

My name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 600,000 federal employees represented by AFGE, including 50,000 who work in the Department of Homeland Security (DHS), I thank you for the opportunity to testify here today on the proposed new personnel rules for DHS.

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

I INTRODUCTION

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

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

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

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

II PROCESS

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

A. THE STATUTORY COLLABORATION PROCESS

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

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

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

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

B. THE DESIGN PROCESS.

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

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

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

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

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

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

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

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

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

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

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

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

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

III PAY, CLASSIFICATION AND PERFORMANCE MANAGEMENT

A. TOWN HALL MEETINGS AND FOCUS GROUPS

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

B. REVIEW OF OTHER EMPLOYERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. ANALYSIS OF PROPOSED PAY AND CLASSIFICATION SYSTEM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV LABOR RELATIONS

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

A. *RESULTS OF TOWN HALL MEETINGS AND FOCUS GROUPS*

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

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

B. RESEARCH ON OTHER EMPLOYERS

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

C. *OTHER STATED REASONS FOR RADICAL CHANGES*

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

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

D. ANALYSIS OF THE LABOR RELATIONS PROPOSAL

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

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

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

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

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

2. Elimination of Bargaining Over Personnel Policies

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

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

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

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

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

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

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

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

- (a) (N)o obligation to bargain unless “a substantial portion of the bargaining unit” is affected. 9701.518(a)(3). For example, if the jobs of 100 employees in a bargaining unit of 20,000 are being eliminated, there would be no bargaining over placement of the 100 because they do not constitute a substantial portion of the bargaining unit.
- (b) No obligation to bargain over the effects of changed work assignments, changes in the organization, etc. 9701.518(a)(2)(i).

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

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

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

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

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

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

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

4. Not once did management identify any threat or impediment to national security or efficient operations caused by recognition of the union as the employees' exclusive representative.
5. Not once did management identify any problem to national security or efficient operations caused by the need to share information as currently required by chapter 71.

V ADVERSE ACTIONS

A. RESULTS OF TOWN HALL MEETINGS AND FOCUS GROUPS

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

B. STATED REASONS FOR RADICAL CHANGES

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

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

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

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

C. ANALYSIS OF ADVERSE ACTION AND APPEALS PROPOSAL

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

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

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

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

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

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

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

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

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

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

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

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

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

VI TSA

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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