

**Statement of  
Dr. Ronald P. Sanders  
Associate Director for Strategic Human Resources Policy  
U.S. Office of Personnel Management**

Before the

**Subcommittee on Oversight of  
Government Management, the Federal Workforce, and the District of Columbia  
Committee on Homeland Security and Governmental Affairs  
United States Senate**

On

**“Unlocking the Potential within Homeland Security:  
the New Human Resources System”**

February 10, 2005

**I. Introduction**

Mr. Chairman, I am Dr. Ronald P. Sanders, the Associate Director for Strategic Human Resources Policy at the Office of Personnel Management (OPM). On behalf of OPM, it is my privilege to appear before you today to discuss the final regulations implementing a new human resources (HR) management system in the Department of Homeland Security (DHS) – a system that we truly believe is as flexible, contemporary, and excellent as the President and the Congress envisioned. It has been an honor for

OPM (and for me personally) to work with the dedicated men and women of DHS, including its senior leaders, employees and union representatives, other stakeholders, and the Congress, to develop this system. It is the result of an intensely collaborative process that has taken almost two years -- and we are all quite proud of it. However, it is not the end, but only the end of the beginning, and the Department must now embark upon the challenge of implementation. As it does, I want to express our appreciation to you for your leadership, and that of this Subcommittee, in this historic effort. Without it, we would not be here today, and we look forward to it in the future.

Mr. Chairman, with the Homeland Security Act of 2002, you and other Members of Congress gave the Secretary of Homeland Security and the Director of the Office of Personnel Management extraordinary authority, and with it a grand trust: to work together with the Department's employees and their union representatives to establish a "21<sup>st</sup> century human resources management system" that fully supports the Department's vital mission without compromising the core principles of merit and fairness that ground the Federal civil service. Striking the right balance, between transformation on one hand and tradition on the other, is an essential part of that trust, and we believe we have lived up to it in these final regulations.

I would like to address the question of balance this morning, with a particular focus on three of the most vital components of the new HR system established by the final regulations: performance-based pay, employee accountability, and labor-management relations. In each case, I will discuss the careful and critical balance we have struck between operational imperatives and employee interests, without compromising on either mission or merit. The final result achieves that balance, and in

so doing, what we have accomplished may very well serve as a model for the rest of the Federal Government.

## **II. Pay, Performance, and “Politicization”**

The new pay system established by the regulations was designed to fundamentally change the way DHS employees are paid, to place far more emphasis on performance and market in setting and adjusting rates of pay. Instead of a “one size fits all” pay system based on tenure, we have established one that bases all individual pay increases on performance. No longer will employees who are rated as unacceptable performers receive annual across-the-board pay adjustments, as they do today. Instead, only those who meet or exceed performance expectations will receive any such adjustments. No longer will those annual pay adjustments apply to all occupations and levels of responsibility, regardless of market or mission value. Instead, those adjustments will be based on national and local labor market trends, budget, recruiting and retention patterns, and other factors – as well as substantial and substantive union input. And no longer will employees who merely meet time-in-grade receive virtually automatic pay increases, as they do today. Instead, individual pay raises will be determined by an employee’s annual performance rating.

This system is entirely consistent with the merit system principles that are so fundamental to our civil service. One of those principles states that Federal employees should be compensated “. . . with appropriate consideration for both national and local rates paid by employers . . . and appropriate incentives and recognition . . . for excellence

in performance.” See 5 U.S.C. 2301(b)(3). However, some have argued that by placing so much emphasis on performance, we risk “politicizing” DHS and its employees. This is a most serious charge. Such a result, if true, would constitute a prohibited personnel practice, something expressly forbidden by the Congress in giving DHS and OPM authority to jointly prescribe these regulations. Moreover, it would tear at the very fabric of our civil service system. Fortunately, nothing could be further from the truth.

The merit system principles provide that Federal employees should be “. . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes.” See 5 U.S.C. 2301(b)(8)(A). And they are. Section 2302(b)(3) of title 5, United States Code, makes it a prohibited personnel practice to “coerce the political activity of any person . . . or take any action against any employee” for such activity. This law is still in place and binding on DHS. The law forbids any political influence in taking any personnel action with respect to covered positions, and it most certainly applies to making individual pay determinations. The DHS regulations did not dilute these prohibitions in any way; indeed, they could not . . . and we would not. This is no hollow promise. A close examination of the DHS regulations reveals that they include considerable protection against such practices – and no less than every other Federal employee enjoys today.

For example, if a DHS employee believes that decisions regarding his or her pay have been influenced by political considerations, he or she has a right to raise such allegations with the Office of Special Counsel (OSC), to have OSC investigate and where appropriate, prosecute them, and to be absolutely protected from reprisal and retaliation in so doing. These rights have not been diminished in any way whatsoever. Moreover,

supervisors have no discretion with regard to the actual amount of performance pay an employee receives. That amount is driven strictly by mathematical formula -- an approach recommended by the DHS unions during the meet-and-confer process. Of the four variables in that formula -- the employee's annual performance rating; the "value" of that rating, expressed as a number of points or shares; the amount of money in the performance pay pool and the distribution of ratings -- only the annual rating is determined by an employee's immediate supervisor, and it is subject to review and approval by the employee's second-level manager.

Once that rating is approved, an employee can still challenge it if he or she doesn't think it is fair -- indeed, employees represented by a union will even be able to contest their performance ratings all the way to a neutral arbitrator, if their union permits. And if it gets to arbitration, the arbitrator will review the grievance according to specific standards set forth in the regulations, standards based directly on union input provided during the meet-and-confer process. Finally, the other factors governing performance pay are also shielded from any sort of manipulation. Individual managers will have no say in how many points or shares a rating is worth, or how much money is in the pool; that will be determined at the headquarters level -- with union input and oversight through a new Compensation Committee (another product of the meet-and-confer process) that gives them far more say in such matters than they have today. And as far as the distribution of ratings is concerned, the regulations ban any sort of quota or forced distribution. Period.

Of course, DHS managers will receive intensive training in the new system, a further safeguard against abuse. And they too will be covered by it, with their pay

determined by how effectively they administer this system. The same is true of their executives, now covered by the new Senior Executive Service pay-for-performance system – indeed, OPM regulations governing that system establish clear chain-of-command accountability in this regard. With these considerable protections in place, we believe that there is no danger whatsoever that the pay of individual DHS employees will become “politicized” just because it will be more performance-based. To the contrary, we believe that the American people expect and demand that performance determine the pay of “their” employees. That is exactly what the DHS pay system is intended to do.

### **III. Accountability and Due Process**

Public trust is essential to the success of the Department’s homeland security mission. DHS has a special responsibility to American citizens; many of its employees have the authority to search, seize, enforce, arrest, and even use deadly force in the performance of their duties, and their application of these powers must be beyond question. By its very nature, the DHS mission requires a high level of workplace accountability, and Congress recognized this fact when it gave DHS and OPM the authority to waive those chapters of title 5, United States Code, that deal with adverse actions and appeals. However, in so doing, Congress also assured DHS employees that they would continue to be afforded the protections of due process. We believe that the regulations strike this balance. They assure far greater individual accountability, but without compromising the protections Congress guaranteed.

In this regard, DHS employees are still guaranteed notice of a proposed adverse action. While the regulations provide for a shorter, 15-day minimum notice period, (compared to a 30-day notice under current law), this fundamental element of due process is preserved. Employees also have a right to be heard before a proposed adverse action is taken against them. This too is a fundamental element of due process, and the regulations also provide an employee a minimum of 10 days to respond to the charges specified in that notice – compared to 7 days today. In addition, the final regulations continue to guarantee an employee the right to appeal an adverse action to the Merit Systems Protection Board (MSPB), except those involving a Mandatory Removal Offense (MRO; see below). And as a result of the meet-and-confer process with DHS unions, the regulations also provide bargaining unit employees the option of contesting a non-MRO adverse action through a negotiated grievance procedure . . . all the way to a neutral private arbitrator, if their union permits. The proposed rules had only provided for adverse action appeals to MSPB.

The final regulations continue to authorize the Secretary to establish a number of MROs that he or she determines will “. . . have a direct and substantial adverse impact on the ability of the Department to carry out its homeland security mission” – like accepting a bribe to compromise border security, or aiding and abetting a potential act of terrorism. And, we have provided examples of potential MROs in the supplementary information accompanying the final regulations, as you had requested, Mr. Chairman. At the same time, the regulations provide a number of checks and balances on the use of this authority: MROs must be published in the *Federal Register* after consultation with the Justice Department, and they must be communicated to all employees on an annual basis;

in addition, the regulations require case-by-case Department-level approval before an employee is charged with one. The final regulations also provide full due process to employees charged with a Mandatory Removal Offense. An employee is still entitled to a notice of proposed adverse action, the right to reply to the charges set forth in that notice, and the right to representation.

The regulations also permit an employee to appeal an MRO to an independent Mandatory Removal Panel, comprising three individuals appointed by the Secretary for their “impartiality and integrity,” as well as their expertise in the Department’s mission. Some have charged that this Panel somehow is unlawful because it lacks independent outside review, but nothing could be further from the truth. First, once appointed, the Panel will operate outside the DHS chain of command– its members do not report to the Secretary or any other management official and are every bit as independent as an agency’s administrative law judges (ALJs). And just as ALJ rulings are binding on the agency that appoints them, so too are the Panel’s determinations binding on DHS with respect to MROs – subject to appeal by either party to the MSPB and the Federal Circuit Court of Appeals. The Panel’s independence is further guaranteed by special protections against removal of its members – protections that are patterned after those that shield members of the MSPB. Second, the Panel’s decisions are in fact subject to outside review – indeed, at least *two levels* of such review. An employee can appeal a Panel decision to MSPB, under the very same standards that the Federal Circuit employs in reconsidering MSPB decisions. And once the Board has ruled on the matter, the employee is entitled to seek judicial review with the Federal Circuit Court of Appeals.



Further, in adjudicating employee appeals, regardless of forum, the final regulations place a heavy burden on the agency to prove its case against an employee. Indeed, in another major change resulting from the meet-and-confer process, the regulations actually establish a *higher* burden of proof: a “preponderance of the evidence” standard for all adverse actions, whether based on conduct or performance. While this is the standard that applies to conduct-based adverse actions under current law, it is greater than the “substantial” evidence standard presently required to sustain a performance-based adverse action.

Finally, the regulations authorize MSPB (as well as arbitrators) to mitigate penalties in adverse action cases. The proposed regulations precluded such mitigation, as does current law in performance-based adverse actions. However, mitigation may occur, but only under limited circumstances. Thus, the final regulations provide that *when the agency proves its case against an employee by a preponderance of the evidence*, MSPB (or a private arbitrator) may reduce the penalty involved *only* when it is “so disproportionate to the basis for the action that it is wholly without justification.” Much has been made of this standard. Although it is admittedly tougher than the standards MSPB and private arbitrators apply to penalties in conduct cases today, it provides those adjudicators considerably more authority than they presently have in performance cases – current law literally precludes them from mitigating a penalty in a performance-based adverse action. Moreover, MSPB’s current mitigation standards basically allow it (and private arbitrators) to second-guess the reasonableness of the agency’s penalty in a misconduct case, without giving any special deference or dispensation to an agency’s mission. That is untenable.

The President, the Congress, and the American public all hold the Department accountable for accomplishing its homeland security mission. MSPB is not accountable for that mission, nor are private arbitrators. Given the extraordinary powers entrusted to the Department and its employees, and the potential consequences of poor performance or misconduct to that mission, DHS should be entitled to the benefit of any doubt in determining the most appropriate penalty for misconduct or poor performance on the job. There is a presumption that DHS officials will exercise that judgment in good faith. If they do not, however, providing MSPB (and private arbitrators) with limited authority to mitigate is a significant check on the Department's imposition of penalties. That is what the new mitigation standard is intended to do, and it is balanced by the higher standard of proof that must first be met.

#### **IV. Mission Imperatives and Employee Interests**

The Department has a covenant of accountability with the American people, and it goes to the heart of another of the most controversial – and critical – provisions of the regulations: labor relations. Accountability must be matched by authority, and here, the current law governing relations between labor and management is out of balance. Its requirements potentially impede the Department's ability to act, and that cannot be allowed to happen. The regulations ensure that the Department can meet its mission, but in a way that still takes union and employee interests into account.

For example, today, in trying to bring about the most extensive reorganization of the Federal Government since the 1940s, the Secretary of Homeland Security cannot

issue personnel rules and regulations that are binding on his subordinate organizational units. Instead, those rules must be negotiated in all of the 70-odd bargaining units currently recognized by DHS (covering only about 25 percent of the Department's workforce) – many of which bear no resemblance to the Department's organizational structure or chain of command. Congress created DHS to assure unity of effort in the war on terror, but how can that possibly happen if the Secretary cannot even issue regulations that bind together the disparate mission elements that are comprised in that merger? The final rules give him, but only him, the authority to do so. Therein lies the balance: personnel policies, practices, and working conditions are still subject to collective bargaining below the Departmental level, but now, when the Secretary speaks, his organizational components and their patchwork of bargaining units must listen.

Today, if the Department wants to introduce new security or search technology, it cannot – not without first negotiating with the Department's various unions, at their various sub-Department levels of recognition, over the implementation and impact of that new technology on bargaining unit employees . . . and it cannot act until those negotiations have been concluded. How can we hold the Department accountable for homeland security if it cannot act swiftly to take full advantage of new technology in the war on terror? The final regulations give the Department the authority to do so. DHS now will be able to introduce new technology when and as it sees fit. However, that right is balanced by a requirement to negotiate over appropriate arrangements for employees adversely impacted by that new technology...*after the fact* – a recommendation you had made, Mr. Chairman. Thus, new technology cannot be delayed by collective bargaining,

but as is the case today, negotiations will still be required over appropriate arrangements for employees adversely affected by it.

Today, the Department cannot assign or temporarily deploy its front-line employees without following complicated, seniority-based procedures governing who, when, and how such assignments and deployments will take place – procedures that have been negotiated with unions. And if there is an operational exigency that those procedures did not anticipate, they cannot be modified without further negotiations. These procedures can force the Department to assign the least senior employee to a particular task, when the situation may call for the most seasoned. Or they can require the Department to assign volunteers from one unit to meet a critical operational need, and in so doing, leave that unit understaffed. These are real situations, with real operational impact, all the result of current law. The final regulations prohibit negotiations over these operational procedures. However, the regulations do require that managers “confer” with unions over them, and they also permit employees to grieve alleged violations -- all the way to arbitration, if their union permits; in addition, the regulations continue to require full collective bargaining over non-operational procedures governing such important subjects as promotion rules, discipline and layoff procedures, overtime, etc.

You will hear much about what is wrong with these changes.

You will hear that current law already allows the agency to do whatever it needs to do in an emergency. However, that statement, while true, explains why the current law is inadequate when it comes to national security matters. The Department needs the ability to move quickly on matters before they become an emergency, and the current law does not allow DHS to take action quickly to prevent an emergency, to prepare or

practice for dealing with an emergency, to deploy personnel or new technology to deter a potential threat, or do any of the things I have described above. Rather, the current law requires agencies to first negotiate with union over the implementation, impact, procedures and arrangements before it can take any of those actions. By the time an ‘emergency’ has arisen it is literally too late. On balance, that simply cannot continue.

You will also hear that the Homeland Security Labor Relations Board (HSLRB), to be appointed by the Secretary to resolve collective bargaining disputes in the Department, will not be independent, and that its decisions will not be impartial because they are not subject to “outside review.” The HSLRB is expressly designed to ensure that those who adjudicate labor disputes in the Department have expertise in its mission, and its members are every bit as independent as those of the Department’s Mandatory Removal Panel...or an agency’s ALJs. Just as an agency’s ALJs operate outside the chain of command, so too will HSLRB’s members. Just as ALJ decisions are binding on the agency that employs them, so too will HSLRB’s decisions be binding – subject to appeal by either party to the FLRA and the Federal Courts of Appeal. Thus, assertions to the contrary notwithstanding, the regulations make it patently clear that the HSLRB’s decisions will be subject to at least *two levels* of outside review.

## **V. Conclusion**

If DHS is to be held accountable for homeland security, it must have the authority and flexibility essential to that mission. That is why Congress gave the Department and OPM approval to waive and revise the laws governing classification, pay, performance

management, labor relations, adverse actions, and appeals. And that is why we have made the changes that we did. However, in so doing we believe that we have succeeded in striking a better balance – between union and employee interests on one hand, and the Department’s mission imperatives on the other.

Mr. Chairman, that concludes my statement. I would be pleased to respond to any questions you and members of the Subcommittee may have.