

## Streamlined Process and Strict Liability Violations [41]

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 provides for a single and significantly streamlined process for taking both adverse actions and unacceptable performance actions.
- Employee coverage is limited.
- Designated DHS "strict liability" violations carry a presumed mandatory removal penalty unless mitigated by the Secretary upon recommendation by a DHS Review Board.
- Use of probationary periods is expanded.

**Note:** Whenever "Secretary" is used throughout this Option, it should be understood to include "or designee."

### Key Features:

- Provides for a single and significantly streamlined process for taking both adverse actions and unacceptable performance actions. Actions could be taken as soon as 6 days after a proposal is issued.
- Due process, including advance notice, right to representation, right to reply, a decision notice, and an appeal right, is afforded covered employees (non probationary permanent employees).
- Covered actions are suspensions, reductions in grade/band/pay, and removals.
- Designated DHS "strict liability" charges carry a presumed mandatory removal penalty unless mitigated by the Secretary.
- An internal DHS Review Board is established by the Secretary to review and make recommendations to the Secretary on whether removal or a mitigated penalty should be imposed for "strict liability violation" charges.
- Probationary periods can be extended to 2 years for certain occupations.
- Employees must serve a 1-year trial period when placed in a higher grade/band/pay position or a supervisory position.

### Sub-Options:

- Internal DHS Review Board could operate as a single centralized entity or multiple organizational component Boards could be used.

### Relation to Other Options:

- This option is intended to work with the appeals process described below, but could work with any streamlined appeals options.

**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.):

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### Possible Advantages/Benefits

- Provide a simple, single, streamlined process for handling employee misconduct and poor performance.
- Establishment of “strict liability violations” and the internal procedure for handling them provides DHS with a strong mechanism for ensuring alignment of adverse action system with agency mission.
- Use of 2-year probationary period and 1-year trial period permits DHS to ensure that employees perform duties appropriate to their abilities.

### Possible Disadvantages/Challenges

- Curtailing of rights for may lead to an increase in grievances, lowering of workplace morale, and diversion of attention away from job duties.
- Strict liability offenses may be overly broad.
- Multiple trial periods may be difficult to administer.
- Extended probationary period will deny due process even though the extension may not be necessary.

### Other Implications

- Extending length of probationary period to 2 years will require OPM issuance of revised regulations.
- Procedure for handling probationary employee terminations will require OPM issuance of revised regulations.
- Effective implementation of “strict liability violation” provision will require that all employees and supervisors be well and frequently informed of requirements.

### Other Implications

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

### Cost

- Establishment of internal DHS Review Board will require allocation of administrative resources.

### Evaluation in Terms of Guiding/Design Principles:

#### Mission Centered

- Establishment of “strict liability violations” and the internal procedure for handling them provides DHS with a strong mechanism for ensuring alignment of adverse action system with agency mission.
- Use of 2-year probationary period and 1-year trial period permits DHS to ensure that employees perform duties appropriate to their abilities.

#### Performance Focused

- Use of 2-year probationary period and 1-year trial period permits DHS to ensure that employees perform duties appropriate to their abilities.
- Simple and quick process supports for holding both employees and managers accountable.

#### Contemporary and Excellent

- Provides a simple and quick process that is mission sensitive and effective in handling employee misconduct and poor performance.

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### Generate Trust and Respect

- Process is simple and quick, yet provides a rational way to handle employee misconduct and poor performance.

### Based on Merit System Principles and Fairness

- Provides adequate due process.

### Transition & Implementation:

- A critical transition issue will how and when to align current labor contracts with new system requirements. For example, current negotiated grievance procedures may need to be revised to incorporate revised procedures for non-covered employees.

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

D Discipline/Adverse Action System	
System elements:	Summary description:
<p>1</p> <p><b>Coverage</b></p> <ul style="list-style-type: none"> <li>- Employees</li> <li>- Actions</li> <li>- Probationary/trial period</li> </ul>	<ul style="list-style-type: none"> <li>• Permanent DHS employees who have completed a required probationary period (1 or 2 years) are covered. Length of probationary period is either 1 or 2 years depending upon the requirements of the position.</li> <li>• Permanent DHS excepted service employees who have completed a required 2 year probationary period are covered.</li> <li>• Actions covered are suspensions of any length, reductions in grade/pay/band, and removals – whether taken for misconduct and/or performance reasons.</li> <li>• Employees must serve a 1-year trial period when placed into a position at a higher grade/pay/band or into a supervisory position. Poor performance and/or misconduct during this trial period will result in the return of the employee to the original grade/pay/band or to an equivalent level non-supervisory position. Decisions will be made in writing and issued through the supervisory chain.</li> <li>• Reprimands and other non-disciplinary actions may be issued by immediate supervisors to any DHS employee.</li> </ul>
<p>2</p> <p><b>Basic Process</b></p> <ul style="list-style-type: none"> <li>- Advance notice</li> <li>- Reply opportunity</li> <li>- Rep. right</li> <li>- Decision</li> <li>- Timeframes</li> <li>- Cause</li> </ul>	<ul style="list-style-type: none"> <li>• Single procedure for handling misconduct and unacceptable performance.</li> <li>• Actions will be taken “for such cause as will promote the efficiency of the service.”</li> <li>• Proposal is issued through the chain-of-command giving employee at least 5 calendar days to respond orally and/or in writing to a deciding official who is at a higher level than the proposing official.</li> <li>• Employee may be represented in delivering the response.</li> <li>• Decisions can be issued and made effective at any time after due consideration of any response or after the due date for responding has passed. However, see <u>Note 1</u> below.</li> </ul> <p><b>Note 1:</b> When an employee is charged with a designated “strict liability violation” which carries a presumed mandatory removal penalty, the deciding official makes a determination after the employee’s response or after the due date for responding has passed, as to whether the charge has been established. Once that determination is made, the case is referred to an internal DHS Review Board (<u>or</u> multiple organizational component Boards) which assesses within 5 calendar days whether the presumed mandatory removal penalty should be mitigated and if so, how. The Board makes a recommendation to the Secretary, who determines, in his/her sole and unreviewable discretion, whether mitigation should occur. The deciding official implements the Secretary’s determination by issuing a written notice to the employee.</p> <p><b>Note 2:</b> Non-covered employees, i.e., nonpermanent employees or permanent employees who have not completed a required probationary period, may be suspended, reduced in grade/pay/band, or removed through issuance of a written notice provided, if possible, in advance.</p>

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D		Discipline/Adverse Action System
System elements:		Summary description:
3	<b>Evaluation</b>	<ul style="list-style-type: none"> <li>• DHS HR Office conducts quantitative and quality review of records to assess:               <ul style="list-style-type: none"> <li>➤ Timeliness of case processing.</li> <li>➤ Understanding of system by managers and employees.</li> <li>➤ Adherence to procedural requirements.</li> <li>➤ Penalty consistency.</li> <li>➤ Effectiveness of handling "strict liability violations."</li> </ul> </li> </ul>

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### Summary Description:

#### **Streamlined 2-step contracted process with limited MSPB review:**

- Provides the exclusive resolution process for appeals by bargaining unit and non-bargaining unit covered employees. Covered actions are suspensions over 30 days, reductions in grade/band/pay and removals.
- Contracted arbitrators and a contracted panel comprised of Merit System Protection Board (MPSB) judges are authorized to review appealed actions. Processes are very streamlined.
- Actions based on "strict liability violation" charges are not appealable, to the extent consistent with law.

**Note:** Whenever "Secretary" is used throughout this Option, it should be understood to include "or designee."

### Key Features:

- Provides the exclusive resolution process for appeals by bargaining unit and non-bargaining unit covered employees. Covered employees are permanent DHS employees (competitive and excepted service) who have completed a required probationary period. Covered actions are suspensions over 30 days, reductions in grade/band/pay and removals. Time frames for filing and adjudicating appeals are short.
- An independent arbitrator (contracted) is authorized to review appealable actions. Arbitrators are selected bilaterally with unions. Hearing process is very streamlined.
- A panel of MSPB judges (contracted) is authorized to review arbitrator decisions on the record. The review process is very streamlined.
- Actions based on a "strict liability violation" are not appealable, to the extent consistent with law.
- Non-covered actions and/or non-covered employees may grieve through the administrative grievance procedure (AGP) or negotiated grievance procedure (NGP), as appropriate. In the latter case, appeals to an arbitrator are permitted but may not proceed further to the MSPB panel.

### Sub-options:

- Bilaterally identified list of arbitrators will hear appeals from unit and non-unit employees or management will develop a separate list of arbitrators to hear non-unit employee appeals.
- Arbitrator decisions may be appealed by either party to a standing or ad hoc DHS panel of judges from the MSPB. **Multiple panels** may be established to serve specific DHS geographic locations or DHS organizational components.
- Passing over an arbitrator who is unavailable is permitted or the 25-day time frame could be extended by mutual agreement of the parties.
- The MSPB panel must give due deference to the arbitrator's decision and review it only on the bases of arbitrator bias or harmful procedural error, and consistency with law, regulation and rule or the panel's review will assume DHS good faith and apply an arbitrary and capricious standard.

### Relation to Other Options:

This option is intended to work with the preceding Adverse Action option; however, it could fit with other similarly streamlined Adverse Action options.

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**Implications** (This section contains "possible advantages/benefits" and "possible disadvantages/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

- Establishing a single exclusive process for appeals (process covers performance and conduct actions as well as actions affecting bargaining and non-bargaining unit employees) could greatly simplify dispute resolution.
- Short time frames for filing and adjudicating appeals could result in more expeditious decisions.
- Use of arbitrators and MSPB judges provides a 2 step external due process review for most actions.
- Use of contracted arbitrators and MSPB judges could permit efficient development of processing rules.
- Eliminating mitigation as a possible appellate outcome could preserve DHS authority to make penalty determinations.
- Making actions based on a "strict liability violation" non appealable could preserve DHS authority to ensure national security and mission accomplishment.
- Attempts to balance due process rights of employees with need on Department to take swift action for certain offenses

### Possible Disadvantages/Challenges

- Curtailing of rights for might lead to an increase in grievances, lowering of workplace morale, and diversion of attention away from job duties.
- Grievances from non-covered employees and/or on non-covered actions which are heard by an arbitrator but are not reviewable by the MSPB panel might eliminate a current avenue for pursuing exceptions to arbitrator rulings.
- Passing over an arbitrator due to unavailability could result in decreased use of top-notch arbitrators unless extensions of time are permitted (see sub option above.)
- Shared costs of arbitration could be perceived as unfair to unions and unit employees in that unrepresented employees will have their arbitration costs absorbed by DHS while unions will have to pick up half of such costs for unit employees. Consequently, if unions decline to take cases to arbitration, unit employees will have been deprived of an appeal avenue. Also, sharing of arbitration costs for unit employee appeals may be perceived as discriminatory based on unit membership.
- No penalty mitigation might result in unnecessarily harsh decisions.
- Might establish insufficient "checks and balances", e.g., changing burden of proof to substantial evidence.
- Lack of judicial review may be inconsistent with requirement for due process.
- Does not provide for a longer probationary period for USSS employees performing duties related to the protection of US officials. Should provide a probationary period upon entry into any position which requires firearms use/training.
- Strict liability violations might paralyze employees from making decisions

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- Change in burden of proof might be perceived as favoring management
- No mitigation might result in unnecessarily harsh decisions
- Process might become too broad and go beyond national security offences
- Multiple probationary periods might be difficult to administer

### Other Implications

- Use of contracted arbitrators and MSPB judges will require exploration of procurement rules as well as MSPB concurrence and cooperation.
- Using a bilaterally identified list of arbitrators to hear appeals may create concern among non-unit employees especially management officials. The bilateral list may need to be supplemented by a list of management identified arbitrators to hear non-unit employee appeals (see sub option above.)
- Procedure for handling probationary employee termination appeals will require OPM issuance of revised regulations.
- Grievances from non-covered employees and/or on non-covered actions which are reviewed by an arbitrator may require an opportunity for additional judicial review (albeit on very limited grounds, e.g., that the award is contrary to law.)
- Evaluation will be particularly critical to ensure that employee rights are not unduly compromised by the limited appeal rights described in this Option.

### Cost

- Establishment of internal DHS Office of Appeals will require allocation of administrative resources.

### Evaluation in Terms of Guiding/Design Principles:

#### Mission-Centered

- Non-appealability of "strict liability violation" actions provides DHS with mechanism for ensuring alignment of appeals process with agency mission.
- Eliminating mitigation as a possible appellate outcome preserves DHS authority to make penalty determinations.

#### Performance Focused

- Simple and quick appeals process supports holding both employees and managers accountable.

#### Contemporary and Excellent

- Provides a simple and quick process that is mission sensitive and effective in handling employee appeals.

#### Generates Respect and Trust

- Process is simple and quick, yet provides a rational way to handle employee appeals.

#### Based on Merit System Principles and Fairness

- Provides adequate due process.

### Transition & Implementation:

- A critical transition issue is how and when to align current labor contracts with new system requirements. For example, current negotiated grievance procedures will require replacement of contractual arbitration process with the arbitration process described in this Option.

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### Detailed Description By System Component and System Element

B		Appeals
System elements:		Summary description:
1	Coverage	<ul style="list-style-type: none"> <li>• Provides the exclusive resolution process for bargaining unit and non-bargaining unit employee appeals of covered actions (permanent DHS employees (including excepted service employees) who have completed required probationary periods <u>and</u> who have been affected by a suspension over 30 days, reduction in grade/band/pay, or removal.</li> <li>• Actions based on a “strict liability violation” are not appealable, to the extent consistent with law.</li> <li>• Non-covered actions (suspensions of 30 days or less, all lesser discipline and other non-disciplinary actions, and actions based on non-completion of the 1-year trial period to a different job) and/or non-covered employees (nonpermanent employees or permanent employees who have not completed required probationary periods) may use the administrative grievance procedure (AGP) or negotiated grievance procedure (NGP), as appropriate, for dispute resolution. If the NGP is used and the union invokes arbitration in accordance with a negotiated contract, the arbitrator is selected using this process. However, the arbitrator decision cannot be appealed to the MSPB panel.</li> </ul>
2	Reviewer	<ul style="list-style-type: none"> <li>• <u>Actions are reviewed by an independent contract arbitrator –</u> <ul style="list-style-type: none"> <li>➢ Union and management will bilaterally identify a standing list of arbitrators to hear unit and non-unit employee appeals <u>or</u> management will develop a separate list of arbitrators to hear non-unit employee appeals.</li> <li>➢ A portion of these arbitrators will need to have security clearances to enable them to hear certain sensitive cases. Arbitrator selection to hear appeals will be made from an alphabetically arranged list, however see Review Process below for arbitrator pass over or time frame extension. Costs will be shared equally by union and management if the action is appealed by a unit employee.</li> <li>➢ Arbitrators will be authorized to sustain or overturn an agency action based on a finding of whether the charge has been proven by DHS by substantial evidence. No mitigation of penalty will be permitted.</li> <li>➢ When an employee is charged with a “strict liability violation” which carries a presumed mandatory removal penalty, the deciding official’s decision is not appealable.</li> </ul> </li> <li>• <u>Arbitrator decisions may be appealed by either party to a contracted panel of judges from the MSPB –</u></li> </ul>

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		<ul style="list-style-type: none"> <li>➤ Could be a standing <u>or</u> an ad hoc DHS panel of MSPB judges.</li> <li>➤ Depending upon workload, <u>multiple panels</u> may be established to serve specific DHS geographic locations <u>or</u> DHS organizational components.</li> <li>➤ A portion of these judges will be required to have security clearances to enable them to review certain sensitive cases.</li> <li>➤ Panel must give due deference to the arbitrator's decision and review it only on the bases of arbitrator bias or harmful procedural error, or inconsistency with law, regulation and rule.</li> <li>➤ When an employee is charged with a designated "strict liability violation" which carries a presumed mandatory removal penalty, the deciding official's decision is not appealable.</li> </ul>
3	Review Process	<ul style="list-style-type: none"> <li>• <u>Arbitration process</u> - <ul style="list-style-type: none"> <li>➤ Appeals must be filed with the DHS Office of Appeals (OA) within 10 calendar days of the effective date of the action. The OA will immediately coordinate activation of the arbitration process including arbitrator selection.</li> <li>➤ Arbitration hearings must completed within 25 calendar days of receipt of the appeal. Passing over an arbitrator who is unavailable is permitted <u>or</u> the time frame could be extended by mutual agreement of the parties.</li> <li>➤ Arbitrator decisions must be rendered within 10 calendar days of the close of the hearing.</li> <li>➤ Short time extensions may be granted by the arbitrator with the concurrence of the OA only for unavoidable and extraordinary reasons.</li> </ul> </li> <li>• <u>MSPB panel process</u> - <ul style="list-style-type: none"> <li>➤ Appeals of arbitrator decisions must be filed by either party with the OA within 10 calendar days of its receipt. The OA will immediately coordinate activation of the appeal process with MSPB.</li> <li>➤ MSPB panel review will be based solely on the arbitration record as well as the parties' briefs.</li> <li>➤ Panel decisions must be rendered within 10 calendar days of the close of the record. By mutual agreement of the parties, the arbitrator could render an expedited bench decision.</li> <li>➤ Short time extensions may be granted by the panel with the concurrence of the OA only for unavoidable and extraordinary reasons.</li> </ul> </li> </ul>
4	Decision	<ul style="list-style-type: none"> <li>• Before the arbitrator, the burden is on DHS to show by substantial evidence that the action promotes the efficiency of the service, i.e., that the misconduct/poor performance occurred and that proper procedures were followed. No mitigation is permitted.</li> </ul>

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		<ul style="list-style-type: none"> <li>• The MSPB panel must give due deference to the arbitrator's decision and review it only on the bases of arbitrator bias or harmful procedural error, and consistency with law, regulation and rule <u>or</u> the panel's review will assume DHS good faith and apply an arbitrary and capricious standard. The panel could sustain, overturn or remand a decision to the arbitrator. No mitigation is permitted.</li> <li>• Neither arbitrator nor MSPB panel decisions are precedential.</li> <li>• No judicial review is provided.</li> </ul>
5	Other Appeals Systems	<ul style="list-style-type: none"> <li>• Allegations of prohibited personnel practices including whistleblower reprisal and discrimination cannot be heard in this appeals forum.</li> </ul>
6	Evaluation	<ul style="list-style-type: none"> <li>• DHS HR Office conducts quantitative and quality review of records to assess –             <ul style="list-style-type: none"> <li>➤ Timeliness of appeals processing</li> <li>➤ Understanding of system by managers and employees</li> <li>➤ Adherence to procedural requirements</li> <li>➤ Numbers of and reasons for overturned or remanded MSPB panel decisions</li> <li>➤ Impact of appeals decisions on national security or DHS mission</li> <li>➤ Impact on employee appeal rights</li> <li>➤ Cost</li> </ul> </li> </ul>