

Testimony of
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Committee on Government Reform
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at a hearing
on human resource management options for the
Department of Homeland Security
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Chairman Davis and members of the Subcommittee, thank you for the opportunity to testify today on human resource management options for the Department of Homeland Security. My name is George Nesterczuk and I am President of Nesterczuk and Associates, a management consulting firm located in Vienna, VA. Of the broad array of Human resource options under consideration at the Department I have been asked to focus on the issues dealing with adverse actions and appeals.

Why are these issues of current concern?

In the interest of fairness and due process employees of the federal government are protected from adverse actions by a web of procedures that many characterize as overly cumbersome. In some instances the criticism is more severe, questioning whether the appeals system may be dysfunctional for some agencies. Viewed from the perspective of an employee facing removal the desire to have the process continue indefinitely is understandable. The employer, however, has a responsibility to maintain an organization that functions both efficiently and effectively and can't indulge in an endless process to enforce workplace rules. These competing, at times conflicting needs must be carefully weighed and properly balanced.

The federal government must be particularly scrupulous in its role as an employer since it promulgates the laws that shape employment rules in the rest of the country. However the government as employer cannot lose sight of its responsibility to maintain a productive workplace that is both healthy and safe. While employees who fail to perform or violate the rules should be afforded due process nevertheless the employing agency has a greater obligation to all other employees to maintain discipline and enforce workplace rules.

Looking at the human resource management system in government from a holistic perspective one can't help but conclude that the processes designed to deal with problems of employee performance or misconduct draw a disproportionate amount of attention. After an often lengthy and perhaps tedious competitive entry federal employees face a yearlong probationary period during which they can be summarily dismissed for little or no cause. Once past the probationary period all manner of due process protections accrue – notice and disclosure requirements, reviews, and multiple avenues of appeal. There are numerous examples of removal actions taking months and even years to wind through the process from initial notice, through agency review, to outside appeal, and subsequent

judicial review. Even lesser adverse actions such as suspensions can take months to adjudicate and are subject to review and mitigation by outsiders.

Ironically, the overwhelming majority of employees for whom these protections have been crafted will never have the need to avail themselves of either performance or conduct due process protections. They will spend the next twenty to thirty years advancing in their occupation, competing for promotion, going to training now and again, looking after their benefits, and of course interacting with their managers and supervisors in routinely accepting and fulfilling work assignments. The entire costly and cumbersome system devised to ensure due process is dedicated to the protection of employees who either break the rules or fail to perform adequately. While we have an obligation to protect the rights of this tiny fraction of the workforce and convey the message that everyone will be treated fairly one nevertheless must ask the question at what point has there been enough due process?

A culture of mediocrity

This is a particularly important question to raise when doubts exist whether superior performers rate as much consideration or attention as problem employees. When managers must spend a disproportionate amount of their time dealing with problem employees the system sends the message that managing poor performance is more important to the organization than identifying and promulgating good performance. This eventually gives rise to a culture of mediocrity.

The emphasis placed on job protections in the civil service also creates an entitlement mentality whereby employees believe they are entitled to pay raises and other rewards as well as to job security regardless of individual performance. This perception of job ownership or entitlement is so prevalent that serious disciplinary actions are difficult to initiate and accountability for performance is difficult to enforce.

This is a difficult environment in which to advance a performance driven agenda or to create organizations of excellence. Managers have too often been intimidated by counter claims filed by employees during a proceeding calling into question the manager's judgment or motivation. Sometimes the use of a preemptive filing in a favorable forum has been effective in dissuading a manager from even initiating an adverse action. As a result few performance based actions find their way into the appeal process. Managers prefer to take their chances on fact-based cases involving some form of misconduct to deal with the problem employee. Such cases usually are based on more objective and factual information and are less likely to involve a manager's subjective judgment.

Possible Reforms

The Department of Homeland Security (DHS) was created out of a need to better focus the government's resources and talents on the critical mission of homeland security. The merger of a large number of existing agencies and organizations required extending to DHS a range of procurement and other management flexibilities, including personnel, in order to create a better functioning new entity, a performance driven organization of excellence. There has been a general acceptance that management systems at DHS must be designed to support the mission of the department in its key

activities of law enforcement, intelligence, and national security. To achieve its goals the organization will place greater emphasis on performance and accountability.

In order to advance its performance agenda the department will need to change the current entitlement paradigm. The changes will need to reach beyond pay and performance management systems and reach the currently perceived job protections including the appeals process. The Department should address reforms in which actions are covered under adverse proceedings and which are not, which actions are subject to review and / or appeal, who is covered and under what circumstances, what are the administrative procedures such as notice and response periods, and what panels or bodies would adjudicate the cases. Some suggested options follow.

Review, no appeal

All performance appraisals and ratings should be reviewed at higher level for consistency

All pay adjustments should require affirmative processing by managers based on a performance appraisal; denial of pay increase not subject to appeal

Pay determinations must be left solely within the purview of management; pay determinations subject to review but not appeal

Other performance based actions not subject to appeal

Disciplinary actions involving suspensions of less than 30 days should be adjudicated within the department; not subject to appeal

Less serious disputes subjected to alternative dispute resolution (ADR) at the discretion of both parties.

Subject to appeal

Suspensions of 30 days or longer and removal actions should be subject to appeal.

Coverage and Notice

Employees who have completed their probationary period; currently 12 months, but could be longer in some occupations that require significant training before employee is ready for duty.

Notice period for action should be 7 days but must allow for a reasonable period of time for employee to respond.

Adjudication

For performance based actions review performed by a panel similar to the Performance Review Board (PRB) used for the SES; these panels also have the responsibility to insure equitable evaluations across the organization.

External review panel for removal cases or suspensions of 30 days or longer.

Conclusion

I will summarize my remarks by reiterating the importance for the Department to change the entitlement paradigm that currently pervades the civil service. Too much emphasis is placed on job protection and not enough on job performance. In the area of adverse actions and appeal rights the department should make clear which actions will be

discretionary to management, not subject to employee appeals, and which disciplinary actions will be subject to appeal. This will serve not only to expedite the entire appeals process but it will also enhance the agency's ability to focus its human resources on mission priorities. The Department should create a separate adjudicatory body so that its caseload is resolved in a manner consistent with the Department mission, not subject to broader civil service interpretations.

That concludes my remarks and I would be happy to respond to any questions that you might have.