



February 24, 2020

VIA Electronic Submission on regulations.gov

Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Re: Promotion and Internal Placement, OPM's Proposed Rule with Request for Comments, RIN 3206-AN77, 84 Fed. Reg. 70,906-70,908 (Dec. 26, 2019)

To Whom It May Concern:

The National Employment Lawyers Association (NELA) respectfully submits the following comments concerning the Office of Personnel Management's (OPM) (Non-competitive) Promotion and Internal Placement Proposed Rule with Request for Comments, as published in the Federal Register at 84 Fed. Reg. 70,906-70,908 (Dec. 26, 2019).

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. Our mission is to advance employee rights and serve lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and comments on relevant Notices of Proposed Rulemaking (NPRMs). NELA also engages in legislative advocacy on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees. Thus, NELA has both an interest in any potential modifications to federal sector personnel regulations issued by OPM and extensive expertise regarding the practical impact of any proposed modifications.

NELA supports the general goal of simplifying and streamlining federal hiring processes, provided that doing so is explicitly subject to, and consistent with, the Merit System Principles (5 U.S.C. § 2301(b)) that protect the Federal workforce from political influence and other non-merit factors. Thus, any aspect of the proposed rule that would override the Merit System Principles is neither acceptable nor in keeping with the statutes governing the civil service. OPM was founded as a proctor of the Federal Government's merit system principles which "are designed to ensure fair and open recruitment and competition and employment practices free of political influence

or other nonmerit factors.”¹). OPM is charged with establishing and overseeing “a merit-based hiring system where fairness, equal access, and protection for all Federal employees ensure a highly effective and non-partisan force to be reckoned with.”²

The present Proposed Rule lacks safeguards that would ensure its modified hiring process be consistent with Merit Systems Principles. The proposal lacks provision for equal access and notice to potentially qualified applicants, lacks a transparent selection procedure, lacks open competition even among those who would be deemed eligible for non-competitive re-hire (providing only for purely subjective decision-making behind closed doors), lacks mechanisms to prevent partisan influence and prohibited pre-selection on non-merit factors.

It is easy to envision circumstances where the new proposed hiring flexibility could be abused to pre-select favored individuals for promotions, for example, in work environments with on-site personal services contractors where individuals continue to work in the same workplace, but can move back and forth between civil service and contractor status.

NELA is concerned that giving promotion preferences for former civil service employees will preserve existing demographic disparities between the federal workforce and the community, raising concerns of disparate impact discrimination. It is easy to see how this proposed selection mechanism is likely to result in a situation in which present disparities and lack of diversity are maintained. By solely drawing on a pool of former federal employees—a pool of applicants which does not mirror wider societal demographics—this proposed selection mechanism cannot help but recreate present disparities and lack of diversity. The government *must* prioritize equal employment opportunity in hiring.

To be consistent with Merit Systems Principles, NELA suggests that this non-competitive promotion hiring method be established as a fallback approach to be utilized only after competitive hiring methods have been attempted, not a replacement. The proposed non-competitive promotion hiring method can be a fallback selection method in cases where the hiring agency has already conducted a competitive selection, but was unable to find qualified candidates who would accept the job. In such case, this rule would allow applicants to be recruited and hired only if the competitive process first fails. The initial competitive process must be a genuine and broad selection attempt and well-documented in the record. Making this non-competitive promotion hiring authority available after a competitive selection has been attempted will allow hiring agencies to tap the pool of former federal applicants for noncompetitive hire rather than requiring competitive readvertisement of the vacancy, while still preserving the Merit Systems Principles by requiring competition first.

In addition to the framework discussed above, NELA proposes additional procedural protections to the Proposed Rule designed (1) to depersonalize the selection process in order to reduce risk

¹ See <https://www.opm.gov/policy-data-oversight/performance-management/reference-materials/more-topics/merit-system-principles-and-performance-management/>

² See <https://www.opm.gov/about-us/our-mission-role-history/our-history/>.

of prohibited pre-selection, and (2) to ensure creation of a paper trail which will allow subsequent review in order to evaluate and ensure effectuation of Merit Systems Principles, and will help ameliorate the concerns raised earlier.

First, as noted above, the hiring agency must first attempt a competitive selection for the vacancy, using normal preexisting competitive hiring policies. If the hiring agency is unable to ultimately hire an applicant based on that selection, only then would the noncompetitive promotion hiring authority become available for use by the hiring agency, in the manner described in the next four paragraphs.

Second, to ensure impartiality, rather than allowing for a specific hiring manager to preselect and recruit the applicant of their choice for federal reappointment to a particular position, OPM should require that former employees interested in reemployment register their interest (perhaps on a registry to be administered by OPM through USAJOBS) to put HR officers on notice of potentially qualified candidates for non-competitive re-hire which can be reviewed during and/or after both the competitive and non-competitive recruitments (*i.e.*, to prevent insular non-competitive re-hire directed at one individual by one manager to the exclusion of all others). USAJOBS, which is maintained by OPM and widely used by Federal agencies (even when not required), is already configured to allow applicants registered in the system to indicate themselves as generally interested in certain types of positions.

Third, individuals who wish to apply for re-hire pursuant to the proposed non-competitive hiring mechanism should be subject to a waiting period of at least several months after submission of notice of interest in reentering federal service. This would prevent a “revolving door” with contractors or current employees.

Fourth, when a non-competitive appointment with promotion occurs under this new hiring mechanism, HR and the hiring manager should each be separately required to submit a statement in writing for the selection folder (A) describing the earlier unsuccessful attempt to competitively select for the position, (B) describing the applicant pool for the original competitive selection attempt and the reason why no ultimate appointment was made as a result, (C) describing what outreach was done to reach qualified candidates for this position prior to the non-competitive selection process being initiated, and (D) explaining why this particular individual was selected using the noncompetitive promotion selection method, including all prior experience with or knowledge of the applicant’s prior Federal government work experience, knowledge, skills and abilities for the position at issue. These two memoranda should then be archived with the selection records for this appointment and for the earlier unsuccessful competitive selection attempt to allow for later review, production in discovery, or investigation in the event of a prohibited personnel practices allegation, an EEO complaint, or other similar complaint or allegation.

Lastly, NELA proposes to amend the proposed non-competitive promotion hiring authority by expanding the proposed definition of who is qualified for this new non-competitive reinstatement. The proposed rule only allows those who were voluntarily separated for at least

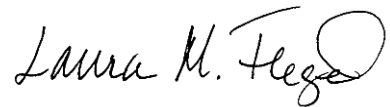
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one year to be appointed. NELA would add as qualified, those who are involuntarily separated for cause that would qualify for CSRS discontinued service retirement/FERS early retirement per the list appearing at the *CSRS/FERS Handbook*, Ch. 44, § 44A1.1-2 where separation is *not* for alleged performance reasons. If those employees found reinstatement, it would enable them to leave retirement status and return to service.

In short, NELA requests that OPM revise its proposed non-competitive promotion hiring authority to include the safeguards discussed above, to ensure that this new hiring method does not violate Merit Systems Principles or hiring diversity principles. NELA thanks OPM for its attention to and consideration of NELA's views on these issues. If you have questions or wish to discuss these matters, please contact Laura Flegel at lflegel@nelahq.org or (202) 898-2880.

Sincerely yours,

A handwritten signature in cursive script that reads "Laura M. Flegel". The signature is written in black ink and is positioned above the typed name and title.

Laura M. Flegel
National Employment Lawyers Association
Director of Legislative & Public Policy