

You Already Have the Flexibility You Seek

— A Report by the American Federation of Government Employees (AFGE)
On the Rights of Federal Managers in Structuring
The New Department of Homeland Security



**A Message to the
Bush Administration**

Homeland Security Now

Preface

Maximum Flexibility: The Existing Rights of Federal Managers

Federal workers support homeland security, not just with their voices but also with their lives and livelihoods. They are the dedicated employees who guard our nation's borders, fight fires, perform rescue and relief operations, protect the security of our transportation system, and enforce our laws. They have been delivering homeland security from the front lines, every day, since long before President Bush proposed creating a new federal department.

The Department of Homeland Security (DHS) proposed by Bush would, in fact, severely undermine national security by putting government employees – those who preserve and protect our safety – in jeopardy. Under the Bush version of the homeland security bill passed by the House of Representatives, federal workers would have to give up the civil service rights that now shield them from the whims of politics and from retaliation for blowing the whistle on wrongdoing they might see on the job. Bush says he wants his homeland security secretary to have the “flexibility” to suspend federal employees’ rights because they might bog down the national security efforts. The fact is, that flexibility already exists.

The report on the following pages shows the wide range of authority available to management from the beginning (hiring and promotion) to the end (discipline and termination) of the federal employment process. And it shows the flexibility managers have to use incentives like retention bonuses and performance awards not just to manage, but to build the morale and efficiency needed in such a vital undertaking as homeland security.

Overriding the more than 80 specific management prerogatives cited are two special provisions with direct application to the new DHS — suspension of all other personnel rights in emergencies or matters concerning national security.

Many of the same federal employment features on the following pages are emphasized in the handbook *Human Resource Flexibilities and Authorities in the Federal Government*. The Office of Personnel Management updated that handbook in July 2001, apparently to show new presidential appointees how to mold federal agencies to their liking.

Some of the highlights of the report include:

Staffing – The 1978 Civil Service Reform Act eliminated any legal reason to explain delays in filling vacancies. Six sections of the law address ways to hire, from either inside or outside the federal service. Agencies can also transfer employees, make temporary assignments and exercise wide discretion in getting the people they want.

Pay and Bonuses – Pay increases passed by Congress go into effect each January, unless the President freezes pay. But managers have the discretion in a wide variety of other financial incentives like promotions, step increases, incentive awards, and special step increases for quality performance. Managers can award recruitment, retention and relocation bonuses worth up to 25 percent of base salary.

Job Elimination – Managers can eliminate positions because of program changes, reorganization, lack of funding, privatization or other reasons. Such tools as early retirement authority and incentives for voluntary separation can expedite the process of reorganization.

Discipline and Termination – The report cites 35 causes that can lead to termination of federal employees, including immediate removal from the workplace for serious misconduct. An agency can also reduce the grade level or remove an employee for receiving a rating of “unacceptable” in any critical job function. No cause is needed for termination during an employee’s first-year probation.

A Message from AFGC National President Bobby L. Harnage

Why is this report important? When President Bush talks about a new homeland security department, he says the new Secretary will need “flexibility” to make it easier to react swiftly to a national threat. Part of the flexibility President Bush has in mind is the ability to suspend civil service laws, collective bargaining rights, and other hard-won federal worker protections whenever the Secretary of Homeland Security sees a need. This report demonstrates that much of what the administration is pleading for already exists.

That leads us to ask, what is he really after? With all of the management authority that is spelled out in this report, what does President Bush really mean by “flexibility?” It looks as if he wants the Secretary of Homeland Security to have absolute power to decide all personnel matters on the basis of political patronage, not merit. Flexibility means nothing less than gutting the civil service merit system and busting employee unions.

This is where we came in. Civil service laws came about because federal managers had too much flexibility. They could hire their cronies, use promotions as payoffs for political favors and use demotions or firings to punish whistleblowers. Muzzled federal employees couldn’t talk with investigators, the media or with Members of Congress.

What the administration is talking about is not the 21st century workplace, but the kind of

system we threw out over 125 years ago, when political patronage and cronyism ran rampant. Neither union membership nor civil service rights have ever interfered with the government’s ability to carry out its mission. Most of all, federal employee protections have never jeopardized national security. Quite the opposite. Before, during, and since September 11, unionized federal workers perform heroically every day, guarding the nation’s borders, fighting fires, performing rescue and relief operations, protecting the security of our transportation system, and enforcing our laws.

If the Secretary of Homeland Security wants to retain the most effective, efficient, and reliable employees for the new department, they are going to want civil service pay, rights, and protections. If the Secretary wants a workforce that hits the ground running, with dedicated employees who have already proved their courage and commitment to national safety, those employees will need to know their rights will be protected. The mission of the Homeland Security Department is far too critical for experimentation with its most valuable asset – its personnel. Shaky morale and an insecure workforce are a feeble foundation for homeland security.

Only with a secure workforce – protected from politics – can our homeland be secure. Denying federal employees their basic freedoms at work will not make the U.S. safer – just less democratic.

Existing Flexibilities and Authorities for Federal Managers

The Civil Service Reform Act of 1978 gave broad managerial flexibility to federal managers. Most significantly, under the law **managers expressly retain the right in the context of labor relations and collective bargaining to act in emergencies:** “[N]othing in this chapter shall affect the authority of any management official of any agency — ...to take whatever actions may be necessary to carry out the agency’s mission during emergencies.” 5 USC §7106(a)(2)(D).

Equally important, in the context of personnel actions, **managers always retain the right to suspend and/or remove any employee in the interest of national security:** “Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security...[and] the head of any agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security.” 5 USC §7532(a)-(b).¹ See e.g., Navy v. Egan, 484 U.S. 518 (1988).

More generally, with respect to performance-based personnel actions, managers were given non-negotiable power to set performance standards

and to fire federal employees for performance deficiencies as long as there was plausible evidence of the employee’s failures. An agency may reduce in grade or remove an employee for receiving a rating of “unacceptable” with respect to even a single “critical element” of the functions of his position. That is, even if an employee appeals a performance-based termination (firing), the firing is upheld as long as there is *some* evidence to support the manager’s conclusion. See e.g., Martin v. FAA, 795 F.2d 995, 997 (Fed. Cir. 1986) and 5 USC §7701(c)(1)(A) (“[T]he decision of the agency shall be sustained...if the agency’s decision – in the case of an action based on unacceptable performance...is supported by substantial evidence....”). Absolutely no evidence is needed to remove an employee during his/her probationary first year. 5 CFR §315.804; Vilt v. Marshalls Service, 16 MSPR 192 (1983).

The 1978 law made clear that in serious misconduct cases, federal employees may be removed from the workplace immediately. See 5 USC §7513(b)(1) (crime exception) and Berti v. Department of Transportation, 16 MSPR 24 (1983). And see Jones v. Navy, 978 F.2d 1223 (Fed. Cir. 1992)(Navy could indefinitely suspend two employees during investigation into whether to terminate their security clearance where the suspension would promote the efficiency of the service). Under collective bargaining agreements,

¹ In addition to the eight enumerated agencies in 5 USC §7531 (1)-(8), “agency” includes “such other agency of the Government of the United States as the President designates in the best interests of national security.” 5 USC §7531 (9).

employee appeals can be decided definitively within 30 days of the charges being brought (faster than the employee could begin an appeal process under the earlier law).

The 1978 civil service reform and subsequent administrative reforms by OPM have eliminated any legal reason to explain delays in filling vacancies. No delay in federal hiring is due to

civil service law. There is nothing in current law or in union contracts that precludes management from quickly defining a job, quickly determining selection criteria, quickly soliciting applicants, quickly evaluating applicants, and quickly making selections. Managers can even select from certain sources (see below) without competitive evaluation.

Federal Managers Currently Enjoy Broad Authority Regarding Staffing, Hiring, Placement and Promotion

Managers are free to choose whether to fill a vacant position from the outside or the inside, as long as merit procedures are followed. Managers can fill a position in any of the following ways:

- Exercise special “noncompetitive appointment authority” to appoint someone from outside the federal government (5 CFR §6.1 *et seq.*);
- Appoint a candidate from the outside, who has never been a federal employee, and who is on a list of competitive service eligibles (5 CFR §7.1);
- Reassign a federal employee who is working elsewhere in an agency at a similarly-graded job (*an employee who refuses reassignment can be terminated*) (5 CFR §335.103);
- Transfer an employee from one agency to another, provided it is in the same commuting area (*an employee who refuses transfer can be terminated*) (5 CFR §335.102);
- Reinstate a former federal employee, such as an annuitant, who can then be terminated/separated at the full discretion of the appointing manager (5 CFR §330.101 *et seq.*, 5 CFR Part 352);

- Detail an employee for a temporary assignment, either within an agency or from one agency to another (*an employee who refuses a temporary detail can be terminated*) (5 CFR §300.301).

Managers can eliminate positions due to changes in programs, lack of funding, reductions in workload, reorganizations, privatization, “divestiture,” or contracting out; personnel ceilings, or a decision to re-employ a returning worker. Managers determine the job or jobs to be eliminated in the context of a Reduction in Force (5 CFR Part 351). In that context, managers can also unilaterally reassign employees to vacant positions in the agency (*id.*).

Probationary periods: Managers can terminate an employee at any time for any reason during the first year of employment; see 5 USC §7511(a), 5 CFR §315.801 *et seq.*, *Milanak v. Dept. of Transportation*, 90 M.S.P.R. 236 (2001).

Management Rights That Would be Unaffected by the Elimination of Title 5

As part of the reinventing government initiative, the requirement for agencies to have internal agency grievance systems was eliminated in 1995. See 5 CFR Part 771. The goal was to give agency management maximum flexibility in designing and implementing their own procedures for resolving conflicts. Some agencies kept existing grievance systems; others designed new, “alternative dispute resolution” systems. The following matters fall under the heading of traditional “management rights.” Although they can be challenged under some collective bargaining agreements and agency dispute resolution systems, they are areas where managerial discretion is assumed:

- Promotions – managers have discretion to decide upon competitive and noncompetitive promotions (5 CFR Part 335);
- Adverse actions – suspensions for 14 days or less (5 CFR §752.201 et seq.); suspension for

more than 14 days (5 CFR §752.401 et seq.); removals (id.); demotions (id.), reductions in grade or pay (id.);

- The return of a career appointee from the Senior Executive Service (SES) to the GS or another pay system (5 CFR §§317.701 & 352.205b);
- Reassignment, transfer, and detail (5 CFR §317.901 et seq.) or firing of a career SES employee (5 CFR §752.601 et seq.);
- The substance of a position description, i.e. the duties, responsibilities, and critical elements of an employee’s job description (5 CFR Part 430);
- The performance standards of an employee’s position (id.);
- The awarding (or failure to award) of performance payments (5 CFR Part 451).

Performance Management: Management Flexibility Regarding Pay

Unless the President freezes pay for all federal workers, a pay increase passed by Congress goes into effect as of the first pay period in January. 5 USC §5303, 5 CFR Part 531. This pay increase varies by metropolitan area, in order to reflect local market conditions. 5 CFR §531.601 et seq.

1. Managers can decide whether employees have earned pay increases known as “step” increases, based upon performance. Only if the supervisor judges an employee’s performance to be at least “Fully Successful,” over the course of defined time periods, will the employee receive a “step” increase in pay (5 CFR §531.401 et seq.).
2. Managers are also able to grant employees additional financial “incentive awards” (5 CFR §451.104 et seq.).

- **Performance-based cash awards**, which are lump sum cash awards for overall high-level performance, as evidenced by supervisor’s current rating (id. and 5 CFR §534.403);
- **Special Act or Service awards**, from work on a special project, exceptional performance on an assignment, a scientific achievement or an act of heroism (5 CFR §451.104 et seq.);
- **Quality Step Increases**, which are one-step increases to base pay for General Schedule workers who receive a performance rating at the highest summary level used by the program (5 CFR §531.501 et seq.);
- **Other Financial Incentive Awards** include time off without use of “leave,” special opportunities such as paid attendance at a

professional conference, special assignments, free parking, special inscribed objects, letters of appreciation, and commendations (5 CFR Part 451).

On average, managers give 600,000 federal employees per year some type of performance award for overall high-level performance in the federal government. Last year, the average award was worth \$800. In addition, 11,200 awards were given for good suggestions and invention/innovations; and 415,000 individuals were given special act or service awards.

Agencies are permitted to give extra financial awards worth up to \$10,000 for suggestions, inventions, or other special performance-based contributions that either reduce costs or improve government operations or services without needing OPM approval (except for DoD) (5 CFR Part 451). Only awards of over \$25,000 require Presidential approval (*id.*).

3. Managers have the authority to award recruitment, retention, and relocation bonuses worth up to 25% of base salary (5 CFR Part 575).

- **Recruitment bonuses:** Managers may pay bonuses of up to 25% of base pay in order to fill a position that is considered difficult to fill. These bonuses may be paid in conjunction with other special compensation authorities, such as superior qualifications appointments, special rate appointments (*id.*).
- **Retention bonuses:** Managers may provide retention allowances to those judged to have unusually high or unique qualifications. The allowance is renewable on an annual basis. Managers can pay group bonuses of up to 10% (25% with OPM approval) to groups with unusually high or unique qualifications (*id.*).
- **Relocation bonuses:** Managers may pay relocation bonuses of up to 25% of base pay of an existing employee who must relocate in order to fill a position the manager judges to be difficult to fill. Managers can use this authority for employees who receive special rates (*id.*).

Management Action to Suspend or Remove a Federal Employee

Federal managers have the authority to take performance-based removal or demotion actions (5 USC §§4303 and 7513; 5 CFR Parts 432 and 752). Under 5 USC §§8336 and 8414, if the reason for the removal or demotion is misconduct, delinquency, or failure to perform, upon issuance of a manager's decision to remove an employee, the employee is ineligible for discontinued service retirement.

Examples of misconduct or performance failure that can result in termination (but which are subject to employee appeals):

- Willful destruction of government property, see e.g., *Strachan v. Dept. of Air Force*, 30 M.S.P.R. 501 (1986);
- Use of government property for other than official government business, see e.g., *Cantu v. Dept. of Treasury*, 88 M.S.P.R. 253 (2001);
- Assault of a coworker, supervisor, or member of the public, see e.g., *Johnson v. Dept. of Air Force*, 10 M.S.P.R. 397 (1982);
- Discourteous conduct, see e.g., *Holland v. Dept. of Defense*, 83 M.S.P.R. 317 (1999);
- Endangering public health or safety, see e.g., *L'Bert v. Dept. of Veterans Affairs*, 88 M.S.P.R. 513 (2001);

- Gross insubordination, including refusal to follow orders, return to work, see e.g., Luciano v. Dept. of Treasury, 88 M.S.P.R. 335 (2001);
- Refusal of a drug test in the context of a manager's reasonable suspicion, see e.g., Garrison v. Dept. of Justice, 67 M.S.P.R. 154 (1995), affirmed, 72 F.3d 1566 (Fed. Cir. 1995);
- Bringing disrepute on an agency, see e.g., Fouquet v. Dept. of Agriculture, 82 M.S.P.R. 548 (1999);
- Failure to perform in an acceptable manner, see e.g., Belcher v. Dept. of Air Force, 82 M.S.P.R. 230 (1999);
- Failure to meet physical requirements of a job, including standards of mental and emotional stability and maturity, see e.g., Bullock v. Dept. of Air Force, 88 M.S.P.R. 531 (2001);
- Failure to meet your personal financial obligations (credit card bills, alimony and child support payments, federal, state, and local taxes, student loans, other government-backed obligations), see e.g., Myers v. Dept. of Agriculture, 88 M.S.P.R. 565 (2001);
- Revelation of non-public information, including classified and non-classified information, see e.g., Gibb v. Dept. of Treasury, 88 M.S.P.R. 135 (2001);
- Engaging in outside employment that impairs the ability of the individual to carry out government duties, see e.g., Office of Hearings and Appeals v. Whittlesey, 59 M.S.P.R. 684 (1993);
- Acceptance of a gift from an individual or organization which the employee plays a role in regulating or otherwise overseeing, see e.g., Herrera-Martinez v. Social Security Administration, 84 M.S.P.R. 426 (1999);
- Falsification of time cards, see e.g., Watson v. Dept. of Air Force, 34 M.S.P.R. 656 (1987);
- Alcohol-related conduct, see e.g., Edwards v. Dept. of Army, 87 M.S.P.R. 27 (2000);
- Absence without previously approved leave, AWOL, see e.g., Wooten v. OPM, 87 M.S.P.R. 680 (2001);
- False statement on employment application, see e.g., Jones v. Dept. of Justice, 87 M.S.P.R. 91 (2000);
- Filing a false statement, see e.g., Haebe v. Dept. of Justice, 81 M.S.P.R. 167, appeal after remand 87 M.S.P.R. 529 (1999)(false claim in report of investigation that investigator observed suspected drug courier purchase airline ticket, go through magnetometer area, and board plane);
- Falsification of medical information, see e.g., Wheeler v. Dept. of Army, 47 M.S.P.R. 240 (1991);
- Falsification of medical documents, see e.g., Major v. Dept. of Air Force, 14 M.S.P.R. 488 (1983);
- Falsification of travel documents or expense accounts, see e.g., Raymond v. Dept. of Army, 34 M.S.P.R. 476 (1987);
- Falsification of time and work records, see e.g., Wooten v. Office of Personnel Management, 87 M.S.P.R. 680 (2000);
- Excessive errors in performance of a job (separate from falsification), see e.g., Taylor v. Dept. of Air Force, 80 M.S.P.R. 450 (1998);
- Engaging in threats, verbal or otherwise, see e.g., Sands v. Dept. of Labor, 88 M.S.P.R. 281 (2001);
- Sexual harassment, see e.g., Gilmore v. Dept. of Army, 87 M.S.P.R. 579 (2001);
- Activities "incompatible with federal employment," see e.g., Beck v. Dept. of Justice, 67 M.S.P.R. 219 (1995), affirmed, 70 F.3d 129 (Fed. Cir. 1996);
- Running a private operation during regular work hours, see e.g., Biniak v. Social Security Administration, 90 M.S.P.R. 682 (2002);
- Sleeping on duty, see e.g., Bond v. Dept. of Energy, 82 M.S.P.R. 534 (1999);
- Conflict of interest, see e.g., Acree v. Dept. of Treasury, 80 M.S.P.R. 73 (1998);
- Patient abuse, see e.g., Byers v. Dept. of Veterans Affairs, 89 M.S.P.R. 655 (2001);

- Gambling, see e.g., Howard v. U.S. Postal Service, 26 M.S.P.R. 393 (1985);
- Drug and/or alcohol related charges, see e.g., Rivera v. Dept. of Veterans Affairs, 28 M.S.P.R. 313 (1985)(possession of marijuana on duty);
- Theft or embezzlement of government property, mail, government services, union funds, credit

- cards, vehicles, telephones or other equipment; see e.g., Waymon v. Dept. of Army, 15 M.S.P.R. 374 (1983);
- Discourteous conduct, see e.g., Render v. Dept. of Veterans Affairs, 90 M.S.P.R. 441 (2001).

Additional Managerial Flexibilities

Federal managers have a broad array of “managerial flexibilities” to help them recruit, retain, and manage the federal workforce. These include those discussed above in addition to the following:

- Student loan repayment plans (5 CFR Part 537);
- Workforce restructuring programs, such as early retirement authority (5 CFR §§831.114 and 842.213) and voluntary separation incentive programs)(Dept. of Defense, Pub. L.102-484);
- Flexibility in determining employees’ hours of work and schedules (5 CFR Part 610);
- Authorization of telecommuting (Pub. L. 106-346 §359);
- Provision of leave flexibilities (5 CFR Part 630);
- Authorization of job sharing (5 CFR Part 340);
- Authorization of child care (40 USC §490b) subsidies (Pub. L. 106-554);
- Authorization to provide subsidized transportation (Exec. Order 13150);
- Authority to waive dual pay limitations (5 USC §5533, 5 CFR Part 550);
- Authority to pay travel and transportation expenses for interviews and/or appointments (5 USC §5706b; 5 CFR Part 572);
- Authority to provide premium pay (5 USC §5547(b); 5 CFR §550.106) and exceptions to biweekly limitations on overtime pay (5 USC §5533, 5 CFR Part 550);
- Authority to pay special rates (5 USC §5305; 5 CFR Part 530), group retention allowances (5 USC §5754; 5 CFR Part 575), critical position pay authority (5 USC §5377; OMB Bul. No. 91-09);
- Authority to design and classify work (5 USC §5101 *et seq.*; 5 CFR Part 511);
- Authority to establish training programs (5 USC §4103(a));
- Authority to design and implement dispute resolution systems (Pub. L. 104-320);
- Authority to determine short term staffing needs and use temporary hiring or contract with the private sector (5 USC §§3371-3375; 5 CFR Part 334).

Additional information regarding agencies’ ability and authority to manage human resources in the federal workforce with maximum flexibility under current law is set forth in “Human Resources Flexibilities and Authorities in the Federal Government,” U.S. Office of Personnel Management, Office of Merit Systems Effectiveness (updated July 25, 2001).