NTEU
National Treasury Employees Union

May 21, 2025

VIA FEDERAL eRULEMAKING PORTAL

Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

RE: RIN 3206-AO80, Proposed Rule re: Improving Performance, Accountability and Responsiveness in the Civil Service

The National Treasury Employees Union (NTEU) submits these comments in opposition to the Office of Personnel Management's (OPM) Proposed Rule regarding Improving Performance, Accountability Responsiveness in the Civil Service, 90 Fed. Reg. 17,182 (Apr. 23, 2025). NTEU strongly objects to OPM's proposed rule which would rescind the rule it issued in April 2024.[1]

OPM's proposed rule would undermine our merit-based civil service and open the door to allowing tens of thousands of employees to be dismissed for non-performance reasons. The rule would improperly enshrine an expansive definition of which federal positions are of a "confidential, policy-determining, policy-making or policy-advocating character," one that is contrary to Congress' civil service regime. It is, moreover, unlawful because it attempts to strip federal employees of constitutionally vested due process rights.

Federal civil servants guard our borders, ensure the safety of our food supply, fund the nation's programs through the collection of tax revenue, and protect our environment. The American public, and the employees who serve the public, are entitled to a federal civil service that is based on merit system principles. OPM's proposal threatens those principles.

A. OPM's proposal would improperly cover "policy-influencing" employees.

OPM improperly conflates the definition of "confidential, policy-determining, policy-making or policy-advocating" with "policy-influencing," and in doing so, purports to apply its proposed rule to an overly broad number of positions.

Throughout its proposal, OPM makes clear that it intends its rule to cover employees who perform "policy-influencing" work. *See* 90 Fed. Reg. 17,182 ("The proposed rule lets policy-influencing positions be moved into Schedule Policy/Career"); *id.* (summarizing the statutory definition as "hereinafter 'policy-influencing positions'"); *id.* at 17,186 ("chapter 75 adverse action procedures do not cover employees in excepted service positions that the President, OPM, or an agency head have determined are policy-influencing.").

[1] Last year, OPM issued regulations to "Uphold[] Civil Service Protections and Merit System Principles" (89 Fed. Reg. 24,982).

But the term "policy-influencing" is *not* the same as the more narrow, statutory language used in 5 U.S.C. § 7511(b)(2), which states that positions of a "confidential, policy-determining, policy-making or policy-advocating character" can be excepted from certain statutory protections for certain reasons. *See id.* § 3302 (The President may provide for exceptions where "necessary" and "as conditions of good administration warrant").

Indeed, "policy-influencing" is a far-reaching descriptor. All federal employees arguably influence policy in some way because the outcome of their work tangentially affects what future decisions their superiors (and their supervisors and so on) will make. The number of overtime hours that an IRS customer service representative works responding to calls from the public during tax season might cause Congress, for example, to increase agency funding so that the IRS can hire additional call center employees. The National Park Service employee who staffs the visitors' center arguably has some effect on what our national parks should look like and how welcoming they should be to visitors. But no reasonable person would say that an IRS customer service representative or Park Service staffer "determines" or "makes" policy.

By improperly substituting "policy-determining, policy-making, or policy-advocating" with "policy-influencing," OPM's proposed excepted service category is too broad and contrary to congressional intent. It is well settled that the competitive service is the "norm." *NTEU v. Horner*, 854 F.2d 490, 495 (D.C. Cir. 1998). An administration can only depart from this norm and create an excepted service schedule in narrow circumstances—when "necessary" for "conditions of good administration." *See* 5 U.S.C. § 3302. OPM's proposed rule, then, would essentially swallow the "rule," which requires a civil service where most positions are merit-based and competitive. *See* Congressional Research Service, "Categories of Federal Civil Service Employment: A Snapshot" at 4 (Mar. 26, 2019).

In its effort to extend its proposed rule far more broadly than the federal labor statute allows, OPM betrays its real goal: to move many more employees into a new excepted service schedule than can be properly done under the narrow statutory definition. OPM states that, based on its proposed rule, it expects about 50,000 employees to initially be moved into the new schedule but also acknowledges that this is a "preliminary estimate" and that the President "may move a greater" number. 90 Fed. Reg. 17,220.

B. OPM's proposed definition of "confidential, policy-determining, policy-making, or policy-advocating" is contrary to congressional intent and would weaken protections against prohibited personnel practices.

In 2024, OPM clarified that the statutory term "confidential, policy-determining, policy-making, or policy-advocating" means only noncareer, political appointments. One year later, OPM now says that its 2024 determination is "erroneous." 90 Fed. Reg. 17,194. NTEU opposes OPM's unsupported and harmful about-face.

1. OPM's 2024 definition was grounded in the Civil Service Reform Act's (CSRA) legislative history. *See* S. Rep. No. 95-969, at 48 (1978), reprinted in 1978 U.S.C.C.A.N. 2723,

2770 (describing confidential, policy employees as "appointments confirmed by the Senate"). In addition, Merit Systems Protection Board (Board or MSPB) precedent and related statutes have reinforced OPM's 2024 interpretation. *See O'Brien v. Office of Indep. Counsel*, 74 M.S.P.R. 192, 206 (1997) (confidential, policy employees is "a shorthand way of describing positions to be filled by 'political appointees'") (citing *Special Counsel v. Peace Corps*, 31 M.S.P.R. 225, 231 (1986)); 5 U.S.C. § 9803 (defining "political appointee" as including individuals in "confidential, policy-determining, policy-making or policy-advocating" positions). The 2024 definition is both legally sound and settled by case law.

2. Statutory protections against prohibited personnel practices, such as reprisal for whistleblowing, do not apply to positions of a "confidential, policy-determining, policy-making, or policy-advocating character." 5 U.S.C. § 2302 (a)(2)(B)(1). OPM's proposal to broaden the category of positions that fall into this statutory exception, to include career positions and anyone doing "policy influencing" work, will decrease substantially the sweep of Congress's protections.

Under OPM's proposal, agencies would thus be able to engage in prohibited personnel practices against more employees without any repercussions. Whistleblowers would have diminished protection and therefore would be less willing to disclose waste, fraud or abuse. Employees would be subject to political coercion without any effective remedy. And agencies would be able to hire employees based on nepotism instead of merit. In its proposed rule, OPM fails to address these consequences, which are all inconsistent with the merit system principles and Congress's intent.

C. OPM's expansive view of Presidential authority is incorrect.

OPM asserts that the President's Executive Order, "Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce" (Jan. 20, 2025), unilaterally rendered its 2024 regulations ineffective. *See* 90 Fed. Reg. 17,189 ("The President has now directly used his authority to render OPM's [2024] amendments inoperative"). In OPM's view, the President has authority "to set federal workforce policy" because the Constitution "vest[s] executive power exclusively in the President." 90 Fed. Reg. 17,188.

OPM's sweeping characterization of what powers the President has regarding the civil service is incorrect. The President has authority over the civil service because *Congress* gave him that carefully delineated authority. *See* 5 U.S.C. § 3301 ("The President may . . . prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service"); *id.* § 3302 ("The President may prescribe rules governing the competitive service.").

But the President does not have unlimited and "exclusive[]" authority over federal sector employment. It has long been settled that Congress may limit a President's authority by statute. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional

powers minus any constitutional powers of Congress over the matter."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers"); *In re Aiken Cnty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (the President "may not decline to follow a statutory mandate . . . simply because of policy objections."); *Roth v. Brownell*, 215 F.2d 500, 502 (D.C. Cir. 1954) ("The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear[.]").

Here, Congress directed OPM—not the President—to execute, administer, and enforce civil service rules and regulations and the civil service laws. 5 U.S.C. § 1103(a)(5)(A); *see id.* § 7504 (OPM "may prescribe regulations to carry out the purpose of this subchapter"); *id.* § 7514 (same). And in the Administrative Procedure Act (APA), Congress said that agencies must follow notice and comment procedures when proposing or rescinding legislative rules. *See* 5 U.S.C. § 551(5) ("'rule making'" means agency process for formulating, amending, or repealing a rule"). As relevant to OPM's proposed rule, the APA requires that an agency have a "reasoned analysis" when changing course. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1983) (internal citation omitted).

OPM's statement that the President can rescind regulations on his own without OPM exercising its congressionally assigned role or without following APA requirements is thus incorrect. And even if OPM were correct about the extent of the President's power, which NTEU disputes, the agencies tasked with carrying out a Presidential order are still subject to APA restrictions. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("it is now well established that 'review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.'") (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment)).

D. OPM's proposal purports to strip employees of constitutionally vested due process rights.

1. Employees hired into the competitive service acquire, after successful completion of their probationary period, due process protections like notice and an opportunity to respond if an agency proposes to remove them. OPM clarified in 2024 that such "tenured" employees "will retain the rights previously accrued upon an involuntary move" into an excepted service schedule. 89 Fed. Reg. 24,983.

OPM now states that tenured employees would lose their due process rights if their positions are moved into the new Schedule Policy/Career. OPM claims that its 2024 view was in error because OPM "has no authority to extend" adverse action protections to employees transferred to the new schedule. *See* 90 Fed. Reg. 17,198. OPM fails to recognize, however, that tenured employees who were hired into a competitive service position or most excepted service positions accrue a property interest in their position that is *constitutionally* based, not based in the statute. OPM "has no authority to" deprive tenured employees of their constitutional rights.

By the same token, OPM's 2024 regulations did not "extend" rights to employees transferred to a new excepted service schedule. The 2024 regulations instead *clarified* what the law already had established: that tenured employees keep their constitutionally acquired rights if they are involuntarily moved to an excepted service schedule. *See* 89 Fed. Reg. 24,983 (noting rule would "clarify" that non-probationary employees keep their adverse action rights); 89 Fed. Reg. 24,991 ("The basis for this rulemaking, as explained herein, is to clarify and reinforce the retention of accrued rights and status following an involuntary move. . ."); 89 Fed. Reg. 25009 ("These amendments clarify that 'employees,' under 5 U.S.C. 7501, 7511(a), in the competitive service or excepted service will retain the rights previously accrued upon an involuntary move . . . .").

2. Citing cases such as *Roth v. Brownell*, 215 F.2d 500 (D.C. Cir. 1954), OPM's 2024 regulations confirmed that employees with competitive status retain appeal rights upon involuntary movement to the excepted service. *See* 89 Fed. Reg. 24,993 & n.135. OPM now asserts that *Roth* is no longer valid precedent because it was limited to an interpretation of the Lloyd-La Follette Act, which has been superseded by the CSRA. *See* 90 Fed. Reg. 17,199. OPM's analysis ignores several key points.

First, OPM's new reading of *Roth* is far too crabbed. *Roth* happened to involve the Lloyd-La Follette Act—because that was the statute in effect at the time of its decision—but the court's holding would apply whenever a statute exists that gives adverse action rights to employees (as the CSRA does).

Second, OPM ignores that for many decades, it did not read *Roth* so narrowly as it does now—i.e., as only applying to the Lloyd-La Follette Act. In a 1988 memo, for example, OPM explained to agencies (citing *Roth*) that an employee who was serving in a position in the competitive service when OPM authorized its conversion to Schedule C may be removed from that position only in accordance with the procedures of 5 U.S.C. § 7511 *et seq*.[2] That 1988 memo was issued a decade after the CSRA had been enacted.

Third, OPM fails to even mention, much less analyze, on-point Supreme Court precedent consistent with *Roth*. The Supreme Court held in *Cleveland Board of Education v. Loudermill*, for example, that civil service protections give public employees a property interest in their job and the government cannot deny employees that property interest without constitutionally adequate due process. 470 U.S. 532, 538 (1985). *Loudermill*'s holding squarely applies to any public employee. OPM, in 2024, recognized and discussed *Loudermill* in reaching its conclusion that tenured federal employees who are moved to another schedule retain their due process rights even after transfer. 89 Fed. Reg. 24987.

[2] *See* Memo from Constance Horner, Director, OPM, to heads of departments and agencies, "Civil Service and Transition to a new Presidential Administration," pp. 8–9 (Nov. 30, 1988), available at https://www.cia.gov/readingroom/docs/CIA-RDP90M01364R000800330004-0.pdf.

The Supreme Court similarly held in *Board of Regents of State Colleges v. Roth* that restrictions on loss of employment, such as tenure, create a property right. 408 U.S. 564, 576–77 (1972). And the Court held again in *Gilbert v. Homar*, that tenured competitive service employees are entitled to "[t]he protections of the Due Process Clause" if subjected to an adverse action. 520 U.S. 924, 935-36 (1997). OPM does not mention either of these decisions in its proposed rule.

Consistent with Supreme Court precedent, the Federal Circuit has held that that "[i]f the government gives a public employee assurances of continued employment or conditions dismissal only for specific reasons, the public employee has a property interest in continued employment." *Stone v. FDIC*, 179 F.3d 1368, 1374 (Fed. Cir. 1999). *See also King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (discussing deprivation of "property rights in [] continued employment"); *Johnson v. Dep't of the Navy*, 62 M.S.P.R. 487, 490 (1994) (stating that "a nonprobationary, competitive service employee . . . has a property interest in his employment that is protected by constitutional due process").

The Merit Systems Protection Board has also recognized that employees can acquire vested rights. In *Briggs v. National Council on Disability*, the Board ordered an employee reinstated who was hired into a position with adverse action rights, but who was later moved into and then fired from a policy position. 60 M.S.P.R. 331 (1994). The Board squarely held that "fairness and due process considerations require that any determination as to the character of the position at issue here have been made in such a manner as to put the appellant on notice of the nature of the position. . . ."[3] *Id.* at 336.

3. OPM claims that due process cannot be applied to an employee shifted into a new Schedule Policy/Career any more than it could apply to an employee affected by a reduction in force (RIF). 90 Fed. Reg. 17,211. This betrays OPM's fundamental misunderstanding of both constitutional principles as well as the civil service laws it administers. Tenured federal employees have constitutionally provided due process rights grounded in their expectation of employment under the CSRA. In stark contrast, no federal employee acquires any constitutional or statutory expectation that they will be immune from the effects of a lawfully executed RIF.

E. Policy considerations counsel against purporting to strip away due process rights.

OPM's proposal betrays its true motivation: ensuring that employees follow the President's agenda and do not engage in any alleged "resistance." *See* 90 Fed. Reg. 17,187 ("Schedule F also came in the context of widespread reports of career staff 'resistance' to Trump Administration policies"); 90 Fed. Reg. 17,191 ("some career Federal employees engage in 'policy resistance'''). OPM's own words make clear that it is not interested in weeding out poor

[3] OPM asserts that it now "believes" that *Briggs* was "mistaken." 90 Fed. Reg. 17200. But the agency's current "belie[f]" is not a reasoned basis for casting aside decades-old MSPB precedent, or for ignoring multiple court decisions.

performers but instead getting rid of employees who are deemed insufficiently loyal to the President's agenda.

First, OPM's attempt to use the narrow statutory language in 5 U.S.C. § 7511(b)(2) to fire employees makes no sense. Whether an employee's position "affects" policy has nothing to do with an employee's performance.

Second, OPM's analysis is internally inconsistent. It acknowledges that the CSRA "made taking adverse actions easier" by creating chapter 43, which was "intended to be a faster process for removing poor performers." 90 Fed. Reg. 17,186. But OPM complains elsewhere in its proposal that those same procedures "make addressing poor performance, misconduct and corruption challenging." 90 Fed. Reg 17,189. OPM effectively concedes that the proper target for any potential change would be to the existing process (via chapter 43), as opposed to establishing a new schedule. The solution would thus be for OPM to petition Congress to change the statute.

F. OPM fails to justify rescinding procedural safeguards.

In 2024, OPM established procedural steps agencies must take before employees were shifted into a new schedule. Those steps include identifying the numbers and locations of positions to be shifted and obtaining certification from agency Chief Human Capital Officers (CHCO) that the shift advances merit system principles. *See* 5 C.F.R. § 302.602(a). OPM explained in 2024 that these modest requirements would:

> help OPM determine whether appointments to the competitive service are "not practicable," protect against prohibited personnel parties, secure appropriate enforcement of the law governing the civil service, and avoid unsound management practices with respect to the civil service.

88 Fed. Reg. 63,874.

OPM now proposes to rescind its procedural safeguards because they allegedly intrude on the President's authority to regulate the civil service. 90 Fed. Reg. 17,205. As explained above, OPM's view of Presidential authority in this context is wrong.

OPM also asserts that the earlier regulations violate the Constitution's Opinion Clause because "OPM has no authority to regulatorily limit how agency heads provide this advice" to the President." 90 Fed. Reg. 17,206. But OPM's 2024 regulations do not limit agency heads from providing advice to the President. They only require certain procedural steps before agencies *act*. *Cf. Trump v. New York*, 592 U.S. 125, 133 (2020) (noting in dicta that a prohibition on an agency communicating information to the President might implicate the Opinions Clause).

OPM further states that "some CHCOs may be unwilling to offer certifications necessary to transfer positions into Schedule Policy/Career." 90 Fed. Reg. 17,206. OPM also says that establishing an appeal right to the MSPB if agencies fail to follow existing procedural requirements "seems likely to produce protracted litigation." 90 Fed. Reg. 17,206. Both are utter speculation. Neither is a sound rationale for rescinding regulations that OPM earlier stated were necessary to "protect against prohibited personnel parties" and "avoid unsound management practices." 88 Fed. Reg. 63,874.

Contrary to OPM's newly found objections, the safeguards that it put in place in 2024 were sound and consistent with caselaw and statute. Agencies moving 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 at 498 (internal citations omitted). *See Dean v. OPM*, 115 M.S.P.R. 157, 170 (2010) (finding that intern program was flawed because it did "not require the justification of placement of positions in the excepted service as required by statute").

Agencies must also ensure that any transfers of employees to an excepted service schedule are done in a manner consistent with merit system principles. Congress has made clear that "[f]ederal personnel management should be implemented consistent with . . . merit system principles." 5 U.S.C. § 2301(b). And it has specifically tasked CHCOs with advising agencies on carrying out their responsibilities "in accordance with merit systems principles." 5 U.S.C. § 1401.

* * *

For these reasons, OPM should revise or withdraw its proposed rule. Thank you for your consideration of these comments.

Sincerely,

Doreen P. Greenwald
National President