Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 335

[Docket ID: OPM–2023–0041]

RIN 3206–AO52

Time-Limited Promotions

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a proposed regulation to clarify that bargaining-unit employees, who are detailed or temporarily promoted to higher grade duties of a higher-graded position, should be paid accordingly for the entire time performing these duties of a higher-graded position, when this action is pursuant to a final order by an arbitrator, adjudicative body, or court, under a collective bargaining agreement that provides for this action and the employees were assigned these duties outside of competitive hiring procedures. In addition, the proposed change clarifies that non-bargaining unit employees who are temporarily promoted to higher grade duties of a higher-graded position should be paid accordingly for the entire time performing these duties of a higher-graded position, as found pursuant to a final order by an adjudicative body or court. At present, non-competitive temporary promotions, and non-competitive details to duties of higher-graded positions are limited to no more than 120 days under OPM regulations regardless of the bargaining-unit status of the employee. Competitive procedures apply for any temporary promotion or detail to duties of a higher-graded position that exceeds 120-days, again, regardless of the bargaining-unit status of the employee.

DATES: Comments must be received on or before February 26, 2024.

ADDRESSES: You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, via the Federal eRulemaking Portal: *https://www.regulations.gov*. Follow the instructions for sending comments.

Instructions: All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Before finalizing this rule, OPM will consider comments received on or before the closing date for comments. OPM may make changes to the final rule after considering the comments received.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at *awr@opm.gov* or by telephone at (202) 606–2930.

SUPPLEMENTARY INFORMATION:

I. Background

On December 29, 1994, OPM issued interim regulations to maintain requirements under which agencies conduct merit promotion and internal placement programs in the competitive service.[1] These requirements were in the provisionally retained chapter 335 of the former Federal Personnel Manual (FPM) and related issuances. Adopting the interim rule prevented a lapse in government-wide requirements when FPM chapter 335 expired on December 31, 1994.[2] The interim rule was effective on January 1, 1995. Agencies were authorized by 5 CFR 335.103 to promote competitive service employees to positions for which the agency had adopted and administered a merit promotion program. The promotion program had to conform with the standards and requirements that were in provisionally retained chapter 335 of the former FPM. This included the requirement that competitive procedures must be followed for time-limited promotions for more than 120 days to higher-graded positions. This requirement still exists today.

The Federal Labor Relations Authority (FLRA) has found union proposals requiring the temporary promotion of bargaining unit employees officially assigned to a higher-graded position, or to the duties of a higher-graded position, for certain specified time periods are within the duty to bargain.[3] The FLRA has further found that, under Federal personnel law, an employee may be entitled to a temporary promotion for performing the duties of a higher grade position for an extended period of time. However, the FLRA has emphasized that ‘‘the entitlement must be based on a provision of a collective bargaining agreement or an agency regulation making a temporary promotion mandatory for details to, or the performance of the duties of, a higher-grade position after a specified period of time.’’[4] As a result, some collective bargaining agreements between Federal agencies and unions have provisions requiring the temporary promotion of employees officially assigned to a higher-graded position or to the duties of a higher-graded position when such assignment is made without use of competitive procedures. As provided for in 5 U.S.C. 7121, disagreements on application and interpretation of such provisions are subject to negotiated grievance procedures that provide for binding arbitration.

Prior to 2004, arbitrators awarded backpay to employees who filed grievances after being assigned to higher graded duties and were not temporarily promoted, and those awards were not time limited to 120 days. For example, in *Oklahoma City Air Logistics Center, Tinker AFB, OK and AFGE Local 9116,* 42 FLRA 62 (October 1991), the arbitrator directed the agency to provide a grievant a retroactive temporary promotion, with backpay, for the entire period of time in which the grievant performed work of a higher-graded position. The grievant, a WG–8 employee, filed a grievance claiming he should have been promoted to the WG–

[1] 59 FR 67121 (Dec. 29, 1994).

[2] OPM abolished the FPM in December 1993, as recommended by the National Performance Review. FPM chapter 335 was kept temporarily through December 31, 1994, to enable OPM to incorporate promotion and internal placement requirements in the CFR.

[3] See *National Federation of Federal Employees* v. *Department of the Interior Bureau of Land Management,* 29 FLRA 1491 (1987).

[4] See *National Treasury Employees Union* v. *Department of Treasury Internal Revenue Service,* 29 FLRA 348 (1987).

9 level. The arbitrator concluded the grievant was not wrongfully denied a permanent, competitive promotion to WG–9. The arbitrator found, however, the grievant ''was temporarily assigned the grade-controlling duties of a WG–9'' employee from February 1987 to February 1990. The arbitrator concluded the agency's failure to promote the grievant temporarily violated the parties' collective bargaining agreement and resulted in an unjustified or unwarranted personnel action. The arbitrator sustained the grievance, in part, and ordered the agency to make the grievant whole for the loss of WG–9 pay from March 29, 1987, to February 2, 1990. The decision was challenged to the FLRA. The FLRA stated, where parties to a collective bargaining agreement provide for the temporary promotion of employees assigned to perform the work of higher-graded positions, an arbitrator may order temporary promotions, with backpay, in accordance with that agreement. The FLRA modified the arbitration award and sustained the grievance in part finding the grievant must be made whole for loss of WG–9 pay for a 2-year period beginning March 29, 1987. The FLRA directed the agency to request OPM to formally authorize the Agency to grant the grievant a retroactive temporary promotion, with backpay, from the end of the 2-year period to February 2, 1990.

Another example concerns *U.S. Department of the Army, Fort Polk, LA, and the National Association of Government Employees, Local R5–168,* 44 FLRA 121 (1992). In this case, the employee filed a grievance claiming that, under the parties' collective bargaining agreement, the grievant was entitled to a temporary promotion for having performed the duties of a higher-graded position for an extended period of time. The arbitrator sustained the grievance and awarded the grievant a retroactive temporary promotion with backpay. The FLRA stated, in order to award backpay, an arbitrator must find (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; (2) the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowance, or differentials; and (3) but for such action, the grievant otherwise would not have suffered the withdrawal or reduction. The FLRA found the arbitrator's award satisfied these requirements for the Back Pay Act. Specifically, the Authority found the arbitrator made a properly supported award of backpay under the Back Pay Act when the arbitrator determined the agency denied the grievant a temporary promotion to which the grievant was entitled for having performed the duties of a higher-graded position for an extended period of time. The award was modified to include the payment of interest on the award of backpay.

Finally, in *Social Security Administration and the American Federation of Government Employees, Local 220,* 57 FLRA 115 (2001), the arbitrator found the agency violated the parties' collective bargaining agreement by failing to temporarily promote certain employees. One employee who performed mentoring duties was temporarily promoted while the other employees who performed the same duties were not. The arbitrator found that the agency's failure to temporarily promote the other employees who performed mentoring duties violated the parties' collective bargaining agreement. The arbitrator concluded that the agency's actions constituted an unjustified and unwarranted personnel action that directly resulted in a reduction of pay within the meaning of the Back Pay Act. The arbitrator sustained the grievance and ordered the agency to grant retroactive temporary promotion to the employees who were not temporarily promoted and were eligible for a temporary promotion under the parties' collective bargaining agreement. The FLRA found denying an employee a temporary promotion to which the employee is entitled under a collective bargaining agreement constitutes an unjustified or unwarranted personnel action, and so, the arbitrator's award of backpay in these circumstances was authorized under the Back Pay Act.

On September 10, 2003, the FLRA, in accordance with 5 U.S.C. 7105(i), requested an advisory opinion from OPM regarding an interpretation of 5 CFR part 335 and posed the following question: ''Where an agency violates a collective bargaining agreement provision entitling employees to noncompetitive temporary promotions and an arbitrator grants a retroactive temporary promotion of more than 120 days to remedy that violation with the retroactive promotion what is the applicability, if any, of the requirements of 5 CFR 335.103(c)(1)(i) that 'competitive procedures' apply to promotions exceeding 120 days. If the requirements apply, what effect do they have on the arbitral remedy of a retroactive temporary promotion exceeding 120 days?'' On February 27, 2004, the OPM General Counsel provided a response to the FLRA. OPM noted: ''Upon analysis of this issue, OPM concludes that 5 CFR 335.103 applies and that the arbitration award in this matter is contrary to the regulatory requirement that executive agencies must apply competitive procedures for the purposes of implementing temporary promotions in excess of 120 days.''

The case before the FLRA that prompted the request to OPM for an advisory opinion was *United States Department of Veterans Affairs Ralph H. Johnson Medical Center Charleston, South Carolina, and National Association of Government Employees,* 60 FLRA 46 (2004) (*Johnson Medical Center*). In this case, an arbitrator granted a retroactive temporary promotion greater than 120 days. A GS–7 employee filed a grievance alleging she had been performing the duties of a computer specialist, GS–9, for approximately 2 years. The grievant alleged the agency failed to promote her temporarily to the higher grade in violation of the parties' collective bargaining agreement that provided for the noncompetitive temporary promotion of employees detailed to a higher-graded position for more than 30 consecutive days.

In ordering a remedy of backpay exceeding two years, the arbitrator rejected the agency's argument that competitive procedures were required for temporary promotions exceeding 120 days. Upon appeal to the FLRA, the agency alleged the remedy of a temporary promotion in excess of 120 days was contrary to 5 CFR 335.103 because competitive promotion procedures were not used to affect that promotion action.

The FLRA rendered its decision relying upon OPM's February 27, 2004, advisory opinion about 5 CFR 335.103(c)(1)(i). OPM opined the arbitrator's decision was contrary to a government-wide regulation by providing the grievant a retroactive temporary promotion exceeding 120 days because there had been no competitive process. Based on this advisory opinion, the FLRA modified the award and ordered the agency to grant the grievant a retroactive temporary promotion with backpay for the difference between GS–7 and GS–9 wage rate, effective August 1999, for a period of 120 days because there was no evidence that competitive procedures were applied in the promotion of the grievant. Furthermore, the FLRA decided there was no showing that a personnel action resulted in the withdrawal or reduction of the grievant's pay and therefore the grievant was not entitled to back pay for the

period exceeding the 120-day limitation.[5]

Following its decision in 2004, the FLRA has found arbitration decisions deficient when the arbitrator ordered a temporary promotion with backpay for the pay differential for higher-graded work performed by an employee exceeding 120 days despite the lack of competitive procedures for the promotion. For example, in *United States Department of the Treasury Internal Revenue Service and National Treasury Employees,* 61 FLRA 667 (2006), an arbitrator determined the agency violated the collective bargaining agreement by ''failing to detail [the grievant] for performing work'' at a higher grade. The arbitrator expressly rejected the agency's claim that monetary relief could not extend beyond 120 days under 5 CFR 335.103(c). In the arbitrator's view, ''[t]o deny a remedy longer tha[n] 120 days not only would be at odds with negotiated terms, but, in effect, would reward the agency with a monetary windfall for its persistent contractual transgression, despite grievances having been lodged, thereby subverting the deterrent value of the contract's prohibitory language.'' The agency filed exceptions with the FLRA. The FLRA noted that ''a provision in a collective bargaining agreement establishing the requisite mandatory promotion is enforceable only to the extent consistent with civil service regulations pertaining to temporary promotions.'' The FLRA also found controlling OPM's advisory opinion in its 2004 *Johnson Medical Center* decision that placed a regulatory cap of 120 days on retroactive temporary promotions awarded by arbitrators without competition. As such, the FLRA set aside that portion of the award of backpay for a period exceeding 120 days.

More recently, in *United States Department of the Navy Commander, Navy Region Mid-Atlantic Naval Weapons Station Earle and International Association of Firefighters Local F–147,* 72 FLRA 533 (2021), an arbitrator found that the grievants were temporarily assigned the duties of a higher-graded position. The arbitrator also found the agency violated the parties' collective bargaining agreement, which required that employees temporarily assigned to higher-graded positions for two pay periods or more receive the higher rate of pay for the position to which they have been assigned. The agency challenged the amount of the backpay remedy noting it was contrary to 5 CFR 335.103(c)(1)(i). The FLRA once again found that ''an award granting a temporary promotion is enforceable only to the extent that it is consistent with civil service regulations pertaining to such promotions.'' Specifically, relying on OPM's 2004 advisory opinion, the FLRA concluded ''a retroactive temporary promotion and associated backpay of more than 120 days cannot be awarded unless the promotion was filled competitively.'' The FLRA determined ''no evidence has established that the temporary promotion was competed. Therefore, to the extent that the backpay remedy exceeds 120 days, it is contrary to law.''

II. Proposed Amendment

OPM proposes amending 5 CFR part 335, as summarized below, to clarify that a bargaining unit employee found, pursuant to a final order by an arbitrator, adjudicative body, or court, to have been detailed or temporarily promoted to a higher-graded position should be paid accordingly (*i.e.,* higher compensation) for the entire time the employee performed the duties of the higher-graded position. This is limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations, but the agency made the assignment without use of competitive procedures. For bargaining unit employees, this may include when a collective bargaining agreement provided for the temporary promotion of employees officially assigned to a higher-graded position or to the duties of a higher-graded position when such assignment is made without use of competitive procedures and the employee otherwise meets qualification and time-in-grade requirements. This amendment only applies when a third party has made a finding the employee is entitled to receive a retroactive temporary promotion. An adjudicative body could include, but not be limited to, a third party such as the U.S. Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission (EEOC).

Similarly, the proposed amendment clarifies that, when a non-bargaining unit employee has been temporarily promoted to a higher-graded position as found by an adjudicative body or court, that employee should be paid accordingly (*i.e.,* higher compensation) for the entire time performing these duties of a higher-graded position, pursuant to a final order by that adjudicative body or court. Similar to what is discussed earlier for bargaining unit employees, this is limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations, but the agency made the assignment without use of competitive procedures. While the background focused on disputes related to collective bargaining agreements, OPM recognizes that non-bargaining unit employees may pursue grievances or complaints related to temporary promotions in forums outside of procedures found in collective bargaining agreements. The proposed regulatory change addresses such matters for the sake of consistency and fairness regardless of the employee's bargaining unit status. This amendment only applies when a third party has made a finding the employee is entitled to receive a retroactive temporary promotion. An adjudicative body could include, but not be limited to, a third party such as the MSPB or the EEOC.

Part 335—Promotion and Internal Placement

Subpart A—General Provisions

Section 335.103—Agency Promotion Program

In § 335.103, agencies are authorized by OPM to make promotions under § 335.102 to positions under the competitive service and to insure systematic means of selection for promotion according to merit. OPM proposes to amend § 335.103 by adding a new paragraph (c)(2)(iii) to read, ''Retroactive temporary promotions to higher-graded positions pursuant to a final order by an arbitrator, adjudicative body or court.'' This added language will require agencies to pay an employee who has been found to have been noncompetitively, temporarily detailed to a higher-graded position at the higher grade even for a period of time that exceeds 120 days, pursuant to a final order by an arbitrator, adjudicative body, or court. As previously noted, this regulatory change would also apply to any employee, including non-bargaining unit employees, pursuant to a final order by an adjudicative body or court unrelated to procedures found in a collective bargaining agreement. For example, an employee may file a complaint with the

[5] In a concurrence to the *Johnson Medical Center* decision, Member Carol Waller Pope noted ''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 can be required to pay employees for those duties. This provides agencies a strong incentive to ignore competitive procedures when they want to assign employees higher-graded duties for more than 120 days.''

Equal Employment Opportunity Commission alleging discrimination on matters related to a temporary promotion exceeding 120 days. Finally, as previously discussed, this is limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations, but the agency made the assignment without use of competitive procedures.

OPM's interpretation of 5 CFR 335.103 continues to be that agencies covered by this regulation must apply competitive procedures for the purpose of implementing temporary promotions in excess of 120 days. This is consistent with the wording of regulatory language that has existed for decades OPM believes requiring competition for these opportunities when they exceed 120 days supports merit system principles at 5 U.S.C. 2301 and provides greater job opportunities to the workforce.

The merit system principles (MSPs)[6] are nine basic standards that govern the management of the executive branch workforce and serve as the foundation of the Federal civil service. The U.S. Merit Systems Protection Board (MSPB) has noted the general themes of the MSPs and prohibited personnel practices[7] are: (1) Fairness—treating employees fairly in all aspects of their employment; (2) Protection—refraining from misuse of authority and protecting employees from harm, such as reprisal for the exercise of a legally protected right; and (3) Stewardship—management employees in the short-term and long-term public interest.[8] For example, MSP # 1 provides that ''Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.''[9] The MSPB has noted MSP # 1 ''[f]ocuses on attaining a well-qualified and representative workforce through open recruitment and fair, job-related assessment of applicants.'' Therefore, OPM believes 5 CFR 335.103 strikes the right balance between when competitive procedures are necessary and when they are not necessary, depending on the duration of the time-limited promotion. For situations where agencies have more immediate, short-term needs of 120 days or less, it is appropriate for agencies to non-competitively assign higher-graded duties to qualified employees to meet these needs. For situations where agencies have longer-term needs exceeding 120 days, use of competitive procedures is consistent with the purpose of MSP # 1. However, OPM also considers it unfair for employees to be assigned these higher-graded duties and not be compensated accordingly for the higher-graded duties when employee has effectively been detailed to a higher-graded position for more than 120 days.

OPM reminds agencies that they should not assign employees to perform higher-graded duties for periods exceeding 120 days such that the employee has been effectively detailed to a higher-grade position without following applicable competitive procedures. Under this proposed regulation, agencies are reminded that they may be required to provide higher compensation as a result of arbitrator, adjudicative or court decisions. OPM also reminds agencies, subject to the requirements of 5 CFR part 335, that competitive procedures should always be followed if the agency anticipates the assignment of higher-graded duties may exceed 120 days. If the agency incorrectly anticipates the assignment of higher graded duties will last 120 days or less but later determines the need exceeds 120 days, the agency must follow competitive procedures for assignment of such duties beyond 120 days for any particular employee or assign the higher-graded work to another qualified employee, up to, but not exceeding 120 days. Finally, OPM reminds agencies to consider this when negotiating new collective bargaining agreement provisions regarding temporary promotions. Collective bargaining agreements must be consistent with requirements in government-wide regulations on this matter. In fact, newly negotiated collective bargaining agreements that allow non-competitive temporary promotion exceeding 120 days must be disapproved in agency head review for not complying with government-wide regulations.[10] However, some agreements are silent on the length of the time-limited promotion and may not be in conflict with government-wide regulations as written.

It should be noted 5 CFR part 335 does not apply to positions in the Excepted Service. Therefore, the 2004 OPM advisory opinion and the various FLRA decisions on this matter are not applicable to the issue of when competitive procedures must be followed for time-limited promotions in the Excepted Service. However, agencies with employees in the Excepted Service are subject to Merit System Principles and should be mindful of these principles when assigning Excepted Service employees the duties of a higher-graded position.

III. Regulatory Analysis

A. Statement of Need

This rulemaking has two purposes. First, OPM intends to remind agencies that competitive procedures must be followed when assigning duties of a higher-graded position to employees for a period of time exceeding 120 days. Second, in recognition that there continue to be situations where competitive procedures are not followed by agencies subject to 5 CFR part 335, this rulemaking provides the possibility of remedial relief to employees covered by collective bargaining agreements requiring temporary promotions to non-bargaining unit employees when an arbitrator, adjudicative body or court finds the employee has been detailed or temporarily promoted to a higher-graded position.

On August 5, 2022, OPM received a petition from the National Treasury Employees Union (NTEU), which represents Federal workers in 34 agencies and departments,[11] to amend OPM regulations at 5 CFR 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.'' NTEU noted that OPM's existing regulation, as interpreted in a 2004 OPM advisory opinion, has led to ''significant unfairness.'' NTEU stated that prior to that advisory opinion, arbitrators had awarded back pay to employees who performed higher-graded duties. ''Arbitrators made employees whole for the time they spent performing such work, without any 120-day limitation.'' NTEU noted that the 2004 decision of the FLRA abandoned years of precedent by limiting the back pay remedy for employees performing higher-graded duties to 120 days each year. NTEU

[6] 5 U.S.C. 2301: Merit system principles.

[7] 5 U.S.C. 2302: Prohibited personnel practices.

[8] The Merit System Principles: Keys to Managing the Federal Workforce (*mspb.gov*), *October 2020, available at https://www.mspb.gov/studies/studies/The_Merit_System_Principles_Keys_to_Managing_the_Federal_Workforce_1371890.pdf*.

[9] See 5 U.S.C. 2301(b)(1).

[10] 5 U.S.C. 7114(c) provides that ''(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.'' and ''(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision.''

[11] See NTEU, ''Our Agencies,'' *https://www.nteu.org/who-we-are/our-agencies*.

correctly noted that FLRA's decision ''was based entirely on [OPM's] advisory opinion.''

NTEU notes that ''although OPM's 2004 interpretation of the regulation was in error, NTEU is not [asking OPM] to revisit its analysis.'' NTEU stated it is proposing ''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 accordingly, even if the detail, temporary promotion or performance of such duties exceeds 120 days.''

On November 3, 2022, the National Federation of Federal Employees (NFFE), which represents approximately 110,000 government workers across the United States,[12] provided suggestions to OPM on revisions to existing OPM regulations, including 5 CFR 335.103(c)(1)(i). Specifically, NFFE requested revisions to ''eliminate limit on back pay for temporary promotions to 120 days.''

OPM's interpretation that competitive procedures must be followed for temporary promotions exceeding 120 days has not changed. Notwithstanding OPM's current interpretation of the requirements of 5 CFR 335.103, however, OPM agrees that employees should be compensated accordingly when an agency has been found to be out of compliance with requirements of a collective bargaining agreement and understands that the current text of the regulations could provide greater clarity. Furthermore, OPM's 2004 advisory opinion should not be cited as a basis for agencies to disregard, whether intentionally or unintentionally, government-wide regulations on use of competitive procedures and collective bargaining agreement requirements regarding temporary promotions for performing duties of a higher-graded position. Therefore, OPM is proposing to modify 5 CFR 335.103 to address these scenarios.

This proposed modification reinforces the President's recognition that Federal civil servants' rights deserve to be protected. President Biden has stated that ''[c]areer 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 Federal workforce.'' [13] NTEU notes that it supports merit-based competition for long-term promotions or details to positions that are properly classified at a higher grade to ensure that the merit system principles of fair and open competition are met.

NTEU notes that ''[i]n 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.'' NTEU notes that ''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.'' OPM believes the proposed modification is a reasonable solution to address those situations where an agency may assign higher-graded duties to an employee without using competitive procedures and where a collective bargaining agreement requires a temporary promotion.

B. Regulatory Alternatives

An alternative to this rulemaking is to not issue a regulation and to continue the possibility of agencies not using competitive procedures when assigning an employee the duties of a higher-graded position over 120 days because of an absence of clarification. As a result, employees may not have an opportunity to be made whole for time performing higher-graded duties in excess of 120 days even if the employee challenges the agency action in a grievance or complaint process. OPM has determined this is not a viable option. As NTEU noted, an inequity exists and employees are precluded from any remedial relief beyond 120 days because the relevant regulation has been reinterpreted since 2004 to undermine, rather than strengthen, merit system principles.

Another regulatory alternative is to address this issue through OPM's oversight function. OPM's statutory responsibility to oversee the Federal personnel system encompasses assessment of compliance with merit system principles, and supporting laws, rules, regulations, Executive orders, and OPM standards, as well as the effectiveness of personnel policies, programs, and operations.[14] The legal authority for OPM oversight is 5 U.S.C. 1104(b)(2) and 5 CFR parts 5 and 10. Under this authority, OPM can evaluate the effectiveness of agency personnel policies, programs and operations and agency compliance with and enforcement of applicable laws, rules, regulations, and OPM directives. OPM can also direct corrective action where appropriate.

While OPM can, through its oversight process, identify situations where an agency is not complying with the requirement to use competitive procedures for time-limited promotions that exceed 120 days, OPM's enforcement process may not provide timely relief to employees who are impacted by an agency's failure to follow OPM procedures on time-limited promotions. Furthermore, based on OPM's 2004 advisory opinion, although OPM may direct, as part of its oversight process, an agency to follow competitive procedures for time-limited promotions exceeding 120 days, this would not provide any monetary relief for employees covered by collective bargaining agreements that require time-limited promotions and are identified by OPM as situations where OPM's regulations were not properly followed.

C. Impact

OPM is issuing this proposed regulation to authorize a retroactive temporary promotion when a competitive service employee, effectively, has been detailed or temporarily promoted to higher grade duties of a higher-graded position if a collective bargaining agreement requires it and the employee has been assigned these duties outside of competitive hiring procedures, as found pursuant to a final order by an arbitrator, adjudicative body, or court. By authorizing a retroactive promotion in these situations, OPM affirms that an employee should be paid accordingly for the entire time performing these duties of a higher-graded position. In addition, a non-bargaining unit competitive service employee who is temporarily promoted to higher grade duties of a higher-graded position should be paid accordingly for the entire time performing these duties of a higher-graded position, as found pursuant to a final order by an adjudicative body or court.

As discussed earlier, OPM reminds agencies to use competitive procedures when assigning an employee the duties of a higher-graded position when the assignment exceeds 120 days. This is

[12] See NFFE, About Us, *https://nffe.org/about/*.

[13] See Executive Order 14003, Protecting the Federal Workforce (January 22, 2021).

[14] OPM website, Compliance, What is our oversight responsibility?, available at *https://www.opm.gov/policy-data-oversight/oversight-activities/compliance/*.

not a new requirement and simply reinforces what agencies, subject to 5 CFR part 335, should already be doing and should have no impact. However, in those situations where an agency does not meet this regulatory requirement, it reinforces the commitment an agency has already made as part of the collective bargaining process under 5 U.S.C. chapter 71. It also provides all employees, whether bargaining unit or non-bargaining unit, an opportunity to be made whole if an agency does not properly follow policies related to temporary promotions and pursues a grievance or complaint in applicable grievance and complaint processes which may be available to employees.

D. Costs

This proposed rule will affect the operations of over 80 non-postal Federal agencies in the Executive Branch—ranging from cabinet-level departments to small independent agencies—with one or more labor organizations certified by the FLRA as the exclusive representative of employees in an appropriate unit pursuant to 5 U.S.C. 7112. We do not believe this proposed rule should substantially increase the ongoing administrative costs to agencies (including the administrative costs of administering the program) as this rulemaking leverages existing procedures and requires agencies to comply with collective bargaining agreements that they have made with unions. Furthermore, OPM believes costs should be negligible as we anticipate agencies will leverage existing resources to implement the reminders in this rulemaking and the regulatory requirements. Ultimately, costs are likely to vary from agency to agency since some agencies have collective bargaining unit agreements with language regarding the process for detailing bargaining unit employees to a higher graded position for more than 120 days. Furthermore, some agencies are currently already closely adhering to OPM regulations in § 335.103.

With the above in mind, we estimate this rulemaking will require agencies to review policies on time-limited promotions subject to 5 CFR part 335; update these policies if needed; and provide reminders and, if necessary, training to implement this proposed rule and reinforce existing requirements in 5 CFR part 335. For the purpose of this cost analysis, the assumed staffing for Federal employees performing the work required by the regulations in part 335 is one executive; one GS–15, step 5; a GS–14, step 5; and one GS–13, step 5 in the Washington, DC, locality area. The 2023 basic rate of pay for an executive at an agency with a certified SES performance appraisal system is $235,600 annually, or $113.27 per hour. For General Schedule employees in the Washington, DC, locality area, the 2023 pay table rates are $176,458 annually and $84.55 hourly for GS–15, step 5; $150,016 annually and $71.88 for GS–14; and $126,949 annually and $60.83 hourly for GS–13, step 5. We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in assumed hourly labor costs of $226.54 for an executive; $169.10 for a GS–15, step 5; $143.76 for a GS–14, step 5; and $121.66 for a GS–13, step 5. In order to comply with the regulatory changes in this proposed rule and the reminder in this preamble to follow competitive procedures for time-limited promotions exceeding 120 days, affected agencies will need to review and update (if applicable) their policies, procedures and develop appropriate training or communications to appropriate personnel. Agencies are reminded to review 5 CFR part 335, agency merit promotion plans, and related guidance to ensure compliance. Agencies are also encouraged to communicate with managers, supervisors, and agency staff who are responsible for completing actions related to part 335. We estimate that this will require an average of 10 hours of work by employees with an average hourly cost of $165.26. This would result in estimated costs of about $1,653 per agency, and about $132,212 in total government-wide. If an agency follows existing requirements to use competitive procedures for time-limited promotions exceeding 120 days, there should be no need for employees to file grievances ending in binding arbitration that could order backpay with interest. To the extent that grievances are filed and arbitration decisions order backpay, the costs will vary by agency depending on the number of employees impacted, the salaries of these employees, and the amount of time performing the higher-graded duties beyond 120 days. OPM does not have data to make a determination on potential costs related to arbitration decisions implementing the proposed regulatory language. OPM requests comments on the implementation and impacts of this proposed rule.

E. Benefits

This proposed rule has several important benefits. First, it supports merit system principles by reminding agencies to use competitive procedures for time-limited promotions exceeding 120 days. As discussed earlier, OPM believes 5 CFR 335.103 strikes the right balance between when competitive procedures are necessary and when they are not necessary, depending on the duration of the time-limited promotion. OPM believes that fair and open competition is appropriate for performing duties for a period of time exceeding 120 days.

OPM also agrees that it is unfair for employees to be assigned these higher-graded duties and not be compensated accordingly when assignment of these duties exceeds 120 days and a third party orders the agency to compensate the employee accordingly. Therefore, the second benefit of this rulemaking is that it facilitates agencies' provision of monetary relief to employees who perform duties of a higher-graded position for more than 120 days where the agency has failed to follow the requirements of 5 CFR part 335. OPM expects this proposed rule to further incentivize agencies to follow proper procedures when assigning higher-graded duties and to honor the commitment agencies made in their collective bargaining agreement when they agreed to temporarily promote employees. This proposed rule not only reinforces merit system principles but reinforces the agency's obligations under the Federal Service Labor-Management Relations Statute.

IV. Request for Comments

OPM requests comments on the implementation and impacts of this proposed rule in general. Such information will be useful for better understanding the effect of these proposed revisions on time-limited promotions impacted by collective bargaining agreements. The type of information in which OPM is interested includes, but is not limited to, the following:

- Each year, out of the total number of grievances or administrative complaints filed by bargaining unit employees, what percentage of those grievances or other types of complaints claim appropriate compensation was denied after being non-competitively placed on time-limited promotions exceeding 120 days and despite collective bargaining agreement requirements?
- Each year, out of the total number of administrative grievances or complaints filed by non-bargaining unit employees, what percentage of those administrative grievances or other types of complaints claim commensurate compensation was denied after being non-competitively placed on time-limited promotions exceeding 120 days?

• OPM also requests comment on the options available to non-bargaining unit employees to seek redress after being non-competitively placed on a time-limited promotion exceeding 120 days without commensurate pay. Based on comments received, OPM could consider exercising its authority to confer jurisdiction on an adjudicative body to evaluate complaints filed by non-bargaining unit employees to the extent OPM can confer such jurisdiction.

Regulatory Review

Executive Orders 13563, 12866, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with effects of $200 million or more in any one year. This rulemaking does not reach that threshold; however, OMB has designated the rule as a ''significant regulatory action'' under Executive Order 14094.

Regulatory Flexibility Act

The Director of OPM certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

Federalism

This proposed rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform

This proposed rule meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

This regulatory action is not expected to impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 335

Government employees.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR part 335 as follows:

PART 335—Promotion and Internal Placement

■ 1. The authority citation for part 335 continues to read as follows:

Authority: 5 U.S.C. 2301, 2302, 3301, 3302, 3330; E.O. 10577, E.O. 11478, 3 CFR 1966–1970, Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152, 3 CFR 19554–58 Comp., p.218; 5 U.S.C. 3304(f), and Pub. L. 106–117, and 5 CFR 2.2 and 7.1.

Subpart A—General Provisions

■ 2. Amend § 335.103 by adding new paragraph (c)(2)(iii) to read as follows:

§ 335.103 Agency promotion programs.

* * * * *

(c) * * *

(2) * * *

(iii) A retroactive temporary promotion to a higher-graded position pursuant to a final order by an arbitrator, adjudicative body, or court.

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[FR Doc. 2023–28458 Filed 12–26–23; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 987

[Doc. No. AMS–SC–23–0058]

Domestic Dates Produced or Packed in Riverside County, California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the California Date Administrative Committee (Committee) to decrease the assessment rate established for the 2023–2024 and subsequent crop years. The proposed assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by January 26, 2024.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments can be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237. Comments can also be submitted to the Docket Clerk electronically by Email: *MarketingOrderComment@usda.gov* or via the internet at: *https://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments submitted in response to this proposed rule will be included in the record and will be made available to the public and can be viewed at: *https://www.regulations.gov.* Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Bianca Bertrand, Marketing Specialist, or Gary Olson, Chief, West Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326–2724, or Email: *BiancaM.Bertrand@usda.gov* or *GaryD.Olson@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 987, as amended (7 CFR part 987), regulating the handling of domestic dates produced or packed in Riverside County, California. Part 987 referred to as the ''Order'' is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and is comprised of producers and producer-handlers operating within the area of production.

The Agricultural Marketing Service (AMS) is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of