National Treasury Employees Union

TESTIMONY OF NTEU NATIONAL PRESIDENT COLLEEN M. KELLEY

ON

"THE COUNTDOWN TO COMPLETION: IMPLEMENTING THE NEW DEPARTMENT OF HOMELAND SECURITY PERSONNEL SYSTEM

BEFORE THE

THE HOUSE GOVERNMENT REFORM COMMITTEE
SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

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Chairman Porter, Ranking Member Davis, I would like to thank the subcommittee for the opportunity to testify on the final human resources management regulations for the Department of Homeland Security (DHS) that were published on February 1 in the Federal Register.

As President of the National Treasury Employees Union (NTEU), I have the honor of representing over 150,000 federal employees, 15,000 of whom are part of the Department of Homeland Security (DHS). I was 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. NTEU was also a part of the statutorily mandated "meet and confer" process with DHS and OPM from June through August 2004.

It is unfortunate that after two years of "collaborating" with DHS and OPM on a new personnel system for DHS employees that I come before the subcommittee unable to support the final regulations. While some positive changes were made because of the collaboration between the federal employee representatives and DHS and OPM during the meet and confer process, NTEU is extremely disappointed that the final regulations fall woefully short on a number of the Homeland Security Act's (HSA) statutory mandates. The most important being the mandates that DHS employees may, "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them,"(5 U.S.C. 9701 (b)(4)) as well as the mandate that any

changes to the current adverse action procedures must "further the fair, efficient and expeditious resolutions of matters involving the employees of the Department." (5 U.S.C. 9701 (f)(2)(C)).

Because the final personnel regulations failed to meet the statutory requirements of the HSA in the areas of collective bargaining, and appeal rights, NTEU, along with fellow federal employee unions AFGE, NFFE and NAAE has filed a lawsuit in Federal court. The lawsuit seeks to prevent DHS and OPM from implementing the final regulations related to these areas and would order DHS and OPM to withdraw the regulations and issue new regulations, after appropriate collaboration with the unions, that fully comply with the relevant statutes.

NTEU and other employee unions put in countless hours over the last two years offering numerous common sense proposals in the areas of collective bargaining, streamlining employee appeals and modernizing the current GS pay system, aimed at giving DHS the flexibility it believes it needs to fulfill its new missions while preserving the rights of employees. NTEU believes there was a unique opportunity lost by the decision of DHS and Office of Personnel Management (OPM) officials to reject these common sense proposals that would have preserved employees' rights and enabled DHS to act swiftly in order to protect homeland security. Instead, the final personnel regulations will create an environment of mistrust and uncertainty for the over 110,000 DHS employees that the regulations will cover.

As the subcommittee is aware, the HSA allowed the DHS Secretary and the OPM Director to make changes in certain sections of Title 5 that have governed the employment rights of federal employees for over 20 years. I will focus my comments on three areas of the final personnel regulations that fall short of protecting federal employees' rights: labor relations/collective bargaining, due process rights, and the pay for performance system.

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 final regulations do not meet this statutory requirement in the following ways.

No Independent Third Party Review of Collective Bargaining Disputes

Under the final personnel regulations, the responsibility for deciding collective bargaining disputes will lie with a three-member DHS Labor Relations Board appointed by the Secretary of the Department of Homeland Security. Senate confirmation will not be required, nor is political diversity required among the Board members. Currently, throughout the federal government, collective bargaining disputes are decided by the Federal Labor Relations Authority (FLRA), an independent body appointed by the President and confirmed by the Senate. A true system of collective bargaining demands independent third party determination of disputes. The final 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 the Secretary's actions.

Drastic Reductions in Negotiability Rights

Under the final regulations, not only will management rights associated with operational matters (subjects that include deployment of personnel, assignment of work, and the use of technology) be non-negotiable, but even the impact and implementation of most management actions will be non-negotiable. In other words, employee representatives will no longer be able to bargain on behalf of employees concerning the procedures that will be followed when DHS management changes basic conditions of work, such as employees' rotation between different shifts or posts of duty, or scheduling of days off.

Non-Negotiability Over Department-Wide Regulations

The final regulations further reduce DHS' obligation to collectively bargain over the already narrowed scope of negotiable matters by making department-wide regulations non-negotiable. Bargaining is currently precluded only over government-wide regulations and agency regulations for which a "compelling need" exists. The new DHS personnel system would allow management to void existing collective bargaining agreements, and render matters non-negotiable, simply by issuing a department-wide regulation.

A real life example of the adverse effect of the negotiability limitations on both employees and the agency 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 such criteria as seniority, expertise, volunteers, or a number of other factors.

CBP Officers around the country have overwhelmingly supported this method for determining their work schedules for a number of reasons. One, it provides employees with a transparent and credible system for determining how they will be chosen for a shift. They may not like management's decision that they have to work the midnight shift but the process is credible and both sides can agree to its implementation. Two, it takes into consideration lifestyle issues of individual officers, such as single parents with day care needs, employees taking care of sick family members or officers who prefer to work night shifts. The new personnel system's elimination of employee input into this type of routine workplace decision-making will have a negative impact on morale.

Based on the elimination of independent third party review of disputes described above, coupled with the drastic limitations to collective bargaining rights, 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," which is why NTEU strongly opposes the final regulations and urges Congress to make changes to ensure that the statutory directives of the HSA are met.

MSPB APPEALS PROCESS DRASTICALLY CHANGED

One of the core statutory underpinnings of the HSA was Congress' determination that DHS employees be afforded due process and that they be treated in a fair manner in appeals they bring before the agency. In fact, the HSA clearly states that the DHS Secretary and OPM Director may modify the current appeals procedures of Title 5, Chapter 77, only in order to, "further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." (5U.S.C. 9701 (f)(2)(C)). Instead the final regulations undermine this statutory provision in a number of ways.

The final regulations undercut the fairness of the appeals process for DHS employees by eliminating 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 now only be authorized to modify agency-imposed penalties under very limited circumstances where the penalty is "wholly unjustified," a standard that will be virtually impossible for DHS employees to meet.

FLRA AND MSPB GIVEN NEW AUTHORITY NOT AUTHORIZED BY LAW

The final regulations exceed the authority given in the HSA to the Secretary and OPM Director, by giving the FLRA and the MSPB new duties and rules of operation not set by statute.

The FLRA and the MSPB are independent agencies, and DHS and OPM are not authorized to impose obligations on either independent agency, or dictate how they will exercise their jurisdiction over collective bargaining and other personnel matters. In the final regulations, the FLRA is assigned new duties to act as an adjudicator of disputes that arise under the new labor relations system and the regulations also dictate which disputes the FLRA will address and how they will address them.

In addition, the final regulations conscript the Merit System Protection Board as an appellate body to review, on a deferential basis, findings of the new Mandatory Removal Panel (MRP). Chapter 12 of Title 5, which sets out MSPB's jurisdiction, does not authorize this kind of action by the Board and the DHS Secretary and OPM Director are not empowered to authorize it through regulation. A similar appellate role is given to the FLRA. It is tasked with reviewing decisions of the Homeland Security Labor Relations Board (HSLRB) on a deferential basis. There is no authority for assigning such a role to the FLRA.

ADDITIONAL PROBLEMS WITH FINAL REGULATIONS

Mandatory Removal Offenses

The final regulations provide the Secretary with unfettered discretion to create a list of Mandatory Removal Offenses (MRO) that will only be appealable on the merits to an internal DHS Mandatory Removal Panel (MRP) appointed by the Secretary.

The final regulations include a preliminary list of seven potential mandatory removal offenses but are not the exclusive list of offenses. The final regulations also

provide that the Secretary can add or subtract MRO's by the use of the Department's implementing directive mechanism and that the Secretary has the sole, exclusive, and unreviewable discretion to mitigate a removal penalty.

The President's FY 2006 budget again includes a proposal to drop the mandatory removal provisions known as the "10 deadly sins" applicable to IRS employees. This similar provision should also be dropped.

By going far beyond the statutory parameters of the HSA, and drastically altering the collective bargaining, due process and appeal rights of DHS personnel, these regulations will leave employees with little or no confidence that they will be treated fairly by the agency, which is why NTEU strongly opposes the final regulations and urges Congress to make changes to protect the rights of federal employees in DHS.

Pay:

While not a part of the lawsuit filed by NTEU and other federal employee representatives, the final regulations as they relate to changes in the current pay, performance and classification systems of DHS employees must be brought to the attention of this subcommittee. While the final regulations lay out the general concepts of the new base pay system, they remain woefully short on details. While NTEU was heartened to see that employee representatives will be able to provide minimal "consultation" as part of the agency's Compensation Committee that will formulate the

implementing pay directives, we believe that there is a greater role for employee representatives to play in the areas of pay, classification and performance appraisals.

Too many of the key features of the new system have yet to be determined. The final regulations make clear that the agency will be fleshing out the system's details in management-issued implementing directives while using an expensive outside contractor that will cost the agency tens of millions of dollars that could be used for additional front line personnel. Among the important features yet to be determined by the agency are the grouping of jobs into occupational clusters, the establishment of pay bands for each cluster, the establishment of how market surveys will be used to set pay bands, how locality pay will be set for each locality and occupation, and how different rates of performance-based pay will be determined for the varying levels of performance.

As part of the design and meet and confer processes, DHS conducted a number of town hall and focus group meetings around the country 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. DHS employees were overwhelmingly opposed to changing the General Schedule (GS) system. In addition, when the proposed regulations were released in early 2004, over 3,800 comments were submitted in response to the proposed pay for performance system and the vast majority strongly urged the Department not to abandon the GS basic pay system.

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, before any changes are made to tie employees' pay to performance ratings, DHS must implement, evaluate, and possibly modify a fair and effective performance system. The linking of basic pay increases to annual performance ratings will be particularly problematic for the tens of thousands of DHS employees who perform law enforcement duties. To date, no information has ever been produced to show that the new "pay band" system will enhance the efficiency of the department's operations particularly in a law enforcement setting.

Finally, any new pay for performance system must be adequately funded. Performance based pay and other types of new pay supplements described in the final regulations must not be funded with money that would have been used to provide GS increases for all DHS employees. By not properly funding any new pay for performance system, Congress in conjunction with DHS, runs the very real risk of rewarding a select few, based on the new pay system, at the expense of the majority of employees who do a solid job, thereby creating an atmosphere of distrust among the workforce.

NTEU Survey of DHS Employees:

To get more information from DHS front-line border protection personnel about the new regulations, NTEU conducted an online survey at our DHS website. While this was not a scientifically structured survey over 300 responses were recorded. The results from this survey

raise serious questions about the impact of these new regulations on the department's ability to recruit and retain the top notch personnel necessary to accomplish the critical missions that keep our country safe.

Some of the more telling highlights from those employees who responded to the survey include the following:

- 65% of employees do not believe U.S. borders are more secure than before September 11th
- 65% of employees would not recommend a job at CBP to friends or family
- 80% of employees report their morale has dropped in the last year
- 88% of employees do not support the proposed new pay system
- 88% of employees named better management as the top measure needed to improve homeland security

In addition, respondents to the survey were able to leave comments in their own words. I would like to share a sampling of them with the committee:

- "Only the "good old boys" will get pay increases."
- "Favoritism is not A-OK. Work assignments, locations, hours. TDY's training etc… are all completely up to management. If you're in favor, you get the goodies. If you are out of favor, you get nothing. There is a reason the union came to be: workers needed protection from unfair, abusive management practices."

- "We will not be protected. We can be hired, fired, transferred, demoted at will. That kind of insecurity will destroy the Service."
- "Employees are very intimidated and feel they will be fired without recourse."

If the agency's goal is to build a workforce that feels both valued and respected, the results from NTEU's survey clearly show that the agency needs to make major changes before it fully implements the final personnel regulations. For employees to successfully accomplish their homeland security missions they need to believe that the personnel system they are under is fair, credible and transparent; the final DHS personnel regulations do not meet these standards.

Conclusion

While NTEU would have preferred to be able to support the final regulations, we will continue to fully support the mission and personnel of the Department of Homeland Security. 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 very disappointed with the results. It is unfortunate that the final regulations place excessive limits on employees' collective bargaining rights, drastically alter the appeals process for DHS employees, and provide too few details for a major overhaul of employee pay, performance and classification systems. Again, NTEU strongly believes that changes are needed in these regulations 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.

NTEU would also like to strongly caution both Congress and the Administration against extending throughout the federal government, the new DHS personnel regulations. Congress approved the creation of the Homeland Security Act under the principle that a new human resources system was required for the Department of Homeland Security because of its national security missions. While we disagree with that proposition, it simply does not apply to the rest of the federal government. To extend the provisions of the DHS personnel system that severely curtails employees' collective bargaining rights, denies employees fair treatment in their appeals, and moves hundreds of thousands of employees from the GS schedule to an unproven and undefined pay, performance and classification system would be ill-advised, and NTEU will vigorously oppose any efforts by the Administration to do so.

Again, I would like to thank the committee for the opportunity to be here today on behalf of the 150,000 employees represented by NTEU to discuss these extremely important federal employee issues as part of the final DHS regulations.