



February 9, 2024

VIA E-MAIL: mspb@mspb.gov

Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419
Attn: Jennifer Everling, Deputy Clerk

Re: Proposed Rule – Appellate Jurisdiction

Dear Madam Deputy Clerk:

The National Treasury Employees Union (NTEU) submits these comments in support of the MSPB’s proposed rule regarding its appellate jurisdiction. 89 Fed. Reg. 8083 (Feb. 6, 2024).

As background, on December 12, 2022, NTEU petitioned the Office of Personnel Management to issue regulations to protect employees who might be moved involuntarily to the excepted service. A since-rescinded Executive Order directed agencies to shift employees doing “confidential, policy-determining, policy-making, or policy-advocating” work into a new excepted service Schedule F. *See* 85 Fed. Reg. 67631 (Oct. 21, 2020). Proponents of that Executive Order intended for employees shifted to Schedule F to have fewer rights, so that they could be “expeditiously remove[d].” *See* E.O. No. 13,957, sec. 1. In response to NTEU’s petition, OPM has proposed regulations that would clarify the rights of employees whose positions might be shifted from the competitive service to the excepted service or from one excepted service schedule to another. 85 Fed. Reg. 63862 (Sept. 18, 2023).

The MSPB’s proposed rule would align its regulations with one of OPM’s proposed changes. Specifically, OPM is proposing to allow employees who are shifted from the competitive service to the excepted service, or shifted from one excepted service schedule to another, to appeal that shift to the MSPB. *See* 85 Fed. Reg. 63883-84 (proposing amendment to 5 C.F.R. § 302.603). The MSPB’s proposal would add such appeals to the existing list of appeals that the Board may hear. *See* 89 Fed. Reg. 8084 (proposing amendment to 5 C.F.R. § 1201.3).

NTEU supports the MSPB’s proposal. The MSPB has the authority to issue this regulation. *See* 5 U.S.C. § 7701(a) (granting the MSPB jurisdiction to hear appeals of any action made appealable “under law, rule, or regulation”). The MSPB’s proposal is sound policy because its regulations should align with OPM’s to ensure uniformity of law. And OPM’s proposal to establish such appeal rights, in turn, promotes merit system principles. Employees should have rights when they are then shifted involuntarily to the excepted service or shifted involuntarily from one excepted service schedule to another.

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To ensure full alignment with OPM's proposal, the MSPB should clarify in the notice accompanying its final rule that this appeal right exists if an agency coerces the employee to "voluntarily" move to a new position that would require the employee to relinquish their competitive service status or civil service protections. *See* 85 Fed. Reg. 63877 (explaining that employees may voluntarily waive their rights, but an appeal right exists if the agency coerces the employee to shift to an excepted service schedule). The MSPB should further clarify that in any such appeal, employees may allege, if applicable, that the agency failed to act in accordance with the procedural requirements of 5 C.F.R. § 302.602 (as modified by OPM's proposal).

We appreciate your consideration of these comments. We urge the MSPB to act promptly once OPM has finalized its proposed rule.

Sincerely,

A handwritten signature in black ink, reading "Doreen P. Greenwald". The signature is written in a cursive, flowing style.

Doreen P. Greenwald
National President