

November 17, 2023

Office of Personnel Management (OPM)
Theodore Roosevelt Building
1900 E Street, NW
Washington, DC 20415-1400

RE: RIN 3206–AO56 (Docket ID: OPM-2023-0013): Upholding Civil Service Protections and Merit Systems Principles

On behalf of the National Active and Retired Federal Employees Association (NARFE), which represents the interests of federal employees and retirees, I write to provide the following comments regarding the proposed rule titled “Upholding Civil Service Protections and Merit System Protections.”

The rule’s clarifications regarding civil service protections would reinforce longstanding merit system principles designed to preserve a nonpartisan, professional civil service that works on behalf of the American people. Notably, it would make clear that competitive service protections cannot be stripped away via reclassification of the position into the excepted service. Such actions would vitiate accrued competitive service protections without due process, in violation of the U.S. Constitution and contrary to the statutory scheme designed to ensure a merit-based civil service.

The statutorily designed, competitive, merit-based civil service provides continuity through changing administrations, preserves institutional knowledge and expertise within the federal government, and safeguards the rule of law. Civil service rules ensure federal employees are hired and fired based on their competence, or lack thereof, and not what political connections they have or lack. The rules also protect employees from being removed for choosing adherence to the Constitution, laws and professional standards over politically motivated actions or perceived allegiance to a president or political party. In so doing, the rules protect against abuse of power by the executive branch, providing greater assurance that laws passed by Congress will be faithfully executed.

This system should be protected for the effective operation of government on behalf of the American people. This proposed rule does so. I urge you to finalize this rule expeditiously.

I also provide comments on specific provisions of the rule below:

- **5 C.F.R. 210.102.** The changes in this section clarifies the long-held understanding that positions of a “confidential, policy-determining, policy-making, or policy-advocating” character are “exclusively associated with a noncareer, political appointment that is identified by its close working relationship with the President, head of an agency, or other key appointed

officials who are responsible for furthering the goals and policies of the President and the Administration, and that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred.” This shores up the statutory scheme that recognizes there will always be a rotating set of political appointees that change with every administration to advance and effectuate the policies of the President of the United States, but ensures a set of nonpartisan, professional civil servants to provide continuity between administrations and expertise in their subject matter and profession. This is the policy supported by statutory law, passed by Congress, and the norm in the United States since the late 1800s.

- **5 C.F.R. 212.401.** The changes in this section provide a critical update to the regulatory scheme to clarify that individuals retain competitive service protections if classified into a new excepted service schedule created after the finalization of this rule. Without this clarification, the existing regulations provided no specific guidance on whether an individual retains such protections if their position is classified into a new excepted service schedule, presumably because there was no need to address an excepted service schedule that did not exist. With the short-lived creation of Schedule F, that need has arisen. The adjustments to this section clarify that an administration cannot simply remove competitive service protections via reclassification of the position, which would circumvent the due process procedures designed by the statutory scheme, in violation of the U.S. Constitution’s due process clause.
- **5 C.F.R. Part 302, Subpart F.** The provisions of this section would provide procedures, including notification, explanation and appeal rights, to ensure reclassification of positions into the excepted service are made in accordance with merit system principles and consistent with objective criteria. Such process would strengthen the procedural protections supporting the substantive clarifications made via 5 C.F.R. 212.102 and 5 C.F.R. 212.401.

In addition to the comments on the specific provisions of the proposed rule above, I suggest OPM provide additional clarifications to safeguard merit-system principles as applied to the Senior Executive Service. It’s critical that all segments of the nonpartisan, professional civil service remain protected.

Conclusion

While every administration holds substantial executive power, that power is limited by the Constitution and laws of the United States. By prioritizing allegiance to that rule of law over personal allegiance, our civil service system stands as a bulwark for limited government. Our country deserves a competent civil workforce that holds the trust of the American people. This proposed rule would provide additional assurance that the civil service remains the professional and nonpartisan system that Americans have come to rely on. For these reasons, I urge OPM to finalize this rule promptly.

NARFE appreciates the opportunity to comment and looks forward to consideration of our views. If you have any questions or concerns, please contact NARFE Staff Vice President for Policy and Programs John Hatton at 571-483-1267 or jhatton@narfe.org.

Sincerely,

A handwritten signature in black ink, reading "William Shackelford". The signature is written in a cursive style with a large, stylized "W" and "S".

William Shackelford
NARFE National President