

**National Treasury Employees Union**



**TESTIMONY OF NTEU NATIONAL PRESIDENT  
COLLEEN M. KELLEY**

**ON**

**HUMAN CAPITAL MANAGEMENT AT THE  
DEPARTMENT OF HOMELAND SECURITY**

**BEFORE THE**

**HOUSE GOVERNMENT REFORM COMMITTEE  
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY  
REORGANIZATION**

**WEDNESDAY, OCTOBER 29, 2003, 10 A.M.  
2154 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, D.C.**

Chairwoman Davis, Ranking Member Davis, distinguished members of the Subcommittee; I would like to thank the subcommittee for the opportunity to testify on the human resources management options being considered for the Department of Homeland Security (DHS).

As President of the National Treasury Employees Union (NTEU), I have the honor of representing over 12,000 federal employees who are part of the Department of Homeland Security (DHS). I am also proud to be serving as the representative of NTEU on the DHS Senior Review Committee (SRC) that has been tasked with presenting to DHS Secretary Tom Ridge and OPM Director Kay Coles James, options for a new human resources (HR) system for all DHS employees.

The formal process for developing the new DHS human resource system options was included as part of the Homeland Security Act of 2002. The legislation allows the DHS Secretary and the OPM Director to make changes in six sections of Title 5 that have governed the employment rights of federal employees for decades. The six chapters of Title 5 include the areas of basic pay, performance management, position classification, adverse actions, appeals, and labor-management relations.

To assist in the creation of a new HR system, the Secretary and the OPM Director assembled a design team composed of DHS managers and employees, HR experts from DHS and OPM, and representatives from the agency's three largest unions, NTEU, American Federation of Government Employees (AFGE) and National

Association of Agriculture Employees (NAAE) in April 2003. The Design Team drafted 52 options in the six areas in which DHS and OPM have flexibility to deviate from the current provisions of Title 5 for the new DHS personnel system. The options include maintaining the status quo, making modest changes to current systems, and making significant revisions to the six areas of Title 5. As previously mentioned, these areas include: basic pay, position classification, performance management, adverse actions, appeals and labor relations.

As you know, these options have been presented to the DHS Senior Review Committee (SRC), of which I am a member, along with the National Presidents of AFGE and NAAE, Commissioner Bonner, and other high-ranking DHS and OPM officials. The Senior Review Committee held an extensive three-day hearing from October 20-22 to discuss and hear public testimony concerning the 52 options presented by the design team. The SRC members will soon forward a formal package of options to the Director of OPM and the DHS Secretary for their consideration.

I believe the collaborative agency/employee process that was mandated by the Homeland Security Act, that created both the DHS Design team and the DHS Senior Review Committee have worked well so far and I would like to strongly suggest that a similar process would continue to be extremely beneficial as the agency looks at the challenges of reorganizing other critical areas in the department. However, while it is not yet clear what the final HR system will look like for DHS personnel, the new HR system may be substantially different from the personnel systems the 22 agencies brought with

them when they were consolidated into DHS last year. NTEU believes that in order for any new human resources management system to be accepted by employees as fair and ultimately to be successful, it is essential that Secretary Ridge and Director James incorporate a number of basic federal employee protections, especially in the areas of labor relations, adverse actions, appeals, performance management, and retirement.

Labor Relations:

The Homeland Security Act requires that any new human resource management system shall “ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them.”

NTEU strongly believes that any labor relations system preserving the right to organize and bargain collectively must include several fundamental components that are central features of Chapter 71 of Title 5. The scope of bargaining and the bargaining process must allow meaningful negotiations over working conditions, and not simply consultation. After all, Chapter 71 of the Civil Service Reform Act has governed collective bargaining in the federal sector for more than 25 years. In contrast to consultation, which contemplates only the expression of viewpoints, collective bargaining in the federal sector includes a duty to bargain in good faith and results in either a voluntary agreement or a decision arrived at through an impasse resolution procedure.

Any labor relations system must also have a process to ensure that disputes can be submitted to an independent adjudicator whose decision, to the extent it involves questions of law, is subject to judicial review. Currently, labor relations disputes can be addressed in the negotiated grievance and arbitration procedure or by seeking relief from the Federal Labor Relations Authority (FLRA) or the Federal Service Impasses Panel (FSIP), as appropriate. Any system that does not preserve access to some type of independent forum to resolve labor relations disputes would be at odds with the Act's express preservation of DHS employees' collective bargaining rights.

Equally important to the preservation of those rights is the maintenance of the current requirement that collective bargaining agreements contain broad scope negotiated grievance procedures culminating in binding arbitration. The grievance and arbitration process provides the basic route for employees to have their workplace issues addressed. Without such a system, employees would be forced to seek relief in other ways, resulting in an increase in court litigation and EEOC filings. The current mandatory grievance and arbitration process provides an efficient and expeditious way to resolve disputes. It must be retained. Many of the options recognize that, due to DHS' unique and important mission, a new labor relations system should take into account matters involving national security. It is essential, however, that the agency's legitimate need to address national security matters be balanced against the Act's statutory guarantee of collective bargaining rights.

The Act safeguards the right of DHS employees to participate in labor organizations of their own choosing in decisions that affect them. This will not be possible without viable unions. NTEU believes that any new system must preserve the ability of labor organizations to function by retaining Chapter 71's current provisions regarding official time and bargaining unit determinations.

NTEU also notes that the current labor relations system can be made even more effective under the Act's flexibilities. Pre-decisional employee input into mission-related decisions is not required, or even encouraged by Chapter 71. The formation of mission-related DHS collaborative committees can only enhance the department's overall effectiveness and the effectiveness of its individual components. DHS front-line employees perform work that is vitally important to our country. They should have the chance to present their views, through their unions, about mission-related decisions that they will be required to carry out.

The current bargaining process can also be made more efficient. Combining the current parallel tracks for negotiability disputes, bad faith bargaining allegations, and impasse resolution procedures into a single process would allow all bargaining-related disputes to be addressed together. Parties to a dispute could also be given the right to mutually agree to select a private arbitrator to resolve a bargaining impasse. Currently, parties are not free to select an arbitrator without having first obtained permission from the FSIP. NTEU believes that these changes would simplify and expedite the current bargaining process.

### Adverse Actions and Appeals:

In the area of adverse actions and appeals for federal employees in the DHS, it is essential that any new DHS human resource management system includes an adverse action and appeal process that treats employees fairly and ensures that their due process rights are protected. Chapters 43, 75, and 77 of the Civil Service Reform Act currently provide these vital safeguards to DHS employees.

Congress affirmed the importance of these principles in the Homeland Security Act. The Act records the sense of Congress that “employees of the Department are entitled to fair treatment in any appeals that they bring in decisions relating to their employment” and that any new system “should ensure that employees of the Department are afforded the protections of due process. NTEU strongly believes that, in order to meet these statutory requirements, any new human resource management system must contain certain basic elements. Employees must be given reasonable notice and an opportunity to make a meaningful reply before disciplinary action is taken against them. Employees must be able to appeal agency actions to an independent adjudicator whose decisions are subject to judicial review and agencies should bear the burden of proving just cause for actions taken against employees. These fundamental rights must be available, at a minimum, to all DHS employees and for all actions that are currently subject to the adverse action and appeals provisions of Title 5.

Any system without these fundamental elements will not satisfy the requirements of the Act and will not be credible to employees. Employees of DHS need to feel confident that issues related to their employment can be addressed fairly and objectively. Otherwise, they will not be sure that merit principles will be protected and that they, like all other federal employees, can be free to do their jobs without fear of arbitrary or unjust agency actions. In a workplace without these bedrock protections, employee morale will suffer, which in turn will adversely affect efficiency. This could create a situation where current DHS employees seek employment elsewhere and DHS would be at a competitive disadvantage in recruiting qualified new hires.

#### Pay, Performance and Classification

NTEU also strongly believes that in designing pay, classification and performance management systems for DHS, certain core principles must be honored and applied to the evaluation of options developed by the DHS HR Design Team.

First, any changes to the pay, performance and classification systems must be justified by mission needs, and designed to minimize burdens on managers, supervisors and employees to implement and administer the systems, so that all can remain focused on the mission to protect homeland security.

During the research and design process, DHS conducted a number of town hall and focus group meetings to obtain input from employees on their views of any problems with the current HR management systems and changes they would like to see made.

Most employees at the town hall meetings and focus groups reported that they were generally satisfied with the current GS system; most problems cited related to the application and administration of the system, rather than to the design of the GS system itself. The problems most frequently cited included inadequate funding for awards and Quality Step Increases to recognize superior performance, perceptions of unfairness in distributing awards, or in distributing work assignments that might lead to awards, and inadequate resources (including both a lack of time and a lack of adequate training) for supervisors to effectively manage and evaluate employee performance. Employees cited a few problems with the classification of some jobs under the General Schedule grading system, but most of these could be addressed through increased agency control over these grade level determinations, and/or a better appeal process for challenging classification determinations.

Like the DHS employees we represent, NTEU does not believe that radical changes are needed in the pay, performance and classification systems. The basic structure of these systems is sound, and they include numerous features to ensure both fairness to employees and opportunities to recognize and reward superior performance. Most of the perceived shortcomings of the current systems could be addressed through better funding and administration of Quality Step Increases and awards programs to reward top performers. Performance Management systems could be improved by providing more time and better training for supervisors to perform, monitor and provide feedback on employee performance, as well as improving the selection process for

supervisory positions so that selections are based on more managerial skills than technical expertise.

NTEU is especially mindful of the fact that the more radical the change, the greater the potential for disruption and loss of mission focus, at a time when the country can ill-afford DHS and its employees being distracted from protecting the security of our homeland. However, this is not to suggest that NTEU opposes any changes to the status quo, as we believe some modifications could be made that would improve the HR systems for the benefit of DHS and its employees and accomplishment of its mission. But, again, these changes must ensure fairness, and be tailored to address legitimate problems and avoid unnecessary loss of mission focus.

In establishing the basic pay system for DHS employees, NTEU believes that pay for all positions must be fair, meeting standards of internal and external equity. Internal equity ensures that all employees are compensated fairly in comparison to other employees within DHS. External equity ensures that pay for DHS employees is competitive with rates in the broader labor market, which will aid recruitment and retention of the highest-caliber employees.

NTEU supports several of the options submitted by the DHS HR Design Team that provide fairness, internal and external equity and allow greater opportunity to reward superior performance. These options provide fairness by ensuring that employees who meet all performance expectations identified by DHS management must receive annual

pay increases that at least include the amount of the general schedule (GS) increase plus some reasonable amount to recognize an individual's successful performance. NTEU does not support pay options that do not include this protection. NTEU also does not support diverting all or part of the general schedule increase to fund a pay-for-performance pool, or trying to implement any pay-for-performance system on a cost-neutral basis, as these would necessarily result in funding larger pay increases for top performers by giving smaller increases to others, even if these individuals are meeting all performance expectations established by the agency. We do not want a "rob Peter to pay Paul" system. This criticism extends to options using pay pool and share systems that do not include a mechanism to set a minimum rate or floor for pay increases for fully successful performers as a protection against inadequate funding of the pay pool.

Many of the options prepared by the DHS Design Team would make fundamental changes to the basic pay system for DHS employees by eliminating the General Schedule grade structure. NTEU does not support these options, as we believe that they are unduly disruptive to employees, the agency and its mission, and are not justified by business or mission needs. Furthermore, these options generally do not identify the specific pay rates applicable for each of the various types of employees, but leave them for further development by the agency. NTEU feels very strongly that, should DHS seek to implement a pay system that departs from the basic structure of the General Schedule, employees and employee representatives must be involved in the design of the pay and any associated performance management systems, through either collective bargaining or a more collaborative, less adversarial, joint labor-management effort. NTEU therefore

opposes those options that provide DHS managers with unfettered discretion to determine the number of pay grades or bands, the pay levels associated with these grades/bands, the jobs or job families assigned to grades/bands, local pay rates or adjustments (locality pay) or the amount of any annual general increase to employees and/or increase to the pay structure.

But before there can be any increased linkage between pay and performance, the underlying performance management system established by DHS must be credible, perceived as fair and supported by employees. Performance standards, including those based on employee skills or “competencies,” must be clearly established, identified and explained to employees in advance, and they must be tested and validated before they are linked to pay. Supervisors must be given adequate training on how to evaluate performance and provide effective and timely feedback to employees. Any pay-for-performance system is doomed to failure if supervisors are unwilling or unable to effectively and fairly differentiate employee performance.

In order to ensure fairness and accountability for pay, performance and classification determinations by agency management, pay determinations and distinctions in pay for individual employees based on performance must be subject to grievance or appeal to an independent third party. It is extremely important that employees have the right to have these determinations reviewed through a process that is not entirely under the control of the agency, to protect against arbitrary and capricious decisions and to avoid perceptions of unfairness. In addition, although some element of subjectivity and

judgment is involved in evaluating employee performance, management discretion through any Pay Panels or Performance Review Boards should be constrained to ensure fair and equitable treatment of employees receiving similar performance evaluations.

It is imperative that the Congress provides adequate funding to pay for any pay-for-performance program, with built-in protections so that performance-based increases for top performers do not come at the expense of good performers. If Congress does not provide for increased funding to support performance-based pay, or for the training necessary to implement and administer such a system, it will fail, and the mission will suffer.

As you know, the General Accounting Office (GAO) recently released its study of the Federal Aviation Administration's (FAA) 7 year overhaul of its pay and personnel systems. The FAA replaced its pay system, which had been based on the General Schedule grade and step system, with what it calls a market-based pay for performance system. When the GAO interviewed FAA employees concerning the new system, nearly two-thirds of the employees interviewed "disagreed, or strongly disagreed that the new pay system is fair to all employees." This sense of unfairness, and employees' view that they will not be treated equitably by their managers, has led a greater number of them to seek union representation – the percentage of the FAA workforce who are members of unions jumped from 63% to almost 80% following the implementation of the new pay system.

Concerns about federal supervisors and managers having more control in the pay setting process are by no means unique to the FAA. The group, FPMI Communications, undertook a poll of federal workers last October on the subject of pay for performance. Fully two-thirds of the respondents in that poll believed that giving managers more authority on pay would lead to too much favoritism.

A demonstration on pay banding at the Bureau of Alcohol, Tobacco and Firearms (BATF) is another good case in point. The BATF program began in early 2000, with the first round of salary reviews scheduled for October of that year. Performance standards and critical job elements needed to be in place prior to implementation of the first salary reviews, however, insufficient thought was given to their development and haphazard standards resulted. As is far too frequently the case, managers received little or no training on how to write pay for performance evaluations for this new system. Although NTEU was given the opportunity to review and comment on the proposed standards, our suggestions largely went unused.

Under the BATF program, once performance appraisals were written by managers, they were forwarded to Performance Review Boards (PRBs) that further reviewed the evaluation and issued a final rating of employees. That rating was subsequently entered into a pay matrix that would determine whether or not the employee would be entitled to a performance based raise.

The PRB was given the authority to downgrade evaluations when compared to other employees in the same pay band and job series. And, in fact, evaluations were downgraded. Employees working for poorly trained managers who were, therefore, unable to write a clear, well-documented appraisal suffered under this system. No matter how stellar their performance, if the individual's supervisor was unable to document that performance in a well-written appraisal, the employee would not be eligible for a performance increase. In addition, the authority the PRB was given to downgrade performance evaluations led to the belief among many of our members that the Bureau was operating within a fixed pool of money. In other words, some employees had to have their evaluations downgraded in order for others to receive pay raises. There is no question that this perception of manipulation of the process by management led to employee skepticism about the overall performance appraisal system.

Another feature of the BATF program was one that permitted employees to provide a self-evaluation as well as any external information regarding their individual performance that they thought would be helpful in their review. This could include customer letters or recognition by a professional association or other information the employee thought complimentary to his or her performance review. Although this part of the program was voluntary, most employees were given no training or guidance on developing these self-assessments, further leading to skepticism concerning the program.

While a fair and unbiased performance appraisal system must be an underlying principle in any pay for performance system, the same basic principles must be heeded

when judging employees in other situations. In 1996, Congress strongly supported this principle during consideration of a proposal (H.R.3841) to give added weight to the use of performance evaluations during Reductions in Force (RIFs) of federal employees. Members of the House of Representatives raised serious questions during floor debate on this bill concerning the lack of formal guidance for performance appraisals and questioned their tendency to be subjective. In a September, 1996 speech on the House floor, Representative Cardiss Collins, the Ranking Member on the House Government Reform Committee, stated "...performance appraisals are routinely challenged as being subjective and unfair, over inflated and biased against minorities." The proposal was soundly defeated. However, little has changed since 1996 concerning performance appraisals.

Evidence also points to pay for performance schemes in the private sector producing less than desired results, especially when implemented in large or complex organizations. In testifying before the House Civil Service Subcommittee, Under Secretary of Defense for Personnel and Readiness, David Chu, noted IBM's use of pay for performance as something that would be good for DoD. Ironically, approximately three years ago, the Ford Motor Company implemented a Performance Management Program and unwittingly created a culture of backstabbing as employees tried to outdo one another instead of working as a team. Instead of cooperation, the system fostered infighting and divisiveness.

Individual employees were rated against each other and instead of working toward a common goal; employees became primarily focused on individual performance. The previous culture of team problem solving and risk taking gave way to a situation where employees were unwilling to make suggestions or propose solutions that might result in their being rated lower than their fellow employees. The federal government, much like Ford Motor Company, relies on employees working together to deliver results. Ford was forced to dismantle key components of their Performance Management Program in the face of sinking employee morale. There are lessons here for the federal government as well.

I think that everyone can agree that when it comes to DHS and its critical mission of protecting the security of our homeland and families, failure is not an option. We must do this right the first time, and establish a system that provides the environment for DHS employees to be able to use their skills, talents and dedication to the mission most effectively.

Premium Pay, Retirement, and the CBP Officer Position:

The Homeland Security Act requires the Secretary and Director to review pay and benefit plans applicable to DHS employees and recommend to Congress a plan to eliminate, to the maximum extent practicable, disparities in pay and benefits, especially among law enforcement personnel. The Secretary informed Congress that he expected the design process to address these issues.

Among the issues that must be considered is the need to provide 20-year law enforcement officer retirement to Customs and Border Protection (CBP) Officers. Recently, DHS announced its "One Face at the Border" initiative and the creation of the CBP Officer position, which combines the duties of customs inspectors, immigration inspectors, and agriculture inspectors into one job. A uniform premium pay and retirement system will, of course, be an essential part of the new CBP Officer position. Members of the Design Team have been tasked with devising options to address these premium pay and retirement issues in time for submission to the Secretary, along with the SRC's HR package.

There is no doubt that extending enhanced law enforcement officer retirement status to law enforcement personnel in DHS is critically important. NTEU strongly believes that providing enhanced retirement benefits to law enforcement personnel in DHS is critical to both the functioning of the new department and to the security of the American public. No one could reasonably dispute the importance of the work done by these law officers. Whether stopping terrorism, the flow of illegal drugs and contraband, or enforcing our nation's immigration and trade laws, these hard-working men and women provide a critical public service.

Given the significance of these jobs, it is vitally important that the CBP Officer position remain competitive with other state and local law enforcement agencies in the recruitment and retention of first-rate personnel. Yet we know that the combination of low starting salaries and second-rate retirement benefits does not always attract the best

candidates for these difficult, dangerous and essential jobs. Recruitment and retention of capable personnel was a preeminent consideration behind Congress' establishment of an enhanced retirement option for other law enforcement officers and firefighters. NTEU believes the same compelling reason exists here.

Currently, newer hires to the CBP are highly susceptible to the pull of enhanced retirement benefits and higher salaries offered by state and local law enforcement agencies. They have received costly training and on-the-job experience within DHS, but they know they deserve to be rewarded for the dangers and risks they are exposed to every day. Very often, talented young officers treat CBP as a stepping-stone to other law enforcement agencies with more generous retirement benefits. One only has to look at the number of legacy Customs personnel who were lost to the Air Marshal program during the last few years because of the benefit of an enhanced retirement. When this occurs, both DHS and the wars on terrorism and drugs suffer as a result.

NTEU is convinced that Inspectors and Canine Enforcement Officers of the CBP should receive the same law enforcement status retirement benefits as those enjoyed by other federal law enforcement personnel. When law enforcement officers from different agencies join forces on a drug raid or to search a boat for armed smugglers or terrorists, CBP officers are often the only law officers on the scene who are not considered law enforcement personnel for retirement purposes. They all face the same dangers and the risk of death or injury, but they don't all have the same rights and benefits.

Conclusion:

NTEU supports the mission and personnel of the Department of Homeland Security. NTEU wants the same thing I believe everyone who has been involved with the creation of the agency wants - a workplace where employees can be successful and do quality work in an environment where they will be treated with dignity and respect.

It would be a mistake to underestimate the impact that a new Human Resources System at DHS could have on employees. Quite simply, employees' successes will be the agency's successes. NTEU was proud to have a voice at the table during the public dialogue concerning the new HR system for DHS employees. This dialogue - among all stakeholders - must continue if the agency's goal is to build a DHS workforce that feels both valued and respected. NTEU looks forward to continuing to work with Congress and the Administration to achieve this goal.