

Bargaining Set by Regulation [30]

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

Summary Description:

This option would fix conditions of employment and set the scope and duty to bargain through regulations issued under the collaborative process established by the Homeland Security. Unions will have pre-decisional involvement as well as the right to bargain over substantive matters and applicable procedures and arrangements for bargaining unit employees to the extent not determined by the DHS Human Resource Management System and other applicable laws/regulations.

An Ombudsman or other internal office would serve as the DHS labor relations dispute resolution entity. This Office reports directly to the Office of the Secretary and is responsible for resolution of issues pertaining to employee and union rights including grievances and unfair labor practice allegations; assistance in resolving negotiation impasses if DHS believes it would be beneficial; providing bargaining unit determinations consistent with the Homeland Security Act; and conducting elections/certifying (decertifying) union representation.

Key Features:

Bargaining:

- Establishment of conditions of employment:
 - Initial establishment via Homeland Security Act process of notice, comment, and recommendation (limited to national level); provides for pre-decisional union involvement.
 - If establishment of a condition of employment is not otherwise covered by the parameters of the initial process, bargaining may occur to the extent the matter is within the discretion of the particular Bureau, i.e., delegated by the Secretary, not covered by or contrary to law or regulation (including any management rights and/or negotiability limitations adopted under the DHS Human Resource Management System pursuant to 5 USC § 9701(b)(4) and (e)(1),(2)).
 - Secretary maintains sole and unreviewable discretion to implement.
 - No union-initiated mid-term bargaining other than impact and implementation as indicated below.
- Impact and implementation of changes to conditions of employment:
 - Impact and implementation bargaining only to the extent not covered by the regulations establishing conditions of employment.
 - Proposals are negotiable to the extent they do not *directly* interfere with the exercise of a DHS management right.
 - Timeframes:
 - Bureau Head or designee determines when negotiations occur, i.e., pre/post – implementation based on unreviewable determination of mission requirements.
 - Regardless of timing of negotiations, notice to Union contemporaneous with announcement to employees; conclude bargaining within 15 workdays of announcement, unless mutually waived; no delay in implementation.

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Dispute Resolution Entity:

An independent Ombudsman's Office will administer the Labor Relations dispute process and serve as a one-stop shop for purposes of resolving grievances, unfair labor practice complaints, bargaining impasses and representational issues, i.e., unit determinations and elections.

Sub-options:

Impasse resolution: In lieu of Ombudsman assistance, management may elect to implement its last, best offer at the bargaining table.

Relation to Other Options:

Consistent with statutory framework; provides focus on efficient accomplishment of DHS mission – optimal companion for facilitation of the implementation and administration of substantive options pertaining to pay, classification, and performance management.

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

Possible Advantages/Benefits

- Eliminates outside third party; maintains objectivity and accountability.
 - Could result in significant time and cost savings (once Ombudsman Office is up and running).
 - "One stop shopping" for LR issues.
- Could enhance management flexibility to act as necessary consistent with mission requirements.
- Could clarify management, union and employee rights; should provide method of eliminating future confusion through regulatory process.
- Could facilitate timely implementation of workplace decisions.

Possible Problems/Challenges

- Unions will resist limits on current scope and duty to bargain, management-appointed panels, bargaining unit coverage through agency regulation, and any system that makes DHS regulations nonnegotiable and gives the Secretary discretion to waive bargaining obligations and contracts; unions will maintain that such systems lack credibility, independence and objectivity.
- Having Department-level DHS Ombudsman/employee investigate and adjudicate grievances would result in a system that might raise concerns about objectivity, independence and credibility. These potential problems would be exacerbated if the decisions of this office turn out to be unreviewable.
- "Most appropriate unit" standard has no precedence in law; concerns were also raised about its impact on employee self-determination.
- Making unions subject to the same standards of conduct regardless of their representational status may have a chilling effect on the ability of union representatives to perform their duties; allowing the Department to issue standards for employee representatives and official time might be viewed as lacking credibility.
- To the extent this option would provide collective bargaining rights for employees of the United States Secret Service, it could result in an adverse impact on national security; labor relations obligations

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might require disclosure to unions of information that is either classified or law enforcement sensitive, which would likely result in operational security concerns.

- Eliminating the FLRA General Counsel function might have a chilling effect on the filing of meritorious ULP's if the charging party lacks the resources to prosecute its own case.
- Limitation of midterm bargaining might result in more complicated term bargaining and less accountability for agency actions with respect to conditions of employment
 - The Ombudsman's Office is an internal process and lacks independence
 - Substance bargaining only occurs at the election of the agency and might eliminate meaningful employee participation in setting conditions of work

Other Implications

- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Costs

Initial start-up costs attendant to establishment of Ombudsman Office, i.e., recruitment, training.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

As its primary objective, this Option is mission-centered. Recognizes the right of the Secretary to make substantive and procedural decisions based on mission requirements.

Performance Focused

Option recognizes collaborative nature of system design.

Contemporary and Excellent

Consistent with requirement that enables DHS to be responsive to changing mission requirements.

Generates Respect and Trust

Establishment of Ombudsman Office established as an independent arbiter for resolving labor-management relations as well as employee relations disputes. Maintains credibility by reporting directly to Office of the Secretary.

Pursuant to statutory mandate, conditions of employment established through notice and recommendation process. Generally, collective bargaining supplements system to extent conditions not established through regulation.

Based on Merit System Principles and Fairness

Provides for fair treatment of employees and expeditious handling/resolution of matters involving DHS employees.

Transition and Implementation:

See Costs above re: establishment of Ombudsman Office.

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

B		Labor Relations Elements
System elements:		Summary description:
1	Administration	<p>DHS Ombudsman Office or other internal mechanism will:</p> <ul style="list-style-type: none"> • Consist of a cadre of DHS employees at the Departmental level. • Investigate and adjudicate ULPs; serve as an appeal body in the event of information request disputes. • Determine the appropriateness of bargaining units and adjustment thereto consistent with standards set forth in the Homeland Security Act. • Resolve negotiation impasses both as to the merits and negotiability disputes. • Investigate and adjudicate grievances. <p>Final decisions by Ombudsman subject to review within the Office of the Secretary; no judicial review or administrative review outside DHS unless otherwise mandated by law.</p>
2	Employee Rights	DHS/OPM to issue Department-wide standards of conduct for employee representatives as well as guidelines for official time.
3	Union Rights and Obligations	<p>As an exclusive representative of an appropriate unit of employees, a certified labor organization has the following rights and obligations:</p> <ul style="list-style-type: none"> • Bargain to the extent allowed by law and regulation, i.e., applicable government-wide regulations and OPM/DHS-established HR System. • Right to notice of meetings conducted by DHS management where attendance of bargaining unit employees is mandatory and conditions of employment are to be discussed (does not include regular staff meetings or other employee work group meetings). The representative may ask questions following the conclusion of any management presentation and briefly state the union's position. • At employee's request, send a representative to a Weingarten interview conducted by DHS management unless Bureau Head or designee determines that such presence could compromise national security or otherwise interfere with the accomplishment of the DHS mission. The representative may not cause a delay in the interview unless agreed to by management and may not speak for the employee or disrupt the meeting. • Existing information, maintained by DHS and demonstrated by the Union to be necessary in order to represent an employee(s) or represent the bargaining unit in negotiations. <p>Does not include the following:</p> <ul style="list-style-type: none"> ✓ Disclosure prohibited by law. ✓ Internal management guidance re: labor and/or employee

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		<p>relations.</p> <ul style="list-style-type: none"> ✓ Disclosure in the event of a management determination that it could compromise national security, employee security or otherwise interfere with the accomplishment of the DHS mission. ✓ Home addresses, telephone numbers, e-mail addresses or any other information facilitating communication with employees outside the workplace. ✓ Providing otherwise necessary information in the event that DHS management, in consultation with the DHS Ombudsman, determines that such production would place undue burden on Department resources. In this event, management will seek to offer a random sampling or other alternative acceptable to the union. <ul style="list-style-type: none"> • Any labor organization certified to represent DHS employees must provide the same level of representation to all employees regardless of labor organization membership. • Employee representatives are subject to the same standards of conduct as any other employee whether they are serving in their representative capacity or not.
4	Management Rights	Consistent with 5 USC § 7106 (a) and (b)(1). Additionally, Secretary or designee may determine that a particular subject is non-negotiable if such negotiations would interfere with the efficient accomplishment of the DHS mission.
5	Bargaining Units	<p>Determined by Ombudsman Office consistent with applicable provisions of Section 842 of the Homeland Security Act.</p> <p>Initial bargaining unit determinations made on the basis of whether the petitioned for unit is the "most appropriate."</p>
6	Negotiations	<ul style="list-style-type: none"> • Bargain to the extent allowed by law and regulation, i.e., applicable government-wide regulations and OPM/DHS-established Human Resource Management System. • The Secretary may suspend any collective bargaining provision upon a determination that such provision will interfere with the accomplishment of the DHS mission.
7	Unfair Labor Practices	<ul style="list-style-type: none"> • ULPs to follow model of 5 USC § 7116 (e.g., drop references to 7116 (a)(6)-(8)). • Ombudsman or other internal office will investigate and adjudicate alleged ULPs / grievances; administrative preference to conduct interviews/gather relevant documentation, take statements, and/or convene mediations (no right to an evidentiary hearing except in the case of terminations; otherwise, hearings conducted only if determined to be necessary by Ombudsman). • Ombudsman decisions are subject to review within the Office of the
8	Grievance/Arbitration	

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		Secretary; no judicial review or administrative review outside DHS unless otherwise mandated by law.
9	Dues Allotment	<ul style="list-style-type: none"> • Dues withholding—based on voluntary allotments by employees—allowed at the exclusive union’s request at no charge to the employee or labor organization; • Allotments are revocable at the employee’s election (two pay period notice).
10	Official Time	<p>Official time rules to be established through DHS/OPM Human Resource Management System:</p> <ul style="list-style-type: none"> ✓ Adopt 5 USC 7131(a) and (b). ✓ “Reasonable time standard” for purposes of representation in connection with investigation of grievances (include substantive guidelines). ✓ Include method of accountability for the employee representative.
11	Evaluation	<ul style="list-style-type: none"> • OPM audits system on a periodic basis through meetings with stakeholders, i.e., HR/line mgrs; Union reps; and Ombudsman Office. • OPM issues post-audit report to include findings on the various program elements and recommendations for adjustments.