NTEU's Response to Attacks on OPM's Proposed Rule Upholding Civil Service Protections

In response to an NTEU petition, OPM has proposed a rule to reinforce and clarify civil service protections and merit system principles. 88 Fed. Reg 63862 (Sept. 12, 2023). Some commentators argue that some or all of OPM's proposal is unlawful. Those commentators are wrong.

1. At least one commentator alleges that OPM's proposed changes can only be accomplished through new congressional action, and OPM lacks authority to issue this proposed rule.

This assertion is incorrect. Congress broadly empowered OPM to issue regulations such as these through the Civil Service Reform Act (CSRA), Pub. L. No. 95-454. *See, e.g.,* 5 U.S.C. § 7504 (OPM "may prescribe regulations to carry out the purpose of this subchapter"); *id.* § 7514 (OPM has authority to "prescribe regulations to carry out the purpose of" subchapter II of Chapter 75 except for matters under the Merit Systems Protection Board's jurisdiction); *id.* § 1103 (OPM Director is charged with "executing, administering, and enforcing . . .the civil service rules and regulations of the President *and the Office*) (emphasis added); *id.* § 1302(b) ("The Office shall prescribe regulations for the administration of the provisions of this title. . ."); *id.* § 4305 (OPM has authority to prescribe regulations to carry out the purpose of subchapter I of Chapter 43). *See also Carrow v. MSPB*, 564 F.3d 1359, 1365 (Fed. Cir. 2009) (OPM "is entrusted with administering the statutory provisions governing the rights of federal employees to appeal adverse actions.").

OPM's proposed rule is well within this congressionally granted authority. Exercising that authority, OPM has issued regulations like the proposal at issue here. For example, there is already a decades-old regulation providing that employees hired into the competitive service who are then moved into schedules A, B or C retain their competitive service rights. 5 C.F.R. § 212.401(b).

OPM's authority to issue regulations such as these has been recognized countless times by the courts. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 81 (1974) (probationary employee regulations are consistent with civil service statutes); *Banks v. MSPB*, 854 F.3d 1360, 1362 n.1 (Fed. Cir. 2017) (OPM has authority to promulgate regulations implementing 5 U.S.C. § 7511); *MSPB v. FLRA*, 913 F.2d 976, 979 (D.C. Cir. 1990) (Congress specifically delegated to OPM the authority to issue regulations concerning reductions in force); *Orloff v. Cleveland*, 708 F.2d 372, 377 n.5 (9th Cir. 1983) (OPM has authority to issue preference eligible regulations); *Oliver v. U.S.P.S.*, 696 F.2d 1129, 1130 (5th Cir. 1983) (OPM "is granted the authority to draft regulations to implement this statute").

2. At least one commentator alleges that OPM's proposal interferes with the President's Article II authority.

OPM's proposal is fully within its statutory authority, as discussed above. That authority, moreover, does not impermissibly infringe on presidential authority over the executive branch.

Congress's role in enacting statutes governing federal employees is well established, dating back almost 150 years to the Pendleton Act of 1883. Congress passed the Lloyd-LaFollette Act of 1912 in part to override Executive Orders by Presidents Roosevelt and Taft that restricted federal employee speech. *See Bush v. Lucas*, 462 U.S. 367, 383-84 (1983).

Presidents, regardless of party, have recognized Congress's role in civil service matters. The CSRA itself grew out of President Jimmy Carter's 1977 Personnel Management Project. And the Schedule F Executive Order was explicitly based on authority that Congress granted to the President. *See* E.O. 13957 (Oct. 21, 2020).

3. Some commentators allege that OPM's statement that its proposal rule is only "reinforcing and clarifying longstanding" parts of the law is inaccurate because it creates new law.

OPM's rule does, in fact, reinforce and clarify existing law because competitive service federal employees' due process rights in their employment already exist.

Competitive service federal employees accrue due process rights in their employment. "[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)). 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 Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (public employee has due process rights in continued employment where statute gives employee certain procedural protections);

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.").

OPM's proposed rule merely reinforces and clarifies Chapter 75's due process requirements consistent with the agency's role of "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). Indeed, OPM previously codified the

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). OPM's proposed rule extends this existing right to positions listed under other excepted service schedules.

In sum, tenured competitive service federal employees already have due process rights, and OPM's proposal is only reinforcing and clarifying those rights.

4. Some commentators allege that OPM's proposal is invalid because the stated intent—to "reinforce and clarify" existing law—does not match the actual intent of the rule, which is stop a future Schedule F. They allege this disparity violates the Administrative Procedures Act.

Where an agency's "sole, stated reason" for its action is "contrived," its action violates the Administrative Procedures Act's requirement "that agencies offer genuine justifications for important decisions." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). But that is not the case here. OPM's purposes are not hidden or contrived. Indeed, OPM links its object of reinforcing and clarifying existing law to its concern over a future Schedule F, which it discusses explicitly and at length. Thus, Supreme Court precedent offers no basis for commentators' misguided APA argument.

5. Some commentators suggest that OPM's proposal is improper because Schedule F was never implemented and the agency's proposal, therefore, is attempting to address a problem that does not exist.

Commentators offer no legal reason why an agency cannot clarify the law with an eye towards a potential, future problem. And there is none. *Cf.* 5 U.S.C. § 706 (delineating the bases under which an agency rulemaking might be invalid).

6. Some commentators allege that OPM's proposed definition of "confidential, policy-determining, policy-making, or policy-advocating" employees as only encompassing political appointees is inconsistent with Supreme Court precedent.

First, OPM's proposed definition is an unremarkable extension of regulations it has already promulgated at 5 C.F.R. § 210.102, which define a variety of terms in Chapter 75.

Second, a broader definition of "confidential, policy-determining, policy-making, or policy-advocating" employees would run afoul of *Elrod v. Burns,* 427 U.S. 347 (1976). *Elrod* held that "a nonpolicymaking, nonconfidential government employee" has certain rights and cannot be discharged for political patronage reasons. *Id.* at 375 (Stewart and Blackmun, JJ., concurring in the judgment). Thus, the category of employees who *can* be discharged for political patronage reasons must be narrow and cannot include career employees.

Congress enacted the CSRA on the heels of *Elrod v. Burns*. The CSRA's legislative history reflects *Elrod*'s holding, explaining that the exclusion for "confidential, policy-determining, policy-making, or policy-advocating" employees from section 7511 is "an extension of the exception for appointments confirmed by the Senate" and covering political appointee positions. S. Rep. No. 95-969, at 48 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2770. *See* Duke University School of Law, Goodson Law Library, *Legislative History* at 1 ("reports of the congressional committees . . . are considered the best source for determining the intent behind a law").

In amending the CSRA in 1990, Congress again explained its distinction between excepted service employees generally and presidential appointees. In those amendments, Congress expanded MSPB jurisdiction over appeal rights for some excepted service employees who have an expectation about continued government employment, but it made clear the exclusion for political appointees would remain. H.R. Rep. No. 101-328, 4-5 (1989), *reprinted in* 1990 U.S.C.C.A.N. 695, 698-99.

Third, OPM's proposed definition aligns with how MSPB has interpreted these terms. MSPB is specifically charged by Congress with protecting the federal merit system. MSPB.gov. In *O'Brien v. Office of Independent Counsel*, the Board analyzed statutory language regarding positions of a "confidential, policy-determining, policy-making, or policy-

advocating character." 74 M.S.P.R. 192, 207-08 (1997). The Board concluded that such language is "a shorthand way of describing 'political appointees.'" *Id.*

While some commentators contend that OPM's definition is in tension with the Supreme Court's decisions in *Seila Law v. CFPB* or *Free Enterprise Fund v. PCAOB*, they overread those narrow, inapposite decisions. *Seila Law* involved removal restrictions on a single head of an independent agency. 140 S. Ct. 2183, 2192 (2020). This was a unique situation that is uninstructive here. *Id.* at 2204 (discussing "unique" structure of CFPB that limited Presidential control). *Free Enterprise Fund* pertained to a dual for-cause limitation on removal of some officers within only some independent agencies. 561 U.S. 477, 483-84 (2010). It is thus similarly inapt here.