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COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5074
FACSIMILE (202) 225–3974
MINORITY (202) 225–5051
TTY (202) 225–6852

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March 22, 2004

The Honorable Tom Ridge
Secretary of Homeland Security
Department of Homeland Security
Washington, DC 20528

The Honorable Kay Cole James
Director
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Re: DHS-2004-001/RIN No. 3206-AK31

Dear Mr. Secretary and Ms. James:

We are writing to express our serious concerns about the human resources management system that has been proposed for the Department of Homeland Security (DHS). We are also separately submitting this letter in conjunction with the rulemaking on the proposed regulations published in the Federal Register on February 20, 2004.

In passing the Homeland Security Act of 2002, Congress intended to give DHS some personnel flexibilities to accomplish its unique mission. However, Congress also clearly stated that any new personnel system must protect fundamental employee rights, such as collective bargaining and due process rights. Unfortunately, the proposed rule unnecessarily infringes on employee rights without furthering the Department's ability to perform its mission. We urge DHS and the Office of Personnel Management (OPM) to rethink these proposed changes and strive for a better balance of employee rights and management's need for flexibility.

I. COLLECTIVE BARGAINING

Although the labor relations component of the proposed rule is significantly better than the proposal recently submitted by the Defense Department, the changes proposed by DHS would drastically alter the conduct of labor-management relations. Most significantly, the proposed rule would limit the number of issues subject to collective bargaining and would prohibit the Federal Labor Relations Authority (FLRA), an independent, third-party arbiter, from

resolving disputes. We believe these proposed changes are unjustified and should be rescinded or modified.

A. Issues Subject to Bargaining

The proposed rule places significant limitations on the type of issues that would be subject to collective bargaining. We believe these changes are unjustified and should be reconsidered.

First, the Department would no longer be required to negotiate over "the numbers, types, and grades of employees and the technology, methods, and means of performing work." The proposed rule would prohibit DHS and its components from bargaining over these subjects, even at their own discretion. We see no reason why the flexibility of DHS supervisors should be limited in this way.

Second, the proposed rule states that "impact and implementation" bargaining would only be conducted at DHS's discretion. Typically, such bargaining involves the procedures used to effectuate any proposed personnel changes and the arrangements for employees adversely affected by the changes. Under the proposed rule, DHS would not be required to negotiate such issues even after the personnel changes had been implemented. We understand the Department's desire for flexibility and speed in its personnel decisions, but allowing post-implementation bargaining with some reasonable time limits is a far better approach.

Finally, the proposed rule states that "proposals that do not significantly impact a substantial portion of the bargaining unit are outside the duty to bargain." There is no definition of the terms "significantly impact" or "substantial portion," and we are concerned that they could be construed to restrict bargaining to only those issues that affect all employees. However, the proposed rule also would prohibit bargaining over Department-wide personnel policies and regulations. Given these two seemingly conflicting prohibitions, it is conceivable that no issues would be subject to bargaining under the proposed rule. Regarding these two provisions, we urge DHS and OPM to eliminate them or, at the very least, clarify the relationship between the provisions.

B. Internal Labor Relations Board

The DHS proposal creates a new Homeland Security Labor Relations Board ("Board") to resolve labor-management disputes. The proposed rule states that the Board is necessary because the Federal Labor Relations Authority (FLRA) is unlikely to "develop the mission-focus and homeland security expertise that the Department and its unions will need, nor will it be as able to dedicate its resources to prioritize DHS cases."

Nowhere does the proposed rule explain why such "mission-focus" and "expertise" is necessary for the prompt and fair resolution of DHS labor disputes. Indeed, for the past quarter century, the FLRA has successfully resolved complicated labor disputes at a myriad of federal agencies, including the agencies that were combined to create DHS. If the problem with FLRA is that it cannot "dedicate its resources to prioritize DHS cases," there are more cost-efficient solutions than creating a new internal labor board. For example, DHS could request that Congress require the FLRA to prioritize and expedite cases impacting national security.

We are also concerned about the fairness of the decisions that would be reached by the new internal board. The DHS Secretary, who is an interested party in labor-management disputes, would select all three members of the Board. Although the Chair of the FLRA would nominate one of the members, there is no requirement that the unions have any input into the selection of the two other board members. Moreover, the proposed rule states that the Board must interpret departmental regulations and policies "in a way that recognizes the critical mission of the Department and the need for flexibility." Such an overly deferential standard of review would seem to require that the Board rule in the Department's favor in most, if not all, instances.

C. Judicial Review

The proposed rule seeks public comment on the availability of judicial review of Board decisions. DHS presents two options for judicial review: (1) the final rule would include no language on judicial review and simply "allow existing governing legal principles to determine the circumstances under which there would be judicial review"; or (2) the final rule would expressly allow judicial review after the FLRA first reviewed the decisions of the Board.

We strongly support the second option. Judicial review of agency decisions is an important component of civil service laws, and the availability of judicial review should be clearly spelled out in the final rule. Moreover, there is great value in having the FLRA conduct an initial review of the Board's decisions. FLRA review maintains the consistency of federal labor practices among different agencies and ensures that the Board's decisions do not contradict longstanding precedent. An initial review by the FLRA could also obviate the need for the parties to seek recourse to the federal courts.

II. APPEALS

The appeals process created by this rule gives the Department broad discretion to suspend and dismiss its employees with only a modicum of due process. Although we agree with DHS's decision to allow the Merit Systems Protection Board (MSPB) to review most adverse personnel actions, the proposed rule stacks the deck against employees by weakening the MSPB's ability to overturn or modify the Department's decisions. We urge DHS and OPM to reconsider these proposed changes.

A. Discovery Rules

DHS proposes significant changes to the conduct of discovery during the appeals process. We support efforts to expedite the appeals process but believe these discovery changes are one-sided and should be reconsidered.

Under the proposed rule, MSPB could not consider a unilateral request for additional time to pursue discovery; both parties would have to agree to the request. Parties would only be allowed to submit one set of interrogatories, requests for production, and requests for admissions. There would be a limit of 25 interrogatories or requests for production or admissions, and each party could conduct no more than two depositions.

In theory, these changes appear to be neutral, but in practice, they disproportionately impact employees. When an employee has been suspended or dismissed, the agency typically controls all the information, including personnel records needed by the employee to build his case. Limiting access to such information could hinder the employee's ability to challenge the agency's decision. Furthermore, allowing only one set of interrogatories and requests for productions or admissions might encourage the Department to provide vague or incomplete discovery responses, since an employee could not file a supplemental request or request additional time to pursue discovery.

B. Standard of Proof

Chapter 77 of Title 5 of the U.S. Code governs employee appeals decided by the MSPB. Under current law, all agency decisions appealed to the MPSB that involve removal or suspension for more than 14 days or reduction in grade or pay are sustained if supported by a preponderance of evidence. DHS proposes to change this standard to a lower standard of proof; under the proposed rule, the MSPB would sustain DHS decisions if they are supported by substantial evidence.

The effect of these changes is to put DHS employees on a different footing from other federal employees whose appeals are decided by the MSPB. This makes no sense to us. We recognize that the Department has a unique mission, but employees who choose to work there should not have to forfeit their due process rights. We are also not convinced that changing the standard of proof in all DHS employee appeals is even necessary. Many DHS employee appeals involve routine personnel matters and are no different from the employee appeals at other federal agencies.

C. Mitigation of Penalties

Under current law, the MSPB is permitted to mitigate penalties in cases in which an employee is removed or suspended for more than 14 days or suffers a reduction in grade or pay. The proposed rule eliminates this authority of MSPB to mitigate penalties. We oppose this change, because it would prevent the MSPB from ensuring that penalties in DHS cases are consistent with penalties in cases from other agencies involving similar misconduct.

As a practical matter, this "take it or leave it" approach also does not further the interests of either the employee or the agency. The MSPB would have no authority to reduce an overly harsh penalty to one that more closely fits the employee misconduct at issue. This is grossly unfair to the employee. Conversely, one could easily foresee cases in which the MSPB has no other choice but to rule in the employee's favor because the agency's recommended penalty is too harsh.

Absent evidence that the MSPB has misused its authority to mitigate proposed penalties, we believe that this change is unwarranted.

D. Attorney Fees

Currently, under 5 U.S.C. § 7701(g), an employee who prevails in an appeal before the MSPB may recover attorney fees if such an award is "in the interest of justice." DHS proposes to change this standard to a much narrower standard: "an appellant may recover fees if the action is reversed in its entirety and the Department's actions constituted a prohibited personnel practice or was taken in bad faith or without any basis in fact or law."

The proposed rule would establish an onerous standard that virtually no litigant could meet. There are only 12 prohibited personnel practices under 5 U.S.C. §2302. Not only do these prohibited practices occur infrequently, but they are extremely difficult to prove. Moreover, it is hard to imagine any employee successfully proving that an agency took a personnel action in "bad faith" or "without any basis in fact or law." The effect of this proposed change would be to discourage employees from challenging wrongful termination actions.

We are not aware of any problem involving the current law of attorney fee awards. If there is such a problem, we are willing to work with DHS and OPM in formulating a better approach to narrowing the language in 5 U.S.C. §7701(g).

III. MANDATORY REMOVAL OFFENSES

The proposed rule allows the DHS Secretary to identify a series of offenses that have "a direct and substantial impact on the ability of the Department to protect homeland security" and thus merit mandatory removal from federal service. The proposed rule does not list these offenses, because DHS believes "it is important to preserve the Secretary's flexibility to carefully

and narrowly determine the offenses that will fall into this category and to make changes over time."

We agree that certain offenses, such as the acceptance of a bribe that compromises border security, cannot be tolerated and should be swiftly punished. However, the essence of due process is notice, and it is critical that these offenses be clearly described in advance in regulations. If the Secretary desires flexibility, these offenses could be amended in subsequent rulemaking. But, we do not believe that due process allows a government agency to decide on an ad hoc basis which offenses merit mandatory removal.

In closing, we appreciate the collaborative manner in which DHS and OPM have dealt with employees and their representatives. However, collaboration is meaningless, unless employee views are reflected in the final regulations. We urge you to modify the proposed rule and strive for an approach that better balances the interests of the Department and its employees.

Sincerely,

Henry A. Waxman
Ranking Minority Member

Danny K. Davis
Ranking Minority Member
Subcommittee on Civil Service
and Agency Organization

Major R. Owens
Member
Subcommittee on Civil Service
and Agency Organization

Chris Van Hollen
Member
Subcommittee on Civil Service
and Agency Organization

Eleanor Holmes Norton
Member
Subcommittee on Civil Service
and Agency Organization

Jim Cooper
Member
Subcommittee on Civil Service
and Agency Organization

cc: DHS/OPM HR System Public Comments