

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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*Homeland Security Department Proposals: Scope of
Personnel Flexibilities*

Thomas J. Nicola, American Law Division

Updated August 30, 2002

Abstract. This report discusses human resources management issues addressed in H.R. 5005 as passed by the House and the Lieberman substitute amendment to H.R. 5005, with emphasis on the provisions of current law that may be subject to adjustment by the Secretary of Homeland Security.

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Homeland Security Department Proposals: Scope of Personnel Flexibilities

Summary

The proposal of President Bush to create a Department of Homeland Security by transferring several existing agencies has generated controversy, among other things, about the nature of the human resources management system for the Department. The debate centers on the degree of flexibility that should be granted to the new system to be able to respond to terrorist threats to the homeland.

H.R. 5005, the Department of Homeland Security Act, as passed by the House on July 26, 2002, creates the Department as an executive agency within the meaning of title 5 of the United States Code, which codifies laws relating to government organization and employees. A provision of H.R. 5005, section 761, authorizes the Secretary of Homeland Security, notwithstanding any other provision of title 5, in regulations prescribed jointly with the Director of the Office of Personnel Management, to establish, and from time to time adjust, a human resources management system for some or all of the organizational units of the Department of Homeland Security. The bill enumerates several chapters of title 5 that may not be waived, but those relating to such matters as Performance Appraisal, Classification, Pay Rates and Systems, Labor-Management and Employee Relations, Adverse Actions, and Appeals are eligible for waiver or adjustment. Authority to establish and adjust a system is scheduled to expire five years after enactment.

A substitute amendment to H.R. 5005, the National Homeland Security and Combating Terrorism Act of 2002, was filed in the Senate on August 1, 2002, after the Committee on Governmental Affairs agreed to language offered by Chairman Joseph Lieberman. The Lieberman substitute provides that the transfer of an employee to the Department of Homeland Security shall not alter the terms and conditions of employment, including compensation, of any employee so transferred.

While the Lieberman substitute amendment does not authorize the Secretary to adjust civil service laws only for the Department of Homeland Security, it contains some provisions that amend civil service laws for the entire government in relation to such matters as evaluating and appointing applicants for federal employment and compensating some employees.

The Advisor to the President on Homeland Security has stated that he would advise the President to veto the Lieberman substitute amendment in its current form if it should be presented to the President for signature because, among other reasons, it does not provide sufficient personnel flexibility with respect to appointing, evaluating, transferring, compensating, and terminating employees that the President believes the Secretary of Homeland Security needs to protect the homeland.

This report discusses human resources management issues addressed in H.R. 5005 as passed by the House and the Lieberman substitute amendment to H.R. 5005, with emphasis on the provisions of current law that may be subject to adjustment by the Secretary of Homeland Security.

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Homeland Security Department: Scope of Personnel Flexibilities

This report discusses civil service provisions in H.R. 5005, 107th Congress, 2d Session, the Homeland Security Act, as passed by the House, and the substitute amendment to H.R. 5005 offered by Senator Joseph Lieberman, the National Homeland Security and Combating Terrorism Act of 2002, 107th Congress, 2d Session, as agreed to by the Committee on Governmental Affairs.¹ H.R. 5005 authorizes the Secretary of Homeland Security to adjust some provisions of title 5 of the United States Code, the civil service laws, but not other provisions. The Lieberman substitute proposes some amendments to civil service laws that would apply to all government agencies. This report identifies civil service laws that may not be adjusted and describes those that may be adjusted pursuant to H.R. 5005, as well as proposals for amendments to civil service laws in the Lieberman substitute.²

House-Passed H.R. 5005, The Homeland Security Act

On July 26, 2002, the House by a vote of 295 to 132 passed H.R. 5005, a bill to establish the Department of Homeland Security. 148 *Cong. Rec.* H5887-H5888 (daily ed. July 26, 2002). Section 101 of the bill establishes the Department “as an executive department of the United States within the meaning of title 5, United States Code.” Title 5 codifies statutes that relate to government organization and employees. Section 601 of H.R. 5005, as passed by the House, provides that the Secretary of Homeland Security, acting through the Under Secretary for Management, shall be responsible for the management and administration of the Department including, among other things, human resources and personnel.

Section 761(a) of H.R. 5005 adds a new section 9701(a) to subpart I of part III of title 5, which states that, “Notwithstanding any other provision of this title, the Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management establish, and from time to time adjust, a human resources management system for some or all of the organizational units of the Department of Homeland Security.”

¹See Barbara L. Schwemle, *Homeland Security: Human Resources Management*, Congressional Research Service Report RL31500, for an overview of H.R. 5005 and S. 2452 as they relate to human resources management.

²The scope of this report is general civil service issues; it does not address collective bargaining or whistleblower issues. See Jon O. Shimabukuro, *Collective Bargaining and Homeland Security*, CRS Report RS31520, and L. Paige Whitaker, *Whistleblower Protection for Federal Employees*, Congressional Research Service Report 97-787, for discussions of these legal issues. CRS Report RL31513 provides a side-by-side comparison of the H.R. 5005 and the Lieberman substitute.

The new section 9701(b) provides that this system shall--

- (1) be flexible;
- (2) be contemporary;
- (3) not waive, modify, or otherwise affect--
 - (A) the public employment principles of merit and fitness set forth in section 2301, including the principles of hiring based on merit, fair treatment without regard to political affiliation or other non-merit considerations, equal pay for equal work, and protection of employees against reprisal for whistleblowing;
 - (B) any provision of section 2302, relating to prohibited personnel practices;
 - (C) (i) any provision of law referred to in section 2302(b)(1); or
 - (ii) any provision of law implementing any provision of law referred to in section 2302(b)(1) by--
 - (I) providing for equal employment opportunity through affirmative action; or
 - (II) providing any right or remedy available to any employee or applicant for employment in the civil service;
 - (D) any other provision of this part [part III of title 5, United States Code, beginning at chapter 21] as described in subsection (c) [*see* p. 4 *infra*]; or
 - (E) any rule or regulation prescribed under any provision of law referred to in any of the preceding subparagraphs of this paragraph;
- (4) ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusion from coverage or limitation on negotiability established by law; and
- (5) permit the use of a category rating system for evaluating applicants for positions in the competitive service.

During floor debate on H.R. 5005, the House by a vote of 227 to 202 agreed to an amendment offered by Representative Jack Quinn that addresses the need to ensure the direct participation of employee representatives in planning, developing, implementing, or adjusting a human resources management system.³ This amendment, new title 5 section 9701(e) “Provisions to Ensure Collaboration with Employee Representatives,” directs the Secretary of Homeland Security and the Director of the Office of Personnel Management, with respect to any proposed system or adjustment-- (1) to provide to each employee representative who represents any employees who might be affected a written description of the proposed system, including reasons why it is considered necessary; (2) give each representative at least 60 days (unless extraordinary circumstances require earlier action) to review and make recommendations with respect to such proposal; and (3) give any such recommendations full and fair consideration in deciding whether and how to proceed with the proposal.

Before implementing any proposed system or adjustment, the Secretary and Director must--(1) give each employee representative details of the decision to implement the proposal, together with information on which the decision was based; (2) give each representative an opportunity to make recommendations with respect to the proposal; and (3) give such recommendations full and fair consideration, including providing reasons to an employee representative if any of its recommendations are rejected.

If a proposal for a system or adjustment is implemented, the Secretary and Director must--(1) develop a method for each employee representative to participate in further planning or development which might become necessary; and (2) give each employee representative adequate access to information to make that participation productive. Any procedures necessary to carry out subsection (e) shall include measures to ensure--(1) in the case of employees in a bargaining unit which has been accorded exclusive recognition, representation by individuals designated or from among individuals nominated by such organization; (2) in the case of any employees who are not within such a unit, representation by any appropriate organization which represents a substantial percentage of those employees or, if none, in such other manner as may be appropriate, consistent with the purposes of subsection (e); and (3) the selection of representatives in a manner consistent with the relative numbers of employees represented by the organizations or other representatives involved.

Another provision of H.R. 5005, subsection (e) “Employment Provisions” of section 812 “Savings Provisions,” also addresses the kinds of regulations that the Secretary of Homeland Security may prescribe. It authorizes the Secretary to “(1) ...adopt the rules, procedures, terms, and conditions, established by statute, rule, or regulation before the effective date of this act, relating to employment in any agency transferred to the Department pursuant to this act.” Section 812(e) also describes the effect of a transfer on terms and conditions of employment: “...except as otherwise provided in this act, or under authority granted by this act, the transfer pursuant to this

³See 147 *Cong. Rec.* H5809-5813 (daily ed. July 26, 2002), for the text, debate, and vote on the Quinn amendment.

act of personnel shall not alter the terms and conditions of employment, including compensation, of any employee so transferred.”

Subsection (g) of the new section 9701 of title 5 contains a sunset provision for authority to issue regulations. It provides that, “Effective five years after the date of enactment of this section, all authority to issue regulations under this section (including regulations which would modify, supersede, or terminate any regulations previously issued under this section) shall cease to be available.”

The new section 9701(c), referred to in section 9701(b)(3)(D) quoted earlier, identifies other provisions of title 5 that are not subject to waiver—subpart A “General Provisions,” which includes chapters 21 “Definitions,” 23 “Merit System Principles,” and 29 “Commissions, Oaths, Records, and Reports;” subpart B “Employment and Retention,” which includes chapters 31 “Authority for Employment,” 33 “Examination, Selection, and Placement,” 34 “Part-time Career Employment Opportunities,” 35 “Retention Preference, Restoration, and Reemployment;” subpart E “Attendance and Leave,” which includes chapters 61 “Hours of Work,” and 63 “Leave;” subchapter G “Insurance and Annuities,” which includes chapters 81 “Compensation for Work Injuries,” 83 “Retirement [in the Civil Service Retirement System],” 84 “Federal Employees’ Retirement System,” 85 “Unemployment Compensation,” 87 “Life Insurance,” 88 “Health Insurance,” and 90 “Long-Term Care Insurance;” and subpart H, “Access to Criminal History Record Information,” which includes chapter 91 “Access to Criminal History Records for National Security and Other Purposes.”⁴

In listing the subparts of part III of title 5 that may not be waived, the new section 9701(c) of title 5 excludes subparts C “Employee Performance,” D “Pay and Allowances,” and F “Labor-Management and Employee Relations.” Nonetheless, this subsection provides that the following chapters within those subparts also may not be waived: chapters 41 “Training,” 45 “Incentive Awards,” and 47 “Personnel Research Programs and Demonstration Projects” in subpart C; chapters 55 “Pay Administration,” 57 “Travel, Transportation, and Subsistence,” and 59 “Allowances” in subpart D; and chapters 72 “Antidiscrimination; Right to Petition Congress,” 73 “Suitability, Security, and Conduct,” and 79 “Services to Congress” in subpart F. Section 9701(c) also provides that chapter 97, the chapter created by H.R. 5005, may not be waived.

Title 5 Chapters Eligible for Adjustment. In the report accompanying H.R. 5005, the House Select Committee on Homeland Security stated that:

The following chapters of title 5 are eligible for adjustment during the Department’s process of developing a human resource system under the chapter added by this section [*i.e.*, chapter 97]: chapter 43 “Performance Appraisal,” chapter 51 “Classification,” chapter 53 “Pay Rates and Systems,” chapter 71 “Labor

⁴See Ronald C. Moe, *General Management Laws: A Selective Compendium—107th Congress*, Congressional Research Service Report RL30795, for synopses of many of these chapters of title 5.

Management Relations (except as to employee rights to organize, collectively bargain and participate in union organizations as set out [in the bill]), chapter 75 “Adverse Actions,” and chapter 77 “Appeals.”

H. Rep. No. 609, pt. I, 107th Cong., 2d Sess. 122 (2002).

A summary issued by the House Select Committee on Homeland Security described section 761 of H.R. 5005 and the need for a new human resources management system:

Creating the right organization for Homeland Security is important, but so is having the management tools and flexibility to create an agile 21st century workforce that can respond to the shifting threat. H.R. 5005 grants the Secretary of Homeland Security greater flexibility in the following areas of personnel management:

Performance Appraisal

The Secretary will have the flexibility to develop a strategic performance management program that effectively links employee performance and accountability to the goals, objectives and mission of the Department. Existing laws focus on specifying minimum requirements for an employee’s position with no consideration of its connection to mission, strategic goals, and objectives.

Classification

The Secretary will have the flexibility to use a broader approach to job classification that more effectively recognizes the strategic value of each employee. The current classification is 53 years old. It is obsolete. It confines federal workers to 15 artificial levels or “grades” that no longer match the needs of a modern workforce or allow for quick changes of mission. It defines pay too rigidly to support rewarding performance in a meaningful way. It ignores important differences across occupational lines and career paths that the Department must manage.

Pay Rates and Systems

The Department will have the flexibility it needs to attract skilled and dedicated workers with a modern pay system not necessarily restricted to the rigid 15 “GS” [General Schedule] pay grades. Annual increases in pay are most commonly automatic pay adjustments for all employees regardless of performance.

...

Adverse Actions and Appeal

The Secretary must have the flexibility to establish a system that allows employees to challenge and appeal agency personnel actions without threatening the mission of the Department. The procedures for providing due process to employees subject to adverse actions are unnecessarily complex and time consuming. Regardless of the nature of the offense, agencies must provide employees at least 30 days notice prior to taking any action. These procedures often result in expensive and protracted litigation in both administrative and judicial forms [sic]. The delay in reaching finality negatively impacts on an agency's ability to carry out its mission.

The Select Committee also protected many existing employee protections. Needless to say, civil rights protections remain. Veterans continue to be rewarded for serving their country by continuing veteran hiring preferences. Age discrimination is prohibited. The workplace will be accessible to the disabled. The Fair Labor Standards Act, the Social Security Act and the Family and Medical Leave Act will continue to apply.

U.S. House of Representatives, Select Committee on Homeland Security, *Transforming Government for the 21st Century* 3-4 (July 23, 2002), available at <http://hsc.house.gov/legislation/final.asp> (*Transforming Government*).

This summary describes some provisions of current law, located in title 5 chapters 43 "Performance Appraisal," 51 "Classification," 53 "Pay Rates and Systems," 75 "Adverse Actions," and 77 "Appeals," that the Select Committee in its report identified as being subject to adjustment during the Department's process of developing a human resource system and that the summary characterized as lacking flexibility.

Chapter 43 "Performance Appraisal". A provision of chapter 43, section 4301(1), defines "agency" for purpose of subchapter I "General Provisions" of the chapter as "...an executive agency, and the Government Printing Office, but does not include the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency; or any executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or the General Accounting Office." 5 U.S.C. § 4301(1). (Emphasis supplied.)

Section 4301(1) grants the President authority to exclude an executive agency or unit thereof from coverage if the principal function of the agency or unit is the conduct of *foreign* intelligence or counterintelligence activities. The version of H.R. 5005 that has passed the House makes chapter 43 subject to adjustment by the Secretary of

Homeland Security, in regulations prescribed jointly with the Director of the Office of Personnel Management, when a new human resources management system is established.

If Congress in later consideration of Homeland Security legislation were not to include chapter 43 as one that is subject to adjustment by the Secretary, an interesting question arises: Could the President nonetheless exclude the Department of Homeland Security or any unit thereof from coverage under chapter 43 by exercising his existing authority in section 4301(1) of title 5 to exclude an agency or unit on the ground that its principal mission is to conduct foreign intelligence or counterintelligence activities?

On the surface, limiting the President's authority to exclude agencies or entities thereof to those whose principal mission is conducting foreign intelligence or counterintelligence activities would appear to preclude the President from excluding the Department of Homeland Security or a unit thereof. The primary purpose of the Department of Homeland Security is to protect the homeland not to conduct foreign intelligence or counterintelligence activities, although the Department's proposed Intelligence Analysis Center is assigned the function of analyzing intelligence, some of which may be foreign intelligence. *See, for example*, section 201, which grants to the Under Secretary for Information Analysis and Infrastructure Protection authority to conduct analysis of information, including foreign intelligence, and sections 211 and 212 of H.R. 5005, which establish the Intelligence Analysis Center and designate its mission, respectively.

Nonetheless, while section 4303(1) sets a standard for agencies and units that may be excluded, it seems to leave to the judgment of the President the question regarding whether the principal function of any particular agency or unit is conducting foreign intelligence or counterintelligence activities. Consequently, it appears that the President possibly could exclude the Department or a unit thereof from coverage of chapter 43 on this basis and leave a question of resolving the matter of the legality of such an exclusion to the courts if a lawsuit challenging an exclusion should be filed and the courts should grant jurisdiction to entertain such a suit.

Section 4302 of title 5 directs each agency to develop one or more performance appraisal systems which provide for periodic appraisal of job performance of employees; encourage employee participation in establishing performance standards; and use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees. Under regulations prescribed by the Office of Personnel Management, each performance appraisal system shall provide for establishing performance standards to do such things as permit the accurate evaluation of job performance, recognize and reward employees on standards of performance and critical elements of their positions, and reassign, reduce in grade, or remove employees who continue to have unacceptable performance. "Unacceptable performance" is defined as "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position." 5 U.S.C. § 4301(3).

Subject to certain provisions, an agency may reduce in grade or remove an employee for unacceptable performance. An employee whose reduction in grade or

removal for unacceptable performance is proposed is entitled to--(A) 30 days advance written notice which identifies specific instances of unacceptable performance, and critical elements of an employee's position involved in each instance of unacceptable performance; (B) be represented by an attorney or other representative; (C) a reasonable time to answer orally and in writing; and (D) a written decision of the action recommended. An agency, under regulations prescribed by the agency head, may extend the notice period for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management. 5 U.S.C. § 4303.

The decision to retain, reduce in grade, or remove an employee shall be made within 30 days after the expiration of the notice period. A decision to reduce in grade or remove an employee may be based only on those instances of unacceptable performance by the employee which occurred during the one year evaluation period and for which there is compliance with the notice and other requirements of section 4303. *Id.*

If, because of performance improvement by an employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for one year from the date of the advance written notice, any entry or other notation of the unacceptable performance for which the action was proposed shall be removed from any agency record relating to the employee. *Id.*

Any qualifying employee who has been reduced in grade or removed under section 4303 is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of title 5. *Id.* The right to appeal a reduction in grade or removal under this section is granted to any employee who is a preference eligible, *see* 5 U.S.C. § 2108(3) for the definition of "preference eligible," *i.e.*, certain veterans who have served in some conflicts and some of their relatives, and to any employee in the competitive service. It also is granted to any employee in the excepted service and to one covered by subchapter II of chapter 75, *i.e.*, an individual in the excepted service (other than a preference eligible) who is not serving a probationary or trial period pending conversion to the competitive service, and to an individual in the excepted service who has completed two years of current continuous service in the same or similar positions in an executive agency other than a temporary appointment limited to two years or less. *Id.*

Section 4303 does not apply to the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of title 5, the reduction in grade or removal of a competitive service employee who is serving a probationary or trial period under an initial appointment or who has not completed one year of current continuous employment under other than a temporary appointment limited to one year or less, or the reduction in grade or removal of an employee in the excepted service who has not completed one year of current continuous employment in the same or similar positions. *Id.*

Subchapter II "Performance Appraisal in the Senior Executive Service" of chapter 43 incorporates the definition of "agency" from section 3132(a) of title 5 in the subchapter that establishes the Senior Executive Service. Section 3132(a) defines

“agency” as an executive agency, except a government corporation and the General Accounting Office, but does not include “any agency or unit thereof excluded from coverage by the President under subsection (c) of this section” as well as a number of agencies including the Federal Bureau of Investigation, the Drug Enforcement Administration, the Central Intelligence Agency “...and, as determined by the President, an executive agency, or unit thereof, whose principal function is the conduct of foreign intelligence or counterintelligence activities;....”

Section 3132(c) of title 5 authorizes an agency to file an application with the Office of Personnel Management setting forth reasons why it, or a unit thereof, should be excluded from subchapter II, which establishes the Senior Executive Service, of chapter 31 “Authority for Employment.” The Office is required to review the application and stated reasons, undertake a review to determine whether the agency or unit should be excluded from coverage under the subchapter, and, upon completing its review, recommend to the President whether the agency or unit should be excluded from coverage. If the Office recommends that an agency or unit thereof should be excluded from coverage, the President on written determination may exclude the agency or unit for the period determined by the President to be appropriate.

A provision of chapter 43, section 4312 of title 5, requires each agency, in accordance with standards developed by the Office of Personnel Management, to develop one or more performance appraisal systems for the Senior Executive Service. These systems are designed to permit the accurate evaluation of performance in any position, provide for systematic appraisals of performance, encourage excellence in performance, and provide a basis for making eligibility determinations for retention and performance awards in the Senior Executive Service. A senior executive may not appeal any appraisal and rating under any performance appraisal system under section 4312. 5 U.S.C. § 4312.

Appraisals of performance in the Senior Executive Service must be based on both individual and organizational performance, taking into account such factors as improvements in efficiency, productivity, quality of work or service; cost efficiency; timeliness of performance; meeting affirmative action goals and achieving equal employment opportunity requirements, and complying with merit system principles set forth under section 2301 of title 5. 5 U.S.C. § 4313.

Each Senior Executive Service performance appraisal system must provide for annual summary ratings of one or more fully successful levels, a minimally satisfactory level, and an unsatisfactory level. Any career senior executive who receives a rating at any of the fully successful levels may be given a performance award under section 5384 of title 5. Any senior executive who receives an unsatisfactory rating shall be reassigned or transferred within the Senior Executive Service or removed from it. Any senior executive who receives two unsatisfactory ratings in any period of five consecutive years must be removed from the SES, as must any senior executive who twice in any period of three consecutive years receives less than fully successful ratings. 5 U.S.C. 4314.

Chapter 51 “Classification”. H.R. 5005's proposed new section 9701 of title 5 of the United States Code permits the Secretary of the Department of Homeland Security, in regulations prescribed jointly with the Office of Personnel Management, to adjust provisions of chapter 51 “Classification.” As noted earlier, the summary issued by the Select Committee on Homeland Security asserts that this chapter is being made subject to adjustment because the Secretary needs “the flexibility to use a broader approach to job classification that more effectively recognizes the strategic value of each employee.” It characterizes the current classification system as “53 years old” and “obsolete.” *Transforming Government* at 3.

A provision of chapter 51, section 5102, defines “agency,” among other things, as “an executive agency” and expressly excludes entities such as the Central Intelligence Agency, the Defense Intelligence Agency, and the National Imagery and Mapping Agency from coverage. Unlike section 4301, the definitions section of chapter 43 relating to performance appraisal, section 5102 does not grant the President authority to exclude an agency or unit thereof from coverage of chapter 51 on the ground that the principal mission is conducting foreign intelligence or counterintelligence.

Nonetheless, section 5103 states that, “The Office of Personnel Management shall determine finally the applicability of section 5102 of this title to specific positions and employees, except for positions in the Office of the Architect of the Capitol.” It appears that if Congress in later consideration of Department of Homeland Security legislation were to make chapter 51 apply to the Department, OPM, pursuant to section 5103, would be authorized to exempt applicability of chapter 51 to “specific positions and employees.”

Section 5104 prescribes the basis for grading Grades 1 through 15 of the General Schedule, based on the difficulty and responsibility of work, ranging from the “simplest routine work in office, business, or fiscal operations...with little or no latitude for the exercise of independent judgment” (GS-1) to “work of outstanding difficulty and responsibility...with very wide latitude for the exercise of independent judgment” (GS-15). Provisions of chapter 51 direct the Office of Personnel Management, after consulting with agencies, to prepare standards for placing positions in their proper classes and grades, require that each position must be placed in its appropriate class, based on the duties and responsibilities. These provisions also state that each class must be placed in its appropriate grade based on the level of difficulty, responsibility, and qualification requirements, and mandate that each agency must place each position in its jurisdiction in its appropriate class and grade. 5 U.S.C. §§ 5105-5107.

Some provisions of chapter 51 impose duties on the Office of Personnel Management to do such things as establish and revise the maximum number of positions which at any one time may be classified above GS-15 and establish standards and procedures in accordance with which positions may be classified above GS-15, review whether agencies are placing positions in classes and grades in conformance with or consistently with published standards and, if necessary, reclassify positions in the appropriate classes and grades. 5 U.S.C. §§ 5109 and 5110. The Office also is authorized to revoke or suspend authority that had been granted to

an agency to place positions in appropriate classes and grades and place in appropriate classes and grades newly created positions and change positions from one class or grade to another when facts warrant. 5 U.S.C. §§ 5111 and 5112.

Chapter 53 “Pay Rates and Systems”. Chapter 53 is another chapter of title 5 that would be subject to adjustment by the Secretary of Homeland Security. As noted earlier, the summary issued by the Select Committee on Homeland Security suggests that the current federal pay system lacks the flexibility that the Department will need to attract skilled and dedicated workers and that the Department needs a pay system “not necessarily restricted to the 15 “GS” pay grades.” It also seems to object to what it characterizes as “annual increases in pay” that “are most commonly automatic pay adjustments for all employees regardless of performance.” *Transforming Government* at 4.

The proposed new section 9701 of title 5, a subsection of section 761 of H.R. 5005, and section 812(e)(2) address pay. Subsection (d) “Limitations Relating to Pay” of the new section 9701 provides that:

Nothing in this section [the new section 9701] shall constitute authority--,

(1) to modify the pay of any employee who serves in--

(A) an Executive Schedule position under subchapter II of chapter 53 of title 5, United States Code; or

(B) a position for which the rate of basic pay is fixed by statute by reference to a section or level under subchapter II of chapter 53 of such title 5;

(2) to fix pay for any employee or position at an annual rate greater than the maximum amount of cash compensation allowable under section 5307 of such title 5 in a year [level 1 of the Executive Schedule, \$166,700 as of January of 2002]; or

(3) to exempt any employee from the application of such section 5307.

Subsection (b) “Effect on Personnel” of section 761 of H.R. 5005, which is not part of the new section 9701 of title 5, provides that:

(1) Nonseparation or Nonreduction in Grade or Compensation of Full-time Personnel Holding Permanent Positions.—Except as otherwise provided in this act, the transfer pursuant to this act of full-time personnel (except special government employees) and part-time personnel holding permanent positions shall not cause any such employee to be separated or reduced in grade or compensation for one year after the date of transfer to the Department.

(2) Positions Compensated in Accordance with Executive Schedule.—Any person who, on the day preceding such person’s date of transfer pursuant to this act, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5, United States Code, and who, without a break in service, is appointed in the Department to a position having duties comparable to the duties performed immediately preceding such appointment shall continue to be compensated in such new position at not less than the rate provided for such previous position, for the duration of the service of such person in such new position.

(3) Coordination Rule.—Any exercise of authority under chapter 97 of title 5, United States Code (as amended by subsection (a)), including under any system established under such chapter, shall be in conformance with the requirements of this subsection.

As mentioned earlier, section 812(e)(2) of H.R. 5005, a savings provision relating to employment, states that, “except as otherwise provided in this act, or under authority granted by this act, the transfer pursuant to this act of personnel shall not alter the terms and conditions of employment, including compensation, of any employee so transferred.”

Another provision of H.R. 5005, section 772 “Review of Pay and Benefit Plans,” addresses the issue of disparities in pay and benefits of agencies proposed for transfer to the Department of Homeland Security.

Notwithstanding any other provision of this act, the Secretary shall, in consultation with the Director of the Office of Personnel Management, review the pay and benefit plans of each agency whose functions are transferred under this act to the Department and, within 90 days after the date of enactment, submit a plan to the President of the Senate and the Speaker of the House of Representatives, and the appropriate committees and subcommittees, for ensuring, to the maximum extent practicable, the elimination of disparities in pay and benefits throughout the Department, especially among law enforcement personnel, that are inconsistent with merit system principles set forth in section 2301 of title 5, United States Code.

Although the new section 9701 generally authorizes the Secretary of Homeland Security to adjust provisions of chapter 53, section 451 (b) “Maintenance of Customs Revenue Functions” of H.R. 5005 denies authority to “...reduce the staffing level, or the compensation or benefits under title 5, United States Code...” of certain employees of the Customs Service who perform revenue functions. These positions include Import Specialists, Entry Specialists, Fines and Penalties Specialists, attorneys of the Office of Regulations and Rulings, and International Trade Specialists.

Chapter 53 of title 5 has nine subchapters, I “Pay Comparability System,” II “Executive Schedule Pay Rates,” III “General Schedule Pay Rates,” IV “Prevailing Rate Systems,” V “Student-Employees,” VI “Grade and Pay Retention,” VII “Miscellaneous Provisions,” VIII “Pay for the Senior Executive Service,” and IX “Special Occupational Pay Systems.”

The Pay Comparability System is based on the policy that, among other things, federal pay rates should be comparable with nonfederal pay rates for the same levels of work within the same local pay area and that existing pay disparities between federal and nonfederal employees should be reduced. 5 U.S.C. § 5301. This system provides for annual adjustments in pay schedules for the General Schedule of one-half percent less than the rate of change in private sector wages for a given time period and locality based comparability payments unless the President determines that levels of these adjustments and payments are inappropriate because of serious economic conditions or serious economic conditions affecting the general welfare. Pay under the General Schedule, excluding locality based comparability pay, may not be paid in excess of level V of the Executive Schedule, \$121,600 as of January 1, 2002, and, when combined with locality based comparability pay, for most employees may not exceed level IV of the Executive Schedule, \$130,000 as of January of 2002. 5 U.S.C. §§ 5303, 5304 and 5304a.

Whenever the President finds that the government’s recruitment or retention efforts with respect to one or more occupations or one or more areas or locations are, or are likely to become, significantly handicapped, the President may establish for areas or locations involved higher minimum rates of basic pay for one or more grades or levels, occupational groups, series, classes, or subdivisions thereof, and may make corresponding increases in all step rates of the pay range for each such grade or level. The amount of such increase may not exceed the maximum pay rate prescribed by statute for the grade or level by more than 30 percent. No rate may be established under this authority (disregarding locality based comparability payments) in excess of the basic rate payable for level V of the Executive Schedule. Locality based comparability pay may be paid to persons paid under this special pay authority, but the rate of basic pay when combined with the locality based comparability pay may not exceed level IV of the Executive Schedule. 5 U.S.C. § 5305.

Except as otherwise permitted by law, the maximum amount of cash compensation for employees, including total basic pay and any allowance, differential, bonus, award, or other cash payment, is capped at the annual rate of basic pay for level I of the Executive Schedule, the rate paid to cabinet secretaries and some other officials, \$166,700 as of January of 2002. 5 U.S.C. § 5307.

The Executive Schedule, which is divided into five levels, with level I being the highest, is the basic pay schedule for high positions, other than the Senior Executive Service and the Federal Bureau of Investigation and Drug Enforcement Senior Executive Service. Subchapter II identifies officials at each level, ranging from cabinet secretaries and some others at level I to such officials as Associate Administrators at the Small Business Administration and the National Aeronautics and Space Administration at level V. 5 U.S.C. §§ 5312-5316.

Section 902 of H.R. 5005, as passed by the House, amends section 5312 of title 5 to place the Secretary of Homeland Security in level I of the Executive Schedule, section 5313 to place the Deputy Secretary of Homeland Security in level II, section 5314 to place the Under Secretaries of Homeland Security in level III, and section 5315 to place the Assistant Secretaries, General Counsel, Chief Financial Officer, Chief Information Officer, and Inspector General of the Department of Homeland Security in level IV. As of January of 2002, the basic pay is \$166,700 for level I, \$150,000 for level II, \$138,200 for level III, and \$130,000 for level IV.

Subchapter III "General Schedule Pay Rates" of chapter 53 of title 5 applies to employees and positions covered by chapter 51 "Classification." 5 U.S.C. § 5331. The General Schedule is a schedule of annual rates of basic pay, consisting of 15 grades designated "GS-1" through "GS-15" consecutively, which correspond to the classification levels set out in chapter 51. Each grade has ten rates of pay called steps. Pay rates in the general schedule are adjusted annually in accordance with section 5303, a provision in the pay comparability system. 5 U.S.C. § 5332. The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management in conformity with subchapter III of chapter 53 and chapter 51 of title 5 when, for example, the employee is demoted to a position in a lower grade, employment status is otherwise changed, or the employee's position is changed from one grade to another. 5 U.S.C. § 5334.

An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate, *i.e.*, step, of the higher grade which exceeds the existing rate of basic pay by not less than two step increases of the grade from which the employee is promoted or transferred. *Id.*

An employee who is paid on an annual basis and occupies a permanent position within the General Schedule, who has not reached the maximum rate of pay for the employee's grade, must be advanced in pay successively to the next higher step within the grade after completing each 52 calendar weeks in steps 1,2 and 3, each 104 weeks in steps 4,5, and 6, and each 156 calendar weeks in pay rates 7, 8, and 9, provided that the employee did not receive an equivalent increase in pay from any cause during that period and the work of the employee is at an acceptable level of competence as determined by the agency head. 5 U.S.C. § 5335.

When a determination is made that the work of an employee is not at an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration within the agency under uniform procedures prescribed by the Office of Personnel Management. If the determination is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board. If the reconsideration or appeal results in a reversal of the earlier determination, the new determination supersedes the earlier one and is deemed to have been made as of the date of the earlier one. *Id.*

The authority of the Office of Personnel Management and the entitlement to appeal to the Board do not apply to a determination of acceptable level of competence made by the Librarian of Congress. *Id.* Section 5335, regarding step increases, does not apply to the pay of an individual appointed by the President, by and with the consent of the Senate. *Id.* Within the limit of available appropriations and under

regulations prescribed by the Office of Personnel Management, the head of each agency may grant additional step increases, not to exceed one such increase within any 52 week period, to recognize high quality performance. 5 U.S.C. § 5336.

Subchapter VI “Grade and Pay Retention” of chapter 53 provides that any employee who is placed as a result of reduction in force procedures in a lower grade than the previous position and who has served for 52 consecutive weeks or more at the higher grade is entitled to retain the higher grade for two years beginning on the date of placement in the lower grade. 5 U.S.C. § 5362.

Any employee whose position has been reduced in grade also is entitled to retain the higher grade for two years beginning on the date the grade was reduced. After the expiration of the two year period for grade retention, an employee is entitled to basic pay at a rate equal to an employee’s allowable former rate of basic pay plus 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee’s position immediately after such reduction in pay if the allowable former rate exceeds the maximum rate for the grade. 5 U.S.C. 5363.

If grade or pay retention benefits are terminated because an employee declines a reasonable offer of a position whose grade or pay were equal to or greater than the employee’s retained grade or pay, the termination may be appealed to the Office of Personnel Management, but may not be appealed elsewhere or made the subject of a grievance under a negotiated grievance procedure. 5 U.S.C. § 5366.

As noted earlier, section 761(b) of H.R. 5005, as passed by the House, provides that the grade or compensation of any employee transferred to the Department of Homeland Security may not be reduced for one year after the date of the transfer. Moreover, any person who held a position compensated under the Executive Schedule on the day preceding transfer to the Department of Homeland must continue to be compensated in the new position at not less than the rate paid in the previous position if there is not break in service and duties at the Department are comparable to those performed immediately preceding appointment.

Pay Flexibility in Current Law. In its summary of H.R. 5005, the House Select Committee on Homeland Security expresses dissatisfaction with the modern pay system that is restricted to the “rigid 15 ‘GS’ pay grades.” *Transforming Government* at 4. Some provisions of chapter 53 illustrate more flexible authority to set pay rates. For example, section 5376 “Pay for certain senior level positions,” a provision in subchapter VII “Miscellaneous” of title 5, authorizes agency heads to fix rates for positions classified above GS-15 pursuant to section 5108 and scientific and professional positions established under section 3104 of title 5, but not Senior Executive Service positions, at not less 120 percent of the minimum rate of basic pay for GS-15 (the basic pay for GS-15, step 1 is \$82,580 as of January of 2002) and not greater than level IV of the Executive Schedule (\$130,000 as of January of 2002).

Section 5377 “Pay authority for critical positions” authorizes fixing payments not greater than level I of the Executive Schedule, \$166,700, as of January of 2002, for up to 800 positions governmentwide for positions which require expertise of an extremely high level in a scientific, technical, professional, or administrative field; and which are critical to an agency’s successful accomplishment of an important mission.

The Office of Management and Budget, in consultation with the Office of Personnel Management, is authorized to grant agencies authority to make such appointments. The cap of level I may not be exceeded except upon written approval of the President.

Another example of some measure of pay flexibility in current law is pay for Senior Executive Service positions. Section 5382 states that there shall be five or more rates of basic pay for the SES, ranging from not less than 120% of the minimum rate of basic pay for GS-15 to not more than level IV of the Executive Schedule, and that each senior executive shall be paid at one of the rates. To encourage excellence in performance by career executives, performance awards of not less than five percent nor more than 20 percent of basic pay may be paid to them, but the aggregate amount of money available to pay these awards is limited. 5 U.S.C. § 5384.

While there are pay flexibilities in current law and H.R. 5005, if enacted in its current form, would permit pay flexibility, the new section 9701(d)(2) of title 5, as noted earlier, imposes a limit on the total amount of cash compensation that any Department of Homeland Security employee would be able to receive. It states, in relevant part, that, “Nothing in this section shall constitute authority—... (2) to fix the pay for any employee for a position at an annual rate greater than the maximum rate of cash compensation allowable under section 5307 of such title 5 in a year; or (3) to exempt any employee from the application of such section 5307.” Section 5307 provides that, except as otherwise permitted by law, no allowance, differential, bonus, award, or other similar cash payment, when added to total basic pay, may exceed the annual rate of basic pay payable for level I of the Executive Schedule, \$166,700 as of January of 2002.

Premium Pay Provisions. While the new section 9701 of title 5 generally would permit the Secretary of the Department of Homeland Security to adjust provisions of chapter 53 of title 5 of the United States Code, which prescribes rates of pay that correspond to position classifications, some agencies scheduled for transfer to the Department have been granted authority in provisions outside of title 5 to pay employees at premium rates for overtime. *See, for example,* section 267 of title 19, which provides authority to pay Customs officers at premium rates. These pay authorities outside of title 5 would appear to continue in effect when these agencies are transferred.

Chapter 75 “Adverse Actions”. Chapter 75 of title 5 also is eligible for adjustment by the Secretary of Homeland Security under H.R. 5005. The summary issued by the House Select Committee on Homeland Security characterizes the procedures for providing due process to employees subject to adverse actions in chapter 75 and appeals in chapter 77 as

...unnecessarily complex and time consuming. Regardless of the nature of the offense, agencies must provide employees at least 30 days notice prior to taking any action. These procedures often result in expensive and protracted litigation in both administrative and judicial forms [sic]. The delay in reaching

finality negatively impacts on an agency's ability to carry out its mission.

Transforming Government at 4.

Chapter 75 of title 5 “Adverse Actions” has five subchapters, I “Suspension for 14 Days or Less,” II “Removal, Suspension for More than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less,” III “Administrative Law Judges,” IV “National Security,” and V “Senior Executive Service.”

“Adverse action” refers to disciplinary action taken “for such cause as will promote the efficiency of the [civil] service.” Disciplinary action taken under adverse action procedures in chapter 75 differs from action taken pursuant to chapter 43 “Performance Appraisal” for unacceptable performance.

Subchapter I defines “employee” as an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed one year of current continuous service in the same or similar positions under other than a temporary appointment. “Suspension” is defined as placing an employee for disciplinary reasons in a temporary status without duties and pay.

An employee against whom a suspension of 14 days or less is proposed is entitled to--

- (1) an advance written notice stating the specific reasons for the proposed action;
- (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and
- (4) a written decision and the specific reasons therefor at the earlier practicable date.

5 U.S.C. § 7503.

Section 7503 does not provide for a right to appeal a suspension for 14 days or less.

Subchapter II, which applies to removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less, defines “employee” more broadly, to include not only an individual in the competitive service, but also a preference eligible (a qualifying veteran) in the excepted service who has completed one year of current continuous service in an executive agency or the United States Postal Service or the Postal Rate Commission. “Employee” also is defined as an individual (not a preference eligible) in the excepted service who is not serving a probationary period under an initial appointment pending conversion to the competitive service or who has completed two years of current, continuous employment in the same or similar positions in an executive agency under other than

a temporary appointment limited to two years or less. 5 U.S.C. § 7511. “Suspension” has the same meaning as it does in section 7501(2) of title 5. “Furlough” means placing an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons. *Id.*

An employee against whom an action under subchapter II is proposed is entitled to--

- (1) at least 30 days’ advance written notice, unless there is reasonable cause to believe that an employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
- (2) a reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and
- (4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. § 7513.⁵

An agency by regulation may provide for a hearing which may be in lieu of or in addition to the opportunity to answer. An employee against whom an action is taken is entitled to appeal to the Merit Systems Protection Board. *Id.*

Pursuant to subchapter III, an action may be taken against an administrative law judge by the agency in which the administrative law judge is employed only for such good cause established by the Merit Systems Protection Board on the record after opportunity for hearing before the Board. 5 U.S.C. § 7521.

Subchapter IV “National Security” defines “agency” as the Departments of State, Commerce, Justice, Defense, a military department, the Coast Guard, the Atomic Energy Commission, the National Aeronautics and Space Administration, and “such other agency of the government of the United States as the President designates in the best interests of national security.” 5 U.S.C. § 7531.

⁵Section 414 of H.R. 5005 statutorily amends this procedure for employees of the Bureau of Border Security. It authorizes the Under Secretary for Border and Transportation Security, notwithstanding any other provision of law, to impose disciplinary action, including termination of employment, pursuant to policies and procedures applicable to employees of the Federal Bureau of Investigation, who do not have rights provided in subchapter II of chapter 75 unless they are preference eligibles on any employee of the Bureau of Border Security who willfully deceives Congress or agency leadership on any matter.

This delegation of authority to the President to include an agency under the national security subchapter would appear to permit the President to include the Department of Homeland Security or units thereof if Congress in later consideration of homeland security legislation were not to grant the Secretary of Homeland Security authority to adjust chapter 75 and thereby make the chapter apply to the Department.

This subchapter grants an agency head authority to suspend without pay an agency employee in the interests of national security.

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an agency employee when that action is considered necessary in the interests of national security. To the extent that the agency head determines that the interests of national security permit, the suspended employee must be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the agency head statements or affidavits to show why the employee should be restored to duty.

(b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) when, after such investigation and review as the agency head considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency head is final.

(c) An employee suspended under subsection (a) of this section who—

- (1) has a permanent or indefinite appointment;
- (2) has completed a probationary or trial period; and
- (3) is a citizen of the United States;

is entitled, after suspension and before removal, to

(A) a written statement of the charges against the employee within 30 days after suspension, which may be amended within 30 days thereafter, and which must be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of the case by the head of the agency or designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

5 U.S.C. § 7532.

Under subchapter V “Senior Executive Service,” a career appointee in the Senior Executive Service who has completed the probationary period or was covered by adverse action procedures immediately before appointment may be removed from the civil service or suspended for more than 14 days only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function. A senior executive against whom removal or suspension is proposed is entitled to the same rights as those granted in subchapter II, enumerated in section 7513, and quoted in the discussion of that section above. 5 U.S.C. §§ 7541-7543. A senior executive who is removed or suspended may appeal the action to the Merit Systems Protection Board.

Chapter 77 “Appeals”. Chapter 77 is the final chapter of title 5 that is subject to adjustment by the Secretary of the Department of Homeland Security pursuant to new section 9701 of title 5.

During floor consideration of H.R. 5005, the House by a vote of 227 to 202 agreed to a floor amendment offered by Representative Jack Quinn to add subsection (f) to section 9701.⁶ This subsection expresses the sense of Congress that employees of the Department are entitled to fair treatment in any appeals. In prescribing regulations, the Secretary of Homeland Security and Director of the Office of Personnel Management should ensure that employees are afforded the protections of due process and, toward that end, should be required to consult with the Merit Systems Protection Board before issuing any such regulations. Moreover, any regulations which relate to matters within the purview of chapter 77 [“Appeals”] shall be issued only after consultation with the Board and shall ensure the availability of procedures which shall be consistent with due process and provide, to the maximum extent practicable, for the expeditious handling of matters involving the Department of Homeland Security.

Under chapter 77, an employee or applicant for employment may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant has the right to a hearing for which a transcript will be kept and to representation by an attorney or other representative. 5 U.S.C. § 7701

The Board may hear any case appealed to it or may refer the case to an administrative law judge or other Board employee designated to hear cases. If an

⁶See 148 *Cong. Rec.* H5808-5313 (daily ed. July 26, 2002), for the text, debate, and vote on the Quinn amendment.

employee or applicant prevails, the employee or applicant shall be granted the relief provided in the decision effective on making the decision. The decision remains in effect pending the outcome of any petition for review unless the deciding official determines that granting such relief is not appropriate or the relief granted provides that the employee or applicant should return to the place of employment pending the outcome of any petition for review and the employing agency determines that the return or presence of the employee or applicant is unduly disruptive to the work environment. If an agency prevents the return of an employee, the employee must receive pay, compensation, and all other benefits as terms and conditions of employment pending the outcome of any petition for review. No award of back pay or attorney fees shall be paid before a decision is final. *Id.*

A decision of an agency must be sustained if the agency's decision in a case involving unacceptable performance under 5 U.S.C. § 4303 or removal from the Senior Executive Service for failure to be recertified under 5 U.S.C. 3393a is supported by substantial evidence. In any other case, an agency's decision must be sustained if it is supported by a preponderance of evidence. An agency's decision, however, may not be sustained if an employee or applicant shows harmful error in the application of an agency's procedures in arriving at its decision, shows that the decision was based on a prohibited personnel practice described in 5 U.S.C. § 2302(b), or shows that the decision was not in accordance with law. *Id.*

The Director of the Office of Personnel Management may intervene as a matter of right in some cases. Except in cases involving discrimination, any decision by the Board or administrative law judge becomes final unless a party to the appeal or the Director of the Office of Personnel Management petitions the Board within 30 days after receiving such decision or the Board reopens and reconsiders a case on its own motion, but the Board, for good cause shown, may extend the 30 day period. If an employee or applicant prevails, reasonable attorney fees may be required if warranted in the interest of justice. *Id.*

In an action appealable to the Board and involving discrimination, the Board, within 120 days, is required to decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures. In any matter before an agency that is appealable to the Board and involves discrimination, the agency is required to resolve the matter within 120 days. An agency decision in any such matter is judicially reviewable unless the employee appeals the matter to the Board. Any Board decision on such a matter is judicially reviewable as of the date of issuance if the employee or applicant does not file an appeal with the Equal Employment Opportunity Commission or the date the Commission determines not to consider the decision. 5 U.S.C. § 7702.

An employee or applicant, within 30 days after notice of a Board decision in a case of alleged discrimination, may petition the Commission to consider the decision. The Commission within 30 days must determine whether to consider the Board decision. A Commission determination not to consider a Board decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning the issue. If the Commission makes a determination to consider a decision, it must, within 60 days after the date of determination, consider the entire record, which may be supplemented, and either concur in the Board

decision or issue in writing another decision which differs from it on the ground that, as a matter of law, the Board decision incorrectly interpreted any law, rule, regulation, or policy directive, or the decision involving such provision is not supported by evidence in the record as a whole. If the Commission concurs with the decision of the Board, the Board decision is judicially reviewable. *Id.*

If the Commission issues a decision differing from the Board decision, the matter immediately must be referred to the Board which, within 30 days, must concur and adopt the whole Commission decision or reaffirm the initial Board decision or reaffirm it with such revisions as it determines appropriate. The Board's concurrence with an entire Commission decision is judicially reviewable. *Id.*

If the Board does not concur in whole or in part with the Commission decision, the Board immediately must certify the matter to a special panel and within five days transmit the administrative record to it. The special panel, within 45 days after certification, must decide the issues in dispute and issue a final decision which is judicially reviewable. The special panel must refer its decision to the Board and the Board must order an agency to take any appropriate action to carry out the special panel's decision. *Id.*

Notwithstanding any other provision of law, an employee is entitled to file a civil action in court in the same manner as provided in relevant provisions of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c), the Age Discrimination Act of 1967, 29 U.S.C. § 633a(c), or the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(b), if there is no judicially reviewable action after prescribed time periods.⁷ If there is no judicially appealable action by an agency within 120 days after an action involving discrimination has been filed, the employee may appeal the matter to the Board. Nothing in section 7702 of title 5 shall be construed to affect the right to a trial *de novo* under certain civil rights laws after a judicially reviewable action. *Id.*

Any employee or applicant for employment who is adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision before the United States Court of Appeals for the Federal Circuit, except for some cases involving discrimination which shall be filed in federal district courts. A petition for review before the Court of Appeals must be filed within 60 days after the petitioner receives notice from the Merit Systems Protection Board. Such a petition for review of an action involving discrimination before a district court must be filed within 30 days after notice is received of a judicially reviewable action. 5 U.S.C. § 7703.

In any case filed in the Court of Appeals for the Federal Circuit, the court is required to review the record and set aside any agency action, findings, or conclusions found to be—(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by

⁷Although this provision appears in a chapter that is subject to adjustment by the Secretary, proposed section 9701(b), quoted at p. 2 above, states that the human resources management system may not waive, modify, or otherwise affect any provision of law relating to discrimination on the basis of such things as race, age, or gender protected by these statutes.

law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. In a case involving discrimination, the employee or applicant has the right to have the facts subject to trial *de novo* by the reviewing court. *Id.*

The Director of the Office of Personnel Management may obtain judicial review of any order or decision of the Board by filing, within 60 days after receiving notice, a petition before the Court of Appeals for the Federal Circuit if the Director believes that the Board erred in interpreting a civil service law, rule, or regulation and that the Board's decision will have substantial impact on a civil service law, rule, or regulation, or policy directive. Granting such a petition for review is at the discretion of the Court of Appeals. *Id.*

House Debate: Waxman-Frost Amendment. During debate on H.R. 5005, the House considered Amendment No. 20, offered by Representatives Henry A. Waxman and Martin Frost, that would have stricken section 761, as reported from the Select Committee on Homeland Security, and substituted a new section 761.⁸

The proposed substitute (a) (1) generally authorized the Secretary of Homeland Security, notwithstanding any provision of title 5, United States Code, in regulations prescribed jointly with the Director of the Office of Personnel Management, to provide for such adjustment in rates of basic pay as may be necessary to address inequitable pay disparities among employees within the Department who perform similar work in similar circumstances, but (2) denied using this authority for any employee who serves in an Executive Schedule position or position whose rate of basic pay is fixed in statute by reference to the Executive Schedule, and (3) denied authority to fix pay at a rate greater than the maximum of cash compensation allowable under section 5307 of title 5 or to exempt any employee from section 5307. Authority to issue these regulations relating to pay disparities would have expired five years after the effective date of the act.

The proposed substitute directed the Secretary of Homeland Security to establish procedures consistent with section 7532 of title 5, to provide for the suspension without pay and removal of employees of the Department when necessary in the interests of national security or homeland security. These procedures must have provided for written notice, hearings, and review similar to that provided in section 7532.

It also required the Secretary of Homeland Security, not later than five years after the effective date of the act, to submit to Congress a proposal for a demonstration project to help attain a human resources management system necessary in the judgment of the Secretary to enable the Department best to carry out its mission. The proposal would have to ensure that veterans' preference and whistleblower protections would be retained, ensure that existing collective bargaining agreements and rights would remain unaffected, ensure the availability of such measures as may be necessary to allow the Department to recruit and retain

⁸See 148 *Cong. Rec.* H5813-5817 (daily ed. July 26, 2002) for the text and debate on the Waxman-Frost amendment.

the best persons possible to carry out its mission, include one or more performance appraisal systems, and contain recommendations for such legislation or other actions by Congress as the Secretary considers necessary.

Merit system principles under section 2301 of title 5 would have to apply to all authorities to issue regulations regarding inequitable pay disparities and suspension and removal in the exercise of national security and to all personnel management flexibilities and authorities proposed pursuant to the demonstration project proposal.

Title 5 section 7211 “Employees’ Right to Petition Congress,” which prohibits interference with or denial of the right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, to a committee, or member thereof, would be amended to permit an employee aggrieved by a violation of this right to file a civil action in a district court within three years after the date of any violation. The action could be brought against any agency or other person responsible for the violation for lost wages and benefits, reinstatement, costs and attorney fees, compensatory damages, and equitable, injunctive, or other relief that the court considers appropriate. The party bringing the action may request a jury trial.

The proposed substitute provided that nothing in it should constitute authority to reduce the rate of basic pay (including any comparability pay) payable to any employee transferred to the Department of Homeland Security below the rate last payable to the employee before the date of transfer.

It also amended section 812(e)(1) of H.R. 5005, as reported from the House Select Committee on Homeland Security, relating to employment provisions in the section relating to savings provisions. A savings provision relating to employment, section 812(e)(1), as reported by the Select Committee, in relevant part, authorizes the Secretary of Homeland Security, in regulations prescribed jointly with the Director of the Office of Personnel Management to “...adopt the rules, procedures, terms, and conditions, established by statute, rule, or regulation before the effective date of this act, relating to employment in any agency transferred to the Department pursuant to this act.”

The proposed substitute struck the word “act” at the end of section 812(e)(1), and replaced it with “...act, except that the rules, procedures, terms, and conditions relating to employment in the Transportation Security Administration, before the effective date of this act may be applied only to the personnel employed by or carrying out the functions of the Transportation Security Administration.” The purpose of this substitute appears to have been to prevent the Secretary of Homeland Security from extending the rules, procedures, terms, and conditions relating to employment at the Transportation Security Administration, which has statutory authority to waive some title 5 provisions, to other entities that are scheduled for transfer to the Department.

During the debate Representative Waxman explained that the proposed substitute included language that was reported unanimously by the Committee on Government Reform and Oversight when it considered H.R. 5005. He asserted that it was “wrong” to allow the Secretary of Homeland Security to waive title 5 chapters

43 “Performance Appraisal,” 51 “Classification,” 53 “Pay Rates and Systems,” 71 “Labor-Management and Employee Relations,” 75 “Adverse Actions,” and 77 “Appeals.” “Civil servants whose responsibilities will be the same today if they are transferred into this new department should not lose their civil service protections just because that organizational chart may change. ... We need to encourage good employees, not treat them as second-class citizens.” 148 *Cong. Rec.* at H5814 and H5816.

Speaking in opposition, Representative Rob Portman argued that the Waxman-Frost amendment “...protects the antiquated civil service system that blunts this Department’s ability to modernize, to consolidate, to streamline, to bring together 22 different personnel systems into one team.” *Id.* at H5816. He asserted that it “...would prohibit the Secretary from using innovative compensation like incentive pay. ... keeps the new agency stuck in the mud of over 100 pay grades [15 grades with 10 steps per grade], arcane classifications that make no sense whatsoever, and performance appraisals that are indifferent to the mission of this agency.” *Id.*

Representative Portman also argued that, under normal civil service rules which involve such things as developing a written job description, classifying a position, conducting job analysis, announcing a position, rating and ranking applicants, as well as referring the top three applicants for interviews and interviewing them, hiring a bioterrorism expert conceivably could take up to five months. *Id.* “Also, the Secretary could have a bureaucratic nightmare trying to decide who is a terrorism risk. If you want to fire somebody under the current rules, it can take, yes, weeks and months. Red tape comes first; homeland security comes second.” *Id.* He added that the Waxman-Frost amendment did not allow the Secretary to *develop* a new system, but only to *propose* one to Congress, which would have to work its will on the proposal by full legislative proceedings of committee and floor action in the House and Senate. *Id.*

The Waxman-Frost amendment was rejected by a recorded vote of 208 to 220. *Id.* at H5837.

Lieberman Substitute to H.R. 5005 in Senate,

On July 25, 2002, the Senate Committee on Governmental Affairs agreed to language in the form of a substitute offered by Chairman Joseph Lieberman to the bill that passed the House. On August 1, 2002, Amendment No. 4467 was filed in the Senate in the nature of a substitute to H.R. 5005.⁹ It contained some human resource management provisions relating to the Department of Homeland Security, as well as some amendments to title 5 of the United States Code that are intended to apply to the entire civil service. A Senate bill, S. 2452, 107th Congress, 2d Session, had been

⁹Amendment No. 4467 is printed in 148 *Cong. Rec.*S7967-S8003 (daily ed. Aug. 1, 2002, pt. II).

reported to the Senate by the Committee on Governmental Affairs on June 24, 2002.¹⁰

Department of Homeland Security Provisions. Section 101 of the Lieberman substitute establishes the Department of Homeland Security and places it in section 101 of title 5, which lists the executive departments. Section 102 provides that the Secretary of Homeland Security shall be the head of the Department. Section 104 establishes the Under Secretary for Management, an official to whom the Secretary may assign, among other things, functions relating to the management and administration of the Department including human resources and personnel. Section 112 establishes the Chief Human Capital Officer who is required, among other things, to oversee the implementation of laws, rules, and regulations of the President and Office of Personnel Management governing the civil service within the Department.

Section 114 of the Lieberman substitute amends section 5312 of title 5 to place the Secretary of Homeland Security in level I of the Executive Schedule (\$160,700 as of January of 2002) and section 5315 of title 5 to place the Under Secretary for Management in level IV of the Executive Schedule (\$130,000 as of January of 2002). Section 114 does not place the Chief Human Capital Officer in any level of the Executive Schedule.

Paragraph (2) “Terms and Conditions of Employment” of section 187(f), a savings provision of the Lieberman substitute amendment to S. 2452, states that, “The transfer of an employee to the Department under this act shall not alter the terms and conditions of employment, including compensation, of any employee so transferred.”

Paragraph (3) “Conditions and Criteria for Appointment” of section 187(f) provides that:

Any qualifications, conditions, or criteria required by law for appointments to a position in an agency, or subdivision thereof, transferred to the Department under this title, including a requirement that an appointment be made with the advice and consent of the Senate, shall continue to apply with respect to any appointment to the position made after such transfer to the Department has occurred.

Section 185 “Implementation Progress Reports and Legislative Recommendations” directs the Secretary of Homeland Security, in consultation with the President, to prepare semiannual implementation progress reports and submit them to the President of the Senate and the Speaker of the House for referral to appropriate committees. These reports must contain, among other things, with respect to human capital planning, a description of the workforce planning undertaken for the Department of Homeland Security including an inventory of skills and competencies available to the Department, the past and anticipated future record

¹⁰S. Rep. No. 175, 107th Cong., 2d Sess. (2002).

with respect to recruiting and retaining personnel, plans or progress reports on utilizing existing personnel flexibility provided by law or Office of Personnel Management regulations, any inequitable disparities in pay or other terms or conditions of employment resulting from consolidations, and efforts to address these disparities using existing personnel flexibility.

Governmentwide Federal Workforce Improvement Provisions.

Division C of the Lieberman substitute amendment to H.R. 2482, entitled “Federal Workforce Improvement,” contains titles XXI through XXV and incorporates some provisions that had been introduced by Senator George V. Voinovich in S. 2651, 107th Cong. 2^d Sess.¹¹ Title XXI “Agency Chief Human Capital Officers” establishes a new chapter 14 “Agency Chief Human Capital Officers” to title 5 of the United States Code, which directs the heads of several agencies to appoint or designate Chief Human Capital Officers and prescribes their duties.

Title XXII “Reforms Related to Federal Human Capital Management,” amends section 1115 of title 31 of the United States Code, to require including information relating to human capital in agency performance plans. It also amends United States Code title 5, section 3304(a) “Competitive service; examinations” to authorize agencies to appoint, without regard to sections 3309 through 3318 of title 5, candidates directly to positions if public notice has been given and the Office of Personnel Management has determined that a severe shortage of candidates exists or there is a critical hiring need.

A new section 3319 “Alternative ranking and selection procedures” is added to title 5 to authorize the Office of Personnel Management or an agency which has been delegated examining authority the option of establishing category rating systems for evaluating candidates in the competitive service under two or more quality categories based on merit consistent with regulations prescribed by the Office. Category rating systems could be used as an alternative to the current system of assigning applicants individual numerical ratings. Veterans’ preference rights would be respected.

Title XXII also adds a new subchapter II “Voluntary Separation Incentive Payments” to title 5, chapter 35 “Retention Preference, Restoration, and Reemployment” permanently to extend, revise, and expand authorities for using voluntary separation incentive pay and voluntary early retirement. It also amends sections 8336 and 8414 of title 5, the immediate retirement provisions of the Civil Service Retirement System and the Federal Employees Retirement System, respectively, to extend eligibility for immediate retirement. The sense of Congress is expressed that implementing voluntary separation incentive payment authority is intended to reshape the federal workforce, not downsize it.

¹¹See Barbara L. Schwemle, *Homeland Security: Human Resources Management*, Congressional Research Service Report RL31500 for a discussion of these federal workforce improvement provisions, and Barbara L. Schwemle, L. Elaine Halchin, Richard A. Best, Jr., and Patrick J. Purcell, Congressional Research Service Report RL 31518, *Federal Workforce Improvement Act of 2002: S.2651* for a discussion of the Voinovich bill from which many of these provisions were derived.

Section 7905(a)(1) of title 5 “Programs to encourage commuting by means other than single-occupancy motor vehicles” is amended to extend eligibility for a transit subsidy to a student who provides voluntary services.

Title XXIII of the Lieberman substitute amendment to S. 2452 repeals title 5, section 3393a “Recertification,” which requires recertifying career appointees in the senior executive service every three years, and makes conforming changes to other provisions of title 5. It also amends title 5 section 5307 “Limitation on certain payments,” which limits total cash compensation, including total basic pay, allowances, differentials, awards, and bonuses, to the basic pay for level I of the Executive Schedule, \$166,700 as of January of 2002. The amendment provides that notwithstanding this cap, the total cash compensation to some categories of employees including administrative law judges, those in senior level positions classified above GS-15 and scientific and professional positions, and senior executives shall not exceed the total annual compensation payable to the Vice President under section 104 of title 3, \$192,600 as of January of 2002.

Title XXIV of the Lieberman substitute amendment replaces title 5 section 4107 “Restriction on degree training,” which generally prohibits agencies from paying or reimbursing the costs of academic degree training, with a new section 4107 “Academic degree training,” to permit them to pay or reimburse such costs under certain circumstances. It also modifies the national security education program and amends section 1902 of title 50, United States Code, to expand the opportunities to fulfill a service requirement if national security positions are unavailable.

Title XXIV also adds a new section 5550b “Compensatory time off for travel” to subchapter V of chapter 55 of the United States Code, to grant one hour of compensatory time off for each hour spent by an employee in travel status away from an official duty station to the extent that the time spent in travel status is not otherwise compensable.

Veto Recommendation to Personnel Provisions in Lieberman Substitute. In an August 1, 2002 letter, the Homeland Security Advisor to the President, wrote that after reviewing the Lieberman substitute amendment, the Bush Administration believes that it would create a “cumbersome bureaucracy that would not provide the best security for America.” He added that, “If the legislation were to come to the President in its current form, I would recommend a veto to the President.”

The Ridge letter and accompanying materials expressed concern about a number of areas, one of which relates to personnel flexibility. The letter stated that:

The President believes that the Department of Homeland Security should have a modern, efficient, and fair personnel system that will maximize every employee’s ability to accomplish the mission of securing the homeland. The President also believes that this system must maintain vital employee rights, such as whistleblower and civil rights protection.

S. 2452 [which, among other things, provides that, “The transfer of an employee of the Department under this act shall not alter the terms and conditions of employment, including compensation, of any employee so transferred” in section 187(f)] fails to strike a reasonable balance in the area of personnel flexibility. It contains a rigid, statutorily mandated, and unalterable personnel system that fails to recognize the need to build a department that is capable of responding to an adaptable terrorist enemy. The bill would deny the Secretary of Homeland Security the ability to integrate and modernize twenty-two different personnel systems that will be combined into the new Department. Additionally, it would prohibit the kind of managerial innovation needed to hire and retain qualified individuals, or to hold them accountable for accomplishing critical homeland security functions.

Letter from the Honorable Tom Ridge, Homeland Security Advisor to the President, to the Honorable Thomas Daschle, Majority Leader of the Senate (Aug. 1, 2002).

The executive summary that accompanied the letter said that:

What the President is Asking for...

With its critical mission, the new Department of Homeland Security must be the most modern, efficient, and flexible in the federal government. The President wants to put the right people in the right jobs at the right pay—and to hold them accountable for their performance. The President also wants to give the new Secretary the authority to reorganize and quickly shift resources to meet new terrorist threats. The President wants to empower the new Department to:

- hire the best possible employees to protect America;
- transfer a percentage of the Department’s funds from one division to another to respond immediately to new threat information;
- provide merit-based pay increases to employees who do an especially good job in their posts;
- quickly move anti-terrorist personnel and resources to respond to the latest threat information;
- hold employees accountable for their performance, while retaining longstanding worker rights and protections that are embedded in the national’s civil service laws;

–remove poor performers who, because of their poor performance, jeopardize America’s national security;

–reorganize and consolidate the current confusing patchwork of homeland security activities into a more efficient and effective system of protecting America.

The Senate Bill Lacks These Critical Authorities

These existing authorities are currently in use in other parts of the federal government and should be applied to the new Department. Yet, the homeland security bill passed out of the Senate Governmental Affairs Committee would handcuff the Secretary of Homeland Security by denying he or she the tools needed to build and maintain a Department capable of meeting the constantly changing threats of terrorism. Protecting the homeland is simply too important not to give the Department this authority.

...

The Senate bill does not provide flexibility to attract, hire, and reward good performers, or to hold poor performers accountable:

–The Office of Personnel Management (OPM) reports that it can sometimes take 5 months or more to hire a new federal employee and 18 months to terminate federal employees who are not getting the job done.

–Current federal civil service rules do not allow managers to reward effective employees and penalize poor performers. This means that all employees are given the same annual pay increase based on how long they have worked for the government, not how effective they have been at their job.

–INS [the Immigration and Naturalization Service] currently is unable to shift border patrol agents from one region to another at a moment’s notice. So, if intelligence indicates that terrorists may attempt to enter America through a particular border location, managers are currently prevented from quickly moving agents to the vulnerable area—even for a temporary 30 day assignment.

–Under current rules, if an employee is found intoxicated at his security post, that employee must be given a 30 day notice before he or she can be

terminated. And the employee is paid for his 30 day period.

–The President is asking for less management authority than Members of Congress have over their staffs.

The Rules That Protect Federal Workers...

Federal workers represent the very best of America and deserve strong civil service protections. Under the President’s plan, employees of the new Department will continue to be protected by important civil service laws, rules, and regulations that protect them against discrimination on the basis of age, disability, race, color, religion, sex, national origin, marital status or political affiliation, and guarantee existing veterans’ preference and whistleblower protections. The employees being transferred to the new Department that are represented by unions—approximately 25% will—retain their union membership and their collective bargaining rights. Employees will also be protected by:

- Fair Labor Standards Act
- Equal Employment Opportunity Commission (EEOC) regulations
- Social Security Act
- Civil Rights Act
- Hatch Act
- Government ethics standards

Executive Summary accompanying Ridge Letter (Underline in original.)

Other material that accompanied the Ridge letter characterized the Senate committee reported draft as follows:

The Committee introduces narrow changes to the personnel system—such as slight hiring process reforms and correction to pay administration anomalies. It provides that no one as a result of transferring to the new department can be fired or receive reduced compensation and terms and conditions of job duties cannot be altered.

Material accompanying Ridge letter at 12.

It identified the following problems with this draft:

–The Senate bill does not provide sufficient flexibility to attract, hire, and reward good performers, or to hold poor performers accountable.

–Although the Committee’s bill provides some improvements in the federal hiring process, it falls short of providing flexibilities necessary to hire, compensate, and remove employees when necessary.

–The Department is restricted in how it can use the [voluntary separation] incentive authority. Payments can be made only for substantial delay[er]ing, reorganization, reductions in force, transfer of functions, or workforce restructuring. The use of the word “substantial” limits the use of this authority.

–Other substantial problems in the federal pay system—like the inability to harmonize the pay systems coming into the new Department, or the inability to substantially reward line employees—are not addressed in the committee reported draft.

Id.

Conclusion

This report has discussed civil service provisions in bills to create a Department of Homeland Security, H.R. 5005, as passed by the House, and the Lieberman substitute to H.R. 5005 agreed to by the Committee on Governmental Affairs and filed as an amendment in the Senate. The House bill authorizes the Secretary of Homeland Security, in regulations prescribed jointly with the Director of the Office of Personnel Management, to establish, and from time to time adjust, a human resources management system for some or all of the organizational units of the Department of Homeland Security. Chapters of title 5 of the United States Code which relate to Performance Appraisal, Classification, Pay Rates and Systems, Labor-Management and Employee Relations, Adverse Actions, and Appeals would be eligible for adjustment. Authority to establish and adjust the human resources management system is scheduled to expire five years after enactment.

The Lieberman substitute generally continues all provisions of current civil service laws for the Department, but alters some provisions for the entire government that relate to evaluating and appointing applicants for federal employment and compensating some employees.

The Homeland Security Advisor to the President has indicated that if the Lieberman substitute amendment in its current form should be presented to the President for signature, he would recommend a veto because, among other things, it does not provide the personnel flexibility that the President believes he needs to protect the homeland against terrorist threats.