part. Once an employee raises a performance rating issue in an appeal under subpart G of this part, any pending grievance or arbitration will be dismissed with prejudice. The arbitrator shall sustain the rating of record unless the grievant proves that it was arbitrary or capricious.

(h)(1) This paragraph applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which paragraph (e) of this section applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (h)(1) of this section may elect not more than one of the procedures described in paragraph (h)(3) of this section with respect thereto. A determination as to whether a particular procedure for seeking a remedy has been elected must be made as set forth under paragraph (h)(4) of this section.

(3) The procedures for seeking remedies described in this paragraph are as follows:

(i) An appeal under subpart G of this part;

(ii) A negotiated grievance under this section; and

(iii) Corrective action under 5 U.S.C. chapter 12, subchapters II and III.

(4) For the purpose of this paragraph, an employee is considered to have elected—

(i) The procedure described in paragraph (h)(3)(i) of this section if such employee has timely filed a notice of appeal under the applicable appellate procedures;

(ii) The procedure described in paragraph (h)(3)(ii) of this section if such employee has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(iii) The procedure described in paragraph (h)(3)(iii) of this section if such employee has sought corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1).

§ 9701.522 Exceptions to arbitration awards.

(a) Either party to arbitration under this subpart may file with the Board an exception to any arbitrator's award. The Board may take such action and make such recommendations concerning the award as is consistent with this subpart.

(b) If no exception to an arbitrator's award is filed under paragraph (a) of this section during the 30-day period beginning on the date of such award, the award is final and binding. Either party must take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided under 5 U.S.C. 5596 and 5 CFR part 550, subpart H).

§ 9701.523 Official time.

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this subpart must be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this section may not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of the labor organization, including the solicitation of membership, elections of labor organization officials, and collection of dues, must be performed during the time the employee is in a nonduty status.

(c) Except as provided in paragraph (a) of this section, the Authority or the Board, as appropriate, will determine whether an employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority or the Board will be authorized official time for such purpose during the time the employee would otherwise be in a duty status.

(d) Except as provided in the preceding paragraphs of this section, any employee representing an exclusive representative or, in connection with any other matter covered by this subpart, any employee in an appropriate unit represented by an exclusive representative, must be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

§ 9701.524 Compilation and publication of data.

(a) The Board must maintain a file of its proceedings and copies of all available agreements and arbitration decisions and publish the texts of its impasse resolution decisions and the actions taken under § 9701.918.

(b) All files maintained under paragraph (a) of this section must be open to inspection and reproduction in accordance with 5 U.S.C. 552 and 552a. The Board will establish rules in consultation with the Department for maintaining and making available for inspection sensitive information.

§ 9701.525 Regulations of the Board.

The Board may prescribe procedural rules and regulations to carry out the provisions of this subpart.

§ 9701.526 Continuation of existing laws, recognitions, agreements, and procedures.

(a) Nothing contained in this subpart precludes the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or an agreement that is otherwise consistent with law and the regulations in this part between an agency and an exclusive representative of its employees, which is entered into before the effective date of this subpart, as determined under § 9701.102(a)(2).

(b) Policies, regulations, and procedures established under, and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838 or any other Executive order, as in effect on the effective date of this subpart (as determined under § 9701.102(a)(2)), will remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this subpart or by regulations or decisions issued pursuant to this subpart.

§ 9701.527 Savings provision.

This subpart does not apply to grievances or other administrative proceedings already pending on the effective date of this subpart, as determined under § 9701.102(a)(2).

Subpart F—Adverse Actions

General

§ 9701.601 Purpose.

This subpart contains regulations prescribing the requirements for employees who are suspended, demoted, reduced in pay, removed, or furloughed for 90 days or less.

§ 9701.602 Waivers.

This subpart waives 5 U.S.C. 7501 through 7514 and 7531 through 7533. This subpart retains 5 U.S.C. 7521 and 7541 through 7543.

§ 9701.603 Definitions.

In this subpart:

Band has the meaning given that term in § 9701.204.

Day means a calendar day.

Demotion means a reduction in grade, a reduction to a lower band within the same occupational cluster, or a reduction to a lower band in a different occupational cluster under rules prescribed by DHS pursuant to § 9701.355.

Furlough means the placement of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

Grade means a level of work under a position classification or job grading system.

Indefinite suspension means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or further Department action. An indefinite suspension continues for an indeterminate period of time and ends with either the employee returning to duty or the completion of any subsequent administrative action.

Initial service period means the 1 to 2 years employees must serve upon appointment to DHS (on or after the effective date of this subpart, as determined under § 9701.102(a)(2)) before obtaining coverage under the adverse action protections of this subpart. Prior Federal service counts toward this requirement.

Pay means the rate of basic pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind. For the purpose of this subpart, pay does not include locality-based comparability payments under 5

U.S.C. 5304, locality or special pay supplements under subpart C of this part, or other similar payments.

Removal means the involuntary separation of an employee from the Department.

Suspension means the placement of an employee, for disciplinary reasons, in a temporary status without duties and pay.

§ 9701.604 Coverage.

(a) *Actions covered.* This subpart covers suspensions, demotions, reductions in pay (including reductions in pay within a band), removals, and furloughs of 90 days or less.

(b) *Actions excluded.* This subpart does not cover—

(1) Any adverse action taken against an employee during an initial service period, except as provided under paragraph (d)(2) of this section. The removal of employees in the competitive service who are in an initial service period must be in accordance with 5 CFR 315.804 and 315.805;

(2) The demotion of a supervisor or manager under 5 U.S.C. 3321;

(3) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent band and pay, if the agency informed the employee that it was to be of limited duration;

(4) A reduction-in-force action under 5 U.S.C. 3502;

(5) An action imposed by the Merit Systems Protection Board under 5 U.S.C. 1204;

(6) An action against an administrative law judge under 5 U.S.C. 7521;

(7) A voluntary action by an employee;

(8) An action taken or directed by the OPM based on suitability under 5 CFR part 731.

(9) Termination of appointment on or before the expiration date specified as a basic condition of employment at the time the appointment was made;

(10) Cancellation of a promotion to a position not classified prior to the promotion;

(11) Placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status in accordance with conditions established at the time of appointment;

(12) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation;

(13) An action taken under a provision of statute, other than one codified in title 5, United States Code, which excludes the action from 5 U.S.C. chapter 75 or this subpart; and

(14) An action which has been effected before the date on which the employee is covered under this subpart.

(c) *Employees covered.* Subject to approval by the Secretary or designee under § 9701.102(a)(2), this subpart covers DHS employees, except as excluded by paragraph (d) of this section.

(d) *Employees excluded.* This subpart does not cover—

(1) Employees who are serving a term, temporary, or otherwise time limited appointment;

(2) Non-preference employees who are serving in an initial service period and preference eligible employees who are serving the first year of an initial service period. Preference eligible employees who have completed the first year of an initial service period are covered by subpart F. Employees in the competitive service who are removed during an initial service period shall be removed in accordance with 5 CFR 315.804 and 315.805;

(3) Employees who are in the Senior Executive Service;

(4) Administrative law judges;

(5) Employees who are terminated in accordance with terms specified as conditions of employment at the time the appointment was made;

(6) Employees whose appointments are made by and with the advice and consent of the Senate;

(7) Employees whose positions have been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by—

(i) The President for a position that the President has excepted from the competitive service;

(ii) OPM for a position that OPM has excepted from the competitive service; or

(iii) An authorized agency official for a position excepted from the competitive service by statute;

(8) An employee whose appointment is made by the President;

(9) An employee who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund based on the service of such employee;

(10) An employee who is described in 5 U.S.C. 5102(c)(11) as an alien or non-citizen occupying a position outside the United States; and

(11) Employees affected by actions taken or imposed under any statute or regulation other than this subpart.

Requirements for Suspension, Demotion, Reduction in Pay, Removal, or Furlough of 90 Days or Less

§ 9701.605 Standard for action.

The Department may take an adverse action under this subpart only when it establishes a factual basis for the action and a connection between the action and a legitimate Departmental interest.

§ 9701.606 Mandatory removal offenses.

(a) The Secretary in his or her unreviewable discretion will identify offenses that have a direct and substantial impact on the ability of the Department to protect homeland security. Such offenses will be identified in advance as part of the Department's internal implementing regulations and made known to all employees.

(b) An employee who commits a mandatory removal offense must be removed from Federal service. The Secretary, however, has the sole and exclusive discretion to mitigate that penalty. Employees alleged to have committed these offenses will have the right to advance notice, an opportunity to respond, a written decision, a review by an adjudicating official, and a further appeal to an independent DHS panel, as set forth in subpart G of this part.

(c) Nothing in this section limits the discretion of the Department or any component thereof to remove employees for offenses other than those identified by the Secretary as a mandatory removal offense.

§ 9701.607 Procedures.

An employee against whom an action is proposed is entitled to the following:

(a) *Proposal notice.* (1) *Notice period.* The Department must provide at least 15 days advance written notice of the proposed adverse action unless a mandatory removal offense is involved, or when there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. In such cases the Department must provide at least 5 days advance written notice.

(2) *Duty status during notice period.* An employee will remain in a duty status in his or her regular position during the notice period. However, when the Department determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the Department may elect one or a combination of the following alternatives:

(i) Assign the employee to duties where the Department determines the employee is no longer a threat to safety, the Department's mission, or to Government property;

(ii) Allow the employee to take leave, or carry him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave; and/or

(iii) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

(3) *Contents of notice.* (i) The proposal notice must inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the Department's evidence supporting the proposed action. The Department may not use evidence that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(ii) When some but not all employees in a given competitive level are being furloughed, the proposal notice must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough. The notice is not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(b) *Opportunity to reply.* (1) The Department must give employees no less than 5 days, which must run concurrently with the notice period, to reply orally and/or in writing.

(2) During the opportunity to reply, the Department must give the employee a reasonable amount of official time to review the Department's supporting evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(3) The Department must designate an official to receive the employee's written and/or oral response who has authority to make or recommend a final decision on the proposed adverse action. The opportunity to reply orally in person does not include the right to a formal hearing with examination of witnesses.

(4) The employee may be represented by an attorney or other representative of the employee's choice and at the employee's expense. The Department may disallow an employee's choice of representative when—

(i) An individual serving as a representative would cause a conflict of interest or position or compromise security; or

(ii) An employee whose release from his or her official position would result in unreasonable costs to the Government, or whose priority work assignment prevents a release from official duties.

(5) An employee who wishes the Department to consider any medical condition that may be relevant to the proposed adverse action must provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply.

(i) *Department responsibilities.* When considering an employee's medical condition, the Department is not required to withdraw or delay a proposed adverse action. However, the Department must—

(A) Allow the employee to provide medical documentation during the opportunity to reply;

(B) Comply with 29 CFR 1614.203(b) and relevant Equal Employment Opportunity Commission rules; and

(C) Comply with 5 CFR 831.1205 when issuing a decision to remove.

(ii) *Medical examinations.* When considering an employee's medical documentation, the Department may require or offer a medical examination pursuant to 5 CFR part 339, subpart C.

(c) *Decision notice.* (1) In arriving at its decision, the Department may not consider any reasons for the action other than those specified in the proposal notice. The Department must consider any response from the employee and employee's representative, if the employee provides the response during the opportunity to reply.

(2) The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights, under subpart G of this part. The Department must deliver the notice to the employee on or before the effective date of the action.

§ 9701.608 Departmental record.

(a) *Document retention.* The Department must keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Processing Personnel Actions. The record must include the following:

(1) A copy of the proposal notice;

(2) The employee's written response, if any, to the proposal;

(3) A summary of the employee's oral response;

(4) A copy of the decision notice; and

(5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department must make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board or the DHS Panel.

National Security

§ 9701.609 Suspension and removal.

(a) Notwithstanding other provisions of law or regulation, the Secretary may suspend an employee without pay when she or he considers suspension in the interests of national security. To the extent that the Secretary determines that the interests of national security permit, the suspended employee must be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the Secretary statements or affidavits to show why he or she should be restored to duty.

(b) Subject to paragraph (c) of this section, the Secretary may remove an employee suspended under this section when, after investigation and review as the Secretary considers necessary, the Secretary determines that removal is necessary or advisable in the interests of national security. The determination of the Secretary is final.

(c) An employee suspended under this section who has a permanent or indefinite appointment, has completed an initial service period, and is a citizen of the United States is entitled, after suspension and before removal, to—

(1) A written notice that informs the employee of the factual basis for the proposed action in sufficient detail, as security considerations permit, to permit the employee to respond to the notice within 30 days after suspension, which may be amended within 30 days thereafter;

(2) An opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to respond to the proposed adverse action and submit affidavits;

(3) A hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(4) A review of his or her case by the Secretary, before a decision adverse to the employee is made final; and

(5) A written decision from the Secretary.

Subpart G—Appeals

§ 9701.701 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(a) through (c) and (f) concerning the Department's appeals system for

certain adverse actions covered under subpart F of this part. These provisions require that the new appeal regulations provide Department employees fair treatment, are consistent with the protections of due process and, to the maximum extent practicable, provide for the expeditious handling of appeals. The Homeland Security Act also specifies that modifications to 5 U.S.C. chapter 77 should further the fair, efficient, and expeditious resolution of appeals.

§ 9701.702 Waivers.

The provisions of 5 U.S.C. 7701 are waived insofar as the appealable adverse actions covered under subpart F of this part are concerned. The provisions of 5 U.S.C. 7702 are modified as provided in § 9701.708. The appellate procedures specified herein supersede those of MSPB to the extent they are inconsistent with MSPB's regulations. MSPB must follow these regulations until conforming regulations are issued by MSPB.

§ 9701.703 Definitions.

In this subpart:

Adjudicating official means an administrative law judge, administrative judge, or other employee designated by MSPB or the Panel to decide an appeal.

Day means calendar day.

Harmful error means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

Mandatory removal offense means an offense that the Secretary determines in his or her sole and unreviewable discretion has a direct and substantial impact on the ability of the Department to protect homeland security.

MSPB means the Merit Systems Protection Board.

Panel means the three-person panel composed of officials appointed by the Secretary to decide appeals of an adjudicating official's decision on an action taken based on a mandatory removal offense.

Petition for review means a request for review of an initial decision of an adjudicating official.

Preponderance of the evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

Substantial evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.

§ 9701.704 Coverage.

(a) Subject to approval by the Secretary or designee under § 9701.102(a)(2), this subpart applies to employees who appeal demotions, reductions in pay, suspensions of 15 days or more, removals, or furloughs of 90 days or less, provided such employees are—

(1) Covered by § 9701.604; or

(2) Employed by the Transportation Security Administration and would be covered by § 9701.604 but for the exclusion in § 9701.604(d)(11).

(b) Appeals of suspensions shorter than 15 days and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or agency administrative grievance procedure, whichever is applicable.

(c) The removal of an employee while serving an initial service period is subject to the provisions of 5 CFR 315.806 to the extent the employee is in the competitive service. Such provisions are applicable for the first year of an initial service period.

§ 9701.705 Alternative dispute resolution.

The Department and OPM recognize the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based negotiation to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. Such methods can result in more efficient and more effective outcomes than traditional, adversarial methods of dispute resolution. The Department will use alternative dispute resolution methods where appropriate.

§ 9701.706 MSPB appellate procedures.

(a) A covered Department employee may appeal an adverse action identified under § 9701.704(a) to MSPB. Such an employee has a right to be represented by an attorney or other representative. However, separate procedures apply when the action is taken because of a mandatory removal offense or is in the interest of national security. (*See* §§ 9701.707 and 9701.609 respectively.)

(b) MSPB may decide any case appealed to it or may refer the case to an administrative law judge appointed under 5 U.S.C. 3105 or other employee of MSPB designated by MSPB to decide such cases. MSPB or an adjudicating official must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

(c)(1) If an employee is the prevailing party in an appeal under this section, the employee must be granted the relief provided in the decision upon issuance of the decision, and such relief remains in effect pending the outcome of any petition for review unless—

(i) MSPB or an adjudicating official determines that the granting of such relief is not appropriate; or

(ii) The relief granted in the decision provides that the employee will return or be present at the place of employment pending the outcome of any petition for review and the Department, subject to paragraph (c)(2) of this section, determines in its sole and unreviewable discretion, that the return or presence of the employee is unduly disruptive to the work environment.

(2) If the Department makes a determination under paragraph (c)(1)(ii) of this section that prevents the return or presence of an employee at the place of employment, such employee must receive pay, compensation, and all other benefits as terms and conditions of employment pending the outcome of any petition for review.

(3) Nothing in the provisions of this section may be construed to require any award of back pay or attorney fees be paid before MSPB's decision is final.

(d)(1) The decision of the Department must be sustained under paragraph (b) of this section if it is supported by substantial evidence, unless the employee shows by a preponderance of the evidence—

(i) Harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(2) The Board or adjudicating official may not reverse a Department action based on the way in which the charge is labeled or the conduct characterized, provided the employee is on notice of the facts sufficient to respond to the factual allegations of the charge.

(e) The Director may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(f) Except as provided in § 9701.708, any decision under paragraph (b) of this

section is final unless a party to the appeal or the Director petitions MSPB for review within 30 days after receipt of the decision; or, MSPB reopens and reconsiders a case on its own motion. The Director may petition MSPB for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(g) If MSPB is of the opinion that the action could result in the appeals being processed more expeditiously and would not adversely affect any party, MSPB may—

(1) Consolidate appeals filed by two or more appellants; or

(2) Join two or more appeals filed by the same appellant and hear and decide them concurrently.

(h) MSPB may require payment by the Department of reasonable attorney fees if the action is reversed in its entirety and only if MSPB determines the action constituted a prohibited personnel practice, was taken in bad faith, or is without any basis in fact and law. However, if the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(i)(1) The Board shall not require settlement discussions in connection with any appealed action under this section. If either party decides that settlement is not desirable, the matter will proceed to adjudication.

(2) Where the parties agree to engage in settlement discussions before MSPB, these discussions will be conducted by an official specifically designated for that sole purpose. Nothing prohibits the parties from engaging in settlement discussions on their own.

(j) If an employee has been removed under subpart F of this part and subsequently elects to retire, such retirement will not affect the employee's appeal rights.

(k) The following provisions modify MSPB's appellate procedures applicable to appeals under this subpart:

(1) All appeals, including class appeals, will be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later.

(2) Either party may file a motion for representative disqualification at any time during the proceedings.

(3) The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(i) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(ii) Neither party may submit more than one set of interrogatories, one set of requests for production, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, each party may not conduct/ compel more than 2 depositions.

(iii) Either party may file a motion requesting additional discovery. Such motion may be granted only if the party has shown ''necessity and good cause'' to warrant such additional discovery.

(4) Requests for case suspensions must be submitted jointly.

(5) When there are no material facts in dispute, the adjudicating official must render summary judgment on the law without a hearing. However, when material facts are in dispute and a hearing is held, a transcript must be kept.

(6) MSPB or an adjudicating official may not reduce or otherwise modify any penalty selected by the Department. If fewer than all the charges are sustained, MSPB or an adjudicating official must direct the Department to promptly determine whether the penalty is still appropriate based on the sustained charge(s). The Department will promptly notify the MSPB of its penalty decision, which is final without any further appeal to MSPB. Within 5 days after receiving the Department's penalty decision, the MSPB will issue a final order incorporating that decision. Judicial review of any final MSPB order or decision is prescribed under 5 U.S.C. 7703.

(7) An initial decision must be made no later than 90 days after the date on which the appeal is filed. If that initial administrative decision is appealed to MSPB, MSPB must render its decision no later than 90 days after the close of the record before MSPB on petition for review. Any time spent by the Department making a penalty determination as provided for under § 9701.706(k)(6) does not count against these time limits.

(8) If the Director seeks reconsideration of a final MSPB order, MSPB must render its decision no later than 60 days after receipt of the opposition to OPM's petition in support of such reconsideration. MSPB is required to state the reasons for its decision so that the Director can determine whether to seek judicial review and to facilitate expeditious judicial review if the Director seeks it.

(9) MSPB, in conjunction with the Department and OPM, will develop and issue voluntary expedited appeals procedures for Department cases.

(l) Failure of MSPB to meet the deadlines imposed by paragraphs (k)(7) and (k)(8) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

§ 9701.707 Appeals of mandatory removal actions.

(a) Appeals of mandatory removal actions are governed by procedures set forth in this section. An employee may appeal such actions to an adjudicating official, whose decision may be further appealed to an independent Panel. Only the Secretary may mitigate the penalty in these cases.

(b) The initial appeal of a mandatory removal action must be to an adjudicating official designated by the Panel. Such official may conduct a hearing for which a transcript will be kept, to resolve any factual disputes and other relevant matters and will issue an initial decision. When there are no material facts in dispute the adjudicating official must render summary judgment on the law without a hearing. The adjudicating official must issue a written decision to each party and to OPM. Decisions of the adjudicating official are appealable by either party to the Panel.

(c) The appellant has the right to be represented by an attorney or other representative.

(d) An employee may appeal an initial decision to the Panel, which will issue a final decision in such matters.

(1) The Panel is composed of three members, appointed by the Secretary for 3-year terms. Members may be removed by the Secretary only for inefficiency, neglect of duty, or malfeasance. The Secretary will designate one member to serve as Chair of the Panel.

(2) A member of the Panel may be reappointed for additional terms. An individual chosen to fill a vacancy will be appointed for the unexpired term of the member replaced. The term of any member may not expire before the date

on which the member's successor takes office.

(3) Two members of the Panel constitute a quorum. A vacancy on the Panel does not impair the right of the remaining members to exercise all of the powers of the Panel.

(4) Panel members will be chosen for their expertise in adjudicating appeals, their knowledge of the Department's mission, and leadership experience in comparable organizations.

(e) The Panel must issue a written decision after conducting a de novo review of the record and must provide a copy of the decision to each party to the appeal and to OPM.

(f) The decision of the Department must be sustained if it is supported by substantial evidence, unless the employee shows by a preponderance of the evidence—

(1) Harmful error in the application of Department procedures in arriving at the decision;

(2) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) That the decision was not in accordance with law.

(g) In no case does the adjudicating official or Panel have the authority to reverse a Department action based on the way in which the charge is labeled or the conduct is characterized. When an employee is on notice of the facts sufficient to respond to the factual allegations of a charge, the Department will be determined to have complied with the required notice provisions.

(h) The Director may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(i) Except as provided in § 9701.708, any decision under paragraph (b) of this section is final unless a party to the appeal or the Director petitions the Panel for review within 30 days after receipt of the decision, or the Panel reopens and reconsiders a case on its own motion. The Director may petition the Panel for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. The Panel, for good cause shown, may extend the filing period.

(j) If the adjudicating official or Panel is of the opinion that the action could result in processing the appeal more expeditiously and that this would not adversely affect any party, the adjudicating official or Panel may—

(1) Consolidate appeals filed by two or more appellants; or

(2) Join two or more appeals filed by the same appellant and hear and decide them concurrently,

(k) The Panel may require payment by the Department of reasonable attorney fees if the action is reversed in its entirety and only if the Panel determines the action constituted a prohibited personnel practice, or was taken in bad faith, or is without any basis in fact and law. However, if the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(l) If an employee has been removed under subpart F of this part, and subsequently elects to retire, such retirement will not affect the employee's appeal rights.

(m) The adjudicating official or Panel may not reduce or otherwise modify any penalty selected by the Department for a mandatory removal offense. If fewer than all the charges are sustained, the Panel or adjudicating official must direct the Department to promptly determine whether the penalty is still appropriate based on the sustained charge(s). This determination of whether the penalty is appropriate is final without any further appeal to the Panel.

(n) The Panel will develop and promulgate regulations for processing appeals of mandatory removal actions which must conform to the requirements set forth in § 9701.706(k)(1) through (8) and for such other matters as may be necessary to ensure the operation of the Panel.

(o) Failure of the Panel to meet any deadlines imposed under paragraph (n) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

§ 9701.708 Actions involving discrimination.

Section 7702 of title 5, U.S. Code, is modified to read ''MSPB or Panel'' wherever the terms ''Merit Systems Protection Board'' or ''Board'' are used.

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