



November 1, 2023

VIA FEDERAL eRULEMAKING PORTAL
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Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

**RE: RIN 3206-AO56, Proposed Rule Upholding
Civil Service Protections and Merit System Principles**

The National Treasury Employees Union (NTEU) and the 13 additional unions listed below submit these comments in support of the Office of Personnel Management's (OPM) Proposed Rule Upholding Civil Service Protections and Merit System Principles, 88 Fed. Reg. 63862 (Sept. 18, 2023). OPM would make important clarifications regarding the rights of federal employees whose positions might be shifted from the competitive service to the excepted service or from one excepted service schedule to another. We urge OPM to finalize the rule promptly.

Background. On December 12, 2022, NTEU petitioned OPM to issue regulations to protect employees who might be moved to the excepted service. A since-rescinded Executive Order would have allowed agencies to shift employees doing "confidential, policy-determining, policy-making, or policy-advocating" work into a new excepted service Schedule F. *See* 85 Fed. Reg. 67631 (Oct. 21, 2020). Proponents of that Executive Order intended for employees shifted to Schedule F to have fewer rights, so that they could be "expeditiously remove[d]." *See* E.O. No. 13,957, sec. 1.

In its petition, NTEU asked OPM to clarify that tenured employees in competitive service positions who are shifted to excepted service positions retain their competitive service rights. NTEU also asked OPM to establish procedural steps that agencies and OPM must take before an employee is moved from the competitive service into the excepted service. OPM's proposed rule adopts these suggestions.

5 C.F.R. § 212.401. OPM states that employees who are in the competitive service at the time their position is first listed under Schedule A, B, or C or whose positions are otherwise moved into an excepted service schedule created after the effective date of OPM's rule will "maintain the civil service status and protections that they have accrued." 88 Fed. Reg. 63877, 63882.

We strongly support OPM's language. As NTEU explained in its petition, employees in the competitive service acquire certain statutory rights that cannot be taken away by simply moving the employee's position into the excepted service. *See* 88 Fed. Reg. 63871. That is because competitive service rights are grounded not only in civil service laws, but in the Constitution as well.

"[T]he federal statutory employment scheme plainly creates a property interest in continued employment" for those who may "not be dismissed except for cause or unacceptable performance." *Stone v. FDIC*, 179 F.3d 1368, 1375 (Fed. Cir. 1999). A tenured competitive service employee is thus entitled to "[t]he protections of the Due Process Clause" if subjected to an adverse action. *Gilbert v. Homar*, 520 U.S. 924, 935-36 (1997). And Chapter 75 of Title 5 itself "reflect[s] the requirements of constitutional due process." *Kriner v. Dep't of Navy*, 61 M.S.P.R. 526, 531 (1994).

No President through an Executive Order or other action can override the Constitution or Chapter 75 and remove the property interest of tenured competitive service employees in their continued federal employment. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidating Executive Order that exceeded President's constitutional authority and conflicted with federal statute). OPM's language clarifies this well-established, existing employee right.

5 C.F.R. Part 302. OPM proposes procedural steps that agencies would have to take before employees and positions were moved into or within the excepted service. NTEU petitioned OPM to establish such procedures to try to ensure that any shifting of employees and positions from the competitive service to an excepted service schedule complies with applicable civil service laws and regulations. We support OPM's proposal.

As NTEU explained in its petition, agencies moving competitive service positions into an excepted service schedule must have a "reasoned" basis for doing so and must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *NTEU v. Horner*, 854 F.2d 490, 498 (D.C. Cir. 1988) (cleaned up). Requiring agencies to undertake the procedural steps proposed in OPM's rule will help ensure that agency decisions are reasoned and legally sufficient.

This proposal will also help ensure that these agency decisions are "implemented consistent with . . . merit system principles." 5 U.S.C. § 2301(b). Congress tasked Chief Human Capital Officers (CHCOs) with advising agencies on carrying out their responsibilities "in accordance with merit systems principles." 5 U.S.C. § 1401(1). OPM's proposal, which includes review and documentation by CHCOs, is consistent with this congressional objective.

OPM's proposed appeal right for employees whose agencies decide to shift them into the excepted service, moreover, will further ensure that agencies follow these new procedures.

5 C.F.R. § 210.102. OPM defines “confidential, policy-determining, policy-making, or policy-advocating” work as “exclusively associated with a noncareer, political appointment.” 88 Fed. Reg. 63882. The “confidential, policy-determining, policy-making, or policy-advocating” language was in the Executive Order creating Schedule F and is in several statutes (5 U.S.C. §§ 2302(a)(2)(B)(i), 7511(b)(2)) and regulations (5 C.F.R. Part 752).

We support this clarification. As OPM states, there has been a long, consistent understanding that this term should encompass only a narrow category of political appointees. The legislative history of the Civil Service Reform Act indicates that Congress meant for this term to equate to confidential, Senate-confirmed positions. *See* S. Rep. 95-969, at 48 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2770 (exclusion of such employees from 5 U.S.C. § 7511 is an “extension of the exception for appointments confirmed by the Senate”).

The Merit Systems Protection Board (Board), which serves as the guardian of federal merit systems, has construed this term narrowly for decades. The Board has explained that the term “confidential, policy-determining, policy-making, and policy-advocating” is “only a shorthand way of describing positions to be filled by so-called ‘political appointees.’” *Special Counsel v. Peace Corps*, 31 M.S.P.R. 225, 231 (1986).

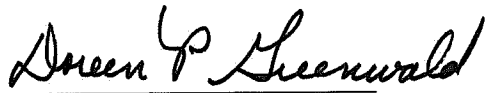
Similarly, the D.C. Circuit has recognized that “the structure and purpose of the civil service statutes” means that “Congress intended appointment to the civil service through competitive examination *to be the norm*[.]” *See NTEU v. Horner*, 854 F.2d at 493 (emphasis added). In other words, excepted service positions—as the term indicates—should be the exception. OPM’s definition appropriately clarifies that employees doing confidential, policy work is limited to noncareer, political appointments.

Indeed, if confidential, policy employees who lack certain rights were defined too broadly, there would be Constitutional implications. The Supreme Court has recognized that patronage dismissals of public, non-policymaking employees violate the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976).

5 C.F.R. § 752.201(b)(1). OPM proposes to afford procedural rights to probationary employees facing a suspension of 14 days or less if the employees have completed one year of current continuous employment in the same or similar position under other than a temporary appointment limited to one year or less. 88 Fed. Reg. 63884. OPM’s proposal would align its regulations with the language of 5 U.S.C. § 7501 and its interpreting jurisprudence. *See Van Wersch v. HHS*, 197 F.3d 1144, 1151-52 (Fed. Cir. 1999). We support OPM’s proposal.

Thank you for your consideration of these comments.

Sincerely,



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