

National Treasury Employees Union



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

**ON**

**THE DEPARTMENT OF HOMELAND SECURITY NEW  
HUMAN RESOURCES MANAGEMENT SYSTEM**

**BEFORE THE JOINT**

**HOUSE GOVERNMENT REFORM COMMITTEE  
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY  
REORGANIZATION AND THE SENATE  
GOVERNMENTAL AFFAIRS COMMITTEE  
SUBCOMMITTEE ON OVERSIGHT AND GOVERNMENT  
MANAGEMENT**

**WEDNESDAY, FEBRUARY 25, 2004, 10 A.M.  
2154 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, D.C.**

Chairman Voinovich, Ranking Member Durbin, Chairwoman Davis, Ranking Member Davis, distinguished members of the Subcommittees; I would like to thank the subcommittees for the opportunity to testify on the recently released proposed human resources management regulations 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 13,000 federal employees who are part of the Department of Homeland Security (DHS). I am also pleased to have served as the representative of NTEU on the DHS Senior Review Committee (SRC) that was 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 was included in the Homeland Security Act of 2002. The legislation allowed 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 Human Resources (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. 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 included maintaining the status quo, making modest changes to current systems, and making significant revisions to the six areas of Title 5.

As you know, these options were presented to the DHS Senior Review Committee (SRC), which 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 then forwarded a formal package of options to the Director of OPM and the DHS Secretary for their consideration.

While I believe that the collaborative process worked well in allowing NTEU to offer our options to address personnel issues the Department identified, I am extremely disappointed at the lack of inclusion of our or other employee representatives' options in the proposed personnel regulations that were released on February 20. I will focus my comments on three areas: pay, labor relations, and due process rights.

**PAY:**

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. NTEU does not believe the pay system in the proposed regulations meets these tests.

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 more on managerial skills than on 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.

The proposed DHS regulations abandon the General Schedule basic pay system and will provide employees with a radically different and unproven “pay banding” system based entirely

on managerial discretion. The plan appears to eliminate across the board annual raises, allowing employees in some locations of the country to be paid significantly less than others. No information has ever been produced to show that the new “pay band” system will enhance the efficiency of the department’s operations.

The proposed regulations consist only of broad statements concerning the creation of occupation clusters of related positions in the department and the ability of DHS/OPM to create a number of “pay bands” for each cluster that relates to skill level. The “pay band” ranges will be set by an extremely complicated formula of mission requirements, local labor market conditions, availability of funds, and pay adjustments received by other federal employees. The President’s Budget for FY 2005 requests \$100 million to design this new system. This money could be put to much better use by hiring more front line personnel.

**LABOR RELATIONS:**

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

NTEU believes that the proposed regulations do not meet this statutory requirement for three reasons. First, and most importantly, collective bargaining disputes will not be subject to independent third party resolution, but will be resolved by an internal DHS Board. Second, this internal DHS Board will replace the independent Federal Labor Relations Authority in determining what constitutes an appropriate

bargaining unit for the purposes of union elections. Third, the scope of collective bargaining is so dramatically limited that the requirement that employees be allowed to “participate through labor organizations of their own choosing in decisions which affect them,” is not met.

### **NO INDEPENDENT THIRD PARTY REVIEW OF BARGAINING DISPUTES**

Currently, throughout the federal government, collective bargaining disputes are decided by the Federal Labor Relations Authority, an independent body appointed by the President and confirmed by the Senate. The statute creating the Authority provides that it shall not be composed entirely of members of one political party.

Under the proposed DHS regulations, collective bargaining stalemates will be resolved by a three-member board appointed by the Secretary of the Department of Homeland Security. Senate confirmation is not required, nor is political diversity. While the proposed regulations attempt to portray this as an “independent” board because members will not be removable at will, the fact is these appointees will not be independent. They will be chosen completely at the Secretary’s discretion, without any Congressional advice or consent and may be dismissed by the Secretary for reasons as ephemeral as “inefficiency.”

A true system of collective bargaining demands independent third party determination of disputes. These proposed regulations do not provide for that, instead creating an internal system in which people appointed by the Secretary will be charged

with deciding matters directly impacting their boss' actions. This fox guarding the hen house system raises questions as to whether the parties' interactions can actually be defined as providing for collective bargaining as required by the statute. NTEU believes it does not and we urge Congress to inform the Department of Homeland Security that these proposed regulations do not meet either the letter or spirit of Congressional intent in this matter.

## **NO INDEPENDENT DETERMINATION OF APPROPRIATE BARGAINING**

### **UNITS**

The first step in a union election is the determination of what constitutes the bargaining unit. This determination is analogous to drawing Congressional District boundaries. It determines who will be eligible to vote in a union election and, like Congressional elections, the parameters of the bargaining unit can have an enormous impact on the outcome of the election.

Currently, the independent Federal Labor Relations Authority determines questions pertaining to the parameters of a bargaining unit for purposes of a union election. Under the proposed regulations, the Authority will retain only duties relating to the ministerial running of elections, while the internal DHS Labor Relations Board will determine what constitutes an appropriate bargaining unit. Can there be any doubt as to how these determinations will be resolved? This system of allowing the DHS to be the judge of a dispute between DHS and a union about what constitutes an appropriate

bargaining unit has no credibility and again undermines the Homeland Security Act's requirement that employees be allowed to "organize."

### **DRASTIC LIMITATIONS ON SUBJECTS AND STANDARDS OF COLLECTIVE BARGAINING**

Under current law the subjects of collective bargaining for the most part fall into three categories: 1) **Management rights** – these subjects include deployment of personnel, assignment of work and the use of technology. While they are **not negotiable** on the merits, the **impact and implementation of working condition changes** in these areas **are negotiable**. Currently, matters covered by **government-wide regulations also fall into this category**. 2) **Permissive subjects of bargaining** – these subjects include methods, means and technology of performing work; numbers, types and grades of employees. Agencies, at their discretion, can negotiate over the substance of the proposals, but they are required to negotiate **the impact and implementation of changes** in working conditions. 3) **Mandatory subjects of bargaining** – these subjects include lay-off, promotion and disciplinary action procedures and they are **subject to negotiation on the merits**. The proposed regulations limit bargaining in each of these areas.

**MANAGEMENT RIGHTS** - Under the proposed regulations not only will these determinations be non-negotiable on the merits, even the impact and implementation of most management actions will not be negotiable. And even post-implementation bargaining will not be required for these matters. While currently, this standard of non-negotiability applies to matters covered by government-wide regulations as well as those

by statute, under the proposed regulations, matters covered merely by department-wide regulations or policies will fall into this totally non-negotiable area.

**PERMISSIVE SUBJECTS OF BARGAINING** – These subjects will be redefined as management rights, not subject to bargaining on the merits, even at the agency’s discretion, with no right to impact and implementation bargaining and no requirement for even post-implementation bargaining.

**MANDATORY SUBJECTS OF BARGAINING** – These few areas that will remain potentially negotiable will be subject to a new standard that will likely dramatically curtail bargaining. According to the proposed regulations, “proposals that do not significantly impact a substantial portion of the bargaining unit are outside the duty to bargain.” No definition of these terms is provided and should there be a dispute as to whether this standard is met, it will not be resolved by an independent third party, but by the DHS’ internal labor relations board.

**CONSULTATION RIGHTS** – Much was made during the legislative debate around the Homeland Security Act about employee representatives being given consultation rights even when they couldn’t negotiate. Even though NTEU believes that consultation rights are not ever an adequate substitute for collective bargaining rights, we would like to point out that the regulations say only that management “may” request the union’s views. The comments make it clear that DHS will consult with employee representatives only “when circumstances permit.”

Based on the sweeping limitations to collective bargaining rights enumerated above and coupled with the elimination of independent third party review of disputes, NTEU does not believe these proposed regulations meet the statutory requirement that any new human resource management system “ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them.” And we urge Congress to see that changes are made to reflect its statutory directive.

A real example of where an adverse effect will be felt for both employees and the agency, because of the impact of narrowing the ability to collectively bargain over issues surrounding operations of the department, will be in the area of determining work shifts. Currently, the agency has the ability to determine what the shift hours will be at a particular port of entry, the number of people on the shift, and the job qualifications of the personnel on that shift. The union representing the employees has the ability to negotiate with the agency, once the shift specifications are determined, as to which eligible employees will work which shift. This can be determined by seniority, expertise, volunteers, or a number of other factors.

Employees around the country have overwhelmingly supported this method for determining their work schedule for a number of reasons. One, it provides employees with a transparent system for determining how they will be chosen for a shift. Two, it takes into consideration lifestyle issues of individual inspectors, such as single parents

with day care needs, employees taking care of infirmed family members or inspectors who prefer to work at night.

## **DUE PROCESS:**

### **Mandatory Removal Offenses**

The proposed DHS regulations would allow the Secretary of Homeland Security to determine an unlimited number of “deadly sins” that require mandatory termination, without access to any independent review of the charges; the only review would be by an in-house entity. These proposed DHS “deadly sins” are even more Draconian than the IRS’ deadly sins, which are subject to independent review and are set by statute, not subject to the whim of the current or future DHS Secretaries.

It is important to note that President Bush supports repealing the mandatory termination provisions currently in effect at the IRS and legislation drafted by the Administration to do this (H.R. 1528) has passed the House with strong bipartisan Congressional, as well as, Administration support. The President’s FY ’05 Budget Proposal (p. 260 of the Analytical Perspectives Section) explains the Administration’s position: “The proposed modification to the RRA98 is comprised of six parts. The first part modifies employee infractions subject to mandatory termination and permits a broader range of available penalties. It strengthens taxpayer privacy while reducing employee anxiety resulting from unduly harsh discipline or unfounded allegations.”

The Administration believes that the IRS needs more flexibility in this area. Since flexibility has been the primary goal of personnel changes at DHS, it is totally inconsistent to introduce procedures that take away all discretion by requiring mandatory penalties.

**No independent review of suspensions:**

Suspensions of 14 days or less would still be subject to grievance/arbitration procedures; however, appeals from arbitration awards would go to an internal review panel rather than the FLRA, which is the current review panel.

**No grievance procedure for removals:**

The proposed regulations take away an employee representative's right to ask an impartial arbitrator to consider serious adverse actions taken against employees. Arbitration is a much faster, cheaper, and less formally legalistic way of addressing these issues.

**MSPB Appeals gutted:**

While removals and other serious adverse actions could be appealed to the MSPB, the proposed regulations severely undercut the fairness of the process. First, they eliminate the Merit Systems Protection Board's (MSPB) current authority to modify agency-imposed penalties. The result is that DHS employees will no longer be able to challenge the reasonableness of penalties imposed against them, and the MSPB will no longer be able to direct agencies to change unreasonable penalties.

Second, the regulations also change the burden of proof in MSPB cases from the agency needing to show a “preponderance of evidence”, to merely “substantial evidence.” This is a much lower standard. These two changes raise serious questions as to whether the new MSPB procedures will provide employees with meaningful due process.

**Weingarten Rights Drastically Weakened:**

The right of a represented employee to have a union representative during interviews that could lead to disciplinary action is known as a Weingarten right. Currently, employees have this right whenever they are questioned by management or its agent. The DHS regulations overturn recent Supreme Court case law by refusing union representation in cases involving management agents such as Inspectors General or Internal Affairs, who often investigate routine allegations of misconduct.

**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 pleased to have a voice at the table during the public dialogue concerning the new HR system for DHS employees. Clearly, we are

disappointed with the results. Changes in these proposed regulations are needed 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.