

CHAPTER XCVII—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM (DEPARTMENT OF HOMELAND SECURITY—OFFICE OF PERSONNEL MANAGEMENT)

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AUTHORITY: 5 U.S.C. 9701.

SOURCE: 70 FR 5318, Feb. 1, 2005, unless otherwise noted.

Subpart A—General Provisions

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart A to part 9701 was rescinded.

§ 9701.101 Purpose.

(a) This part contains regulations governing the establishment of a new human resources management system within the Department of Homeland Security (DHS), as authorized by 5 U.S.C. 9701. As permitted by section 9701, these regulations waive and replace various statutory provisions that would otherwise be applicable to affected DHS employees. These regulations are issued jointly by the Secretary of Homeland Security and the Director of the Office of Personnel Management (OPM).

(b) The system established under this part is designed to be mission-centered, performance-focused, flexible, contemporary, and excellent; to generate respect and trust through employee involvement; to be based on the principles of merit and fairness embodied in the statutory merit system principles; and to comply with all other applicable provisions of law.

§ 9701.102 Eligibility and coverage.

(a) All civilian employees of the Department are eligible for coverage under one or more subparts of this part except those covered by a provision of law outside the waivable chapters of title 5, U.S. Code, identified in § 9701.104. For example, Transportation

Security Administration employees, employees appointed under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Secret Service Uniformed Division members, Coast Guard Academy faculty members, and Coast Guard military members are not eligible for coverage under any classification or pay system established under subpart B or C of this part. Refer to subparts B through G of this part for specific information regarding the coverage of each subpart.

(b)(1) Subpart A of this part becomes applicable to all eligible employees on March 3, 2005.

(2) The Secretary or designee may, at his or her sole and exclusive discretion and after coordination with OPM, establish the effective date for applying subparts E, F, and G of this part to all eligible employees. Unless otherwise determined by the Secretary and the Director, subparts E, F, and G of this part will become applicable to all eligible employees no later than August 1, 2005.

(3) With respect to subparts B, C, and D of this part, the Secretary or designee may, at his or her sole and exclusive discretion and after coordination with OPM, apply one or more of these subparts to a specific category or categories of eligible civilian employees at any time. With respect to any given category of civilian employees, the Secretary or designee may apply some of these subparts, but not others, and such coverage determinations may be made effective on different dates (e.g., in order to phase in coverage under a new classification, pay, and performance management system).

(4) DHS will notify affected employees and labor organizations in advance of the application of one or more subparts of this part to them.

(c) Until the Secretary or designee makes a determination under paragraph (b) of this section to apply the provisions of one or more subparts of this part to a particular category or categories of eligible DHS employees, those DHS employees will continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DHS employees must be based on the Federal

laws and regulations applicable to them on the effective date of the action.

(d) Any new DHS classification, pay, or performance management system covering Senior Executive Service (SES) members must be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance system authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable implementing regulations issued by OPM. If the Secretary determines that SES members employed by DHS should be covered by classification, pay, or performance management provisions that differ substantially from the Governmentwide SES pay-for-performance system, the Secretary and the Director must issue joint regulations consistent with all of the requirements of 5 U.S.C. 9701.

(e) At his or her sole and exclusive discretion, the Secretary or designee may, after coordination with OPM, rescind the application under paragraph (b) of this section of one or more subparts of this part to a particular category of employees and prescribe implementing directives for converting that category of employees to coverage under applicable title 5 provisions. DHS will notify affected employees and labor organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f) The Secretary or other authorized DHS official may exercise an independent legal authority to establish a parallel system that follows some or all of the requirements in this part for a category of employees who are not eligible for coverage under this part.

§9701.103 Definitions.

In this part:

Authorized agency official means the Secretary or an official who is authorized to act for the Secretary in the matter concerned.

Coordination means the process by which DHS, after appropriate staff-level consultation, officially provides OPM with notice of a proposed action and intended effective date. If OPM concurs, or does not respond to that notice within 30 calendar days, DHS may proceed with the proposed action. However, if OPM indicates the matter

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has Governmentwide implications or consequences, DHS will not proceed until the matter is resolved. The coordination process is intended to give due deference to the flexibilities afforded DHS by the Homeland Security Act and the regulations in this part, without compromising OPM's institutional responsibility, as codified in 5 U.S.C. chapter 11 and Executive Order 13197 of January 18, 2001, to provide Governmentwide oversight in human resources management programs and practices.

Department or *DHS* means the Department of Homeland Security.

Director means the Director of the Office of Personnel Management.

Employee means an employee within the meaning of that term in 5 U.S.C. 2105.

General Schedule or *GS* means the General Schedule classification and pay system established under chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code.

Implementing directives means directives issued at the Departmental level by the Secretary or designee to carry out any policy or procedure established in accordance with this part. These directives may apply Departmentwide or to any part of the Department as determined by the Secretary at his or her sole and exclusive discretion.

OPM means the Office of Personnel Management.

Secretary means the Secretary of Homeland Security or, as authorized, the Deputy Secretary of Homeland Security.

Secretary or *designee* means the Secretary or a DHS official authorized to act for the Secretary in the matter concerned who serves as—

(1) The Undersecretary for Management; or

(2) The Chief Human Capital Officer for DHS.

§ 9701.104 Scope of authority.

Subject to the requirements and limitations in 5 U.S.C. 9701, the provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9701:

(a) Chapter 43, dealing with performance appraisal systems;

(b) Chapter 51, dealing with General Schedule job classification;

(c) Chapter 53, dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees;

(d) Chapter 71, dealing with labor relations;

(e) Chapter 75, dealing with adverse actions and certain other actions; and

(f) Chapter 77, dealing with the appeal of adverse actions and certain other actions.

§ 9701.105 Continuing collaboration.

(a) In accordance with 5 U.S.C. 9701(e)(1)(D), this section provides employee representatives with an opportunity to participate in the development of implementing directives. This process is not subject to the requirements established by subpart E of this part, including but not limited to §§ 9701.512 (regarding conferring on procedures for the exercise of management rights), 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain, confer, and consult), or 9701.519 (regarding impasse procedures).

(b)(1) For the purpose of this section, the term “employee representatives” includes representatives of labor organizations with exclusive recognition rights for units of DHS employees, as well as representatives of employees who are not within a unit for which a labor organization has exclusive recognition.

(2) Consistent with 5 U.S.C. 9701(e)(2)(A), (B), and (D), DHS will determine the number of employee representatives to be engaged in the continuing collaboration process.

(3) Each national labor organization with multiple collective bargaining units accorded exclusive recognition will determine how its units will be represented within the limitations imposed by DHS.

(c)(1) Within timeframes specified by DHS, employee representatives will be provided with an opportunity to submit written comments and/or to discuss their views with DHS officials on proposed final draft implementing directives.

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(2) As the Department determines necessary, employee representatives will be provided with an opportunity to discuss their views with DHS officials and/or to submit written comments at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives.

(d) Employee representatives will be provided with access to information, including research, to make their participation in the continuing collaboration process productive.

(e) Any written comments submitted by employee representatives regarding proposed final draft implementing directives will become part of the record and will be forwarded to the Secretary or designee for consideration in making a final decision.

(f) Nothing in the continuing collaboration process affects the right of the Secretary to determine the content of implementing directives and to make them effective at any time.

(g) In accordance with 5 U.S.C. 9701(e)(2), any procedures necessary to carry out this section will be established by the Secretary and the Director jointly as internal rules of Departmental procedure which will not be subject to review.

§9701.106 Relationship to other provisions.

(a)(1) The provisions of title 5, U.S. Code, are waived or modified to the extent authorized by 5 U.S.C. 9701 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical mission of the Department. Each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary or designee. The interpretation of the regulations in this part by DHS and OPM must be accorded great deference.

(b) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including

paragraph (c) of this section) or in DHS implementing directives. Applications of this rule include, but are not limited to, the following:

(1) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (*i.e.*, chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code), DHS employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DHS employees (notwithstanding coverage under subparts B through G of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521-4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b;

(iii) Differentials for duty involving physical hardship or hazard under 5 U.S.C. 5545(d);

(iv) Recruitment, relocation, and retention payments under 5 U.S.C. 5753-5754;

(v) Physicians' comparability allowances under 5 U.S.C. 5948; and

(vi) The higher cap on relocation bonuses for law enforcement officers established by section 407 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509).

(2) In applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart G of this part (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with §9701.706(h).

(3) In applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart E of this part (dealing with labor relations), the reference in section 5596(b)(5) to section 7116 (dealing with unfair labor practices) is considered to be a reference to a modified section 7116 that is consistent with §9701.517.

(c) When a specified category of employees is covered by a classification

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and pay system established under subparts B and C of this part, the following provisions do not apply:

(1) Time-in-grade restrictions that apply to competitive service GS positions under 5 CFR part 300, subpart F;

(2) Supervisory differentials under 5 U.S.C. 5755; and

(3) Law enforcement officer special rates and geographic adjustments under sections 403 and 404 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509).

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d). Employees and applicants for employment in DHS will continue to be covered by EEOC's Federal sector regulations found at 29 CFR part 1614.

§ 9701.107 Program evaluation.

(a) DHS will establish procedures for evaluating the regulations in this part and their implementation. DHS will provide designated employee representatives with an opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluations.

(b) Involvement of employee representatives under this section will occur at the following stages:

(1) Identification of the scope, objectives, and methodology to be used in program evaluation; and

(2) Review of draft findings and recommendations.

(c) Involvement in the evaluation process does not waive the rights of any party under applicable law or regulations.

Subpart B—Classification

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart B to part 9701 was rescinded.

GENERAL

§ 9701.201 Purpose.

(a) This subpart contains regulations establishing a classification structure and rules for covered DHS employees

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and positions to replace the classification structure and rules in 5 U.S.C. chapter 51 and the job grading system in 5 U.S.C. chapter 53, subchapter IV, in accordance with the merit principle of equal pay for work of equal value.

(b) Any classification system prescribed under this subpart must be established in conjunction with the pay system described in subpart C of this part.

§ 9701.202 Coverage.

(a) This subpart applies to eligible DHS employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b).

(b) The following employees and positions are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376; and

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9701.102(d).

§ 9701.203 Waivers.

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 and 5 U.S.C. 5346, and related regulations, are waived with respect to that category of employees, except as provided in paragraph (b) of this section, § 9701.106, and § 9701.222(d) (with respect to OPM's authority under 5 U.S.C. 5112(b) and 5346(c) to act on requests for review of classification decisions).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS-15, is not waived.

§ 9701.204 Definitions.

In this subpart:

Band means a work level or pay range within an occupational cluster.

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by law or regulation. For the specific purposes prescribed in §§9701.332(c) and 9701.333, respectively, basic pay includes locality and special rate supplements.

Classification, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, cluster, and band for pay and other related purposes.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Occupational cluster means a grouping of one or more associated or related occupations or positions. An occupational cluster may include one or more occupational series.

Occupational series means the number OPM or DHS assigns to a group or family of similar positions for identification purposes (for example: 0110, Economist Series; 1410, Librarian Series).

Position or *Job* means the duties, responsibilities, and related competency requirements that are assigned to an employee whom the Secretary or designee approves for coverage under §9701.202(a).

§9701.205 Bar on collective bargaining.

As provided in the definition of *conditions of employment* in §9701.504, any classification system established under this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the classification system, including but not limited to coverage determinations, the design of the classification structure, and classification methods, criteria, and administrative procedures and arrangements.

CLASSIFICATION STRUCTURE

§9701.211 Occupational clusters.

For the purpose of classifying positions, DHS may, after coordination with OPM, establish occupational clusters based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progres-

sion patterns; relevant labor-market features; and other characteristics of those occupations or positions. DHS must document in implementing directives the criteria and rationale for grouping occupations or positions into occupational clusters.

§9701.212 Bands.

(a) For purposes of identifying relative levels of work and corresponding pay ranges, DHS may, after coordination with OPM, establish one or more bands within each occupational cluster.

(b) Each occupational cluster may include, but is not limited to, the following bands:

(1) Entry/Developmental—work that involves gaining the competencies needed to perform successfully in a Full Performance band through appropriate formal training and/or on-the-job experience.

(2) Full Performance—work that involves the successful completion of any required entry-level training and/or developmental activities necessary to independently perform the full range of non-supervisory duties of a position in an occupational cluster.

(3) Senior Expert—work that involves an extraordinary level of specialized knowledge or expertise upon which DHS relies for the accomplishment of critical mission goals and objectives; reserved for a limited number of non-supervisory employees.

(4) Supervisory—work that may involve hiring or selecting employees, assigning work, managing performance, recognizing and rewarding employees, and other associated duties.

(c) DHS must document in implementing directives the definitions for each band which specify the type and range of difficulty and responsibility, qualifications, competencies, or other characteristics of the work encompassed by the band.

(d) DHS must, after coordination with OPM, establish qualification standards and requirements for each occupational cluster, occupational series, and/or band. DHS may use the qualification standards established by OPM or, after coordination with OPM, may establish different qualification standards. This paragraph does not

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waive or modify any DHS authority to establish qualification standards or requirements under 5 U.S.C. chapters 31 and 33 and OPM implementing regulations.

CLASSIFICATION PROCESS

§ 9701.221 Classification requirements.

(a) DHS must develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and DHS must make such descriptions and documentation available to affected employees.

(b) An authorized agency official must—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105 and 5346 or by DHS, after coordination with OPM; and

(2) Apply the criteria and definitions required by § 9701.211 and § 9701.212 to assign jobs to an appropriate occupational cluster and band.

(c) DHS must establish procedures for classifying jobs and may make such inquiries or investigations of the duties, responsibilities, and qualification requirements of jobs as it considers necessary for the purpose of this section.

(d) Classification decisions become effective on the date designated by the authorized agency official who makes the decision.

(e) DHS must establish a plan to periodically review the accuracy of classification decisions.

§ 9701.222 Reconsideration of classification decisions.

(a) An individual employee may request that DHS or OPM reconsider the pay system, occupational cluster, occupational series, or band assigned to his or her current official position of record at any time.

(b) DHS will, after coordination with OPM, establish implementing directives for reviewing requests for reconsideration, including nonreviewable issues, rights of representation, and the effective date of any corrective actions. OPM will, after consulting with DHS, establish separate policies and

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procedures for reviewing reconsideration requests.

(c) An employee may request OPM to review a DHS determination made under paragraph (a) of this section. If an employee does not request an OPM reconsideration decision, DHS's classification determination is final and not subject to further review or appeal.

(d) OPM's final determination on a request made under this section is not subject to further review or appeal.

TRANSITIONAL PROVISIONS

§ 9701.231 Conversion of positions and employees to the DHS classification system.

(a) This section describes the transitional provisions that apply when DHS positions and employees are converted to a classification system established under this subpart. Affected positions and employees may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system, as provided in § 9701.202. For the purpose of this section, the terms “convert,” “converted,” “converting,” and “conversion” refer to positions and employees that become covered by the classification system as a result of a coverage determination made under § 9701.102(b) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the DHS system.

(b) DHS will issue implementing directives prescribing policies and procedures for converting the GS or prevailing rate grade of a position to a band and for converting SL/ST and SES positions to a band upon initial implementation of the DHS classification system. Such procedures must include provisions for converting an employee who is retaining a grade under 5 U.S.C. chapter 53, subchapter VI, immediately prior to conversion. As provided in § 9701.373, DHS must convert employees to the system without a reduction in their rate of pay (including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, locality rate supplement under § 9701.332, or special rate supplement under § 9701.333).

§ 9701.232 Special transition rules for Federal Air Marshal Service.

Notwithstanding any other provision in this subpart, if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover those positions under a classification system that is parallel to the classification system that was applicable to the Federal Air Marshal Service within TSA. DHS may, after coordination with OPM, modify that system. DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new classification system that may subsequently be established under this subpart, consistent with the conversion rules in § 9701.231.

Subpart C—Pay and Pay Administration

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart C to part 9701 was rescinded.

GENERAL**§ 9701.301 Purpose.**

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DHS employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53, as authorized by 5 U.S.C. 9701. These regulations are designed to provide DHS with the flexibility to allocate available funds strategically in support of DHS mission priorities and objectives. Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DHS.

(b) Any pay system prescribed under this subpart must be established in conjunction with the classification system described in subpart B of this part.

(c) The pay system established under this subpart, working in conjunction with the performance management system established under subpart D of this part, is designed to incorporate the following features:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between elements of the pay system established in this subpart, the employee performance appraisal system, and the Department's strategic plan;

(4) Employee involvement in the design and implementation of the system (as specified in § 9701.105);

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay system established in this subpart;

(6) Periodic performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting time-tables for review;

(7) Effective safeguards so that the management of the system is fair and equitable and based on employee performance; and

(8) A means for ensuring that adequate resources are allocated for the design, implementation, and administration of the performance management system that supports the pay system established under this subpart.

§ 9701.302 Coverage.

(a) This subpart applies to eligible DHS employees in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b).

(b) The following employees are eligible for coverage under this subpart:

(1) Employees who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III;

(2) Employees who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376; and

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9701.102(d).

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§ 9701.303 Waivers.

(a) When a specified category of employees is covered by the pay system established under this subpart, the provisions of 5 U.S.C. chapter 53, and related regulations, are waived with respect to that category of employees, except as provided in § 9701.106 and paragraphs (b) through (f) of this section.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived:

(1) Section 5307, dealing with the aggregate limitation on pay;

(2) Sections 5311 through 5318, dealing with Executive Schedule positions;

(3) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. chapter 74 to DHS employees in health care positions covered by section 5371 in lieu of any DHS pay system established under this subpart or the following provisions of title 5, U.S. Code: Chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to “chapter 51” in section 5371 is deemed to include a classification system established under subpart B of this part; and

(4) Section 5377, dealing with the critical pay authority.

(c) Section 5373 is modified. The limit on rates of basic pay, including any applicable locality payment or supplement, for DHS employees who are not covered by this subpart and whose pay is set by administrative action (e.g., Coast Guard Academy faculty) is increased to the rate for level III of the Executive Schedule.

(d) Section 5379 is modified. DHS may, after coordination with OPM, establish and administer a student loan repayment program for DHS employees, except that DHS may not make loan payments for any noncareer appointees to the SES (as defined in 5 U.S.C. 3132(a)(7)) or for any employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.

Notwithstanding § 9701.302(a), any DHS employee otherwise covered by section 5379 is eligible for coverage under the provisions established under this paragraph, subject to a determination by the Secretary or designee under § 9701.102(b).

(e) In approving the coverage of employees who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, DHS may limit the waiver so that affected employees remain entitled to environmental or other differentials established under 5 U.S.C. 5343(c)(4) and night shift differentials established under 5 U.S.C. 5343(f) if such employees are grouped in separate occupational clusters (established under subpart B of this part) that are limited to employees who would otherwise be covered by a prevailing rate system.

(f) Employees in SL/ST positions and SES members who are covered by a basic pay system established under this subpart are considered to be paid under 5 U.S.C. 5376 and 5382, respectively, for the purpose of applying 5 U.S.C. 5307(d).

§ 9701.304 Definitions.

In this part:

48 contiguous States means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

Band means a work level or pay range within an occupational cluster.

Band rate range means the range of rates of basic pay (excluding any locality or special rate supplements) applicable to employees in a particular band, as described in § 9701.321. Each band rate range is defined by a minimum and maximum rate.

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by law or regulation. For the specific purposes prescribed in §§ 9701.332(c) and 9701.333, respectively, basic pay includes locality and special rate supplements.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Day means a calendar day.

Demotion means a reduction to a lower band within the same occupational cluster or a reduction to a lower band in a different occupational cluster under implementing directives issued by DHS pursuant to § 9701.355.

Locality rate supplement means a geographic-based addition to basic pay, as described in §9701.332.

Modal rating means the rating of record that occurs most frequently in a particular pay pool.

Occupational cluster means a grouping of one or more associated or related occupations or positions. An occupational cluster may include one or more occupational series.

Promotion means an increase to a higher band within the same occupational cluster or an increase to a higher band in a different occupational cluster under implementing directives issued by DHS pursuant to §9701.355.

Rating of record means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations (as defined in §9701.404) over the applicable period; or

(2) To support a pay determination, including one granted in accordance with subpart C of this part, a within-grade increase granted under 5 CFR 531.404, or a pay determination granted under other applicable rules.

SES means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

SL/ST refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term “SL” identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term “ST” identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

Special rate supplement means an addition to basic pay for a particular category of employees to address staffing problems, as described in §9701.333. A special rate supplement is paid in place of any lesser locality rate supplement that would otherwise apply.

Unacceptable performance means the failure to meet one or more performance expectations, as described in §9701.406.

§9701.305 Bar on collective bargaining.

As provided in the definition of *conditions of employment* in §9701.504, any pay

program established under authority of this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the pay program, including but not limited to coverage decisions, the design of pay structures, the setting and adjustment of pay levels, pay administration rules and policies, and administrative procedures and arrangements.

OVERVIEW OF PAY SYSTEM

§9701.311 Major features.

Through the issuance of implementing directives, DHS will establish a pay system that governs the setting and adjusting of covered employees' rates of pay. The DHS pay system will include the following features:

(a) A structure of rate ranges linked to various bands for each occupational cluster, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of basic pay rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§9701.321 and 9701.322;

(c) Policies regarding the setting and adjusting of supplements to basic pay based on local labor market conditions and other factors, as described in §§9701.331 through 9701.334;

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§9701.323 through 9701.325 and 9701.335 through 9701.337;

(e) Policies regarding performance-based pay adjustments, as described in §§9701.341 through 9701.346;

(f) Policies on basic pay administration, including movement between occupational clusters, as described in §§9701.351 through 9701.356;

(g) Policies regarding special payments that are not basic pay, as described in §§9701.361 through 9701.363; and

(h) Linkages to employees' performance ratings of records, as described in subpart D of this part.

§9701.312 Maximum rates.

(a) DHS may not pay any employee an annual rate of basic pay in excess of

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the rate for level III of the Executive Schedule, except as provided in paragraph (b) of this section.

(b) DHS may establish the maximum annual rate of basic pay for members of the SES at the rate for level II of the Executive Schedule if DHS obtains the certification specified in 5 U.S.C. 5307(d).

§9701.313 Homeland Security Compensation Committee.

(a) DHS will establish a Homeland Security Compensation Committee to provide options and/or recommendations for consideration by the Secretary or designee on strategic compensation matters such as Departmental compensation policies and principles, the annual allocation of funds between market and performance pay adjustments, and the annual adjustment of rate ranges and locality and special rate supplements. The Compensation Committee will consider factors such as turnover, recruitment, and local labor market conditions in providing options and recommendations for consideration by the Secretary. The Secretary's or designee's determination with regard to those options and/or recommendations is final and not subject to further review.

(b) The Compensation Committee will be chaired by the DHS Undersecretary for Management. The Compensation Committee has 14 members, including 4 officials of labor organizations granted national consultation rights (NCR) in accordance with §9701.518(d)(2). An OPM official will serve as an *ex officio* member of the Compensation Committee. DHS will provide technical staff to support the Compensation Committee.

(c) DHS will establish procedures governing the membership and operation of the Compensation Committee.

(d) An individual will be selected by the Chair to facilitate Compensation Committee meetings. The facilitator will be selected from a list of nominees developed jointly by representatives of the Department and NCR labor organizations, the latter acting as a single party, according to procedures and time limits established by implementing directives. Nominees must be known for their integrity, impar-

tiality, and expertise in facilitation and compensation. If the Department and the labor organizations are unable to reach agreement on a joint list of nominees, they will enlist the services of the Federal Mediation and Conciliation Service (FMCS) to assist them. If the parties are unable to reach agreement with FMCS assistance, each party will prepare a list of up to three nominees and provide those separate lists to FMCS; FMCS may add up to three additional nominees. From that combined list of nominees, the Department and the labor organizations, the latter acting as a single party, will alternately strike names from the list until five names remain; those five nominees will be submitted to the Chair for consideration. The Chair may request that the parties develop an additional list of nominees. If the representatives of the Department's NCR labor organizations, acting as a single party, do not participate in developing the list of nominees in accordance with this section, the Chair will select the facilitator.

(e) After considering the views of all Compensation Committee members, the Chair prepares and provides options and/or recommendations to the Secretary or designee. Members may present their views on the final recommendations in writing as part of the final recommendation package. The Secretary or designee will make the final decision and notify the Compensation Committee. This process is not subject to the requirements established by §§9701.512 (regarding conferring on procedures for the exercise of management rights), 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain, confer, and consult), or 9701.519 (regarding impasse procedures).

(f) The Secretary retains the right to make determinations regarding the annual allocation of funds between market and performance pay adjustments, the annual adjustment of rate ranges and locality and special rate supplements, or any other matter recommended by the Compensation Committee, and to make such determinations effective at any time.

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§9701.314 DHS responsibilities.

DHS responsibilities in implementing this subpart include the following:

(a) Providing OPM with information regarding the implementation of the programs authorized under this subpart at OPM's request;

(b) Participating in any interagency pay coordination council or group established by OPM to ensure that DHS pay policies and plans are coordinated with other agencies; and

(c) Fulfilling all other responsibilities prescribed in this subpart.

SETTING AND ADJUSTING RATE RANGES

§9701.321 Structure of bands.

(a) DHS may, after coordination with OPM, establish ranges of basic pay for bands, with minimum and maximum rates set and adjusted as provided in §9701.322. Rates must be expressed as annual rates.

(b) For each band within an occupational cluster, DHS will establish a common rate range that applies in all locations.

§9701.322 Setting and adjusting rate ranges.

(a) Within its sole and exclusive discretion, DHS may, after coordination with OPM, set and adjust the rate ranges established under §9701.321 on an annual basis. In determining the rate ranges, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) DHS may, after coordination with OPM, determine the effective date of newly set or adjusted band rate ranges. Unless DHS determines that a different effective date is needed for operational reasons, these adjustments will become effective on or about the date of the annual General Schedule pay adjustment authorized by 5 U.S.C. 5303.

(c) DHS may establish different rate ranges and provide different rate range adjustments for different bands.

(d) DHS may adjust the minimum and maximum rates of a band by different percentages.

§9701.323 Eligibility for pay increase associated with a rate range adjustment.

(a) When a band rate range is adjusted under §9701.322, employees covered by that band are eligible for an individual pay increase. An employee who meets or exceeds performance expectations (*i.e.*, has a rating of record above the unacceptable performance level for the most recently completed appraisal period) must receive an increase in basic pay equal to the percentage value of any increase in the minimum rate of the employee's band resulting from a rate range adjustment under §9701.322. The pay increase takes effect at the same time as the corresponding rate range adjustment, except as provided in §§9701.324 and 9701.325. For an employee receiving a retained rate, the amount of the increase under this paragraph is determined under §9701.356.

(b) If an employee does not have a rating of record for the most recently completed appraisal period, he or she must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to receive an increase based on the rate range adjustment, as provided in paragraph (a) of this section.

(c) An employee whose rating of record is unacceptable is prohibited from receiving a pay increase as a result of a rate range adjustment, except as provided by §§9701.324 and 9701.325. Because the employee's pay remains unchanged, failure to receive a pay increase is not considered an adverse action under subpart F of this part.

§9701.324 Treatment of employees whose rate of basic pay does not fall below the minimum rate of their band.

An employee who does not receive a pay increase under §9701.323 because of an unacceptable rating of record and whose rate of basic pay does not fall below the minimum rate of his or her band as a result of that rating will receive such an increase if he or she demonstrates performance that meets or exceeds performance expectations, as reflected by a new rating of record issued under §9701.409(b). Such an increase will be made effective on the

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first day of the first pay period beginning on or after the date the new rating of record is issued.

§ 9701.325 Treatment of employees whose rate of basic pay falls below the minimum rate of their band.

(a) In the case of an employee who does not receive a pay increase under § 9701.323 because of an unacceptable rating of record and whose rate of basic pay falls below the minimum rate of his or her band as a result of that rating, DHS must—

(1) If the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the rate range adjustment, issue a new rating of record under § 9701.409(b) and adjust the employee's pay prospectively by making the increase effective on the first day of the first pay period beginning on or after the date the new rating of record is issued; or

(2) Initiate action within 90 days after the date of the rate range adjustment to demote or remove the employee in accordance with the adverse action procedures established in subpart F of this part.

(b) If DHS fails to initiate a removal or demotion action under paragraph (a)(2) of this section within 90 days after the date of a rate range adjustment, the employee becomes entitled to the minimum rate of his or her band rate range on the first day of the first pay period beginning on or after the 90th day following the date of the rate range adjustment.

LOCALITY AND SPECIAL RATE SUPPLEMENTS

§ 9701.331 General.

The basic pay ranges established under §§ 9701.321 through 9701.323 may be supplemented in appropriate circumstances by locality or special rate supplements, as described in §§ 9701.332 through 9701.335. These supplements are expressed as a percentage of basic pay and are set and adjusted as described in § 9701.334. As authorized by § 9701.356, DHS implementing directives will determine the extent to which §§ 9701.331 through 9701.337 apply to employees receiving a retained rate.

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§ 9701.332 Locality rate supplements.

(a) For each band rate range, DHS may, after coordination with OPM, establish locality rate supplements that apply in specified locality pay areas. Locality rate supplements apply to employees whose official duty station is located in the given area. DHS may provide different locality rate supplements for different occupational clusters or for different bands within the same occupational cluster in the same locality pay area.

(b) For the purpose of establishing and modifying locality pay areas, 5 U.S.C. 5304 is not waived. A DHS decision to use the locality pay area boundaries established under 5 U.S.C. 5304 does not require separate DHS regulations. DHS may, after coordination with OPM and in accordance with the public notice and comment provisions of 5 U.S.C. 553, publish Departmental regulations (6 CFR Chapter I) in the FEDERAL REGISTER that establish and adjust different locality pay areas within the 48 contiguous States or establish and adjust new locality pay areas outside the 48 contiguous States. These regulations are subject to the continuing collaboration process described in § 9701.105. As provided by 5 U.S.C. 5304(f)(2)(B), judicial review of any DHS regulation regarding the establishment or adjustment of locality pay areas is limited to whether or not the regulation was promulgated in accordance with 5 U.S.C. 553.

(c) Locality rate supplements are considered basic pay for only the following purposes:

(1) Retirement under 5 U.S.C. chapter 83 or 84;

(2) Life insurance under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority;

(4) Severance pay under 5 U.S.C. 5595;

(5) Application of the maximum rate limitation set forth in § 9701.312;

(6) Determining the rate of basic pay upon conversion to the DHS pay system established under this subpart, consistent with § 9701.373(b);

(7) Other payments and adjustments authorized under this subpart as specified by DHS implementing directives;

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(8) Other payments and adjustments under other statutory or regulatory authority that are basic pay for the purpose of locality-based comparability payments under 5 U.S.C. 5304; and

(9) Any provisions for which DHS locality rate supplements must be treated as basic pay by law.

§9701.333 Special rate supplements.

DHS will, after coordination with OPM, establish special rate supplements that provide higher pay levels for subcategories of employees within an occupational cluster if DHS determines that such supplements are warranted by current or anticipated recruitment and/or retention needs. In exercising this authority, DHS will issue necessary implementing directives. Any special rate supplement must be treated as basic pay for the same purposes as locality rate supplements, as described in §9701.332(c), and for the purpose of computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.

§9701.334 Setting and adjusting locality and special rate supplements.

(a) Within its sole and exclusive discretion, DHS may, after coordination with OPM, set and adjust locality and special rate supplements. In determining the amounts of the supplements, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) DHS may, after coordination with OPM, determine the effective date of newly set or adjusted locality and special rate supplements. Established supplements will be reviewed for possible adjustment on an annual basis in conjunction with rate range adjustments under §9701.322.

§9701.335 Eligibility for pay increase associated with a supplement adjustment.

(a) When a locality or special rate supplement is adjusted under §9701.334, an employee to whom the supplement applies is entitled to the pay increase resulting from that adjustment if the employee meets or exceeds perform-

ance expectations (*i.e.*, has a rating of record above the unacceptable performance level for the most recently completed appraisal period). This includes an increase resulting from the initial establishment and setting of a special rate supplement. The pay increase takes effect at the same time as the applicable supplement is set or adjusted, except as provided in §§9701.336 and 9701.337.

(b) If an employee does not have a rating of record for the most recently completed appraisal period, he or she must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to any pay increase associated with a supplement adjustment, as provided in paragraph (a) of this section.

(c) An employee who has an unacceptable rating of record is prohibited from receiving a pay increase as a result of an increase in an applicable locality or special rate supplement, except as provided by §§9701.336 and 9701.337. Because the employee's pay remains unchanged, failure to receive a pay increase is not considered an adverse action under subpart F of this part.

§9701.336 Treatment of employees whose pay does not fall below the minimum adjusted rate of their band.

An employee who does not receive a pay increase under §9701.335 because of an unacceptable rating of record and whose rate of basic pay (including a locality or special rate supplement) does not fall below the minimum adjusted rate of his or her band as a result of that rating will receive such an increase if he or she demonstrates performance that meets or exceeds performance expectations, as reflected by a new rating of record issued under §9701.409(b). Such an increase will be made effective on the first day of the first pay period beginning on or after the date the new rating of record is issued.

§9701.337 Treatment of employees whose rate of pay falls below the minimum adjusted rate of their band.

(a) In the case of an employee who does not receive a pay increase under

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§ 9701.335 because of an unacceptable rating of record and whose rate of basic pay (including a locality or special rate supplement) falls below the minimum adjusted rate of his or her band as a result of that rating, DHS must—

(1) If the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the locality or special rate supplement adjustment, issue a new rating of record under § 9701.409(b) and adjust the employee's pay prospectively by making the increase effective on the first day of the first pay period beginning on or after the date the new rating of record is issued; or

(2) Initiate action within 90 days after the date of the locality or special rate supplement adjustment to demote or remove the employee in accordance with the adverse action procedures established in subpart F of this part.

(b) If DHS fails to initiate a removal or demotion action under paragraph (a)(2) of this section within 90 days after the date of a locality or special rate supplement adjustment, the employee becomes entitled to the minimum adjusted rate of his or her band range on the first day of the first pay period beginning on or after the 90th day following the date of the locality or special rate supplement adjustment.

PERFORMANCE-BASED PAY

§ 9701.341 General.

Sections 9701.342 through 9701.346 describe various types of performance-based pay adjustments that are part of the pay system established under this subpart. Generally, these within-band pay increases are directly linked to an employee's rating of record (as assigned under the performance management system described in subpart D of this part). These provisions are designed to provide DHS with the flexibility to allocate available funds based on performance as a means of fostering a high-performance culture that supports mission accomplishment. While performance measures primarily focus on an employee's contributions (as an individual or as part of a team) in accomplishing work assignments and achieving mission results, performance

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also may be reflected in the acquisition and demonstration of required competencies.

§ 9701.342 Performance pay increases.

(a) *Overview.* (1) The DHS pay system provides employees in a Full Performance or higher band with increases in basic pay based on individual performance ratings of record as assigned under a performance management system established under subpart D of this part. The DHS pay system uses pay pool controls to allocate pay increases based on performance points that are directly linked to the employee's rating of record, as described in this section. Performance pay increases are a function of the amount of money in the performance pay pool, the relative point value placed on ratings, and the distribution of ratings within that performance pay pool.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period (subject to the requirements of subpart D of this part), except that if the supervisor or other rating official determines that an employee's current performance is inconsistent with that rating, the supervisor or other rating official may prepare a more current rating of record, consistent with § 9701.409(b). If an employee does not have a rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle for the purpose of determining the employee's performance pay increase.

(b) *Performance pay pools.* (1) DHS will establish pay pools for performance pay increases.

(2) Each pay pool covers a defined group of DHS employees, as determined by DHS.

(3) An authorized agency official(s) may determine the distribution of funds among pay pools and may adjust those amounts based on overall levels of organizational performance or contribution to the Department's mission.

(4) In allocating the monies to be budgeted for performance pay increases, the Secretary or designee must take into account the average value of within-grade and quality step increases

under the General Schedule, as well as amounts that otherwise would have been spent on promotions among positions placed in the same band.

(c) *Performance point values.* (1) DHS will establish point values that correspond to the performance rating levels established under subpart D of this part, so that a point value is attached to each rating level. For example, in a four-level rating program, the point value pattern could be 4-2-1-0, where 4 points are assigned to the highest (outstanding) rating and 0 points to an unacceptable rating. Performance point values will determine performance pay increases.

(2) DHS will establish a point value pattern for each pay pool. Different pay pools may have different point value patterns.

(3) DHS must assign zero performance points to an unacceptable rating of record.

(d) *Performance payout.* (1) DHS will determine the value of a performance point, expressed as a percentage of an employee's rate of basic pay (exclusive of locality or special rate supplements under §§9701.332 and 9701.333) or as a fixed dollar amount.

(2) To determine an individual employee's performance payout, DHS will multiply the point value determined under paragraph (d)(1) of this section by the number of performance points assigned to the rating.

(3) To the extent that the adjustment does not cause the employee's rate of basic pay to exceed the maximum rate of the employee's band rate range, DHS will pay the performance payout as an adjustment in the employee's annual rate of basic pay. Any excess amount may be granted as a lump-sum payment, which may not be considered basic pay for any purpose.

(4) DHS may, after coordination with OPM, determine the effective date of adjustments in basic pay made under paragraph (d)(3) of this section.

(5) For an employee receiving a retained rate under §9701.356, DHS will issue implementing directives to provide for granting a lump-sum performance payout that may not exceed the amount that may be received by an employee in the same pay pool with the same rating of record whose rate of

pay is at the maximum rate of the same band.

(e) *Proration of performance payouts.* DHS will issue implementing directives regarding the proration of performance payouts for employees who, during the period between performance pay adjustments, are—

(1) Hired or promoted;

(2) In a leave-without-pay status (except as provided in paragraphs (f) and (g) of this section); or

(3) In other circumstances where proration is considered appropriate.

(f) *Adjustments for employees returning after performing honorable service in the uniformed services.* DHS will issue implementing directives regarding how it sets the rate of basic pay prospectively for an employee who leaves a DHS position to perform service in the uniformed services (as defined in 38 U.S.C. 4303 and 5 CFR 353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (e.g., 38 U.S.C. 4316). DHS will credit the employee with intervening rate range adjustments under §9701.323(a), as well as developmental pay adjustments under §9701.345 (as determined by DHS in accordance with its implementing directives), and performance pay adjustments under this section based on the employee's last DHS rating of record. For employees who have no such rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle. An employee returning from qualifying service in the uniformed services will receive the full amount of the performance pay increase associated with his or her rating of record.

(g) *Adjustments for employees returning to duty after being in workers' compensation status.* DHS will issue implementing directives regarding how it sets the rate of basic pay prospectively for an employee who returns to duty after a period of receiving injury compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee). DHS will credit the employee with intervening rate range adjustments

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under § 9701.323(a), as well as developmental pay adjustments under § 9701.345 (as determined by DHS in accordance with its implementing directives), and performance pay adjustments under this section based on the employee's last DHS rating of record. For employees who have no such rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle. An employee returning to duty after receiving injury compensation will receive the full amount of the performance pay increase associated with his or her rating of record.

§ 9701.343 Within-band reductions.

Subject to the adverse action procedures set forth in subpart F of this part, DHS may reduce an employee's rate of basic pay within a band for unacceptable performance or conduct. A reduction under this section may not be more than 10 percent or cause an employee's rate of basic pay to fall below the minimum rate of the employee's band rate range. Such a reduction may be made effective at any time.

§ 9701.344 Special within-band increases.

DHS may issue implementing directives regarding special within-band basic pay increases for employees within a Full Performance or higher band established under § 9701.212 who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment or in other circumstances determined by DHS. Increases under this section are in addition to any performance pay increases made under § 9701.342 and may be made effective at any time. Special within-band increases may not be based on length of service.

§ 9701.345 Developmental pay adjustments.

DHS will issue implementing directives regarding pay adjustments within the Entry/Developmental band. These directives may require employees to meet certain standardized assessment or certification points as part of a formal training/developmental program. In administering Entry/Developmental

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band pay progression plans, DHS may link pay progression to the demonstration of required knowledge, skills, and abilities (KSAs)/competencies. DHS may set standard timeframes for progression through an Entry/Developmental band while allowing an employee to progress at a slower or faster rate based on his or her performance, demonstration of required competencies, and/or other factors.

§ 9701.346 Pay progression for new supervisors.

DHS will issue implementing directives requiring an employee newly appointed to or selected for a supervisory position to meet certain assessment or certification points as part of a formal training/developmental program. In administering performance pay increases for these employees under § 9701.342, DHS may take into account the employee's success in completing a formal training/developmental program, as well as his or her performance.

PAY ADMINISTRATION

§ 9701.351 Setting an employee's starting pay.

DHS will, after coordination with OPM, issue implementing directives regarding the starting rate of pay for an employee, including—

- (a) An individual who is newly appointed or reappointed to the Federal service;
- (b) An employee transferring to DHS from another Federal agency; and
- (c) A DHS employee who moves from a noncovered position to a position already covered by this subpart.

§ 9701.352 Use of highest previous rate.

DHS will issue implementing directives regarding the discretionary use of an individual's highest previous rate of basic pay received as a Federal employee or as an employee of a Coast Guard nonappropriated fund instrumentality (NAFI) in setting pay upon reemployment, transfer, reassignment, promotion, demotion, placement in a different occupational cluster, or change in type of appointment. For this purpose, basic pay may include a locality-based payment or supplement under circumstances approved by DHS.

If an employee in a Coast Guard NAFI position is converted to an appropriated fund position under the pay system established under this subpart, DHS must use the existing NAFI rate to set pay upon conversion.

§ 9701.353 Setting pay upon promotion.

(a) Except as otherwise provided in this section, upon an employee's promotion, DHS must provide an increase in the employee's rate of basic pay equal to at least 8 percent. The rate of basic pay after promotion may not be less than the minimum rate of the higher band.

(b) DHS will issue implementing directives providing for an increase other than the amount specified in paragraph (a) of this section in the case of—

(1) An employee promoted from an Entry/Developmental band to a Full Performance band (consistent with the pay progression plan established for the Entry/Developmental band);

(2) An employee who was demoted and is then repromoted back to the higher band; or

(3) Employees in other circumstances specified by DHS implementing directives.

(c) An employee receiving a retained rate (*i.e.*, a rate above the maximum of the band) before promotion is entitled to a rate of basic pay after promotion that is at least 8 percent higher than the maximum rate of the employee's current band (except in circumstances specified by DHS implementing directives). The rate of basic pay after promotion may not be less than the minimum rate of the employee's new band rate range or the employee's existing retained rate of basic pay. If the maximum rate of the employee's new band rate range is less than the employee's existing rate of basic pay, the employee will continue to be entitled to the existing rate as a retained rate.

(d) DHS may determine the circumstances under which and the extent to which any locality or special rate supplements are treated as basic pay in applying the promotion increase rules in this section.

§ 9701.354 Setting pay upon demotion.

DHS will issue implementing directives regarding how to set an employ-

ee's pay when he or she is demoted. The directives must distinguish between demotions under adverse action procedures (as defined in subpart F of this part) and other demotions (*e.g.*, due to expiration of a temporary promotion or canceling of a promotion during a new supervisor's probationary period). A reduction in basic pay upon demotion under adverse action procedures may not exceed 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

§ 9701.355 Setting pay upon movement to a different occupational cluster.

DHS will issue implementing directives regarding how to set an employee's pay when he or she moves voluntarily or involuntarily to a position in a different occupational cluster, including rules for determining whether such a movement is to a higher or lower band for the purpose of setting pay upon promotion or demotion under §§ 9701.353 and 9701.354, respectively.

§ 9701.356 Pay retention.

(a) Subject to the requirements of this section, DHS will, after coordination with OPM, issue implementing directives regarding the application of pay retention. Pay retention prevents a reduction in basic pay that would otherwise occur by preserving the former rate of basic pay within the employee's new band or by establishing a retained rate that exceeds the maximum rate of the new band.

(b) Pay retention must be based on the employee's rate of basic pay in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate must be compared to the range of rates of basic pay applicable to the employee's position.

(c) In applying § 9701.323 (regarding pay increases provided at the time of a rate range adjustment under § 9701.322), any increase in the rate of basic pay for an employee receiving a retained rate is equal to one-half of the percentage value of any increase in the minimum rate of the employee's band.

§ 9701.357

§ 9701.357 Miscellaneous.

(a) Except in the case of an employee who does not receive a pay increase under §§ 9701.323 or 9701.335 because of an unacceptable rating of record, an employee's rate of basic pay may not be less than the minimum rate of the employee's band (or the adjusted minimum rate of that band).

(b) Except as provided in § 9701.356, an employee's rate of basic pay may not exceed the maximum rate of the employee's band rate range.

(c) DHS must follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of pay must be converted to hourly rates of pay in computing payments received by covered employees.

(d) DHS will issue implementing directives regarding the movement of employees to or from a band with a rate range that is increased by a special rate supplement.

(e) For the purpose of applying the reduction-in-force provisions of 5 CFR part 351, DHS must establish representative rates for all band rate ranges.

(f) If a DHS employee moves from the pay system established under this subpart to a GS position within DHS having a higher level of duties and responsibilities, DHS may issue implementing directives that provide for a special increase prior to the employee's movement in recognition of the fact that the employee will not be eligible for a promotion increase under the GS system.

SPECIAL PAYMENTS

§ 9701.361 Special skills payments.

DHS will issue implementing directives regarding additional payments for specializations for which the incumbent is trained and ready to perform at all times. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special skills payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering

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pay retention or adverse action procedures.

§ 9701.362 Special assignment payments.

DHS will issue implementing directives regarding additional payments for employees serving on special assignments in positions placing significantly greater demands on the employee than other assignments within the employee's band. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special assignment payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention provisions or adverse action procedures.

§ 9701.363 Special staffing payments.

DHS will issue implementing directives regarding additional payments for employees serving in positions for which DHS is experiencing or anticipates significant recruitment and/or retention problems. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special staffing payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention or adverse action procedures.

TRANSITIONAL PROVISIONS

§ 9701.371 General.

(a) Sections 9701.371 through 9701.374 describe the transitional provisions that apply when DHS employees are converted to a pay system established under this subpart. An affected employee may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system, as provided in § 9701.302. For the purpose of this section and §§ 9701.372 through 9701.374, the terms “convert,” “converted,” “converting,” and “conversion” refer to employees who become

covered by the pay system without a change in position (as a result of a coverage determination made under §9701.102(b)) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the DHS system.

(b) DHS will issue implementing directives prescribing the policies and procedures necessary to implement these transitional provisions.

§9701.372 Creating initial pay ranges.

(a) DHS must, after coordination with OPM, set the initial band rate ranges for the DHS pay system established under this subpart. The initial ranges will link to the ranges that apply to converted employees in their previously applicable pay system (taking into account any applicable special rates and locality payments or supplements).

(b) For employees who are law enforcement officers as defined in 5 U.S.C. 5541(3) and who were covered by the GS system immediately before conversion, the initial ranges must provide rates of basic pay that equal or exceed the rates of basic pay these officers received under the GS system (taking into account any applicable special rates and locality payments or supplements).

§9701.373 Conversion of employees to the DHS pay system.

(a) When a pay system is established under this subpart and applied to a category of employees, DHS must convert employees to the system without a reduction in their rate of pay (including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, locality rate supplement under §9701.332, or special rate supplement under §9701.333).

(b) When an employee receiving a special rate under 5 U.S.C. 5305 before conversion is converted to an equal rate of pay under the DHS pay system that consists of a basic rate and a locality or special rate supplement, the conversion will not be considered as resulting in a reduction in basic pay for the purpose of applying subpart F of this part.

(c) If another personnel action (e.g., promotion, geographic movement)

takes effect on the same day as the effective date of an employee's conversion to the new pay system, DHS must process the other action under the rules pertaining to the employee's former system before processing the conversion action.

(d) An employee on a temporary promotion at the time of conversion must be returned to his or her official position of record prior to processing the conversion. If the employee is temporarily promoted immediately after the conversion, pay must be set under the rules for promotion increases under the DHS system.

(e) The Secretary has discretion to make one-time pay adjustments for GS and prevailing rate employees when they are converted to the DHS pay system. DHS will issue implementing directives governing any such pay adjustment, including rules governing employee eligibility, pay computations, and the timing of any such pay adjustment.

(f) The Secretary has discretion to convert entry/developmental employees in noncompetitive career ladder paths to the pay progression plan established for the Entry/Developmental band to which the employee is assigned under the DHS pay system. DHS will issue implementing directives governing any such conversion, including rules governing employee eligibility, pay computations, and the timing of any such conversion. As provided in paragraph (a) of this section, DHS must convert employees without a reduction in their rate of pay.

§9701.374 Special transition rules for Federal Air Marshal Service.

Notwithstanding any other provision in this subpart, if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover those positions under a pay system that is parallel to the pay system that was applicable to the Federal Air Marshal Service within TSA. DHS may, after coordination with OPM, modify that system. DHS will issue implementing directives on converting Federal Air Marshal Service employees to

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any new pay system that may subsequently be established under this subpart, consistent with the conversion rules in § 9701.373.

Subpart D—Performance Management

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart D to part 9701 was rescinded.

§ 9701.401 Purpose.

(a) This subpart provides for the establishment in the Department of Homeland Security of at least one performance management system as authorized by 5 U.S.C. chapter 97.

(b) The performance management system established under this subpart, working in conjunction with the pay system established under subpart C of this part, is designed to promote and sustain a high-performance culture by incorporating the following features:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between elements of the pay system established in subpart C of this part, the employee performance appraisal system, and the Department's strategic plan;

(4) Employee involvement in the design and implementation of the system (as provided in § 9701.105);

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) Periodic performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, with specific time-tables for review;

(7) Effective safeguards so that the management of the system is fair and equitable and based on employee performance; and

(8) A means for ensuring that adequate resources are allocated for the design, implementation, and administration of the performance management system that supports the pay system established under subpart C of this part.

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§ 9701.402 Coverage.

(a) This subpart applies to eligible DHS employees in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b), except as provided in paragraph (c) of this section.

(b) The following employees are eligible for coverage under this subpart:

(1) Employees who would otherwise be covered by 5 U.S.C. chapter 43; and

(2) Employees who were excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart, as determined under § 9701.102(b).

(c) This subpart does not apply to employees who are not expected to be employed longer than a minimum period (as defined in § 9701.404) during a single 12-month period.

§ 9701.403 Waivers.

When a specified category of employees is covered by the performance management system(s) established under this subpart, 5 U.S.C. chapter 43 is waived with respect to that category of employees.

§ 9701.404 Definitions.

In this subpart—

Appraisal means the review and evaluation of an employee's performance.

Appraisal period means the period of time established under a performance management system for reviewing employee performance.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Contribution means a work product, service, output, or result provided or produced by an employee that supports the Departmental or organizational mission, goals, or objectives.

Minimum period means the period of time established by DHS during which an employee must perform before receiving a rating of record.

Performance means accomplishment of work assignments or responsibilities.

Performance expectations means that which an employee is required to do, as described in § 9701.406, and may include observable or verifiable descriptions of

quality, quantity, timeliness, and cost effectiveness.

Performance management means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

Performance management system means the policies and requirements established under this subpart, as supplemented by DHS implementing directives, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance.

Rating of record means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) To support a pay determination, including one granted in accordance with subpart C of this part, a within-grade increase granted under 5 CFR 531.404, or a pay determination granted under other applicable rules.

Unacceptable performance means the failure to meet one or more performance expectations.

§ 9701.405 Performance management system requirements.

(a) DHS will issue implementing directives that establish one or more performance management systems for DHS employees, subject to the requirements set forth in this subpart.

(b) Each DHS performance management system must—

(1) Specify the employees covered by the system(s);

(2) Provide for the periodic appraisal of the performance of each employee, generally once a year, based on performance expectations.

(3) Specify the minimum period during which an employee must perform before receiving a rating of record;

(4) Hold supervisors and managers accountable for effectively managing the performance of employees under their

supervision as set forth in paragraph (c) of this section;

(5) Include procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance; and

(6) Specify the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers are responsible for—

(1) Clearly communicating performance expectations and holding employees responsible for accomplishing them;

(2) Making meaningful distinctions among employees based on performance;

(3) Fostering and rewarding excellent performance; and

(4) Addressing poor performance.

§ 9701.406 Setting and communicating performance expectations.

(a) Performance expectations must align with and support the DHS mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. Such expectations include those general performance expectations that apply to all employees, such as standard operating procedures, handbooks, or other operating instructions and requirements associated with the employee's job, unit, or function.

(b) Supervisors and managers must communicate performance expectations, including those that may affect an employee's retention in the job. Performance expectations need not be in writing, but must be communicated to the employee prior to holding the employee accountable for them. However, notwithstanding this requirement, employees are always accountable for demonstrating appropriate standards of conduct, behavior, and professionalism, such as civility and respect for others.

(c) Performance expectations may take the form of—

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(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, administrative manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee;

(3) A particular work assignment, including expectations regarding the quality, quantity, accuracy, timeliness, and/or other expected characteristics of the completed assignment;

(4) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make; or

(5) Any other means, as long as it is reasonable to assume that the employee will understand the performance that is expected.

(d) Supervisors must involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

§ 9701.407 Monitoring performance and providing feedback.

In applying the requirements of the performance management system and its implementing directives and policies, supervisors must—

(a) Monitor the performance of their employees and the organization; and

(b) Provide timely periodic feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period.

§ 9701.408 Developing performance and addressing poor performance.

(a) Subject to budgetary and other organizational constraints, a supervisor must—

(1) Provide employees with the proper tools and technology to do the job; and

(2) Develop employees to enhance their ability to perform.

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(b) If during the appraisal period a supervisor determines that an employee's performance is unacceptable, the supervisor must—

(1) Consider the range of options available to address the performance deficiency, which include but are not limited to remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, and/or an adverse action (as defined in subpart F of this part); and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(c) As specified in subpart G of this part, employees may appeal adverse actions based on unacceptable performance.

§ 9701.409 Rating and rewarding performance.

(a)(1) Except as provided in paragraphs (a)(2) and (3) of this section, each DHS performance management system must establish a single summary rating level of unacceptable performance, a summary rating level of fully successful performance (or equivalent), and at least one summary rating level above fully successful performance.

(2) For employees in an Entry/Developmental band, the DHS performance management system(s) may establish two summary rating levels, *i.e.*, an unacceptable rating level and a rating level of fully successful (or equivalent).

(3) At his or her sole and exclusive discretion, the Secretary or designee may under extraordinary circumstances establish a performance management system with two summary rating levels, *i.e.*, an unacceptable level and a higher rating level, for employees not in an Entry/Developmental band.

(b) A supervisor or other rating official must prepare and issue a rating of record after the completion of the appraisal period. An additional rating of record may be issued to reflect a substantial change in the employee's performance when appropriate. A rating of record will be used as a basis for determining—

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(1) An increase in basic pay under § 9701.324;

(2) A locality or special rate supplement increase under § 9701.336;

(3) A performance pay increase determination under § 9701.342(a);

(4) A within-grade increase determination under 5 CFR 531.404, prior to conversion to the pay system established under subpart C of this part;

(5) A pay determination under any other applicable pay rules;

(6) Awards under any legal authority, including 5 U.S.C. chapter 45, 5 CFR part 451, and a Departmental or organizational awards program;

(7) Eligibility for promotion; or

(8) Such other action that DHS considers appropriate, as specified in the implementing directives.

(c) A rating of record must assess an employee's performance with respect to his or her performance expectations and/or relative contributions and is considered final when issued to the employee with all appropriate reviews and signatures.

(d) DHS may not impose a forced distribution or quota on any rating level or levels.

(e) A rating of record issued under this subpart is an official rating of record for the purpose of any provision of title 5, Code of Federal Regulations, for which an official rating of record is required.

(f) DHS may not lower the rating of record of an employee on an approved absence from work, including the absence of a disabled veteran to seek medical treatment, as provided in Executive Order 5396.

(g) A rating of record may be grieved by a non-bargaining unit employee (or a bargaining unit employee when no negotiated procedure exists) through an administrative grievance procedure established by DHS. A bargaining unit employee may grieve a rating of record through a negotiated grievance procedure, as provided in subpart E of this part. An arbitrator hearing a grievance is subject to the standards of review set forth in § 9701.521(g)(2). Except as otherwise provided by law, an arbitrator may not conduct an independent evaluation of the employee's performance or otherwise substitute his or her judgment for that of the supervisor.

(h) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in the applicable performance management system (e.g., transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

(i) DHS implementing directives will establish policies and procedures for crediting performance in a reduction in force, including policies for assigning additional retention credit based on performance. Such policies must comply with 5 U.S.C. chapter 35 and 5 CFR 351.504.

§ 9701.410 DHS responsibilities.

In carrying out its performance management system(s), DHS must—

(a) Transfer ratings between subordinate organizations and to other Federal departments or agencies;

(b) Evaluate its performance management system(s) for effectiveness and compliance with this subpart, DHS implementing directives and policies, and the provisions of 5 U.S.C. chapter 23 that set forth the merit system principles and prohibited personnel practices;

(c) Provide OPM with a copy of the implementing directives, policies, and procedures that implement this subpart; and

(d) Comply with 29 CFR 1614.102(a)(5), which requires agencies to review, evaluate, and control managerial and supervisory performance to ensure enforcement of the policy of equal opportunity.

Subpart E—Labor-Management Relations

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart E to part 9701 was rescinded.

§ 9701.501 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(b) relating to the Department's labor-management relations system. The Department was created in recognition of the paramount interest in safeguarding the American people, without compromising statutorily protected employee rights. For this reason

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Congress stressed that personnel systems established by the Department and OPM must be flexible and contemporary, enabling the Department to rapidly respond to threats to our Nation. The labor-management relations regulations in this subpart are designed to meet these compelling concerns and must be interpreted with the Department's mission foremost in mind. The regulations also recognize the rights of DHS employees to organize and bargain collectively, subject to any exclusion from coverage or limitation on negotiability established by law, including these regulations, applicable Executive orders, and any other legal authority.

§ 9701.502 Rule of construction.

In interpreting this subpart, the rule of construction in § 9701.106(a)(2) must be applied.

§ 9701.503 Waivers.

When a specified category of employees is covered by the labor-management relations system established under this subpart, the provisions of 5 U.S.C. 7101 through 7135 are waived with respect to that category of employees, except as otherwise specified in this part (including § 9701.106).

§ 9701.504 Definitions.

In this subpart:

Authority means the Federal Labor Relations Authority described in 5 U.S.C. 7104(a).

Collective bargaining means the performance of the mutual obligation of a management representative of the Department and an exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

Collective bargaining agreement means an agreement entered into as a result

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of collective bargaining pursuant to the provisions of this subpart.

Component means any organizational subdivision of the Department.

Conditions of employment means personnel policies, practices, and matters affecting working conditions—whether established by rule, regulation, or otherwise—except that such term does not include policies, practices, and matters relating to—

(1) Political activities prohibited under 5 U.S.C. chapter 73, subchapter III;

(2) The classification of any position, including any classification determinations under subpart B of this part;

(3) The pay of any position, including any determinations regarding pay or adjustments thereto under subpart C of this part; or

(4) Any matters specifically provided for by Federal statute.

Confidential employee means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

Day means a calendar day.

Dues means dues, fees, and assessments.

Exclusive representative means any labor organization which is recognized as the exclusive representative of employees in an appropriate unit consistent with the Department's organizational structure, pursuant to 5 U.S.C. 7111 or as otherwise provided by § 9701.514.

Grievance means any complaint—

(1) By any employee concerning any matter relating to the conditions of employment of the employee;

(2) By any labor organization concerning any matter relating to the conditions of employment of any employee; or

(3) By any employee, labor organization, or the Department concerning—

(i) The effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation issued for the purpose of affecting conditions of employment.

HSLRB means the Homeland Security Labor Relations Board.

Labor organization means an organization composed in whole or in part of Federal employees, in which employees participate and pay dues, and which has as a purpose the dealing with the Department concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by the Department; or

(4) An organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

Management official means an individual employed by the Department in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the Department or who has the authority to recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment.

Professional employee has the meaning given that term in 5 U.S.C. 7103(a)(15).

Supervisor means an individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.

§ 9701.505 Coverage.

(a) *Employees covered.* This subpart applies to eligible DHS employees, subject to a determination by the Secretary or designee under § 9701.102(b), except as provided in paragraph (b) of this section. DHS employees who would otherwise be covered by 5 U.S.C. chapter 71 are eligible for coverage under this subpart. In addition, this subpart applies to an employee whose employment has ceased because of an unfair labor practice under § 9701.517 of this subpart and who has not obtained any other regular and substantially equivalent employment.

(b) *Employees excluded.* This subpart does not apply to—

(1) An alien or noncitizen of the United States who occupies a position outside the United States;

(2) A member of the uniformed services as defined in 5 U.S.C. 2101(3);

(3) A supervisor or a management official;

(4) Any person who participates in a strike in violation of 5 U.S.C. 7311;

(5) Employees of the United States Secret Service, including the United States Secret Service Uniformed Division;

(6) Employees of the Transportation Security Administration; or

(7) Any employee excluded pursuant to § 9701.514 or any other legal authority.

§ 9701.506 Impact on existing agreements.

(a) Any provision of a collective bargaining agreement that is inconsistent with this part and/or its implementing directives is unenforceable on the effective date of coverage under the applicable subpart or directive. In accordance with procedures and time limits established by the HSLRB under § 9701.509, an exclusive representative may appeal to the HSLRB the Department's determination that a provision is unenforceable. Provisions that are identified by the Department as unenforceable remain unenforceable unless held otherwise by the HSLRB on appeal. The Secretary or designee, in his or her sole and exclusive discretion, may continue all or part of a particular provision(s) with respect to a specific category or categories of employees

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and may cancel such continued provisions at any time; such determinations are not precedential.

(b) Upon request by an exclusive representative, the parties will have 60 days after the effective date of coverage under the applicable subpart and/or implementing directive to bring into conformance those remaining negotiable terms directly affected by the terms rendered unenforceable by the applicable subpart and/or implementing directive. If the parties fail to reach agreement by that date, they may utilize the negotiation impasse provisions of § 9701.519 to resolve the matter. Agreements reached under this section are subject to approval under § 9701.515(d). Nothing in this paragraph will delay the effective date of an implementing directive.

§ 9701.507 Employee rights.

Each employee has the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee must be protected in the exercise of such right. Except as otherwise provided under this subpart, such right includes the right—

(a) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and

(b) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this subpart.

§ 9701.508 Homeland Security Labor Relations Board.

(a) *Composition.* (1) The Homeland Security Labor Relations Board is composed of at least three members who will be appointed by the Secretary for terms of 3 years, except that the appointments of the initial HSLRB members will be for terms of 2, 3, and 4 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint

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the member for an additional term. The Secretary, in his or her sole and exclusive discretion, may appoint additional members to the HSLRB; in so doing, he or she will make such appointments to ensure that the HSLRB consists of an odd number of members.

(2) Members of the HSLRB must be independent, distinguished citizens of the United States who are well known for their integrity and impartiality. Members must have expertise in labor relations, law enforcement, or national/homeland or other related security matters. At least one member of the Board must have experience in labor relations. Members must be able to acquire and maintain an appropriate security clearance. Members may be removed by the Secretary on the same grounds as an FLRA member.

(3) An individual chosen to fill a vacancy on the HSLRB will be appointed for the unexpired term of the member who is replaced.

(b) *Appointment of the Chair.* The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the HSLRB.

(c) *Appointment procedures for non-Chair HSLRB members.* (1) The appointments of the two non-Chair HSLRB members will be made by the Secretary after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department of Homeland Security.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for additional consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint HSLRB members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requirements established by the Secretary.

(d) *Appointment of additional non-Chair HSLRB members.* If the Secretary determines that additional members are needed, he or she may, subject to the criteria set forth in paragraph

(a)(2) of this section, appoint the additional members according to the procedures established by paragraph (c) of this section.

(e) *Filling a HSLRB vacancy.* A HSLRB vacancy will be filled according to the procedure in effect at the time of the appointment.

(f) *Procedures of the HSLRB.* (1) The HSLRB will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases. To the extent practicable, the HSLRB will use a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. The HSLRB may, pursuant to its regulations, use a combination of mediation, factfinding, and any other appropriate dispute resolution method to resolve all such disputes at the earliest practicable time and with a minimum of process. Such proceedings will be conducted by the HSLRB, a HSLRB member, or employee of the HSLRB. Individual HSLRB members may decide a particular dispute. However, at the motion of a party upon its initial request for HSLRB assistance or upon the HSLRB's own motion at any time, the full HSLRB (or, where the Secretary appoints more than three members, a three-person panel of the HSLRB) may decide a particular dispute involving a matter of first impression or a major policy.

(2) In cases where the full HSLRB acts, a vote of the majority of the HSLRB (or a three-person panel of the HSLRB) will be dispositive. A vacancy on the HSLRB does not impair the right of the remaining members to exercise all of the powers of the HSLRB. The vote of the Chair will be dispositive in the event of a tie.

(g) *Finality of HSLRB decisions.* Decisions of the HSLRB are final and binding. However, in cases involving unfair labor practices and/or negotiability disputes decided by a single member, a party may seek review of that decision with the full HSLRB, according to rules prescribed by the HSLRB. In such cases the initial decision is stayed pending the final decision by the full HSLRB.

(h) *Review of a HSLRB decision.* (1) In order to obtain judicial review of a HSLRB decision, a party must request a review of the record of a HSLRB decision by the Authority by filing such a request in writing within 15 days after the issuance of the decision. Within 15 days after the Authority's receipt of the request for a review of the record, any response must be filed. A party may each submit, and the Authority may grant for good cause shown, a request for a single extension of time not to exceed a maximum of 15 additional days. The Authority will establish, in conjunction with the HSLRB, standards for the sufficiency of the record and other procedures, including notice to the parties. The Authority must defer to findings of fact and interpretations of this part made by the HSLRB and sustain the HSLRB's decision unless the requesting party shows that the HSLRB's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Based on error in applying the HSLRB's procedures that resulted in substantial prejudice to a party affecting the outcome; or

(iii) Unsupported by substantial evidence.

(2) The Authority must complete its review of the record and issue a final decision within 30 days after receiving the party's timely response to such request for review. This 30-day time limit is mandatory, except that the Authority may extend its time for review by a maximum of 15 additional days if it determines that—

(i) The case is unusually complex; or

(ii) An extension is necessary to prevent any prejudice to the parties that would otherwise result.

(3) No extension beyond that provided by paragraph (h)(2) of this section is permitted.

(4) If the Authority does not issue a final decision within the mandatory time limit established by paragraph (h) of this section, the Authority will be considered to have denied the request for review of the HSLRB's decision, which will constitute a final decision of the Authority and is subject to judicial review in accordance with 5 U.S.C. 7123.

§ 9701.509 Powers and duties of the HSLRB.

(a) The HSLRB may, to the extent provided in this subpart and in accordance with regulations prescribed by the HSLRB—

(1) Resolve issues relating to the scope of bargaining and the duty to bargain in good faith under § 9701.518 and conduct hearings and resolve complaints of unfair labor practices concerning—

(i) The duty to bargain in good faith; and

(ii) Strikes, work stoppages, slowdowns, and picketing, or condoning such activity by failing to take action to prevent or stop such activity;

(2) Resolve disputes concerning requests for information under § 9701.515(b)(5) and (c);

(3) Resolve exceptions to arbitration awards involving the exercise of management rights, as defined in § 9701.511, and the duty to bargain, as defined in § 9701.518. The HSLRB must conduct any review of an arbitral award in accordance with the same standards set forth in 5 U.S.C. 7122(a), which is not waived for the purpose of this subpart but which is modified to apply to this section and to read “HSLRB” wherever the term “Authority” appears;

(4) Resolve negotiation impasses in accordance with § 9701.519;

(5) Conduct *de novo* review of legal conclusions involving all matters within the HSLRB’s jurisdiction;

(6) Have discretion to evaluate the evidence presented in the record and reach its own independent conclusions with respect to the matters at issue; and

(7) Assume jurisdiction over any matter concerning Department employees that has been submitted to FLRA pursuant to § 9701.510, if the HSLRB determines that the matter affects homeland security.

(b) The HSLRB may issue binding Department-wide opinions, which may be appealed as if they were decisions of the HSLRB in accordance with § 9701.508(h).

(c) In issuing opinions under paragraph (b) of this section, the HSLRB may elect to consult with the Authority.

(d)(1) In any matter filed with the HSLRB, if the responding party believes that the HSLRB lacks jurisdiction, that party must timely raise the issue with the HSLRB and simultaneously file a copy of its response with the Authority in accordance with regulations established by the HSLRB. The HSLRB’s determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority.

(2) If a matter involves one or more issues that are appropriately before the HSLRB and one or more issues that are appropriately before the Authority, the matter must be filed with the HSLRB in accordance with its procedures. The HSLRB will have primary jurisdiction over the matter. The HSLRB will decide those issues within its jurisdiction and will promptly transfer the matter to the Authority for resolution of any remaining issues.

§ 9701.510 Powers and duties of the Federal Labor Relations Authority.

(a) The Federal Labor Relations Authority may, to the extent provided in this subpart and in accordance with regulations prescribed by the Authority, make the following determinations with respect to the Department:

(1) Determine the appropriateness of units pursuant to the provisions of § 9701.514;

(2) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of 5 U.S.C. 7111 relating to the according of exclusive recognition to labor organizations, which are not waived for the purpose of this subpart but which are modified to apply to this section;

(3) Conduct hearings and resolve complaints of unfair labor practices under § 9701.517(a)(1) through (4) and (b)(1) through (4), and in accordance with the provisions of 5 U.S.C. 7118, which is not waived for this purpose but which is modified to apply to this section;

(4) Resolve exceptions to arbitrators’ awards otherwise in its jurisdiction and not involving the exercise of management rights under § 9701.511, the

duty to bargain, as defined in §9701.518, and matters under §9701.521(f); and

(5) Review HSLRB decisions and issue final decisions pursuant to §9701.508(h).

(b) In any matter filed with the Authority, if the responding party believes that the Authority lacks jurisdiction, that party must timely raise the issue with the Authority and simultaneously file a copy of its response with the HSLRB in accordance with regulations established by the Authority. The Authority must promptly transfer the case to the HSLRB, which will determine whether the matter is within the HSLRB's jurisdiction. If the HSLRB determines that the matter is not within its jurisdiction, the HSLRB will return the matter to the Authority for appropriate action. The HSLRB's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority.

(c) Judicial review of any Authority decision is as prescribed in 5 U.S.C. 7123, which is not waived.

§9701.511 Management rights.

(a) Subject to paragraphs (b), (c), and (d) of this section, nothing in this subpart may affect the authority of any management official or supervisor of the Department—

(1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department;

(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, grades, or occupational clusters and bands of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign and deploy employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission; and

(3) To lay off and retain employees, or to suspend, remove, reduce in grade, band, or pay, or take other disciplinary

action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

(b) Management is prohibited from bargaining over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section.

(c) Notwithstanding paragraph (b) of this section, management will confer with an exclusive representative over the procedures it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section, in accordance with the process set forth in §9701.512.

(d) If an obligation exists under §9701.518 to bargain, confer, or consult regarding the exercise of any authority under paragraph (a) of this section, management must provide notice to the exclusive representative concurrently with the exercise of that authority and an opportunity to present its views and recommendations regarding the exercise of such authority under paragraph (a) of this section. However, nothing in this section prevents management from exercising its discretion to provide notice as far in advance of the exercise of that authority as appropriate. Further, nothing in paragraph (d) of this section establishes an independent right to bargain, confer, or consult.

(e) To the extent otherwise required by §9701.518 and at the request of an exclusive representative, the parties will bargain at the level of recognition (unless otherwise delegated below that level, at their sole and exclusive discretion) over—

(1) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

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(2)(i) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(1) or (2) of this section, provided that the effects of such exercise have a significant and substantial impact on the bargaining unit, or on those employees in that part of the bargaining unit affected by the action or event, and are expected to exceed or have exceeded 60 days. Appropriate arrangements within the duty to bargain include proposals on matters such as—

(A) Personal hardships and safety measures; and

(B) Reimbursement of out-of-pocket expenses incurred by employees as the direct result of the exercise of authorities under this section, to the extent such reimbursement is in accordance with applicable law and governing regulations.

(ii) Appropriate arrangements within the duty to bargain do not include proposals on matters such as—

(A) The routine assignment to specific duties, shifts, or work on a regular or overtime basis; and

(B) Compensation for expenses not actually incurred, or pay or credit for work not actually performed.

(f) Nothing in this section will delay or prevent the Department from exercising its authority. Any agreements reached with respect to paragraph (e)(2) of this section will not be prece-dential or binding on subsequent acts, or retroactively applied, except at the Department's sole, exclusive, and unreviewable discretion.

§ 9701.512 Conferring on procedures for the exercise of management rights.

(a) As provided by § 9701.511(c), management, at the level of recognition, will confer with an appropriate exclusive representative to consider its views and recommendations with regard to procedures that management will observe in exercising its rights under § 9701.511(a)(1) and (2). This process is not subject to the requirements established by §§ 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain and consult), and 9701.519 (regarding impasse procedures). Nothing in this section requires that

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the parties reach agreement on any covered matter. The parties may, upon mutual agreement, provide for the Federal Mediation and Conciliation Service or another third party to assist in this process. Neither the HSLRB nor the Authority may intervene in this process.

(b) The parties will meet at reasonable times and places but for no longer than 30 days, including any voluntary third party assistance, unless the parties mutually agree to extend this period.

(c) Nothing in the process established under this section will delay the exercise of a management right under § 9701.511(a)(1) and (2).

(d) Management retains the sole, exclusive, and unreviewable discretion to determine the procedures that it will observe in exercising the authorities set forth in § 9701.511(a)(1) and (2) and to deviate from such procedures, as necessary.

§ 9701.513 Exclusive recognition of labor organizations.

The Department must accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit as determined by the Authority, who cast valid ballots in the election.

§ 9701.514 Determination of appropriate units for labor organization representation.

(a) The Authority will determine the appropriateness of any unit. The Authority must determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this subpart, the appropriate unit should be established on a Department, plant, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the Department, consistent with the Department's mission and organizational structure.

(b) A unit may not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor may a unit be determined to be appropriate if it includes—

(1) Except as provided under 5 U.S.C. 7135(a)(2), which is not waived for the purpose of this subpart, any management official or supervisor;

(2) A confidential employee;

(3) An employee engaged in personnel work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subpart;

(5) Both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) Any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by the Department whose duties directly affect the internal security of the Department, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Pursuant to 6 U.S.C. 412(b)(2), a unit to which continued recognition was provided upon transfer to DHS may not include an employee whose primary duty has materially changed to consist of intelligence, counterintelligence, or investigative work directly related to terrorism investigation.

(d) Any employee who is engaged in administering any provision of law or this subpart relating to labor-management relations may not be represented by a labor organization—

(1) Which represents other individuals to whom such provision applies; or

(2) Which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(e) Two or more units in the Department for which a labor organization is the exclusive representative may, upon petition by the Department or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the

larger unit to be appropriate. The Authority will certify the labor organization as the exclusive representative of the new larger unit.

§9701.515 Representation rights and duties.

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit must be given the opportunity to be represented at—

(i) Any formal discussion between Department representative(s) and bargaining unit employees, the purpose of which is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. This right does not apply to meetings between Department representative(s) and bargaining unit employees for the purpose of discussing operational matters where any discussion of personnel policies, practices or working conditions—

(A) Constitutes a reiteration or application of existing personnel policies, practices, or working conditions;

(B) Is incidental or otherwise peripheral to the announced purpose of the meeting; or

(C) Does not result in an announcement of a change to, or a promise to change, an existing personnel policy(s), practice(s), or working condition(s);

(ii) Any discussion between one or more Department representatives and one or more bargaining unit employees concerning any grievance;

(iii) Any examination of a bargaining unit employee by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests such representation; or

(iv) Any discussion between a representative of the Department and a

bargaining unit employee in connection with a formal complaint of discrimination only if the employee, at his or her sole discretion, requests such representation.

(3) Notwithstanding any other provision of this paragraph, if the Supreme Court determines that the definition of “grievance” in 5 U.S.C. 7103(a)(9) includes a formal complaint of discrimination filed by a bargaining unit employee, the definition of *grievance* in § 9701.504, and its application to this section, will be interpreted and applied consistent with that decision.

(4) The Department must annually inform its employees of their rights under paragraph (a)(2)(iii) of this section.

(5) Except in the case of grievance procedures negotiated under this subpart, the rights of an exclusive representative under this section may not be construed to preclude an employee from—

(i) Being represented by an attorney or other representative of the employee’s own choosing, other than the exclusive representative, in any other grievance or appeal action; or

(ii) Exercising other grievance or appellate rights established by law, rule, or regulation.

(b) The duty of the Department or appropriate component(s) of the Department and an exclusive representative to negotiate in good faith under paragraph (a) of this section includes the obligation—

(1) To approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) To be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on conditions of employment;

(3) To meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) If agreement is reached, to execute on the request of any party to the negotiation, a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement; and

(5) In the case of the Department or appropriate component(s) of the Department, to furnish information to an

exclusive representative, or its authorized representative, when—

(i) Such information exists, is normally maintained, and is reasonably available;

(ii) The exclusive representative has requested such information and demonstrated a particularized need for the information in order to perform its representational functions in grievance proceedings or in negotiations; and

(iii) Disclosure is not prohibited by law.

(c) Disclosure of information in paragraph (b)(5) of this section does not include the following:

(1) Disclosure prohibited by law or regulations, including, but not limited to, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, and Executive orders;

(2) Disclosure of information if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without recourse to the information;

(3) Internal Departmental guidance, counsel, advice, or training for managers and supervisors relating to collective bargaining;

(4) Any disclosure that would compromise the Department’s mission, security, or employee safety; and

(5) Home addresses, telephone numbers, email addresses, or any other information not related to an employee’s work.

(d)(1) An agreement between the Department or appropriate component(s) of the Department and the exclusive representative is subject to approval by the Secretary or designee.

(2) The Secretary or designee must approve the agreement within 30 days after the date the agreement is executed if the agreement is in accordance with the provisions of these regulations and any other applicable law, rule, or regulation.

(3) If the Secretary or designee does not approve or disapprove the agreement within the 30-day period specified in paragraph (d)(2) of this section, the agreement must take effect and is

binding on the Department or component(s), as appropriate, and the exclusive representative, but only if consistent with law, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, and Executive orders.

(4) A local agreement subject to a national or other controlling agreement at a higher level may be approved under the procedures of the controlling agreement or, if none, under Departmental regulations. Bargaining will be at the level of recognition except where delegated.

(5) Provisions in existing collective bargaining agreements are unenforceable if an authorized agency official determines that they are contrary to law, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives (as provided by §9701.506) and other policies and regulations, or Executive orders.

§9701.516 Allotments to representatives.

(a) If the Department has received from an employee in an appropriate unit a written assignment which authorizes the Department to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the Department must honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment must be made at no cost to the exclusive representative or the employee. Except as provided under paragraph (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under paragraph (a) of this section for the deduction of dues with respect to any employee terminates when—

(1) The agreement between the Department or Department component and the exclusive representative involved ceases to be applicable to the employee; or

(2) The employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (c)(2) of this section, if a petition has been filed

with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in the Department have membership in the labor organization, the Authority must investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the Department has a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(i) The provisions of paragraph (c)(1) of this section do not apply in the case of any appropriate unit for which there is an exclusive representative.

(ii) Any agreement under paragraph (c)(1) of this section between a labor organization and the Department or Department component with respect to an appropriate unit becomes null and void upon the certification of an exclusive representative of the unit.

§9701.517 Unfair labor practices.

(a) For the purpose of this subpart, it is an unfair labor practice for the Department—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) To sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities on an impartial basis to other labor organizations having equivalent status;

(4) To discipline or otherwise discriminate against an employee because the employee has filed a complaint or petition, or has given any information or testimony under this subpart;

(5) To refuse, as determined by the HSLRB, to consult or negotiate in good faith with a labor organization, as required by this subpart;

(6) To fail or refuse, as determined by the HSLRB, to cooperate in impasse

procedures and impasse decisions, as required by this subpart; or

(7) To fail or refuse otherwise to comply with any provision of this subpart.

(b) For the purpose of this subpart, it is an unfair labor practice for a labor organization—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To cause or attempt to cause the Department to discriminate against any employee in the exercise by the employee of any right under this subpart;

(3) To coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) To discriminate against an employee with regard to the terms and conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) To refuse, as determined by the HSLRB, to consult or negotiate in good faith with the Department as required by this subpart;

(6) To fail or refuse, as determined by the HSLRB, to cooperate in impasse procedures and impasse decisions as required by this subpart;

(7)(i) To call, or participate in, a strike, work stoppage, or slowdown, or picketing of the Department in a labor-management dispute if such picketing interferes with an agency's operations; or

(ii) To condone any activity described in paragraph (b)(7)(i) of this section by failing to take action to prevent or stop such activity; or

(8) To otherwise fail or refuse to comply with any provision of this subpart.

(c) Notwithstanding paragraph (b)(7) of this section, informational picketing which does not interfere with the Department's operations will not be considered an unfair labor practice.

(d) For the purpose of this subpart, it is an unfair labor practice for an exclu-

sive representative to deny membership to any employee in the appropriate unit represented by the labor organization, except for failure to meet reasonable occupational standards uniformly required for admission or to tender dues uniformly required as a condition of acquiring and retaining membership. This does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this subpart.

(e) The HSLRB will not consider any unfair labor practice allegation filed more than 6 months after the alleged unfair labor practice occurred, unless the HSLRB determines, pursuant to its regulations, that there is good cause for the late filing.

(f) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except where an employee has an option of using the negotiated grievance procedure or an appeals procedure in connection with an adverse action under subpart F of this part, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(g) The expression of any personal view, argument, opinion, or the making of any statement which publicizes the fact of a representational election and encourages employees to exercise their right to vote in such an election, corrects the record with respect to any false or misleading statement made by any person, or informs employees of the Government's policy relating to labor-management relations and representation, may not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions—

(1) Constitute an unfair labor practice under any provision of this subpart; or

(2) Constitute grounds for the setting aside of any election conducted under any provision of this subpart.

§ 9701.518 Duty to bargain, confer, and consult.

(a) The Department or appropriate component(s) of the Department and any exclusive representative in any appropriate unit in the Department, through appropriate representatives, must meet and negotiate in good faith as provided by this subpart for the purpose of arriving at a collective bargaining agreement. In addition, the Department or appropriate component(s) of the Department and the exclusive representative may determine appropriate techniques, consistent with the operational rules of the HSLRB, to assist in any negotiation.

(b) If bargaining over an initial collective bargaining agreement or any successor agreement is not completed within 90 days after such bargaining begins, the parties may mutually agree to continue bargaining or mutually agree to refer the matter to an independent mediator/arbitrator for resolution. Alternatively, either party may refer the matter to the HSLRB for resolution in accordance with procedures established by the HSLRB. Either party may refer the matter to the Federal Mediation Conciliation Service (FMCS) for assistance at any time.

(c) If the parties bargain during the term of an existing collective bargaining agreement over a proposed change that is otherwise negotiable, and no agreement is reached within 30 days after such bargaining begins, the parties may mutually agree to continue bargaining or mutually agree to refer the matter to an independent mediator/arbitrator for resolution. Alternatively, either party may refer the matter to the HSLRB for resolution in accordance with procedures established by the HSLRB. Either party may refer the matter to the Federal Mediation Conciliation Service (FMCS) for assistance at any time.

(d)(1) Management may not bargain over any matters that are inconsistent with law or the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, or Executive orders.

(2) In promulgating Departmental policies and regulations that deal with otherwise negotiable subjects, the De-

partment will utilize the process set forth in § 9701.512, except that the Department will confer with those labor organizations that request and have been accorded national consultation rights (NCR) established pursuant to 5 U.S.C. 7113, which is not waived for these purposes, and consult with those organizations on other appropriate matters.

(3) Management has no obligation to bargain over a change to a condition of employment unless the change is otherwise negotiable pursuant to these regulations and is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(4) Management has no obligation to confer or consult as required by this section unless the change is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(5) Nothing in paragraphs (b) or (c) of this section prevents or delays management from exercising the rights enumerated in § 9701.511.

(e) If a management official involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the HSLRB in accordance with procedures established by the HSLRB.

§ 9701.519 Negotiation impasses.

(a) If the Department and exclusive representative are unable to reach an agreement under §§ 9701.515 or 9701.518, either party may submit the disputed issues to the HSLRB for resolution.

(b) If the parties do not arrive at a settlement after assistance by the HSLRB, the HSLRB may take whatever action is necessary and not inconsistent with this subpart to resolve the impasse.

(c) Pursuant to §§ 9701.508 and 9701.525, the HSLRB's regulations will provide for a single, integrated process to address all matters associated with a negotiations dispute, including unfair

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labor practices, negotiability disputes, and bargaining impasses.

(d) Notice of any final action of the HSLRB under this section must be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 9701.520 Standards of conduct for labor organizations.

Standards of conduct for labor organizations are those prescribed under 5 U.S.C. 7120, which is not waived.

§ 9701.521 Grievance procedures.

(a)(1) Except as provided in paragraph (a)(2) of this section, any collective bargaining agreement must provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in paragraphs (d), (f), and (g) of this section, the procedures must be the exclusive administrative procedures for grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in paragraph (a) of this section must be fair and simple, provide for expeditious processing, and include procedures that—

(i) Assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) Assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) Provide that any grievance not satisfactorily settled under the negotiated grievance procedure is subject to binding arbitration, which may be invoked by either the exclusive representative or the Department.

(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (b)(1)(iii) of this section must, if or to the extent that an al-

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leged prohibited personnel practice is involved, allow the arbitrator to order a stay of any personnel action in a manner similar to the manner described in 5 U.S.C. 1221(c) with respect to the Merit Systems Protection Board and order the Department to take any disciplinary action identified under 5 U.S.C. 1215(a)(3) that is otherwise within the authority of the Department to take.

(3) Any employee who is the subject of any disciplinary action ordered under paragraph (b)(2) of this section may appeal such action to the same extent and in the same manner as if the Department had taken the disciplinary action absent arbitration.

(c) The preceding paragraphs of this section do not apply with respect to any matter concerning—

(1) Any claimed violation of 5 U.S.C. chapter 73, subchapter III (relating to prohibited political activities);

(2) Retirement, life insurance, or health insurance;

(3) A suspension or removal under § 9701.613;

(4) A mandatory removal under § 9701.607;

(5) Any examination, certification, or appointment; and

(6) Any subject not within the definition of *grievance* in § 9701.504 (e.g., the classification or pay of any position), except for any other adverse action under subpart F of this part which is not otherwise excluded by paragraph (c) of this section.

(d) To the extent not already excluded by existing collective bargaining agreements, the exclusions contained in paragraph (c) of this section apply upon the effective date of this subpart, as determined under § 9701.102(b).

(e)(1) An aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. 2302(b)(1) which also falls under the coverage of the negotiated grievance procedure may raise the matter under the applicable statutory procedures, or the negotiated procedure, but not both.

(2) An employee is deemed to have exercised his or her option under paragraph (e)(1) of this section to raise the matter under the applicable statutory

procedures, or the negotiated procedure, at such time as the employee timely initiates an action under the applicable statutory or regulatory procedure or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(f)(1) For matters covered by subpart G of this part (except for mandatory removal offenses under §9701.707), an aggrieved employee may raise the matter under the appeals procedure of §9701.706 or under the negotiated grievance procedure, but not both. An employee will be deemed to have exercised his or her option under this section when the employee timely files an appeal under the applicable appellate procedures or a grievance in accordance with the provisions of the parties' negotiated grievance procedure, whichever occurs first.

(2) An arbitrator hearing a matter appealable under subpart G of this part is bound by the applicable provisions of this part.

(3) Section 7121(f) of title 5, United States Code, is not waived, but is modified to provide that—

(i) Matters covered by subpart G are deemed to be matters covered by 5 U.S.C. 4303 and 7512 for the purpose of obtaining judicial review; and

(ii) Judicial review under 5 U.S.C. 7703 will apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by MSPB under §9701.706, including the preponderance of the evidence standard.

(4) In order to ensure consistency, the Department and representatives of those labor organizations granted national consultation rights may establish a mutually acceptable panel of arbitrators who have been trained and qualified to hear adverse action grievances under this part.

(g)(1) An employee may grieve a performance rating of record that has not been appealed in connection with an action under subpart G of this part. Once an employee raises a performance rating issue in an appeal under subpart G of this part, any pending grievance or arbitration will be dismissed with prejudice.

(2) An arbitrator may cancel a performance rating upon a finding that management applied the employee's established performance expectations in violation of applicable law, Department rule or regulation, or provision of collective bargaining agreement in a manner prejudicial to the grievant. An arbitrator who has properly canceled an employee's appraisal may order management to change the grievant's rating only when the arbitrator is able to determine the rating that management would have given but for the violation. When an arbitrator is unable to determine what the employee's rating would have been but for the violation, the arbitrator must remand the case to management for re-evaluation. Except as otherwise provided by law, an arbitrator may not conduct an independent evaluation of the employee's performance or otherwise substitute his or her judgment for that of the supervisor.

(h)(1) This paragraph applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which paragraph (e) of this section applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (h)(1) of this section may elect not more than one of the procedures described in paragraph (h)(3) of this section with respect thereto. A determination as to whether a particular procedure for seeking a remedy has been elected must be made as set forth under paragraph (h)(4) of this section.

(3) The procedures for seeking remedies described in this paragraph are as follows:

(i) An appeal under subpart G of this part;

(ii) A negotiated grievance under this section; and

(iii) Corrective action under 5 U.S.C. chapter 12, subchapters II and III.

(4) For the purpose of this paragraph, an employee is considered to have elected one of the following, whichever election occurs first:

(i) The procedure described in paragraph (h)(3)(i) of this section if such employee has timely filed a notice of appeal under the applicable appellate procedures;

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(ii) The procedure described in paragraph (h)(3)(ii) of this section if such employee has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(iii) The procedure described in paragraph (h)(3)(iii) of this section if such employee has sought corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1).

§ 9701.522 Exceptions to arbitration awards.

(a)(1) In the case of awards involving the exercise of management rights or the duty to bargain under §§9701.511 and 9701.518, either party to arbitration under this subpart may file with the HSLRB an exception to any arbitrator's award. The HSLRB may take such action and make such recommendations concerning the award as is consistent with this subpart.

(2) In the case of awards not involving the exercise of management rights or the duty to bargain under §§9701.511 and 9701.518, either party may file exceptions to an arbitration award with the Authority pursuant to 5 U.S.C. 7122 (which is not waived for the purpose of this subpart but which is modified to apply to arbitration awards under this section) and the Authority's regulations.

(3) Notwithstanding paragraph (a)(2) of this section, exceptions to awards relating to a matter described in §9701.521(f) may not be filed with the Authority.

(b) If no exception to an arbitrator's award is filed under paragraph (a) of this section during the 30-day period beginning on the date of such award, the award is final and binding. Either party must take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided under 5 U.S.C. 5596 and 5 CFR part 550, subpart H).

(c) Nothing in this section prevents the HSLRB from determining its own jurisdiction without regard to whether any party has raised a jurisdictional issue.

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§ 9701.523 Official time.

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this subpart must be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this section may not exceed the number of individuals designated as representing the Department for such purposes.

(b) Any activities performed by any employee relating to the internal business of the labor organization, including but not limited to the solicitation of membership, elections of labor organization officials, and collection of dues, must be performed during the time the employee is in a nonduty status.

(c) Except as provided in paragraph (a) of this section, the Authority or the HSLRB, as appropriate, will determine whether an employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority or the HSLRB will be authorized official time for such purpose during the time the employee would otherwise be in a duty status.

(d) Except as provided in the preceding paragraphs of this section, any employee representing an exclusive representative or, in connection with any other matter covered by this subpart, any employee in an appropriate unit represented by an exclusive representative, must be granted official time in any amount the Department and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

§ 9701.524 Compilation and publication of data.

(a) The HSLRB must maintain a file of its proceedings and copies of all available agreements and arbitration decisions and publish the texts of its impasse resolution decisions and the actions taken under §9701.519.

(b) All files maintained under paragraph (a) of this section must be open to inspection and reproduction in accordance with 5 U.S.C. 552 and 552a.

The HSLRB will establish rules in consultation with the Department for maintaining and making available for inspection sensitive information.

§ 9701.525 Regulations of the HSLRB.

The Department may issue initial interim rules for the operation of the HSLRB and will consult with labor organizations granted national consultation rights on the rules. The HSLRB will prescribe and publish rules for its operation in the FEDERAL REGISTER.

§ 9701.526 Continuation of existing laws, recognitions, agreements, and procedures.

(a) Except as otherwise provided by § 9701.506, nothing contained in this subpart precludes the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or an agreement that is otherwise consistent with law and the regulations in this part between the Department or a component thereof and an exclusive representative of its employees, which is entered into before the effective date of this subpart, as determined under § 9701.102(b).

(b) Policies, regulations, and procedures established under, and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838 or any other Executive order, as in effect on the effective date of this subpart (as determined under § 9701.102(b)), will remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this subpart or by implementing directives or decisions issued pursuant to this subpart.

§ 9701.527 Savings provision.

This subpart does not apply to grievances or other administrative proceedings already pending on the date of coverage of this subpart, as determined under § 9701.102(b). Any remedy that applies after the date of coverage under any provision of this part and that is in conflict with applicable provisions of this part is not enforceable.

Subpart F—Adverse Actions

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart F to part 9701 was rescinded.

GENERAL

§ 9701.601 Purpose.

This subpart contains regulations prescribing the requirements when employees are furloughed for 30 days or less, suspended, demoted, reduced in pay, or removed. DHS may issue implementing directives to carry out the provisions of this subpart.

§ 9701.602 Waivers.

When a specified category of employees is covered by the adverse action provisions established under this subpart, 5 U.S.C. 7501 through 7514 and 7531 through 7533 are waived with respect to that category of employees. The provisions in 5 U.S.C. 7521 and 7541 through 7543 are not waived.

§ 9701.603 Definitions.

In this subpart:

Adverse action means a furlough for 30 days or less, a suspension, a demotion, a reduction in pay, or a removal.

Band means a work level or pay range within an occupational cluster.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Current continuous service means a period of service immediately preceding an adverse action in the same or similar positions without any break in Federal civilian employment.

Day means a calendar day.

Demotion means a reduction in grade, a reduction to a lower band within the same occupational cluster, or a reduction to a lower band in a different occupational cluster under rules prescribed by DHS pursuant to § 9701.355.

Furlough means the placement of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

Grade means a level of work under a position classification or job grading system.

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Indefinite suspension means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or further Department action. An indefinite suspension continues for an indeterminate period of time and usually ends with either the employee returning to duty or the completion of any subsequent administrative action.

Initial service period (ISP) means the 1 to 2 years employees must serve after selection (on or after the date this subpart becomes applicable, as determined under § 9701.102(b)) for a designated DHS position in the competitive service for the purpose of providing an employee the opportunity to demonstrate competencies in a specific occupation.

Mandatory removal offense (MRO) means an offense that the Secretary determines, in his or her sole, exclusive, and unreviewable discretion, has a direct and substantial adverse impact on the Department's homeland security mission.

Mandatory Removal Panel (MRP) means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

Pay means the rate of basic pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind. For the purpose of this subpart, pay does not include locality-based comparability payments under 5 U.S.C. 5304, locality or special rate supplements under subpart C of this part, or other similar payments.

Probationary period has the meaning given that term in 5 CFR 315.801.

Removal means the involuntary separation of an employee from the Department.

Similar positions means positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be moved from one position to another without significant training or undue interruption to the work.

Suspension means the temporary placement of an employee, for disciplinary reasons, in a nonduty/nonpay status.

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Trial period has the meaning given that term in 5 CFR 316.304.

§ 9701.604 Coverage.

(a) *Actions covered.* This subpart covers furloughs of 30 days or less, suspensions, demotions, reductions in pay (including reductions in pay within a band), and removals.

(b) *Actions excluded.* This subpart does not cover—

(1) Any adverse action taken against an employee during a probationary, trial, or initial service period, except for an adverse action taken against a preference eligible employee in the competitive service who has completed the first year of an initial service period;

(2) The demotion of a supervisor or manager under 5 U.S.C. 3321;

(3) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent band and pay, if the employee was informed that the promotion was to be of limited duration;

(4) A reduction-in-force action under 5 U.S.C. 3502;

(5) An action under 5 U.S.C. 1215;

(6) An action against an administrative law judge under 5 U.S.C. 7521;

(7) A voluntary action by an employee;

(8) An action taken or directed by OPM based on suitability under 5 CFR part 731;

(9) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(10) Cancellation of a promotion to a position not classified prior to the promotion;

(11) Placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status in accordance with conditions established at the time of appointment;

(12) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation;

(13) An action taken under a provision of statute, other than one codified in title 5, U.S. Code, which excludes the action from 5 U.S.C. chapter 75 or this subpart;

(14) A classification determination, including a classification determination under subpart B of this part; and

(15) An action that entitles an employee to grade retention under 5 CFR part 536 and an action to terminate this entitlement.

(c) *Employees covered.* Subject to a determination by the Secretary or designee under § 9701.102(b), this subpart applies to DHS employees, except as excluded by paragraph (d) of this section.

(d) *Employees excluded.* This subpart does not apply to—

(1) An employee in the competitive service who is serving a probationary, trial, or initial service period, except for a preference eligible employee in the competitive service who has completed the first year of an initial service period;

(2) A preference eligible employee in the excepted service who has not completed 1 year of current continuous service in the same or similar positions in an Executive agency or in the United States Postal Service or Postal Rate Commission;

(3) An employee in the excepted service (other than a preference eligible) who has not completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment of 2 years or less;

(4) A non-preference eligible employee who is serving a time-limited appointment (including a term appointment) of 2 years or less;

(5) Members of the Senior Executive Service;

(6) Administrative law judges;

(7) Employees who are terminated in accordance with terms specified as conditions of employment at the time the appointment was made;

(8) Employees whose appointments are made by and with the advice and consent of the Senate;

(9) Employees whose positions have been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by—

(i) The President, for a position that the President has excepted from the competitive service;

(ii) OPM, for a position that OPM has excepted from the competitive service; or

(iii) The President or the Secretary for a position excepted from the competitive service by statute;

(10) An employee whose appointment is made by the President;

(11) An employee who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund based on the service of such employee;

(12) An employee who is an alien or non-citizen occupying a position outside the United States, as described in 5 U.S.C. 5102(c)(11);

(13) Members of the Homeland Security Labor Relations Board or the Mandatory Removal Panel;

(14) Employees against whom an adverse personnel action is taken or imposed under any statute or regulation other than this subpart (e.g., Transportation Security Administration employees); and

(15) Employees appointed and serving under a Schedule B excepted service appointment subject to conversion to career status pursuant to Executive Order 11203.

§ 9701.605 Initial service period.

(a) DHS may establish an initial service period of 1 to 2 years for certain designated occupations in order for employees in such occupations to demonstrate appropriate competencies. DHS will establish standard policies for determining the applicability and the length of the ISP for specific occupations.

(b) Employees must complete an ISP after selection for a designated DHS position in the competitive service before obtaining coverage under this subpart. All relevant prior Federal civilian service (including non-appropriated fund service), as determined by appropriate standards established by DHS, counts toward completion of this requirement.

(c) An employee who is removed during a probationary, trial, or initial service period must be removed in accordance with 5 CFR 315.804 or 315.805,

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except for a preference eligible employee in the competitive service who has completed the first year of an ISP.

REQUIREMENTS FOR FURLOUGH OF 30 DAYS OR LESS, SUSPENSION, DEMOTION, REDUCTION IN PAY, OR REMOVAL

§ 9701.606 Standard for action.

The Department may take an adverse action under this subpart only for such cause as will promote the efficiency of the service. The standards for mandatory removal offenses and actions taken under the national security provisions are set forth in §§ 9701.607 and 9701.613, respectively.

§ 9701.607 Mandatory removal offenses.

(a) The Secretary has the sole, exclusive, and unreviewable discretion to identify offenses that have a direct and substantial adverse impact on the Department's homeland security mission. Such offenses will be identified in advance as part of the Department's implementing directives, publicized via notice in the FEDERAL REGISTER, and made known to all employees on an annual basis.

(b) When a mandatory removal action is proposed under this section, employees will have the right to advance notice, an opportunity to respond, a written decision, and a review by the Mandatory Removal Panel as set forth in subpart G of this part.

(c) Prior to the issuance of a notice to the employee in question, the Secretary or designee will review and approve a proposed notice of removal on the grounds that the employee has committed a mandatory removal offense.

(d) The Secretary has the sole, exclusive, and unreviewable discretion to mitigate the removal penalty.

(e) Nothing in this section limits the discretion of the Department or any component thereof to remove employees for offenses other than those identified by the Secretary as mandatory removal offenses.

(f) Nothing in this subpart limits the discretion of the Department or any component thereof to remove an em-

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ployee based on the revocation of that employee's security clearance.

§ 9701.608 Procedures.

An employee against whom an adverse action is proposed is entitled to the following:

- (a) A proposal notice under § 9701.609;
- (b) An opportunity to reply under § 9701.610; and
- (c) A decision notice under § 9701.611.

§ 9701.609 Proposal notice.

(a) *Notice period.* The Department must provide at least 15 days advance written notice of a proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department must provide at least 5 days advance written notice.

(b) *Contents of notice.* (1) The proposal notice must inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the Department's evidence supporting the proposed action. The Department may not use evidence that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(2) When some but not all employees in a given competitive level are being furloughed, the proposal notice must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough. The notice is not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(c) *Duty status during notice period.* An employee will remain in a duty status in his or her regular position during the notice period. However, when the Department determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the Department may elect one

or a combination of the following alternatives:

(1) Assign the employee to duties where the Department determines the employee is no longer a threat to safety, the Department's mission, or Government property;

(2) Allow the employee to take leave, or place him or her in an appropriate leave status (annual leave, sick leave, or leave without pay) or absence without leave if the employee has absented himself or herself from the worksite without approved leave; or

(3) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

§9701.610 Opportunity to reply.

(a) The Department must give employees at least 10 days, which must run concurrently with the notice period, to reply orally and/or in writing to a notice of proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department must give the employee at least 5 days, which must run concurrently with the notice period, to reply orally and/or in writing.

(b) The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses.

(c) During the opportunity to reply, the Department must give the employee a reasonable amount of official time to review the Department's supporting evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) The Department must designate an official to receive the employee's written and/or oral response. The official must have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or other representative of the employee's choice and at the employee's expense, subject to paragraph (f) of this section. The employee must provide the Department with a written designation of his or her representative.

(f) The Department may disallow as an employee's representative—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes the Department to consider any medical condition that may be relevant to the proposed adverse action must provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) When considering an employee's medical documentation, the Department may require or offer a medical examination pursuant to 5 CFR part 339, subpart C.

(3) When considering an employee's medical condition, the Department is not required to withdraw or delay a proposed adverse action. However, the Department must—

(i) Allow the employee to provide medical documentation during the opportunity to reply;

(ii) Comply with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules; and

(iii) Comply with 5 CFR 831.1205 when issuing a decision to remove.

§9701.611 Decision notice.

(a) In arriving at its decision on a proposed adverse action, the Department may not consider any reasons for the action other than those specified in the proposal notice.

(b) The Department must consider any response from the employee and the employee's representative, if the response is provided to the official designated under §9701.610(d) during the opportunity to reply, and any medical documentation furnished under §9701.610(g).

(c) The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts E or G of this part.

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(d) The Department must deliver the notice to the employee on or before the effective date of the action.

§ 9701.612 Departmental record.

(a) *Document retention.* The Department must keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record must include the following:

- (1) A copy of the proposal notice;
- (2) The employee's written response, if any, to the proposal;
- (3) A summary of the employee's oral response, if any;
- (4) A copy of the decision notice; and
- (5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department must make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board or the MRP.

NATIONAL SECURITY

§ 9701.613 Suspension and removal.

(a) Notwithstanding other provisions of law or regulation, the Secretary may suspend an employee without pay when she or he considers suspension in the interests of national security. To the extent that the Secretary 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 Secretary statements or affidavits to show why he or she should be restored to duty.

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

(c) An employee suspended under this section who has a permanent or indefinite appointment, has completed his or her initial service period, probationary

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period, or trial period, and is a citizen of the United States is entitled, after suspension and before removal, to—

(1) 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;

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

(3) A hearing, at the request of the employee, by a Department authority duly constituted for this purpose;

(4) A review of his or her case by the Secretary or designee, before a decision adverse to the employee is made final; and

(5) A written decision from the Secretary.

SAVINGS PROVISION

§ 9701.614 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Subpart G—Appeals

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart G to part 9701 was rescinded.

§ 9701.701 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(a) through (c) and (f) concerning the Department's appeals system for certain adverse actions covered under subpart F of this part. These provisions require that the new appeals regulations provide Department employees fair treatment, are consistent with the protections of due process and, to the maximum extent practicable, provide for the expeditious handling of appeals.

§ 9701.702 Waivers.

When a specified category of employees is covered by an appeals system established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The

provisions of 5 U.S.C. 7702 are modified as provided in § 9701.709 to use “MSPB or MRP” wherever the terms “Merit Systems Protection Board” or “Board” occur. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB must follow the provisions in this subpart until conforming regulations are issued by MSPB.

§ 9701.703 Definitions.

In this subpart:

Adjudicating official means an administrative law judge, administrative judge, or other employee designated by MSPB to decide an appeal.

Day means calendar day.

Harmful error means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

Mandatory removal offense (MRO) means an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department’s homeland security mission.

Mandatory Removal Panel (MRP) means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

MSPB means the Merit Systems Protection Board.

Petition for review means a request for review of an initial decision of an adjudicating official.

Preponderance of the evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

§ 9701.704 Coverage.

(a) Subject to a determination by the Secretary or designee under § 9701.102(b), this subpart applies to employees who appeal furloughs of 30 days

or less, demotions, reductions in pay, suspensions of 15 days or more, or removals, provided such employees are covered by § 9701.604.

(b) Appeals of suspensions shorter than 15 days and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(c) The appeal rights in 5 CFR 315.806 apply to the removal of an employee while serving a probationary, trial, or initial service period, except for a preference eligible employee in the competitive service who has completed the first year of an initial service period.

(d) Actions taken under § 9701.613 are not appealable to MSPB.

§ 9701.705 Alternative dispute resolution.

The Department and OPM recognize the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based negotiation to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. Such methods can result in more efficient and more effective outcomes than traditional, adversarial methods of dispute resolution. The Department will use alternative dispute resolution methods where appropriate. Such methods will be subject to collective bargaining to the extent permitted by subpart E of this part.

§ 9701.706 MSPB appellate procedures.

(a) A covered Department employee may appeal an adverse action identified under § 9701.704(a) to MSPB. Such an employee has a right to be represented by an attorney or other representative, and to a hearing if material facts are in dispute. However, separate procedures apply when the action is taken because of a mandatory removal offense or is in the interest of national security. (See §§ 9701.707 and 9701.613, respectively.)

(b) MSPB may decide any case appealed to it or may refer the case to an administrative law judge appointed under 5 U.S.C. 3105 or other employee of MSPB designated by MSPB to decide such cases. MSPB or an adjudicating

official must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

(c)(1) If an employee is the prevailing party in an appeal under this section, the employee must be granted the relief provided in the decision upon issuance of the decision, subject to paragraph (c)(3) of this section, and such relief remains in effect pending the outcome of any petition for review unless—

(i) An adjudicating official determines that the granting of such relief is not appropriate; or

(ii) The relief granted in the decision provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Department, subject to paragraph (c)(2) of this section, determines in its sole, exclusive, and unreviewable discretion, that the return or presence of the employee is unduly disruptive to the work environment.

(2) If the Department makes a determination under paragraph (c)(1)(ii) of this section that prevents the return or presence of an employee at the place of employment, such employee must receive pay, compensation, and all other benefits as terms and conditions of employment pending the outcome of any petition for review.

(3) Nothing in the provisions of this section may be construed to require that any award of back pay or attorney fees be paid before the decision is final.

(d) The decision of the Department must be sustained under paragraph (b) of this section if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(1) Harmful error in the application of Department procedures in arriving at the decision;

(2) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) That the decision was not in accordance with law.

(e) The Director of OPM may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director

believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(f) Except as provided in § 9701.709, any decision under paragraph (b) of this section is final unless a party to the appeal or the Director of OPM petitions MSPB for review within 30 days after receipt of the decision or MSPB reopens and reconsiders a case on its own motion. The Director may petition MSPB for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(g) If MSPB or an adjudicating official is of the opinion that consolidation or joinder could result in more expeditious processing of appeals and would not adversely affect any party, MSPB or an adjudicating official may—

(1) Consolidate appeals filed by two or more appellants; or

(2) Join two or more appeals filed by the same appellant and hear and decide them concurrently.

(h)(1) Except as provided in paragraph (h)(2) of this section or as otherwise provided by law, MSPB or an adjudicating official may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and MSPB or an adjudicating official determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the Department or any case in which the Department's action was clearly without merit.

(2) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(i)(1) MSPB or an adjudicating official may not require settlement discussions in connection with any appealed action under this section. If either party decides that settlement is not desirable, the matter will proceed to adjudication.

(2) Where the parties agree to engage in settlement discussions before MSPB or an adjudicating official, these discussions will be conducted by an official specifically designated by MSPB for that sole purpose. Nothing prohibits the parties from engaging in settlement discussions on their own.

(j) If an employee has been removed under subpart F of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

(k) The following provisions modify MSPB's appellate procedures applicable to appeals under this subpart:

(1) All appeals, including class appeals, will be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later.

(2) Either party may file a motion for representative disqualification at any time during the proceedings.

(3) The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(i) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(ii) Neither party may submit more than one set of interrogatories, one set of requests for production of documents, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, neither party may conduct/compel more than 2 depositions.

(iii) Either party may file a motion requesting additional discovery. Such motion may be granted only if the party has shown necessity and good

cause to warrant such additional discovery.

(4) Requests for case suspensions must be submitted jointly.

(5) When there are no material facts in dispute, the adjudicating official must render summary judgment on the law without a hearing. However, when material facts are in dispute and a hearing is held, a transcript must be kept.

(6) Given the Department's need to maintain an exceptionally high degree of order and discipline in the workplace, an arbitrator, adjudicating official, or MSPB may not modify the penalty imposed by the Department unless such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When a penalty is mitigated, the maximum justifiable penalty must be applied.

(7) An initial decision must be made no later than 90 days after the date on which the appeal is filed. If that initial decision is appealed to MSPB, MSPB must render its decision no later than 90 days after the close of the record before MSPB on petition for review.

(8) If the Director seeks reconsideration of a final MSPB order, MSPB must render its decision no later than 60 days after receipt of the opposition to OPM's petition in support of such reconsideration. MSPB must state the reasons for its decision so that the Director can determine whether to seek judicial review and to facilitate expeditious judicial review.

(9) MSPB, in conjunction with the Department and OPM, will develop and issue voluntary expedited appeals procedures for Department cases.

(l) Failure of MSPB to meet the deadlines imposed by paragraphs (k)(7) and (k)(8) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

(m) Except as otherwise provided by 5 U.S.C. 7702 with respect to cases involving allegations of discrimination, judicial review of any final MSPB order or decision is as prescribed under 5 U.S.C. 7703.

§ 9701.707 Appeals of mandatory removal actions.

(a) *General.* Appeals of mandatory removal actions are governed by procedures set forth in this section. An employee may appeal such actions to the Mandatory Removal Panel (MRP) established under § 9701.708.

(b) *Procedures.* (1) The MRP will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases, consistent with the requirements set forth in § 9701.706(k), as applicable, and for such other matters as may be necessary to ensure the operation of the MRP.

(2) The MRP will conduct a hearing, for which a transcript will be kept, to resolve any factual disputes and other relevant matters. All members will hear a particular appeal and will decide it based on a majority vote of the members. If only two members are serving, the vote of the Chair will be dispositive in the event of a tie.

(3) The appellant has the right to be represented by an attorney or other representative.

(4) The only action available to the MRP is to sustain or overturn a mandatory removal. The MRP does not have authority to mitigate the penalty. Only the Secretary may mitigate the penalty in these cases after the MRP has rendered its decision.

(5) The decision of the Department must be sustained if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(i) Harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(6)(i) Except as provided in paragraph (b)(6)(ii) of this section or as otherwise provided by law, the MRP may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the Panel reviewing the initial appeal determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel prac-

tice was engaged in by the Department or any case in which the Department's action was clearly without merit.

(ii) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(7) The MRP must issue a written decision (including dissenting opinions, where appropriate) in each case and serve each party and OPM with a copy. These decisions are final and binding.

(8) Failure of the MRP to meet applicable deadlines imposed under § 9701.706(k) in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

(c) *MSPB review.* (1) In order to obtain judicial review of an MRP decision, an employee, the Department, or OPM must request a review of the record of an MRP decision by MSPB by filing such a request in writing within 15 days after the issuance of the decision. Within 15 days after MSPB's receipt of the request for a review of the record, any response or OPM intervention must be filed. A party, or OPM, may each submit, and MSPB may grant for good cause shown, a request for a single extension of time not to exceed a maximum of 15 additional days. MSPB will establish, in conjunction with the MRP, standards for the sufficiency of the record and other procedures, including notice to the parties and OPM. MSPB must accept the findings of fact and interpretations of this part made by the MRP and sustain the MRP's decision unless the employee shows that the MRP's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Caused by harmful error in the application of the MRP's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

(2) MSPB must complete its review of the record and issue a final decision within 30 days after receiving the party's timely response to such request for review or OPM's intervention brief,