

Expanded Coverage [37]

NOTE: The content of this document has not been reviewed by legal counsel, nor does it represent a consensus view of the Design Team or indicate any kind of preference among options presented to the Senior Review Committee.

Summary Description:

This option expands the current coverage of the adverse action system, in terms of both employees covered and actions covered. It also substantially increases the length of the advance notice period, both to permit full use of alternative dispute resolution techniques and to accommodate consideration of the employee's response in the final decision by senior DHS officials.

Key Features:

- All DHS employees are covered after completion of one year of service.
- Any action involving a reduction in base pay (including suspensions 14 days or less) is covered.
- An employee's initial response to a proposed action is to her supervisor; if not satisfied with the initial decision, the employee may obtain review by the head of her major DHS component and if desired, by the Secretary of DHS.
- The current advance notice period (30 days) is replaced by a 90-day period to accommodate both the higher level DHS review as well and the full use of alternative dispute resolution techniques to resolve the matter.

Sub-Options:

1. Actions covered could include any loss of pay to which an employee would otherwise have been entitled – such as failure to receive a government-wide pay increase.
2. The organizational level of the additional internal review of initial adverse action decisions could be modified so long as the final agency decision reflected the concurrence of senior agency management.
3. Current authority under Chapter 43 for taking action based on unacceptable performance (including the requirement that actions be based on pre-established objective performance standards and that employee receive an opportunity to improve prior to removal or demotion) could be retained or abolished. If abolished, all actions would be processed under this single new system. Still another alternative would be to retain Chapter 43 but incorporate the opportunity to improve within the extended advance notice period.
4. Instead of establishing an automatic, fixed 90-day proposal period, many of the benefits of this option could be realized by providing for incremental extension of the advance notice period on a case by case basis, depending on the employee requesting higher level review and the success or failure of ADR in resolving the matter.
5. Appeal of performance-based demotion or removal would be limited to review of whether the employee met the requirements of the performance improvement period. MSPB would not have authority to review the performance standards themselves.

Relation to Other Options:

This option could work with any appeal system option. While it covers more employees and actions and significantly extends the time period within which actions will be taken, the option does not fundamentally change the current process. Review of the final agency decision on adverse actions processed under this option could be handled under any appeals process.

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Implications (This section contains "possible advantages/benefits" and "possible problems/challenges" and "other implications" suggested by design team members. The views expressed in these "implications" represent the opinions of one or more members of the design team and therefore reflect sometimes opposing points of view. These opinions do not reflect the collective judgment of the entire design team on any of the issues addressed, nor have they been reviewed by legal counsel.):

Possible Advantages/Benefits

- Simplification of the current coverage criteria might make it easier for both managers and employees to understand when advance notice and due process is required and eliminate current litigation over such matters.
- Review of initial supervisory decisions by top DHS management might not only insure that inappropriate action is not taken but more importantly, might insure top level support for first level supervisors if actions are challenged under any appeals system.
- While extending the notice period might appear initially to increase the length of time to effect an adverse action, the use of such additional time to accommodate higher level DHS review and to fully utilize ADR might ultimately both reduce the number of actions subject to appeal and the likelihood that any such appeals would be successful.
- Different proposing and deciding officials provides greater management accountability.

Possible Problems/Challenges

- Required higher level DHS review might initially discourage first level supervisors from taking action.
- When the penalty is clearly supported by the evidence and ADR is not appropriate, the longer advance notice period might increase the time involved in taking adverse actions.
- Might prolong the process without adding to the resolution rate – for example, agency officials might simply utilize the longer advance notice period to delay issuing a decision.
- Any increase in the time between misconduct and imposition of penalty (resulting from the longer advance notice period) might lessen the impact of the penalty.
- The purpose of the probationary or trial period is to ensure that employees are fit for public service. Many employees in DHS serve probationary periods beyond one year because the time needed to train new employees in these positions makes it impracticable to determine their fitness for the position in one year (e.g. Secret Service employees assigned to protect the President of the United States). Shortening or effectively eliminating this trial period by providing extended appeal rights could limit management's ability to deal effectively with new employees who are not well suited to these types of positions.
- Allowing appeals internally to high level DHS officials (component heads or the Secretary), could be very time consuming, and detract from their ability to carry out their assigned missions.
- Might prolong certain types of adverse action such as 3 day suspensions.
- The greater the time between penalty and conduct, the less impact the action might have.

Other Implications

- This option might benefit from the establishment of a robust, aggressive ADR program to make best use of the additional time provided in the extended notice period.
- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- In the case of removals or demotions, additional cost would result from employees remaining in a pay status during the extended advance notice period.

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- To the extent that fewer inappropriate actions were taken or were resolved prior to an appealable action being effected and reversed, monies spent on attorney fees and back pay would be reduced.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- Mandating the involvement of high level DHS management in the final agency decision on adverse actions would ensure that such actions are directly related to the achievement of the DHS mission.

Performance Focused

- Recognizes that employees are key to successful organizational performance and ensures that disciplinary and performance based adverse actions reflect consistent DHS-wide standards and are supported by top DHS management.

Contemporary and Excellent

- Recognizes the value of alternative dispute resolution and permits time for its full utilization.

Generate Trust and Respect

- Increases the likelihood that only appropriate adverse actions are taken.
- Increases the likelihood that adverse actions that are taken are supported at all levels of DHS management.
- Ensures through the use of ADR, that no alternative exists to better address the problem which necessitated the proposed adverse action.
- Involves no diminishment in employees' entitlement to due process and expands internal agency review of adverse actions, thus enhancing the likelihood that all parties trust and respect the resulting decisions.

Based on Merit System Principles and Fairness

- Fully consistent with all merit system principles and is more likely to be seen as fair by employees.

Transition & Implementation:

- No major implementation problems anticipated although the establishment of an active and aggressive ADR program within DHS prior to implementation would be important.

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

D		Discipline/Adverse Action System	
System elements:		Summary description:	
1	Coverage - Employees - Actions - Probationary/ trial period	<ul style="list-style-type: none"> • All DHS employees are covered after completion of one year of service at any Federal agency. • Any action involving a reduction in base pay (including suspensions of 14 days or less) is covered. • All DHS employees would effectively serve a one year probationary period. • Current distinctions in terms of competitive and excepted service or between preference and non-preference eligibles would be abolished. 	
2	Basic Process - Advance notice - Reply opportunity - Rep. right - Decision - Timeframes - Cause	<ul style="list-style-type: none"> • 90-day advance notice prior to any covered adverse action. • Employee has right to respond to proposing official and to receive initial decision. • If employee is not satisfied with initial decision, he or she has a right to have their response to the proposed action considered by the head of their DHS component and ultimately by the Secretary of DHS. • Current cause of action (for the efficiency of the service) retained. 	
3	Evaluation	<ul style="list-style-type: none"> • Response of employees, supervisors, and managers to annual survey which includes such questions as: <ul style="list-style-type: none"> ○ "The new system appropriately provides a fair process for employee to challenge adverse actions." ○ "Appropriate action is taken to deal with employees whose performance or conduct is deficient." • Documented time to process adverse actions, including resolution of any challenge to such actions. • Cost of taking adverse actions, including cost of resolving any challenge to such actions. 	