Proposed Rules

Federal Register
Vol. 60, No. 6
Tuesday, January 10, 1995

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 300

RIN 3206–AG06

Time-In-Grade Rule Eliminated

AGENCY: Office of Personnel Management.

ACTION: Extension of public comment period on proposed elimination of time-in-grade rule.

SUMMARY: On June 15, 1994, the Office of Personnel Management (OPM) proposed regulations to abolish the time-in-grade restriction on promotion of Federal employees to positions in the General Schedule. The National Performance Review and National Partnership Council had recommended the elimination of the 1-year Federal service requirement for promotions because it prevents employees from applying for jobs for which the qualify.

To ensure that the public has ample opportunity to fully review and comment on the proposed rulemaking, this notice extends the public comment period for an additional 60 days.

DATES: Comments must be submitted on or before March 13, 1995.

ADDRESSES: Send or deliver written comments to Leonard R. Klein, Associate Director for Career Entry, Office of Personnel Management, Room 6F08, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Lee Shelkey Edwards on 202–606–0830, TDD 202–606–0023, or FAX 202–606–2329.

SUPPLEMENTARY INFORMATION:

A. Background

Since the early 1950's, Federal employees in General Schedule positions at GS–5 and above have had to serve at least 1 year in grade before being promoted. This restriction originated in statute with the now expired ''Whitten Amendment,'' a series of controls on expansion of the Federal work force during the Korean conflict. The time-in-grade restriction currently is in 5 CFR part 300, subpart F. Prior to the Whitten Amendment, no such regulatory restriction existed.

The National Performance Review recommended abolishing the time-in-grade restriction because it prevents employees from being considered for jobs for which they qualify. On June 15, 1994, OPM proposed regulations (59 FR 30717) to abolish the time-in-grade restriction. We received 241 written comments; 30 agreed with the proposal (22 individuals and 8 agencies) and 211 disagreed with it (197 individuals, 5 employee unions, 2 agencies, and 7 other organizations).

Comments from individuals include 189 form letters expressing serious concern that the proposal would have an adverse impact on minority and disabled employees. Others also commented that the elimination of time in grade could lead to favoritism and inequity in promotions, and promoted employees would not be qualified. A majority of commenters who opposed the proposal requested an extension of the comment period.

As requested, OPM is extending the comment period to allow additional time to examine the proposal. We are also using this notice to provide additional information on the background of the time-in-grade restriction and the impact of its elimination.

B. History of Restriction

In the early 1950's as the conflict in Korea escalated, Congress determined it should take steps to prevent a permanent buildup of the civil service with expanded grade levels as had happened during World War II and, during 1951–52, it adopted the so–called ''Whitten Amendment,'' a series of personnel controls. These statutory controls included a requirement to make all promotions and appointments on a temporary basis to simplify readjustment downward at the end of the conflict, an annual survey of positions to assure they were properly graded, and time-in-grade restrictions to prevent excessively rapid promotions.

Thus, the basis for the original time-in-grade restriction was not to prevent favoritism, but to prevent the permanent upgrading of the work force and avoid the disruption and readjustments required after World War II. The former Civil Service Commission was responsible for administering the restriction for competitive service positions and agency heads for excepted service positions.

Before allowing the Whitten Amendment to expire, Congress sought a review by the Civil Service Commission to determine whether any of its provisions, including time-in-grade, should be retained. The Commission reported that the time-in-grade restriction on competitive service employees had been placed in regulation and would continue even if the Whitten Amendment expired. Subsequently, Congress permitted the Whitten Amendment to expire effective September 14, 1978. Since then, competitive service employees, but not excepted employees, have continued to be subject to the Governmentwide time-in-grade restriction, although individual agencies could at their discretion require it for excepted employees.

Over the 16 years since its expiration, much has happened in Federal personnel administration. The civil service has been subject to numerous reviews, and several reports, most recently from the National Performance Review, have recommended deregulation and simplification of the hiring system. The time-in-grade rule is often seen as a symbol of bureaucratic red tape that binds managers hands and prevents the efficient use of qualified workers.

C. NPR Proposal

In its September 1993 report From Red Tape to Results: Creating a Government That Works Better & Costs Less, the National Performance Review (NPR) recommended abolishing the time in-grade requirement as an arbitrary limit on competition. The requirement excludes from consideration those candidates who meet OPM qualification standards and have the proven ability to perform the duties of higher grade positions, but who have not served at least one year in lower graded Government positions. See pages 11 and 15 of Reinventing Human Resources Management, Accompanying Report of the National Performance Review.

The National Partnership Council, established by Executive Order 12871 of October 1, 1993, was charged with developing legislative proposals for the President to implement the NPR recommendations. The Council's report

also recommended abolishing the time-in-grade restriction. In A Report to the President on Implementing Recommendations of the National Performance Review by the National Partnership Council, January 1994, the Council states on page 30:

''The NPC recommends the following * * * regulatory changes be made to allow employees to compete for job opportunities based on their qualifications and to enable decision makers to utilize employees more fully where needed—

• Abolish the time-in-grade regulatory requirement. For bargaining unit employees, the current requirement should remain in effect until the parties agree to modify it either through consensus or collective bargaining.''

Thus, OPM's proposal is consistent with recommendations of both the NPR and National Partnership Council.

D. Impact of Proposal

Shrinking Federal Work Force

When Congress passed the Whitten Amendment in the 1950's, the civil service was expanding to respond to the needs of the growing conflict in Korea. Time in grade was a brake on that expansion.

The situation today is just the opposite. The Federal Workforce Restructuring Act of 1994, Pub. L. 103–226 of March 30, 1994, mandates reductions in Federal employment levels. Employment in executive agencies is to be reduced in each fiscal year from FY 94 through FY 99 by a total of 272,900 positions. Also, the level of agency funding is being reduced because of deficit reduction legislation.

The results is that managers must do more with fewer employees and less money. Managers cannot inflate grade levels because their funds and position authorizations will be tight. And, since agencies are being asked to do more with less, the quality of the work force has become even more important. It makes more sense for managers to be able to select from among the best-qualified employees available, regardless of their existing grade levels.

Another effect of the shrinking work force is fewer opportunities for employee advancement. Agencies traditionally encourage employees to improve their capabilities. Employees who have acquired new skills and knowledge—many on their own time and with their own resources—will find far fewer vacancies available. The time-in-grade restriction is just one more obstacle to prevent them from competing to use the new skills they have worked hard to acquire, even though they meet OPM qualification standards.

Coverage

Not all Federal employees are subject to the restriction. The Whitten Amendment applied to both competitive and excepted employees in GS positions. However, when the law expired in 1978, excepted employees were released from its coverage because OPM's time-in-grade regulations apply only to the competitive service. Other competitive service employees under other pay plans, such as the wage grade system, also are free of the restriction. Yet the lack of a time-in-grade restriction has had no discernible adverse effect on these excepted and wage grade positions. OPM's proposal would put competitive service employees on an equal footing by allowing them to compete for advancement based on their qualifications just as these other employees do.

Qualifications

Many of the commenters who disagreed with the proposal believed that its abolishment would result in the promotion of employees who are not qualified for their jobs. This is not true. When the time-in-grade restriction was implemented in the 1950's, no effective means existed to prevent employees from advancing rapidly through the grades. But there is now in place a comprehensive qualification standards system covering all General Schedule positions in the competitive service.

To qualify for most positions, an individual must have 1 year of specialized experience equivalent in difficulty to the next lower grade level, or equivalent education. Even without the time-in-grade restriction, individuals must meet this specialized experience or education requirement. Thus, this proposal would not result in the hiring of unqualified persons. Nor would this proposal allow persons to be placed in a higher grade position merely because of their ''potential'' and without the necessary qualifying background. In fact, the only employees who could be promoted in less than 1 year are those who have higher level experience from another job or qualifying education.

Abolishment of time in grade simply means that employees may be considered for any grade for which they meet the qualification requirements, either through education or experience acquired in Federal or any other work settings. Employees may compete in civil service examinations without regard to time in grade, and this proposal would enable them also to compete under internal merit promotion procedures based on qualifications.

The time-in-grade restriction prevents that consideration, as with individuals who take lower graded jobs when nothing else is available and then find they are not allowed to apply for higher graded jobs for which they are well qualified. Letters from individuals supporting the proposed elimination provide other representative examples of how time in grade inhibits employee advancement:

—An employee pursued Bachelors and Masters degrees while balancing time as a student, mother, and Federal clerical employee in positions up to GS–5, yet time in grade prevents her from competing for the GS–9 professional positions for which she now qualifies.

—An employee whose agency has had a longstanding hiring freeze has been detailed to a higher grade position for more than 1 year. Although the employee is now qualified for a position two grades higher, he meets time in grade only for positions one grade higher.

—A minority employee entered Government employment as a GS–9. Despite two Masters degrees, a year and a half of law school, 10 years experience in executive positions at a private corporation, service as adjunct instructor at a major university, and other substantive experience, he was restricted by time in grade from applying for managerial positions for which he qualified.

—A co-op student accepted a GS–4 clerical job when her agency terminated its trainee program. Most jobs in her field start at GS–7, for which she qualifies, but she is eligible only for GS–5 because of time in grade and will have to pursue a different line of work.

—A retired military member with a degree and over 20 years of experience took a Federal wage grade position. A debilitating accident required him to accept a GS–4 position, and now time in grade prevents him from applying for positions consistent with his experience.

Impact on Minorities

Individual commenters and organizations representing minority employees were concerned that eliminating time in grade would lead to abuse and favoritism, with a negative impact on affirmative action and equal employment opportunity. OPM does not believe that retention of time in grade contributes to equality in the work place. Although abolishing the restriction will not eliminate the ''glass ceiling,'' it would be one more step toward eliminating artificial barriers to employees advancement for minorities and nonminorities alike.

Promotions

Even without time in grade, agencies must continue to assure that employees

meet Governmentwide qualification standards to be eligible for promotion, both competitive actions under the merit promotion program and noncompetitive actions such as career ladder promotions. Agencies also must continue to evaluate the relative qualifications of candidates to determine the best-qualified applicants under a competitive promotion action. Therefore, it is not necessary for an agency to have any additional processes or systems in place before implementing the abolishment of time in grade.

Many commenters focused on the impact of the proposal on career ladder promotions. Several thought employees in career ladders would expect rapid advancement without time in grade and that managers could be pressured into making rapid promotions. Again, we must stress that career ladder promotions require an individual to have 1 year of specialized experience equivalent in difficulty to the next lower grade level or possess equivalent education.

Furthermore, agencies have the discretion to specify requirements employees must meet for career ladder promotions, and many have done so. Such requirements include, for example, the level of performance to be met, the range of skills to be acquired, a finding that higher level duties exist, and the availability of funds. Elimination of time in grade will enable agencies to dispel the idea that promotion automatically follows a period of time in grade and instead concentrate on qualifications and the level of performance that is need for the next higher level.

One employee union suggested that OPM consider whether to limit the number of grades an employee could be promoted in a year. The current regulation has such limits only on promotions up to GS–5 because employees in grades GS–1 through GS–4 are not subject to the year in grade requirement. OPM believes grade limits are not needed because they too are arbitrary and disregard employee qualifications.

One employee union felt it would normally disrupt the work place to a great degree if a lower graded employee were promoted over higher graded employees. The union believes this should occur only when there is a specific, identifiable, business-related reason which the agency documents in writing. OPM's view is that managers must be prepared to deal with the impact of selection decisions, such as when selecting an individual from outside an immediate unit instead of an eligible employee within the unit. The manager decide which qualified employee is best able to carry out the duties of the position and must weigh various effects of different options. Abolishment of time in grade would not alter this responsibility.

Several commenters suggested managers hire workers at the grade needed instead of, for example, hiring at the GS–5 level and later promoting the employee to a GS–9. However, there may be instances where a manager hires an employee at a lower level to save money or because the manager feels the individual is not ready for the higher level. If the funding level changes or the employee demonstrates good work, the manager might want to promote the employee is less than 1 year. In neither of these cases is there a merit system violation, and our proposal would allow these employees to advance.

Violations

Some individuals, for personal reasons, must accept jobs lower than their highest skill level and later will seek higher grade jobs. However, it would be improper for an agency to hire someone at a lower grade to avoid proper appointing procedures and then promote the individual to the desired grade. For example, it would be improper to appoint an individual to a clerical job because he or she is not ''within reach'' for appointment to a professional job, and then promptly promote the person to the professional job. To prevent this, 5 CFR 330.501 prohibits the promotion of an employee within 90 days of a new competitive appointment. OPM continues to enforce violations of that provision and, in the absence of a time-in-grade rule, would closely monitor agency actions for potential violations.

Other protections against potential abuse are the statutory merit principles and prohibited personnel practices (5 U.S.C. 2301 and 2302) in place since January 1979. For example, it is a prohibited personnel practice for an agency official to grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for the purpose of improving or injuring the prospects of any particular person for employment (5 U.S.C. 2302(b)(6)). These statutory provisions did not exist when the Whitten Amendment expired in 1978. Alleged violations may be pursued through the independent Office of Special Counsel, which is responsible for investigating allegations of prohibited personnel practices and initiating corrective or disciplinary action where warranted.

Training Agreements

Agencies have long had the authority to establish training agreements under which employees acquire qualifications at a faster than normal rate. This proposal will have no impact on agencies' continued use of training agreements. However, with abolishment of time in grade, agencies no longer will need to obtain OPM approval of training agreements that contain waivers of time in grade.

Training agreements are traditionally used for critical shortage occupations at the entry level. These programs provide a valuable recruitment incentive in filling positions where qualified applicants are in extremely short supply.

E. Waivers

Several commenters recommended the time-in-grade restriction be retained with authority to waive it in inequitable or hardship situations or to promote an outstanding employee. Agencies currently have waiver authority in inequitable or hardship situations. The problem with this approach is that an employee is dependent on agency management to seek a waiver when management needs it. Our proposed elimination of the restriction would free employees to seek other opportunities, in any agency, without being dependent on management's waiver action. Also, because of the restriction, managers often are not aware that lower graded employees may have higher level qualifications and thus seek job candidates from outside the agency.

F. Bargaining Unit Employees

One employee union suggested that OPM should not allow agencies to eliminate time in grade for nonbargaining unit employees while continuing to apply it to those in bargaining units. OPM's proposal is consistent with the National Partnership Council recommendations to abolish the regulatory time-in-grade rule. Inasmuch as time in grade has been a condition of employment for bargaining unit employees, the Council recommended that it should remain in effect until the bargaining unit parties (agency management and union) agree to modify it either through consensus or collective bargaining. In other words, OPM's elimination of the regulation would have no effect on bargaining unit positions unless the parties agreed to modify or eliminate time in grade.

OPM has no authority to require agencies to seek agreement with unions, through consensus or collective bargaining, over time-in-grade

provisions or to prohibit agencies from implementing a regulatory revision affecting nonbargaining unit positions.

G. Public Notice

Many individual commenters asked that we ensure proper dissemination of National Performance Review initiatives to all levels of the work force to allow greater input and commentary. Some commenters suggested that OPM's 60-day comment period on the initial proposal appeared to be designed to restrict the number of comments and commenters.

OPM's 60-day comment period is the standard open period for receiving comments on proposed regulatory changes. As is our usual practice required by law, OPM distributed the time-in-grade proposal to agencies with instructions for public posting. OPM also made the proposal available through its primary electronic bulletin board, Mainstreet, at 202–606–4800. OPM issued a press release on the proposal, and it was widely reported in the press. We are taking the same steps with this notice. Furthermore, the recommendations of the NPR and the National Partnership Council were widely reported in the press and in newsletters that reach employees.

Authority: 5 U.S.C. secs. 552, 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., page 218, unless otherwise noted.

Secs. 300.101 through 300.104 also issued under 5 U.S.C. secs. 7201, 7204, 7701; E.O. 11478, 3 CFR, 1966–1970 Comp., page 803.

Secs. 300.401 through 300.408 also issued under 5 U.S.C. secs. 1302(c), 2301, and 2302.

Secs. 300.501 through 300.507 also issued under 5 U.S.C. 1103(a)(5).)

Office of Personnel Management.

James B. King,

Director.

[FR Doc. 95–562 Filed 1–9–95; 8:45 am]

BILLING CODE 6325–01–M

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5 CFR Part 551

RIN 3206–AA40

Pay Administration Under the Fair Labor Standards Act

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is publishing a proposed rule to amend regulations on the Fair Labor Standards Act (FLSA or the ''Act''). This rule supersedes instructions contained in Federal Personnel Manual Letter 551–9, *Civil Service Commission System for Administering the Fair Labor Standards Act (FLSA) Compliance and Complaint System* (March 30, 1976), provisionally retained through December 31, 1994; and provides for OPM compliance authority regarding FLSA matters.

DATES: Comments must be received on or before February 9, 1995.

ADDRESSES: Written comments may be sent to Bruce Oland, Chief, Program Development Division, Office of Agency Compliance and Evaluation, Room 7661, U.S. Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Jeffery Miller, (202) 606–2530.

SUPPLEMENTARY INFORMATION: In 1974, Congress amended the FLSA to authorize the former Civil Service Commission (CSC) to administer the Act for Federal employees. OPM has since taken over this responsibility and issued substantive regulations at part 551 of title 5, Code of Federal Regulations, prescribing the criteria and conditions for administration of the Act. These regulations have, from time to time, been supplemented by issuances under the Federal Personnel Manual System (FPM). FPM Letter 551–9 describes the complaint and compliance system for FLSA complaints. One of the key features of this system is that OPM served as an adjudicator of individual (and group) FLSA complaints. This role remained essentially unchanged until 1990.

On March 30, 1990, a Federal court in *Carter* v. *Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990), ruled that the rights of certain employees to seek review of FLSA complaints were limited by the *Civil Service Reform Act of 1978* (CSRA). In this regard, the court determined that employees covered by negotiated grievance procedures (NGP's) established under Section 7121 of title 5, United States Code, could not seek judicial review of matters under the Act and that their only forum in which to seek relief is through the NGP up to and including the arbitration process. A subsequent decision by the Federal Circuit in *Muniz* v. *U.S.*, 972 F. 2d 1304 (Fed. Cir. 1992), expanded on *Carter* by holding that its principles also applied to former employees of agencies (including retirees) and employees promoted out of bargaining unit positions.

On October 1, 1990, the Supreme Court denied certiorari of the Federal Circuit's en banc decision in *Carter.* As a result, OPM informed agencies by memorandum dated November 29, 1990, that, in view of *Carter*, OPM would no longer adjudicate complaints from employees covered by NGP's when those NGP's did not exclude grievances over FLSA matters, but would continue to accept complaints from other employees.

On April 23, 1992, the General Accounting Office (GAO), in *Cecil E. Riggs, et al.*, B–222926.3, announced that, in view of *Carter* and other judicial decisions, it too would no longer accept complaints from employees covered by NGP's. The GAO subsequently amended (57 FR 31272, July 14, 1992) its regulations at 4 CFR parts 22 and 30 to reflect this policy change. The GAO noted that it would continue to accept claims from Federal employees not subject to an NGP.

With judicial and GAO decisions placing most FLSA-covered employees under the exclusive jurisdiction of the NGP for the purpose of FLSA complaints, OPM has reviewed its FLSA compliance program to determine whether the program could be changed in a manner that would facilitate efficient governmentwide administration of the Act. Specifically, OPM believes that FLSA complaint adjudication at the agency level, now provided to most FLSA-covered employees under the above decisions, can and should be extended to all employees. In this event, OPM would no longer adjudicate FLSA complaints. In the case of bargaining unit employees, the procedure would be the NGP (unless FLSA complaints are excluded), with the possibility of invoking binding arbitration. All other employees would seek redress through and agency-based review or grievance system. Such employees also would have access to GAO and the courts if they are not satisfied with the agency decision, thus providing them with a third-party review opportunity. OPM believes this change, as well as other provisions of this proposed subpart, will make administration of the Act more efficient and consistent. The subpart more clearly defines the various FLSA complaint resolution forums and explains which employees have access to which forum at a particular time; i.e. negotiated grievance procedures, or other agency-based review or grievance systems, the GAO, and the judiciary.

OPM also believes that the complaints adjudication process is likely to work better if the parties to the dispute are better aware of their respective responsibilities. Therefore, the proposed rule contains sections discussing the responsibilities of both the employee and the agency. Another section describes the responsibilities of OPM. In this regard, while OPM proposes to discontinue accepting complaints, OPM