

**Before the
OFFICE OF PERSONNEL MANAGEMENT**

Petition for Amendment of Regulations of:)
)
)
NATIONAL TREASURY) File No. _____
EMPLOYEES UNION,)
)
)
Petitioner.)
_____)

**PETITION FOR AMENDMENT OF REGULATIONS
TO ELIMINATE 120-DAY CAP ON BACK PAY FOR EMPLOYEES
PERFORMING HIGHER GRADED DUTIES**

Pursuant to 5 U.S.C. § 553(e), the National Treasury Employees Union (NTEU) submits this petition to amend OPM’s regulations.

NTEU’s proposal would amend 5 C.F.R. § 335.103 to remove the existing 120-day cap on back pay for employees who perform higher-graded work during noncompetitive temporary promotions and details.

OPM’s existing regulation, as interpreted in a 2004 OPM advisory opinion, has led to significant unfairness. For decades prior to 2004, arbitrators appropriately awarded back pay to employees who performed higher-graded duties.¹ Arbitrators made employees whole for

¹ *See, e.g., SS Local 1923, AFGE*, 4 F.L.R.C. 254 (1976) (denying agency petition for review of arbitration award of back pay for clerk who

the time they spent performing such work, without any 120-day limitation. In 2004, however, the Federal Labor Relations Authority (FLRA) abruptly abandoned years of 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 Medical Center, Charleston, South Carolina*, 60 F.L.R.A. 46 (2004) (*Johnson Medical Center*). The FLRA's decision was based entirely on a February 27, 2004, advisory opinion by OPM stating that under its interpretation of 5 C.F.R. § 335.103, an arbitrator could not award a temporary retroactive promotion in excess of 120 days.

OPM's 2004 advisory opinion was flawed in multiple ways. It failed to articulate the agency's rationale and conflicted with its prior interpretation of the regulation and with companion regulations. It was also grossly unfair as it gave agencies an incentive to assign employees higher-graded duties for months or even years while avoiding paying them salaries commensurate with those duties. The FLRA decision and

performed higher graded duties for 13 months); *DoD, Navy, Norfolk Shipyard, Portsmouth, VA*, 55 F.L.R.A. 1014 (1999) (upholding arbitrator award of back pay to employee who received a temporary promotion and performed higher-graded duties beyond 120 days).

OPM opinion perversely encouraged agencies to violate competition requirements.

This problem can and should be rectified. Although NTEU believes OPM's 2004 interpretation of the regulation was in error, NTEU is not in this petition asking the agency to revisit its analysis. NTEU proposes instead that the regulation itself be changed to more clearly establish that employees detailed or temporarily promoted to a higher grade, or who perform higher-graded duties, should be paid appropriately even if the detail, temporary promotion or performance of such duties exceeds 120 days.

NTEU'S PROPOSAL AND STATEMENT OF GROUNDS

I. NTEU's Proposed Regulatory Language

NTEU proposes that 5 C.F.R. § 335.103(c)(2) be supplemented to include the italicized language below:

(2) Noncompetitive actions. Competitive procedures do not apply to:

(i) A promotion resulting from the upgrading of a position without significant change in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error;

(ii) A position change permitted by reduction-in-force procedures in part 351 of this chapter; *and*

(iii) Retroactive temporary promotions to higher-graded positions pursuant to a final order by an arbitrator, administrative body or court.

II. NTEU's Proposal is Lawful.

NTEU's proposed language is lawful. "The regulations in 5 C.F.R. Part 335 governing promotions and internal placement . . . were promulgated by OPM pursuant to specific statutory authority found at 5 U.S.C. §§ 3301 and 3302." *Johnson Medical Center*, 60 F.L.R.A. at 49. OPM has amended the regulations several times, most recently on June 8, 2021. 86 Fed. Reg. 30375. There is no legal bar to the agency again revising the regulations that it itself promulgated.

NTEU's proposal is not contrary to any statutory provision. *Johnson Medical* and the 2004 OPM advisory opinion that was the basis for the FLRA's decision were based on the existing OPM regulation and not any statutory language. NTEU's proposal is fully consistent with the pre-2004 state of the law, which allowed back pay to employees performing higher graded duties even where they did so for more than 120 days.

III. NTEU's Proposal is Sound Policy.

NTEU's proposal is consistent with this Administration's recognition that federal civil servants' rights deserve to be protected. As

President Biden has stated, “Career civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government. It is the policy of the United States to protect, empower, and rebuild the career Federal workforce.” Executive Order 14003 (Jan. 22, 2021). OPM likewise defines its priorities as “positioning the federal government as a model employer” and “bringing much needed talent to the federal workforce.”²

NTEU’s proposal to ensure that employees are paid for the work they perform would help the administration fulfill these important pro-civil service policies. NTEU supports merit-based competition for long-term promotions, along with the inherent concept that certain temporary promotions or details to positions that are properly classified at a higher grade must be done competitively to ensure that the merit system principles of fair and open competition are met. That is why NTEU’s proposal is narrowly tailored to simply allow for the

² Press Release, Office of Personnel Management Displays Strong Leadership Under Director Ahuja’s Tenure (June 23, 2022), <https://www.opm.gov/news/releases/2022/05/fact-sheet-office-of-personnel-management-displays-strong-leadership-under-director-ahuja-s-tenure/>.

appropriate and proportionate remedy when employing agencies choose to ignore those procedures.

Conversely, OPM's 2004 opinion and the existing state of the law reflect bad policy. It is unfair to employees who perform higher-graded work but have not—through no fault of their own—received a temporary promotion from the agency consistent with competitive hiring procedures. The existing rule paradoxically encourages agencies to violate competitive procedures, which undermines merit system principles.

Former FLRA Chairman, and then-Member, Carol Waller Pope accurately anticipated this unfairness in her concurrence to the *Johnson Medical* decision, stating:

I have concerns that OPM's interpretation actually encourages agencies to violate, rather than comply with, § 335.103(c). Specifically, under OPM's interpretation, an agency that ignores competitive procedures cannot be required to pay employees for higher-graded duties performed in excess of 120 days, while an agency that complies with competitive procedures presumably can be required to pay employees for those duties. This provides agencies a strong financial incentive to ignore competitive

procedures when they want to assign employees higher-graded duties for more than 120 days.

60 F.L.R.A. at 51.

The patent and absurd hardship that this rule inflicts on employees is demonstrated by numerous cases, including *Johnson Medical Center* itself. In that case, an employee performed higher-graded duties for *more than two years*—yet was denied pay for the work she performed because of the agency’s failure to follow the rules and competitively fill the higher-graded position. *See* 60 F.L.R.A. at 46, 50.

In practice, many of these cases arise where higher-graded duties are assigned to employees on a different, lower-graded position description, due to staffing shortages, budget constraints, retirements, etc. Agency managers, who are often tasked with delivering the agency’s mission without the resources to do so, simply assign the higher-graded work to whomever is available and convenient.

In such instances, where the principle of equal pay for equal work is absent, the sole meaningful recourse for the employee comes from a negotiated collective bargaining agreement provision requiring that the employee be compensated for performing the duties of a properly classified higher-graded position. However, under *Johnson Medical* and

its progeny, these employees are precluded from any remedial relief beyond 120 days—not because the inequity has ceased to exist, but because the relevant regulation has been reinterpreted since 2004 to undermine, rather than strengthen, merit system principles.

CONCLUSION

For the foregoing reasons, OPM should adopt NTEU’s proposal and amend its regulations to establish that employees detailed or temporarily promoted to a higher grade, or who perform higher grade duties, should be paid appropriately even if the detail, temporary promotion or performance of duties exceeds 120 days.

Respectfully submitted,

/s/ Julie M. Wilson
JULIE M. WILSON
General Counsel

/s/ Paras N. Shah
PARAS N. SHAH
Associate General Counsel for Litigation

/s/ Allison C. Giles
ALLISON C. GILES
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
800 K Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 572-5500

August 5, 2022

Counsel for Petitioner