

NTEU's proposed regulation will ensure that the Constitution's parameters and civil service laws are observed.

NTEU's second proposal sets forth procedural steps that agencies and OPM must take before moving any employees or positions from the competitive service into the excepted service. NTEU believes that creating any new excepted service schedules would be unnecessary and contrary to good administration principles. But if new schedules are created and if employees or positions are shifted into the excepted service, such shifts must be done consistent with civil service laws and merit system principles. NTEU's proposed procedural steps provide guardrails to help ensure this.

NTEU'S PROPOSALS AND STATEMENT OF GROUNDS

I. Recognition of Vested Chapter 75 Rights for Competitive Service Employees.

A. Proposed Language.

NTEU proposes that OPM clarify that any employee in the competitive service who is not serving a probationary or trial period will retain Chapter 75 rights if the employee or the employee's position is

moved to the excepted service. This would be accomplished by making three revisions to OPM's existing regulations.

First, NTEU proposes that 5 C.F.R. § 212.401(b) be amended to replace the existing language with the following italicized language:

(b) An employee in the competitive service at the time his position is first listed under *an excepted service schedule* remains in the competitive service while he occupies that position *or while he performs substantially similar duties.*

Second, NTEU proposes to add the following italicized language to 5 C.F.R. § 752.401(c)(1) (employees covered):

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period, *including an employee whose position is later shifted into the excepted service;*

Third, NTEU proposes that 5 C.F.R. § 752.401(d)(2) (employees excluded) be amended to replace the existing language with the following italicized language:

(2) *An employee who is hired into a position which has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by the President for a position that the President has excepted from the competitive service; hired into a position which the Office of Personnel Management has excepted from the competitive service (Schedule C); or hired into a position that*

the President or the head of an agency has excepted from the competitive service by statute.

B. NTEU's Proposal is Lawful.

1. “[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). In other words, “an employee, as defined by 5 U.S.C. § 7501, has a property right in his continued employment.” *Id.* (quoting *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996)).¹ 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). *Accord Johnson v. Dep’t of the Navy*, 62 M.S.P.R. 487, 490 (1994) (stating that “a nonprobationary, competitive service employee . . . has a

¹ An “employee” is defined under 5 U.S.C. § 7501 as “an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less.”

property interest in his employment that is protected by constitutional due process”).

Chapter 75 itself “reflect[s] the requirements of constitutional due process.” *Kriner v. Dep’t of Navy*, 61 M.S.P.R. 526, 531 (1994) (discussing “the procedures required by 5 U.S.C. 7513(b)”). *See King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (discussing deprivation of “property rights in [] continued employment” and Section 7513’s procedural protections). Employees hired into the competitive service who accrue Chapter 75’s due process protections do not lose those protections if they are moved into an excepted service position and then subjected to an adverse action. *See Stone*, 179 F.3d at 1375 (“Congress need not confer a property interest in public employment. However, once it does confer such an interest, it may not remove it without constitutional safeguards.”).

The President cannot 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). No Executive Order, therefore, could rescind the constitutional due process protections acquired by tenured competitive service employees, which are reflected in Chapter 75.

2. Because Chapter 75 reflects these due process requirements, OPM can (and should) promulgate regulations to ensure those rights are protected. OPM “is entrusted with administering the statutory provisions governing the rights of federal employees to appeal adverse actions” *Carrow v. MSPB*, 564 F.3d 1359, 1365 (Fed. Cir. 2009). *Accord* 5 U.S.C. § 7514 (granting OPM the authority to “prescribe regulations to carry out the purpose of” subchapter II of Chapter 75).

OPM has already codified the important principle that employees hired into the competitive service retain competitive service rights if their position is listed under Schedules A, B and C. 5 C.F.R. § 212.401(b). NTEU’s proposal merely extends this existing right to positions listed under other excepted service schedules, including ones created in the future.

3. NTEU notes that the existing language in 5 C.F.R. § 752.401 is drawn from 5 U.S.C. § 7511(b), the latter of which could be read to exclude certain excepted service employees from adverse action

protections. But Section 7511(b) must be read as meaning employees *hired into* certain excepted service positions can be excluded from having adverse action rights.

That is because interpreting Section 7511(b) as extending to tenured competitive service employees who are shifted into excepted service schedules through an Executive Order would be unconstitutional. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.”). Employees who are hired into competitive service positions and obtain Chapter 75 protections through Congress’s statutory framework have constitutionally protected property interests in their continued federal employment. A President cannot eliminate that protected property interest through an Executive Order that shifts them into an excepted service schedule.

C. NTEU's Proposal is Sound Policy.

NTEU's proposal provides OPM with an important opportunity to provide a constitutionally-sound clarification regarding the Chapter 75 rights of tenured competitive service employees who are shifted to the excepted service. None of the branches of the federal government has had occasion to provide guidance on the retention of Chapter 75 rights for employees in this category.

Given that Congress has entrusted OPM with administering Chapter 75, it would be appropriate for OPM to provide the federal workforce with clarity on this issue. It would also be wise for OPM to provide that clarity now. The last President issued an Executive Order that, if it had not been rescinded, would have resulted in large numbers of tenured competitive service employees being shifted to a new excepted service schedule, Schedule F. Similar efforts might occur in the future.

It would be wiser for OPM to provide its considered view on tenured competitive service employees' retention of their Chapter 75 rights now, instead of providing it in a hurried way as future events

unfold. The federal workforce, the American public, and OPM itself would benefit from OPM putting this issue to rest now.

II. Procedural Steps for Shifting Competitive Service Employees and Positions into the Excepted Service.

A. Proposed Language.

NTEU proposes that 5 C.F.R. Part 213 be amended to add a new subsection 213.105, which would read as follows:

Procedures for new excepted service schedules.

Agencies complying with any Executive Order that creates a new schedule of employees excepted from the competitive service under 5 U.S.C. § 3302 or other authority shall take the following steps:

A. Chief Human Capital Officer Review. As part of each agency's review to determine whether any positions should be moved to any newly created excepted service schedule, the Chief Human Capital Officer (CHCO) in each agency shall gather the names and the position description of all employees and positions that are under consideration to be shifted into the new schedule and shall review such names and position descriptions to ensure compliance with the Executive Order and all applicable legal authority. If an agency has no CHCO, these steps shall be taken by the Acting CHCO or the most senior human resources official.

The CHCO shall document in a written report, for each position, (1) whether the position falls within the scope of the Executive Order, and (2) whether the position is typically filled by individuals not normally subject to replacement or change as a result of a Presidential transition. The report must state for each position whether the basis for the CHCO's determination is derived from a statute (in which case the report must state the statutory cite and which specific category the position falls under), the Executive Order, a regulation (in which case

the report must state the regulatory cite), or an internal agency document such as the position description (in which case the report must state what the agency document is and include it with the report).

The CHCO report shall document the anticipated effect on employee recruitment and retention, if any, stemming from compliance with the EO. Among the anticipated effects, the CHCO must address how the absence of adverse action rights for new hires in excepted service positions is anticipated to impact recruitment.

The CHCO report shall document how shifting each employee and position to the new schedule supports merit system principles.

B. Agency Legal Review. After review by the CHCO and completion of the report, the general counsel of the agency (or, if none, the most senior person responsible for the agency's legal compliance duties) shall review all names and all position descriptions and the CHCO report to ensure compliance with the Executive Order as well as with all applicable civil service laws and regulations, and merit systems principles. The general counsel shall issue a written report concerning areas of agreement or disagreement with the CHCO's report.

C. Agency Head Review. After the general counsel's report issues, the agency head shall review the CHCO's report, the general counsel's report, and the names of all employees and all position descriptions proposed to be shifted to the new excepted service schedule to ensure compliance with the Executive Order and all applicable legal authority. The agency head shall issue a report indicating agreement or disagreement with the CHCO's report and the general counsel's report.

The agency head shall provide notice to each employee whose position is under consideration to be moved to the new schedule and shall provide the basis for the proposed move. The employee shall have 30 days to file a written response with the agency head. If the agency still decides to proceed with moving the employee's position, it shall provide the employee with the reasons in writing.

After agency head review is complete, the agency shall provide a list of positions to be moved to the new schedule to OPM. The list must be accompanied by the following information:

- the criteria used to determine whether a position should be moved to the new schedule;*
- the number of positions to be moved to the new schedule;*
- a description of the factors used to determine the position was eligible to be placed into the new schedule;*
- an explanation of how including such positions in the new schedule is consistent with merit system principles; and*
- for each position to be moved to the new schedule, the position's title, occupational series, pay plan and grade level, and geographic location.*

If OPM approves any agency's list, such agency shall publish in the Federal Register a list of the positions to be placed in the newly created schedule and shall state:

- the criteria used to determine whether a position should be moved to the new schedule;*
 - the number of positions to be moved to the new schedule,*
 - a description of the factors used to determine the position was eligible to be placed into the new schedule;*
 - an explanation of how including such positions in the new schedule is consistent with merit system principles.*
- position title; and*
- for each position to be moved to the new schedule, the position's title, occupational series, pay plan and grade level, and geographic location.*

B. NTEU's Proposal is Lawful.

This proposed regulation would ensure that shifting competitive service positions into any excepted service schedules is consistent with

federal law and regulations, as well as the terms of any Executive Order.

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) (internal citations omitted). *See Dean v. OPM*, 115 M.S.P.R. 157, 170 (2010) (finding that intern program established by Executive Order was flawed because it did “not require the justification of placement of positions in the excepted service as required by statute”). Requiring agencies to undertake the procedural steps outlined above will ensure that agency decisions are reasoned and legally sufficient.

Similarly, agencies must ensure that any transfers of competitive service employees to excepted service positions 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. NTEU’s proposal is thus consistent with this congressional objective.

Finally, OPM has the authority to promulgate this proposed regulation. OPM, for example, previously stated that it “retains final authority over which categories and types of positions will be placed in [the newly created excepted service] Schedule F.” OPM, *Instructions on Implementing Schedule F* at 1 (Oct. 23, 2020), available at <https://www.chcoc.gov/content/instructions-implementing-schedule-f>.

C. NTEU’s Proposal is Sound Policy.

NTEU’s proposal will help ensure that any shifting of employees and positions from the competitive service to an excepted service schedule is done conscientiously and in a way that complies with applicable civil service laws and regulations. If a President creates a new excepted service schedule, it would be sound policy to require CHCOs and agency general counsel to comprehensively evaluate whether a position falls within the scope of the Executive Order and whether the position is typically filled by individuals not normally subject to replacement or change as a result of a Presidential transition.

CONCLUSION

For the foregoing reasons, OPM should adopt NTEU's proposals and amend its regulations regarding excepted service employees.

Respectfully submitted,

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