

STATEMENT BY
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BEFORE

THE HOUSE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION

REGARDING

UNION VIEWS OF THE OPTIONS FOR THE DEPARTMENT
OF HOMELAND SECURITY'S NEW PERSONNEL SYSTEM

ON

OCTOBER 29, 2003

My name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 600,000 federal employees represented by AFGE, including 50,000 in the agencies that comprise the Department of Homeland Security (DHS), and the many thousands who work for the Transportation Security Administration (TSA) of DHS and seek our representation but have had their aspirations thwarted by the administration, I thank you for the opportunity to testify here today on the options for personnel system design that will be considered for DHS.

During the past six months, AFGE staff has joined with staff from the Office of Personnel Management (OPM), DHS, and other unions to participate in a "Design Team," charged with carrying out the process of defining the universe of alternative personnel systems that might be adopted in the new agency. In the Congressional debate which preceded the enactment of the legislation that established DHS, the Administration's rationale for its insistence on broad authority to waive certain chapters of Title 5 was that it would need flexibility to harmonize the 22 divergent personnel systems that operated in the agencies that were to be merged into DHS and at the same time enhance our nation's domestic security. The Administration won the broad authorities that it demanded, which set in motion the process of investigating what might replace the pay, classification, due process, labor relations, performance management, adverse action, and collective bargaining systems that have previously been enjoyed by the employees who now find themselves part of DHS.

The group assembled by DHS to consider alternatives to existing Title 5 systems has worked in a conscientious, collegial, and diligent way to solicit the views of employees at all levels of DHS who will be affected by the imposition of any new personnel system component. The group was addressed by experts in personnel system design from academic institutions, federal agencies, non-profits, and private firms. They read widely, and shared freely with one another their knowledge, experience, and their own views and the views of those they represented. As their time drew to a close, they took pen to paper and submitted a large number of proposals for new systems governing pay, classification, and labor-management relations in DHS.

As a group they adopted a set of criteria (or “guiding/design principles”) which all proposals would strive to meet, and which any author believed would comply with the law’s instructions regarding DHS’s new personnel system. To facilitate judgement of whether the options submitted succeeded in compliance with the law’s instructions, all the pay system, due process and appellate procedures, classification system, and collective bargaining proposals submitted for consideration were placed into an evaluation template. The template addressed each option according to whether and to what degree it was: “mission centered,” “performance focused,” “contemporary and excellent,” “(likely to) generate trust and respect,” “based on merit system principles and fairness,” and mindful of cost.

Importantly, it was understood that any proposals submitted for consideration were to be informed by the data collected by the design team in the course of their Town Hall-style and focus-group meetings with DHS employees, the overwhelming majority of whom expressed a strong desire to retain their existing rights regarding pay, classification, collective bargaining, appeals of adverse actions, and due process procedures.

The Design Team process for soliciting the views of experts, gathering published information, eliciting and collecting information on the concerns, aspirations, attitudes, and priorities of DHS employees who would be affected by any changes in the personnel system imposed upon them; and finally assembling and evaluating submitted options for consideration by the Senior Review Committee seemed to have gone well. However, the fact that proposals were put forward that would either eliminate or dilute a wide range of employee rights at DHS in spite of the unequivocal and unanimous views of employees, expressed in Design Team-sponsored town-hall meetings and focus groups, is troubling. What seems to be even more troubling is the insistence expressed at recent public hearings by representatives of the Office of Personnel Management (OPM) and DHS that employee rights be eliminated and/or diluted prior to the imposition of new systems.

AFGE did not oppose the establishment of the Department of Homeland Security, however, we did not support passage of the Homeland Security Act.

The legislation was held up for many months because of profound disagreements over the authorities that would be granted to the Secretary regarding personnel issues in general, and collective bargaining in particular. The focus of the debate was the President's contention that the existing labor relations system would interfere with management's ability to protect and promote the nation's security, particularly in the area of counter-terrorism activities.

In that context, AFGE has striven not only to focus attention on the issues that most concerned the president and the Congress, but also to promote changes that respond directly to the goal of ensuring that union participation and the collective bargaining process contribute positively to strengthening our ability to be successful in countering terrorism. To fashion a mechanism for DHS employees to participate, through their elected union representatives, in the decisions which affect their jobs and their compensation, and which forecloses the delays described in the Congressional debate, has been AFGE's highest priority.

Thus to propose elimination or dilution of employee rights before new systems involving pay, classification, appellate procedures, or collective bargaining presumes that these new systems fail at their most basic task – to institute a new DHS personnel system that simultaneously enhances the Department's ability to pursue its counter-terrorism mission, and manage its human resources. Unless

the sole purpose of the establishment of DHS was to destroy its employees' rights to union representation through collective bargaining, this effort is a dangerous case of putting the cart before the horse.

Alternatives Concerning Collective Bargaining

The Administration's central complaint was that collective bargaining negotiations took too long in general, and that negotiations over mid-term operational changes in particular caused unacceptable delays in implementing necessary changes. I am pleased to report to you that many of the options that have been presented by the Design Team have elements that successfully address these important concerns.

There are five proposals which appear in various options submitted for consideration by the Senior Review Panel that accommodate the concerns that gave rise to the Homeland Security Act's authorities in the area of collective bargaining, and which preserve collective bargaining. They are as follows:

1. After a fairly short, clearly defined period of bargaining, any matter over which the parties are at an impasse can be sent to the impasse resolution body.
2. Impasses would have to be resolved within a specific short time limit after having been referred to the impasse resolution body.

3. Information disputes related to bargaining would be decided by the impasse resolution body, rather than through a separate “unfair labor practice” (ULP) complaint procedure.
4. Disputes over the scope of bargaining would be decided by the impasse resolution body, rather than through a separate “negotiability appeals” procedure.
5. Management would be able to implement changes on its own schedule, as long as there is a credible opportunity for swift, effective, *post-implementation* bargaining.

These five provisions imply the necessity for a DHS-specific labor relations panel, which is provided for in all options submitted for consideration, except for the status-quo option. However, it is crucial that unless that board is independent of the agency and is subject to judicial review, the overall system will not meet the statutory standard of being a collective bargaining system.

AFGE has not endorsed specific language relative to these elements. In fact, there are significant differences between many of the elements on any particular subject. But because these elements address essential subjects, we have concentrated our efforts on finding particular formulations that best serve our members, and the purposes of the Homeland Security Act.

It is equally important to note the elements in various options which are directly inconsistent with the principle of employee participation, through collective bargaining, in decisions affecting them.

There are proposals to eliminate the right to bargain over management decisions once 15 days have passed after notice of the proposed change, regardless of whether management was available to bargain during that period. In the same vein, it has been proposed to eliminate the right of employees to bargain unless they happen to be in bargaining units that, in some sense, can be described by management as the "most appropriate unit." Two of the options (nos. 28 and 30) would make impossible the current collective bargaining relationships in the Federal Emergency Management Agency (FEMA) and the Coast Guard, regardless of whether those relationships are satisfactory to the affected management or unions. Other options deprive Secretary Ridge of the authority that every other agency head has to bargain over subjects listed in the current 7106(b)(1). He alone, among the cabinet secretaries, will not be trusted to do this.

One proposed option would eliminate post-implementation bargaining over certain categories of emergency-based actions. Within the same option and two others is a proposal to allow management to eliminate completely employee participation in decisions regarding personnel rules and policy by putting them into the form of agency regulations. Similarly, it has been proposed in one option

to eliminate all employee participation in matters affecting working conditions during the life of any contract, and to eliminate the right of management and the union to channel bargaining to the levels they deem most appropriate.

Finally and most egregiously, one option (no. 28) provides that employees adversely affected by management actions cannot bargain for appropriate arrangements unless a third party determines (a) that the adverse effect is “significant” and (b) that a substantial portion of the entire bargaining suffered the same adverse effect. The fundamental basis for collective bargaining is that it allows employees who have voted in free and democratic elections, to have union representation to respond to management actions. It is perhaps the major rationale for union membership, and is the major reason for bargaining in both the private sector and in the public sector, whether on the state, local, or federal level. Collective bargaining over arrangements for employees adversely affected by management operational decisions is the essence of employee representation through their unions.

The alternative of eliminating collective bargaining altogether was not put forth as an option for the Senior Review Committee to consider. Although that alternative is within the authorities provided to the president in the Homeland Security Act, the president is only permitted to eliminate employee participation rights after a finding that the new labor relations system has failed to allow DHS management

to carry out its counter-terrorism responsibilities. We foresee no possibility that would allow for the exercise of this authority.

Alternatives Regarding Appeal Rights, Adverse Actions, and Due Process

Procedures

Several options were offered to the Senior Review Committee for consideration on the subject of possible changes to the rights and procedures that allow DHS employees to appeal management charges against them, especially those that lead to adverse actions such as suspensions and termination. It is important to note that maintaining employee appeal rights would have no impact on management's ability to impose discipline or any other adverse action. Indeed, an employee appeal does not stay or prevent an adverse action from being implemented. Thus eliminating or altering these rights would not enhance management's ability to impose an action with an immediate impact.

Some of the deviations from current practice that appear in options submitted for consideration appear to assume that appeal rights are in conflict with management's ability to act, and are therefore entirely insupportable. DHS employees remain unanimous in their opposition to the elimination of their appeal rights, whether this elimination is explicit or implicit. That is, they are just as opposed to new schemes that pretend to maintain appeal rights, but effect an implicit elimination by means of internal "kangaroo courts" or other mechanisms

wholly internal to the agency that allow the accuser to be judge and jury for the accused, as they are to outright elimination.

One proposed option would be to limit appeal rights to employees who are veterans' preference eligibles. The rationale for segmenting the DHS workforce in terms of access to justice in the context of allegations of wrongdoing escapes me. Giving appeal and other due process rights only to those who have qualified for veterans' preference would seem to conflict with the requirement in Section 9701 (b) (2) of the Homeland Security Act (HAS) that the new DHS personnel management system be "contemporary." Although veterans are rightly given preference in the context of government hiring as a way of honoring their service to the nation, the freedoms they served to protect should not be denied their fellow citizens. Further, since veterans make up only a portion of the DHS workforce, imposition of such a policy would eliminate any accountability for management actions relative to the remaining portion of the workforce.

Accountability is desirable, and accountability for actions relative only to a fraction of the workforce is not the standard toward which we should aspire in DHS.

Proposals that include longer probationary periods for DHS employees would also segment the DHS workforce into portions that enjoy due process and appeal rights, and those who do not. Employees do not have due process or appeal rights during the period of probation. While representatives of DHS management

have argued that there are some occupations that require a period of more than one year to assess an individual's ability to perform, this is not a reason to deprive all employees of due process for that period. Extending probationary periods during which employees can be fired without explanation is especially dangerous in the context of public employment because it facilitates cronyism and politicized "spoils system" hiring and firing, without accountability.

Using the Homeland Security Act's own criteria, allowing management to extend probationary periods arbitrarily and unilaterally is neither "fair" nor "contemporary."

Disparate treatment for employees with regard to due process rights --whether on the basis of years of service, or on the basis of prior military service --as a basic pillar of the personnel system is the wrong direction for DHS or any employer. It is easy to imagine that under the guise of such superficial demarcations disparate treatment of individuals and groups who have long been the victims of discrimination might serve as a justification for discrimination at DHS. Women or minorities, the relatively young or relatively aged, the supporter or opponent of a particular political party might be victimized if management is permitted to make due process and/or appeal rights available to only certain segments of the workforce.

One of the most disturbing proposals to appear in the options submitted for consideration regarding DHS employees' due process and appeal rights would

be to lower the standard of evidence necessary to sustain management's charges against an employee. The current standard is "preponderance of the evidence" which is a standard that is fair considering the stakes for employees in such proceedings. Management has proposed changing this to either "substantial evidence" or "sufficient evidence," both of which are lesser standards than "preponderance of evidence." (Moving to a higher standard than "preponderance of evidence" known as "clear and convincing evidence" has also been proposed; the latter being akin to the standard of "beyond a reasonable doubt.")

In American jurisprudence, "preponderance of evidence" is the standard for civil procedures, which are often disputes involving money or property, and "evidence beyond a reasonable doubt" is the standard for criminal procedures wherein the stakes for the accused involve the loss of his or her liberty. The higher the stakes, the higher the standard of evidence and the law treats the prospect of a loss of liberty as constituting higher stakes than the loss of money or property. In that vein, "preponderance of evidence" is commonly understood to mean at least 51 percent certainty, and "evidence beyond a reasonable doubt" is understood to mean at least 75 percent certainty.

While "substantial" evidence has a meaning in the context of the evaluation of performance, we do not know what "sufficient" evidence is supposed to mean. Do they intend to impose a standard that would allow the imposition of adverse

actions when the adjudicator is presented with evidence that allows him or her to be 35 percent certain that the charges are valid? 25 percent? Is this a “close enough for government work” cynicism on the part of DHS management, the same people to whom we have entrusted our domestic security? The fact is that there is no rationale offered, or available, for lowering the standard of evidence except that it would become easier for management to act against employees whether or not the evidence justifies it.

In order to sustain a charge that will affect the livelihood of an employee and his or her dependents, and will affect the integrity of the apolitical civil service, there must be an adequate and serious standard of evidence, and it should be at least better than 50-50, which is another way of saying that the evidence has failed to persuade by anything more than a flip of a coin. Further, to be consistent with the American system of jurisprudence, there should be a greater burden on the accuser than the accused. Indeed, the “preponderance of the evidence” standard leads the adjudicator to decide in favor of the party whose claim is right, rather than the party who merely was able to state his case well enough to produce 50 percent or less certainty.

Current law allows some federal agencies to suspend employees, summarily and without pay, if the head of the agency judges the action to be necessary to protect national security. Employees who are suspended in this way may later be terminated on the basis of the allegation, without the procedural and appellate

protections other employees at the same agency receive. This type of approach is similar to providing rights only to certain categories of employees; what is different is that the due process rights are withheld on the basis of the type of allegation made against the employee, rather than on the basis of the type of employee against whom an allegation is made.

There is considerable doubt about whether such a process is constitutional. Characterizing an alleged action as a threat to national security allows management to do unimaginable harm to an employee's life and career, without allowing the accused to defend him or herself or refute the charges. If an employee's conduct does or might do harm to national security, DHS should not compound the harm and allow fear to justify the forfeit of our democracy's procedural standards for the removal of an employee from his or her position.

In the course of its work, the Design Team had the privilege of being addressed by the Honorable John Charles Thomas, former justice of the Virginia Supreme Court. He emphasized that the American system of justice does not tolerate having the prosecutor, judge, and jury rolled up into one. Judge Thomas also pointed out the important principle, discussed above, that the more serious the alleged offense, the more strenuous the effort must be to ensure that the accused has a chance to prove his or her innocence. This principle is reflected in Chapter 75 of Title 5, which provides lesser procedural requirements for taking minor discipline against a federal employee than for severe adverse actions. We

therefore consider it especially egregious to suggest denying all appeal rights to those accused of the most serious charges.

Termination should be a possible consequence for an employee who is found to have harmed national security, or committed an offense that threatened national security. It is, however, our position that in cases where such a serious allegation is made that the burden of proof be upon the accuser, and that the accused be given an opportunity to make his or her case before an impartial adjudicator.

An additional proposal that has been included in the proposed options for DHS to adopt in the areas of adverse actions, appeal rights, and due process rights would be to eliminate outside administrative review altogether. AFGE strongly opposes this approach. Regardless of how independent one may insist an internal appellate mechanism is, the fact would remain that decisions would be made by employees who report to the Secretary of DHS. This is “independence” in name only, and everyone on all sides at DHS will know it. Internal administrative review has no credibility at all with employees. Again, as Justice Thomas warned the Design team, internal review is another example of trying to combine prosecutor, judge, and jury into one – an approach which is not only unconstitutional, but which makes a mockery of the constitutional approach to justice.

It is important to note that the Design Team investigated the approaches taken by eleven states with regard to the question of internal versus external administrative review. All eleven provided outside review of adverse actions taken against public employees. They did so not only to be consonant with Constitutional procedures, but also to provide accountability to taxpayers who support an apolitical civil service in their states. In addition, the Federal Managers Association, the Senior Executives Association, as well as the focus group participants interviewed as part of the Design Team process were unanimous in their support and insistence that there continue to be external review of adverse actions taken by DHS management.

Another proposal that federal employees consider both extreme and entirely reprehensible that has been submitted for possible adoption by DHS would eliminate judicial review. Whatever decision were reached by the internal reviewer or outside administrative adjudicator would be final. Even the most arbitrary decision could not be reviewed by a federal court. This is clearly unconstitutional. The very essence of due process and the accountability it is designed to effect requires independent judicial review of government actions.

Along these same lines is the proposal to eliminate for DHS employees the right to hearings. To deny employees the opportunity to confront and cross-examine their accusers is a violation of due process rights. If this change were imposed in DHS, it would violate several sections of the Homeland Security Act, including

section 9701 (f) (1) (B) (I) which requires the Secretary and the Director to ensure that employees of the Department are afforded due process; section 9701 (f) (2) (B) (I) which requires that appeals procedures be consistent with due process; and section 9701 (f) (2) (C) which provides that appellate procedures in the current chapter 75 may only be modified “insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department.” No one could consider this change “fair” although the elimination of due process is undeniably efficient and expeditious.

AFGE is not opposed to all proposed changes in procedures involving adverse actions and appeals. The difficulty in defining exactly what those changes might be arises because no one knows what type of pay and classification system DHS will adopt. Thus, while we can say that any action taken against an employee must be for cause, the cause must be related to DHS mission. Cause in this context may include conduct or unacceptable performance, but performance-based actions must be based on a determination of unacceptable performance as measured against pre-established, objective performance standards. To consider eliminating the right or ability of DHS employees to hold management accountable to such a standard prior not only the decision of whether to change the pay, performance-evaluation, and classification, or how specifically it will be changed is irresponsible.

Pay System Alternatives for DHS

At every town hall meeting and in every focus group gatherings conducted by the Design Team, DHS employees were unanimous in their vehement rejection of supervisor-controlled “pay for performance.” No matter how the question was framed and, no matter which version of “pay for performance” was concerned, the message was the same. Federal employees, at DHS and elsewhere, are not in favor of replacing their current Congressionally-passed annual pay adjustment for a pay adjustment decided by their supervisor, nominally or actually based upon their individual performance.

DHS employees recognize the hype surrounding the promotion of pay for performance for what it is. They view the promise of higher pay in return for improved performance with disdain because they understand that it is a trap designed to exploit perceived resentment against so-called “poor performers” on the part of so-called “high performers.” The employees at DHS, whether they are employed in law enforcement at the border in an office processing requests for disaster assistance or anywhere in between, know that they must cooperate with their coworkers to be successful, not compete against them. They know that the mission of DHS is too important to cast aside in the pursuit of individual gain. And make no mistake: individual pay for performance makes looking out for oneself the highest priority, above teamwork, above mission, above the spirit of public service.

Just as important, managers and bargaining unit members alike emphasized that no systems exist that would allow individual pay for performance to be administered in a way that would be fair and based upon objective, measurable performance factors. They know that the General Schedule structure has been hugely successful in preventing pay discrimination based upon race, gender, or politics. They know that implementing a new pay system would not only breed confusion, resentment, antipathy, and fear; it would also divert scarce resources away from the vital job of protecting Americans from terror and other threats to their security.

AFGE has testified before this committee previously regarding the shortcomings of pay for performance, and cited the work of academic experts and the experience of both public and private sector employers who have abandoned their experiments with this fad.

This is not an endorsement of the status quo. AFGE has proposed improvements in the General Schedule and the current classification system. There is no reason why steps and grades cannot be added to the existing GS matrix, or why workers cannot be moved more rapidly through career ladders on the basis of performance in the GS. There is no reason why journeyman status

should mean the end of pay progression, or why the only alternative for high performing journeymen is a move into management.

Among the options regarding pay that were put before the Senior Review Committee were several categorized as either “time-focused” or “performance-focused.” AFGE considers the distinction between “time-focused” and “performance-focused” options to be a false dichotomy. In three of the so-called time-focused options, performance would have a significant impact on an employee’s pay. In the current debate over federal pay, taunting the GS with the charge that adjustments are more a function of passage of time than any other factor has taken the place of rational argument. Regardless of the politicized nature of the nomenclature coming out of the Design Team, the fact is that the current GS system, which is among the options, is performance-focused system since employees are only supposed to receive “within-grade increases” (WIGI) if they are performing up to certain, objective standards, and managers are supposed to reward superior employees with “quality step increases” (QSI). That the GS is not called performance-focused is evidence of both ideological bias and the fact that its performance related components have not been utilized by managers because they have not been funded. Renaming the system or merely making performance-related components even more dependent on dedicated appropriations will only make this problem worse.

In the absence of adequate funding, pay for performance degenerates. Indeed, in the Design Team deliberations, inadequate funding became a virtual assumption as various ways to implement a poorly funded or entirely unfunded system were contemplated. The ideas for implementing zero-sum, one worker's gain is another's loss, pay-for-performance were as follows:

- Require *forced distributions* – no more than a certain percentage of the workforce is eligible for high ratings and larger payouts. This approach skews ratings to fit the budget instead of measuring actual performance and providing an incentive to the entire workforce to excel. It also forces managers to make meaningless distinctions among employees whose performance is similar.
- Expand the number of high ratings given, but simultaneously lower the value of each. Although this is fairer, the benefits become too small to justify the efforts and problems associated with pay-for-performance. Further, if it is successful it will approach the pay distribution that characterizes the current GS. This outcome is both ironic and wasteful because administering pay for performance is far costlier and burdensome for agencies than the GS.
- Give below acceptable, or even acceptable employees no increase in order to pay others larger increases – this takes money out of the pockets of good employees to pay a few so-called stars – guaranteed to demoralize the majority of the workforce.

- Rotate who gets the outstanding rating and larger payout from year to year. This cynical approach tries to make the best of a bad system that forces meaningless distinctions among workers.
- Give one outstanding employee a larger amount because that employee is lower in the pay range or did not get a promotion recently, or is being pursued by another employer, or for some other reason *not* directly related to their performance. This is not pay for performance and employees should not be misled that they are under a system that rewards them for their performance if decisions actually will be made that have more to do with who is considered to be more important, or whose job is more difficult to fill or who is able to threaten a project by leaving.

One method premised on an assumption of inadequate funding is far less objectionable than the rest and has been called the “plug and play” pay for performance option. It is found in option number nine, and it is one that could be used in connection with any pay for performance option.

- Provide a pay adjustment to employees rated “fully successful” or better first. If and only if there is additional funding, additional pay adjustments should be granted to those rated “outstanding” and “excellent.” Further, the agency should only be allowed to differentiate among employees by performance and pay them different amounts if it has the money to do so.

Pay adjustments should not be granted under the banner of “pay for performance” if they are actually responses to recruitment or retention challenges.

This option says that if pay-for-performance is not specifically funded, an agency should not be permitted to distribute pay adjustments at will and call it pay-for-performance. This option acknowledges that the Congress authorized putting increased emphasis on performance in the distribution of federal pay adjustments but it did not authorize the distribution of federal pay adjustments merely as management sees fit.

Pay-for-Performance is not appropriate for all occupations, organizations or work cultures. If DHS must have some pay-for-performance, it should not make the mistake of trying to force it onto its entire workforce. A better idea would be to establish a basic pay structure DHS-wide, but allow for the methodology of pay progression to be negotiated on behalf of the various components and occupations. Negotiating over performance-based pay progression, at least where local or component management has discretion to determine the pay progression method is probably the only way to ensure that the plan is accepted and trusted by affected employees. Pay progression could be based on steps, on performance, on competencies, on gainsharing or a combination of one or more of these – whatever makes sense for the job and the work environment and is acceptable and affordable for management

Ability to Budget Less for Payroll Than the GS System

Sadly, some options allow DHS or its components to budget less than the amount that would be necessary to fund continuation of the GS system. Over time, this would lead to the overall erosion of federal pay as agencies try to make up budget shortfalls or mismanagement by cutting the pay of some or all of their employees. This could occur by having the agency freezing pay ranges rather than adjusting them by the amount of the rest of the federal system, or by refusing pay increases for employees who are rated “fully satisfactory” and below. AFGE will continue to advocate that DHS and its component agencies budget for the GS system if there is no explicit pay for performance beyond WIGI and QSI, and for additional appropriations to fund any explicit pay for performance program so that all employees who meet expectations receive an annual pay adjustment.

Performance Review Boards

Performance Review Boards (PRB) are featured in several options (nos. 5, 6, 7, 8, 11, 13, 23, and 24). In these options, PRBs are contemplated to consist of either managers only or a combination which may include frontline employees or union representatives. They may serve one or more purposes:

1. They oversee the performance evaluation system to ensure that ratings are fair. Several members of the Design Team seem to believe that such a board can greatly reduce or even eliminate the problem of favoritism, subjective appraisals, and different rating styles among different managers. The PRB would be able to adjust the ratings.

2. The PRB (or a Pay Pool Panel) could regulate performance-based payouts, making sure that one component does not get the lion's share of a pay pool. It might also make determinations about individual payouts that require parsing, how to distinguish between two outstanding employees on the basis of difficulty of assignments, timing of most recent promotion, or position in a band.

3. The PRB could also hear employee complaints about their ratings or payouts, in some cases before the ratings are actually issued. Some of the options offer no other appeals mechanism, either because there is a union representative on the PRB or because the board adjusted the ratings before they were issued and made them so perfect no appeals process is necessary.

4. Competencies and skills must be validated, including involvement of the employees themselves, in order to ensure that the right skills are being measured and measured correctly.

Internal boards such as these should never be permitted to take the place of the right to appeal to an external, impartial third party. While we have argued extensively above on this issue with regard to adverse actions, it is equally true regarding disputes over performance ratings that may have profound implications for an employee's pay. While a PRB may provide some oversight to a pay for performance system, there must be an opportunity for employees to hold to account any body that comes between the employee and supervisor, and the recommendations it may make. A supervisor could have been communicating all year long with an employee, assuring the employee that his or her work was excellent and that there would be a financial reward at the end of the year. In these options, the PRB could overrule the supervisor for reasons that were never communicated to the employee, thereby denying the employee the opportunity to adjust performance during the rating period in order to win a payout.

Competency-Focused Systems

As an alternative to subjective pay for performance systems that open the door to discrimination and political cronyism, competency or skills-based systems have some appeal for AFGE members. There is an acknowledgement that skills certification can be a far more objective way for an employee to advance or receive supplemental pay than by performance appraisal. Employees, especially those in law enforcement, are accustomed to the idea of skills requirements and

testing, and gaining certification of competency in areas such as marksmanship, foreign languages, and other necessary abilities. In fact, a true skills-based system is quite compatible with the kind of career development/career ladder system that AFGE favors.

In order for a career development/career ladder system based on competency to succeed, several conditions must hold:

1. Competency or skills-based systems require organizations committed to training and career development; they fail in organizations that cut training budgets and leave career development to chance.
2. Competency-based programs can suffer from the same problems that affect pay-for-performance. Unless there is collective bargaining to effect accountability, managers can manipulate training authorizations and job assignments to ensure that their cronies or favorites are able to jump ahead of others in gaining the skills that lead to higher pay.
3. "Skills" or "competencies" must have objective, concrete meaning. Trying to measure personal traits, behaviors or values is problematic and subjective, and that is what failed competency-focused systems attempt to do.

Conclusion

AFGE greatly appreciates the fact that the Subcommittee decided to hold this hearing. The authorities held by the president and the Secretary of DHS are extremely broad, and it will be important to the employees of the agencies and to taxpayers that the Congress maintain an ongoing oversight role with respect to the exercise of those authorities.

The stated rationale for extending such broad authority to the Executive branch regarding the labor relations and pay systems in DHS was the contention that the existing system might somehow interfere with domestic security and that extraordinary performers were not receiving adequate financial rewards. We

believe that both of those concerns can be accommodated by improvements in the labor relations and pay systems that entail neither the elimination of due process rights, nor a reduction in pay for DHS employees who perform well and do everything that is asked of them.

There is tremendous anxiety among the employees of DHS: They are concerned about political cronyism in pay, hiring, and adverse actions if some of the options that were presented to the Senior Review Committee are adopted. They are

concerned about whether their elected union representatives will retain its ability to represent them. They are concerned that they will be asked to continue to put their lives on the line every day for an agency that refuses to reciprocate their loyalty by paying them fairly and allowing them to exercise their democratic rights.

This concludes my statement, and I will be happy to answer any questions the members of the Subcommittee may have.