



February 15, 2024

VIA FEDERAL eRULEMAKING PORTAL

The Honorable Kiran Ahuja
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

RE: RIN 3206-AO52, Time-Limited Promotions

Dear Director Ahuja:

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 regarding time-limited promotions, 88 Fed. Reg. 89321 (Dec. 27, 2023). OPM would make important clarifications regarding the rights of federal employees who are detailed or temporarily promoted to a higher-graded position. We urge OPM to finalize the rule promptly.

Background. On August 5, 2022, NTEU petitioned OPM to issue regulations to clarify that employees who perform higher-graded work during noncompetitive temporary promotions and details are entitled to appropriate compensation.

Employees often perform higher-graded work at management's direction because of staff absences, retirements, or budget constraints. Many collective bargaining agreements between agencies and unions have provisions requiring the temporary promotion of employees officially assigned to a higher-graded position or to the duties of a higher-graded position. For years, arbitrators appropriately awarded back pay to employees who temporarily perform such higher-graded work, and the Federal Labor Relations Authority (FLRA) upheld such awards.¹

In 2004, however, the FLRA abruptly abandoned decades of its own precedent and issued a decision that limited the back pay remedy for employees performing higher-graded duties to 120 days each year. *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, SC*, 60 F.L.R.A. 46 (2004). The FLRA's decision was based on a flawed reading of OPM's promotion regulation, 5 C.F.R. § 335.103.

As NTEU explained in its petition, capping any back pay employees can receive at 120 days per year—no matter how long they performed the higher-grade work—is patently unfair. It also incentivizes agencies to violate competition requirements and assign employees higher-

¹ See, e.g., *AFGE, Local 220*, 57 F.L.R.A. 599 (2001); *Tidewater Virginia Fed. Emps. Metal Trades Council, Local 734*, 55 F.L.R.A. 1014 (1999); *NAGE, Local R5-168*, 44 F.L.R.A. 1548 (1992).

graded duties for months or even years while avoiding paying them salaries commensurate with those duties.

5 C.F.R. § 335.103(c)(2). To remedy the unfairness of this 120-day cap, OPM is proposing a modest amendment to 5 C.F.R. § 335.103(c)(2). OPM’s proposed change will clarify that a bargaining unit employee found by an adjudicator to have been detailed or temporarily promoted to a higher-graded position should be paid accordingly (i.e., higher compensation) for the entire time the employee performed the duties of the higher-graded position. OPM correctly explains that the cost of this change will be negligible. And the compensating benefits are that the new rule will reinforce merit system principles and rectify an inequitable state of affairs for employees doing higher-graded work.

To ensure that this objective is met, OPM should further clarify that grievances seeking back pay owed for temporary promotions do not involve classification matters within the meaning of 5 U.S.C. § 7121(c)(5). The FLRA erroneously held in 2018 that a grievance on behalf of an employee who had not received appropriate compensation for higher-graded work involved a nongrievable, classification matter. *U.S. Small Business Admin. (SBA)*, 70 F.L.R.A. 729, 730 (2018). The FLRA corrected course a few years later, explaining that a grievance concerns classification of a position under section 7121(c)(5) when “the substance of the grievance concerns the grade level of the duties *permanently* assigned to and performed by an employee.” *AFGE Local 2018*, 73 F.L.R.A. 379, 381 (2022) (emphasis added). By contrast, a grievance does *not* involve classification within the meaning of section 7121(c)(5) when its substance “concerns whether the employee is entitled to a temporary promotion . . . because the employee has performed the established duties of a higher-graded position.” *Id.* at 381-82. Accordingly, OPM should clarify, consistent with the FLRA’s *AFGE Local 2018* decision, that grievances seeking back pay owed for temporary promotions do not involve classification matters.

Thank you for your consideration of these comments.

Sincerely,



DOREEN P. GREENWALD
National President
NATIONAL TREASURY
EMPLOYEES UNION

/s/ Randy Erwin
RANDY ERWIN
National President
NATIONAL FEDERATION OF
FEDERAL EMPLOYEES,
FD-1, IAMAW, AFL-CIO

/s/ Teague P. Paterson

TEAGUE P. PATERSON
General Counsel
MATTHEW STARK BLUMIN
Deputy General Counsel
FERNANDO R. COLÓN
Associate General Counsel
AMERICAN FEDERATION
OF STATE, COUNTY
AND MUNICIPAL
EMPLOYEES, AFL-CIO

/s/ Richard Tarr

RICHARD TARR
Executive Director/General
Counsel
FEDERAL EDUCATION
ASSOCIATION

/s/ Robert Suplee

ROBERT SUPLEE
President
INTERNATIONAL PLATE PRINTERS,
DIE STAMPERS, PLATE
MAKERS & ENGRAVERS UNION
OF NORTH AMERICA

/s/ Lee Blackmon

LEE BLACKMON
Director
NAGE/IBPO Federal Division
NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

/s/ Richard Hirn

RICHARD HIRN
Counsel
ANTILLES CONSOLIDATED
EDUCATION ASSOCIATION

/s/ Edward A. Kelly

EDWARD A. KELLY
General President
INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS

/s/ Matthew Biggs

MATTHEW BIGGS
President
INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS

/s/ Michael E. Randall

MICHAEL E. RANDALL
President
NATIONAL ASSOCIATION
OF AGRICULTURE
EMPLOYEES

/s/ Richard Hirn

RICHARD HIRN
General Counsel
NATIONAL WEATHER
SERVICE EMPLOYEES
ORGANIZATION

The Honorable Kiran Ahuja
February 15, 2024
Page 4 of 4

/s/ Richard Hirn
RICHARD HIRN
General Counsel
PATENT OFFICE PROFESSIONAL
ASSOCIATION

/s/ Steve Nobles
STEVE NOBLES
President
CLARK RITCHEY
Secretary-Treasurer
PRINTING PACKAGING &
PRODUCTION WORKERS UNION
OF NORTH AMERICA

/s/ John Pielli
JOHN PIELLI
President
UNITED POWER TRADES
ORGANIZATION