

## CHAPTER 9

### PROMOTION ACTIONS

#### **I. INTRODUCTION**

Promotions in the federal service are required to be based upon "principles of merit and equal opportunity" in order to enhance the effectiveness of both individuals and agencies. Federal Personnel Manual 335-1, Subchapter 1. Congress enacted merit system principles which specifically provide that "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". 5 U.S.C. 2301(b)(2). It can be a "prohibited personnel practice" to "discriminate", "deceive", "willfully obstruct", or grant any unauthorized preference to candidates for promotion.

5 U.S.C. 2302(b).

#### **This is the law.**

Promotions provide a clear avenue to secure greater financial and personal rewards on the job. It is an area of great concern and interest to those we represent. With this in mind, NTEU has negotiated extensive contract provisions which create significant procedural protections to further the requirements of objectivity and fairness in the promotion process, establish standards by which to challenge agency actions, require the production of information to assist in evaluating whether a promotion action is proper and set forth remedies for particular promotion violations.

Stewards often hear complaints that a particular promotion action was not done in a fair and objective manner, that pre-selection or favoritism runs through the system, that employees were found not qualified, received low ranking scores, or were non-selected for reasons which, on their face, do not make any sense. The promotion process is a mystery to many people. The perception is that management manipulates the system to do whatever they want, whenever they want, to select whomever they want.

This Chapter is designed to guide NTEU stewards through the complicated merit promotion and career ladder promotion process. Over the years, we have met with success in challenging agency actions in the promotion arena. Federal statutes, regulations, and our contracts not only force agencies to comply with a number of important procedural steps to ensure that promotions are made systematically, but also establish standards of fairness, objectivity, and uniformity which must be followed. Management actions can be evaluated under these standards in a subsequent grievance. Therefore, the ability to challenge management's actions in a promotion is a significant benefit of NTEU representation.

## **II. BUILDING MEMBERSHIP THROUGH PROMOTION CASES**

Promotion cases reinforce the relationship between a member and NTEU and are an effective membership incentive to non-members. An employee's belief that management violated his/her promotion rights strikes at the very heart of that employee's sense of equity, personal welfare, and self-image. Promotion action cases offer us a great opportunity for increasing our collective strength and visibility. Lunch and Learn sessions covering such topics as "Overview of the Merit Promotion Process" and "Interview Techniques" are extremely popular among rank and file bargaining unit employees.

Non-members who express an interest in learning about the merit promotion process or who request the Union to investigate or represent them in a promotion-related case should always be asked to join NTEU. It is very natural to tie our recruiting efforts to such discussions.

In addition, we should always publicize our efforts to protect and advance the interests of employees in the area of promotions. This can be done through newsletters, flyers, desk drops, bulletin board postings, lunchtime or after work meetings, and personal conversations. Our job does not end when we obtain a favorable resolution or a clear remedy for an employee in a promotion case. We must use these victories to publicize our efforts and build our strength through increased membership.

## **III. KNOW YOUR CONTRACT**

In order to properly represent an employee in a promotion action, it is absolutely essential that you have a first hand knowledge of your particular contract. No two contracts are completely identical. While similarities do exist, each contract provides somewhat different details and procedures which the agency must follow in a competitive promotion action.

For example in the IRS, for all positions except GS-8 and below at IRS Centers, applicants for competitive promotions are rated and scored in three parts: 1) their current Job Element Appraisal; 2) their ranking on the critical elements of the position to be filled; and 3) points for Incentive Awards received. See NTEU/IRS 2002 National Agreement, Article 13, Section 5. At IRS Centers for positions GS-8 and below, employees are ranked on "pertinent experience and training", not on the elements of the position to be filled. See 2002 National Agreement, Article 13, Section 5F. At the Bureau of Customs and Border Protection<sup>1</sup> (NTEU Customs Service Agreement, Article 36), non-SSA and non-FDA Operating Divisions in the Department of Health and Human Services (NTEU/HHS Multi-Region Agreement, Article 19, Section 9), the Financial Management Service (NTEU/FMS Agreement, Article 13, Section 9), and the Bureau of Alcohol, Tobacco, and Firearms (NTEU/AFT Agreement, Article 9, Section 4), employees are rated in a competitive promotion by means of a crediting plan or so called "KSA's" (Knowledges, Skills, and Abilities) which may or may not weigh the current appraisal or incentive awards in the same manner. While each of these contracts requires that such evaluative methods conducted by management be done fairly and uniformly, the procedures and scoring under which each is different and must be examined closely. It is very important that you, as a Union representative, take the time necessary to thoroughly familiarize yourself with the requirements of your contract. Do not be afraid to ask

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<sup>1</sup> Formerly U.S. Customs Service.  
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questions of others in your Chapter or your National Field Representative. The system is complicated and many times management counts on this complexity to act as a shield to cloak improper action. It is our job to pierce this shield.

#### **IV. ANALYSIS OF THE CAREER LADDER PROMOTION PROCESS**

There are two general categories of promotions: competitive promotions and career ladder promotions. Both career ladder and competitive promotions are based upon an evaluation of the employee's performance in the current position and an assessment of the employee's future potential to perform in the position in question.

An employee in a career ladder position is entitled to promotion to the next appropriate grade level of his or her position without competing against other employees. However, a career ladder promotion is not automatic. Three basic criteria must be met. First, the employee must meet the requisite time in grade requirements (usually one year). Second, the employee must be rated at least Fully Successful on the performance standards of his/her current position. See 5 C.F.R. 335.104. Third, the employee must demonstrate capability to satisfactorily perform at the next higher level. Career ladder promotions are generally required to be effective the first full pay period after the requisite criteria are met.

The employee's immediate supervisor is normally responsible for certifying that the employee can perform at the next higher level. While upper level management usually must approve the supervisor's assessment of potential, it is that supervisor's familiarity with the employee's work that is of prime importance. This is a subjective judgment made by the supervisor without use of any ranking materials such as crediting plans.

Consequently, the supervisor's appraisal of performance in the current position is an essential component of a career ladder promotion and of particular relevance when the critical elements and standards for the next higher level are identical to the current position. Indeed, some agencies have agreed that Fully Successful performance at the current grade satisfy the performance requirements for career ladder promotions when the elements and standards are no different at the next higher grade level. See for example NTEU/IRS 2002 National Agreement, Article 13, Section 8.

The supervisor's assessment of an employee's ability (or lack thereof) to perform at the next higher level is usually the reason why career ladder promotions are denied. This assessment of the employee's future ability to perform can be challenged under the fair and objective standards contained in the Promotion and/or Performance Appraisal articles of your contract. Management is required to accurately appraise an employee's performance and potential to do more complex work. In addition, management can commit a prohibited personnel practice or violate contractual or internal manual requirements concerning the proper assignment of work (See NTEU/Customs Agreement, Article 20, Section 1 and HHS, Multi-Region Agreement, Article 16, Section 2) if management improperly fails to provide developmental assignments so employees can demonstrate the ability to perform higher-graded work.

#### **V. ANALYSIS OF THE COMPETITIVE PROMOTION PROCESS**

The remainder of this Chapter will deal with an analysis of the competitive promotion

process. As previously stated, the contract between NTEU and the respective agency is the starting point for evaluating a potential promotion grievance. In addition to the contract, internal agency rules and regulations such as Treasury's Personnel Manual Chapter 335, Internal Revenue Manual Chapter 335, and Customs Merit Promotion Plan, Directive No. 51335-03 contain valuable information about how the promotion process should run. It makes good sense to obtain a copy of such internal agency rules. They will not only be invaluable to you in developing your case at the chapter level, they will also be helpful to your Field Representative should the case move forward to arbitration or other third party review. They are binding on the agency unless in direct conflict with a provision of the contract. If an agency manual provision, rule, or regulation is in direct conflict with the contract, the contract governs.

Competitive promotion violations can occur at the following stages:

- 1) Vacancy Announcement Stage
- 2) Performance Appraisal Stage
- 3) Evaluation/Ranking of Potential Stage
- 4) Selection Stage

You might find agency errors at any stage, more than one stage, or even at every stage. The contract, supplemented by internal agency rules and government-wide statutes and regulations, will lay out the procedures the agency must follow at each stage of the promotion action and the standards of fairness and uniformity under which the agency's actions must be judged.

Often, you must combine several errors to determine the effect on the competitive process. An error which looks trivial standing alone may combine like a pebble in a pile to produce a real harm to the employee's interests in the selection. The remedy will depend on the nature of the harm and the stage or stages at which the harm occurred.

**Remember that you must examine each and every stage of the process to determine if flaws exist in the process as a whole.**

### **STAGE 1: VACANCY ANNOUNCEMENT**

#### **A. To post or not to post:**

- Question: Is the vacancy one which management must fill according to the contract's procedures for processing competitive promotions?

Answer: The contract itself is the best reference in making this determination. Management may attempt to fill non-competitively a position vacancy which it is required contractually to post and fill by competition. In such a case, the Union or any potential applicant may grieve the failure to post the vacancy.

#### **B. Who can compete:**

- Question: Can the contract or internal agency rules require a sequence for considering internal applicants or mandate that a certain number of positions be

filled from inside the agency rather than by individuals from outside the agency?

Answer: Many of our contracts or agency rules contain a "first consideration" obligation. This means the agency is required to consider current agency employees for vacancies before considering candidates from outside the agency. If external applicants are considered along with internal applicants when first consideration applies, internal applicants who were improperly considered (i.e., omitted from a best qualified list) may be entitled to priority consideration. While we cannot require an agency to select the in-house candidate before considering the outside applicant, often this will provide a mechanism of pressuring the agency to provide meaningful "first consideration".

Federal court decisions have limited our rights to negotiate first consideration provisions due to an infringement on management rights. However, many agencies have taken it upon themselves to continue with first consideration or have agreed that certain numbers of vacant positions be reserved for in-house employees.

### **C. Contents of the vacancy announcement:**

- Question: Was the vacancy announcement posted for a specified length of time, and did it contain all the necessary information?

Answer: The vacancy announcement must be posted for a specified length of time, for example, 10 days under many of our contracts. The contract and agency regulations will specify what information the announcement must include. A typical announcement will contain:

1. Announcement number;
2. Opening and closing dates;
3. Title, series, grade, and organizational location of the position(s);
4. Shift and number of positions available (not required if a roster is announced);
5. Minimum eligibility of the position;
6. Summary of the duties of the position;
7. Selective placement factors;
8. Evaluative methods to be used by a ranking panel or official such as interviews or tests;
9. Statement of roster, if applicable;
10. Statement of equal employment opportunity;
11. Where to submit applications;
12. What application materials to submit (i.e., SF 171, current performance appraisal, interest card); and
13. The career ladder potential of the position.

- Question: What if the agency changes the vacancy announcement after posting it?

Answer: Any change in the vacancy announcement that could result in other

employees being interested and eligible in the position warrants an extension of the posting time.

- Question: How are the minimum qualifications for the vacant position determined and by whom?

Answer: Once the application materials are submitted, the usual practice is for a personnel staffing specialist to review the application materials for each candidate to determine if the employee possesses the requisite experience and education to qualify for the job. Qualification standards are set by the agencies for the particular position and are governed by the General Schedule (GS) Qualification Standards and the Wage Grade<sup>2</sup> and the X-118C Handbook for Trades and Labor Occupations<sup>3</sup> established by OPM. The GS Qualification Standards, the X-118C Standards, and agency personnel manuals list the qualifications by job series. In order to be eligible to even compete, each candidate must have a specified amount of time in grade at the next lower grade level, training, experience, and/or education. A candidate without the minimum eligibility/basic qualifications cannot compete for the position. If the minimum qualifications are not met by the selected employee, an illegal appointment occurs which normally requires the selectee to vacate the position and a new competition to be run. If the minimum qualifications are misapplied, anyone kept from competing due to this error can grieve being left out of the competition.

- Question: What methods/techniques/means/ways can management use to evaluate the employee?

Answer: The agency can only use those evaluative methods listed in the vacancy announcement. These can include personal interviews, writing examples, testing, or crediting plans. Personal knowledge of the candidate is never a proper tool for management to use in the selection process. Many contracts have language which mandates that the rating and ranking process and the selecting official can only use that information which is part of a candidate's application. This limiting language is found in 5 CFR 335 and as a government-wide regulation applies to all covered employees. The requirements of fairness and uniformity mean the methods used to assess applicants for promotion have to relate to the job and be applied to everyone equally. Failure to apply fairness and uniformity in the promotion process might constitute a violation of the Merit System Principles and might rise to the level of a Prohibited Personnel Practice found in 5 USC § 2302. If the grievance alleges that the agency failed in some material way to fairly apply the selection process you should cite a violation 5 USC § 2302. You can also allege a Prohibited Personnel Practice when the non-selection was the result of discrimination as defined by the equal employment opportunity statutes and regulations (e.g., Civil Rights Act, Title VII, Rehabilitation Act,).

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<sup>2</sup> This information can be found on the OPM web site at <http://www.opm.gov/fedclass/html/gsseries.asp>

<sup>3</sup> This information can be found on the OPM web site at <http://www.opm.gov/qualifications/x-118c/index.htm>

- Question: What special qualities can management properly use as "selective placement factors"?

Answer: Selective placement factors are special qualities required by the job. They should be looked at carefully as they often mask pre-selection. The factors must have a rational relationship to the job and usually are required by contract and/or agency rules or regulations to have been declared in writing prior to the job announcement being opened. Information on selective placement factors for previous announcements would be a good place to look for clues of pre-selection. Agencies are required by OPM to maintain information on selections for 2 years after the selection is made.

- Question: If a long-term vacancy announcement or a roster is being announced, is it used correctly?

Answer: Long-term vacancy announcements and rosters are used when management expects several vacancies to occur over a period of time. The long-term announcement and roster allows management to go through the ranking process once, rather than several times, when filling unexpected vacancies. Management's vacancy announcement must specify the opening and closing date of the announcement, the first or earliest time it expects to make a selection from the roster, and when and how it will up-date the roster with applicants received after the first selection. The roster must have a specified expiration date.

## **STAGE 2: PERFORMANCE APPRAISAL**

A performance appraisal is the immediate supervisor's evaluation of the employee in his or her current position. It is an extremely important evaluative tool in a promotion case. In the IRS, it stands on its own to count for points in the form of a converted score which should always be checked for mathematical accuracy. However, in all agencies, the performance appraisal is used by ranking officials as a method to predict future performance in the job to be filled. Consequently, an improper performance appraisal can taint or contaminate the entire ranking process.

If a performance appraisal is being challenged upon its use in a promotion action, it is absolutely essential that these two rules be followed.

### **Rule 1**

Any grievance should cite both the Performance Appraisal article and the relevant provisions of the Promotion article that set forth the standards used by the ranking official(s).<sup>4</sup> It is also important to note that the process for grieving the employee's Performance Appraisal rating itself must be followed because grieving a Performance Appraisal rating is its own case separate and apart from the grievance related to a grievance alleging that an employee has not been given proper

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<sup>4</sup> For instance at IRS, such grievances should always cite 2002 Negotiated Agreement Article 12, Section 4(C)(E) and Article 13, Section 1A and Article 13, Section 5C. Those covered by 2002 Negotiated Agreement in positions GS-8 and below should cite Article 13, Section 5F. Other violations may also merit citing other contract provisions.

consideration in a selection process.<sup>5</sup>

## **Rule 2**

Try to raise as many critical element ratings as possible. Scores given to employees on their appraisals are given different weights or levels of consideration during the promotion/ranking process and the more scores raised, the more potential there is for relief. If we can demonstrate the employee did not receive a fair and objective evaluation from the supervisor and if we can raise the employee's score to a degree that he/she now makes the best qualified list (or in some cases improves his/her position on the best qualified list), then we can succeed in obtaining the remedy of priority consideration.

### **Ten Issues to Consider**

Here are some issues to consider in determining whether the employee received a fair and objective performance appraisal from the supervisor:

1. Were the narratives and ratings given by the supervisor to other employees of the same grade and position consistent with those given to the grievant? For example, if certain qualifications are cited in support of a "5" rating for an employee - and if the grievant possess those same qualifications but they are not cited in the narrative supporting the Grievant's rating of "3" - we can succeed in raising the Grievant to a "5". In other words, is the grievant subject to disparate treatment when compared to other similarly situated employees?
2. Was the evaluation based on performance outside rating period? Does the rating period cover the time frame specified in the contract and is it consistent with the rating periods of similarly situated employees?
3. Does the evaluation take into account all of the employee's performance relative to that specific factor?
4. If the employee's evaluation on a particular factor is lower than a recent performance evaluation, what documentary evidence exists to support the lower evaluation?
5. Do the Grievant's elements and standards permit, "to the maximum extent feasible", "the accurate evaluation of job performance on the basis of objective criteria", as required by 5 U.S.C. 4302(b)? In other words, are the elements too vague, broad, subjective, imprecise, absolute, or in violation of the statute or contract? In an important case, Newark Air Force Station, 30 FLRA 616 (1988), the FLRA ruled that violations of the objectivity requirements of 5 U.S.C. 4302(b) are grievable.
6. If the evaluation was revalidated, what documentary evidence exists supporting the

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<sup>5</sup> IRS Chapters should pay special note to the fact that under the 2002 National Agreement, Article 12, an employee must have grieved his/her Performance Appraisal within 15 workdays of receipt of his/her annual performance appraisal. This is a substantial change from previous contracts which allowed employees to grieve their performance appraisal within 15 workdays of their receipt by the employee or within 15 workdays of their use in a completed personnel action.

revalidated rating?

7. What type of counseling, assistance, or other guidance was given to the employee by his or her supervisor relative to a particular rating? This is especially relevant when there is an unexplained drop from the prior rating.
8. Was the employee properly informed of the manager's expectations or local guidelines and given the opportunity to participate in the establishment of standards at the beginning of the appraisal period as required by 5 U.S.C. 4302(a) and our contracts?
9. Do the narratives support the numerical ratings and do they correspond to the proper element?
10. Did the employee file a rebuttal to the evaluation, and, if so, was it considered in the promotion action by the ranking official?

### **STAGE 3: EVALUATION AND RANKING OF POTENTIAL**

This is the stage of the merit promotion process that is most frequently challenged. At this stage, the employee's future ability to perform in the position to be filled is assessed by a ranking official(s) via use of a crediting plan or an evaluation against the elements of the vacant job. An employee's rating at this stage is usually done in a very subjective manner with ranking officials having different judgments as to what in the employee's past education, training, or expertise is predictive of future success. Most of our contracts require that the ranking process be fair and uniform and not be based upon personal knowledge. Many of our contracts require narratives to justify ranking scores.

Because of the subjectivity of this process and the contractual requirements of fairness, many promotion grievances result from deficiencies in the evaluation stage of the ranking process.

#### **A. The Procedure**

##### **1. Ranking Panel/Official**

The ranking process is generally conducted by a panel of three management officials but can be conducted by a single ranking official. The immediate supervisor of a candidate may serve as a ranking official. However, the selecting official for the vacancy may not serve as a ranking official. The ranking panel or ranking official must evaluate the candidates based on the performance appraisals by the immediate supervisors, relevant experience, training, awards, and other relevant factors identified in the vacancy announcement.

##### **2. Written Narrative**

Each member of the ranking panel individually scores each candidate. A written narrative supporting the score is normally required.

### **3. Assigning Points**

The ranking panel or official must then assign points to each candidate's potential to perform in the vacant position. Management establishes the standards which are supposed to measure how the employee will perform in the position to be filled. These standards are supposed to correspond to the particular knowledge, skill, or ability that is needed to successfully perform in the position.

Once the employee is ranked, the usual practice is to convert the scores to point totals via a formula either contained in the contract, the crediting plan itself, or the agency's internal manual. In most agencies, the point total after the ranking (which takes into account the employee's performance appraisal and awards) becomes the total score. At IRS, the ranking scores comprise the second of a three-part scoring system. In any event, a total score is achieved for all the candidates.

### **4. The Highly Qualified List**

Candidates are then listed in the order by the highest score. Management then establishes a "cut-off" score, usually where there is a "natural break" between one group and another. Those who meet or exceed the cut-off score comprise the highly qualified candidates. This is often called the "HQ" list.

### **5. The Best Qualified List**

The top candidates on the HQ list are referred to the selecting official. These candidates are called best qualified and the list of names sent to the selecting official is known as the "BQ" list. Our contracts usually provide the number of BQ candidates to be sent to the selecting official based upon the number of vacant positions. For example, at IRS and HHS, four candidates are referred to the selecting official if there is one vacant position.

### **6. Challenging the Score Produced At the Ranking Stage**

A grievance contesting the ranking is designed to demonstrate that the employee should have been given a higher score. Mere fractions of a point can separate an employee from the best qualified list and getting more points is the name of the game. Therefore, it is always important to determine the aggrieved employee's point total and how many points are need to make the BQ list (if the employee failed to BQ) or to improve his or her standing on the BQ list.

Keep in mind what remedy is available for an improper ranking of the grievant (i.e., he or she was not "properly considered" for the job). For instance, if raising the grievant's ranking score by three points is needed elevate the grievant from the highly qualified to the best qualified list, and if we are challenging only one alleged inaccuracy, the remedy of which is one point, the remedy of priority consideration is not available. Yet, the grievance may be worth pursuing for the sole purpose of raising the score for a potential future promotion. However, the grievant would not be entitled to priority consideration for that vacancy.

**Here are some issues to be considered when determining whether a ranking official or panel gave a fair and objective evaluation.**

1. Did the panel/official follow the rules outlined above regarding who can be on the panel, who can be ranking official, individual scoring, and proper ranking by score?
2. Did the panel/official rely on personal knowledge or the personal knowledge of another member of the panel or personal knowledge of another person in the process such as someone from the Personnel Office or Labor Relations Office?
3. Do the narratives refer to information which can be found in the employee's promotion package or did the panel members or single official go outside of the record to find favorable or unfavorable items?
4. Are the scores or narratives given by different members of the panel to the employee consistent? Are panel members coming to different conclusions about an employee's potential based upon review of the same information? For example, if a narrative justifies a "5" rating by stating the employee received an award or has a degree, did everyone get a "5" who possessed these attributes?
5. Are the rankings uniformly applied? Are employees ranked Outstanding in the same critical elements by their supervisor being rated the same way in the corresponding elements by the ranking official?
6. Is the ranking panel or official omitting information contained in the employee's package that was used to justify a higher score for another employee?
7. Are incumbents of certain positions or employees under the supervision of a particular manager being ranked higher or lower than employees in other identical jobs?
8. If ranking scores are lower than the applicant's corresponding performance appraisal scores, check to see if there is uniformity among employees with similar elements and standards?

You should be on the lookout for evidence of disparate treatment among employees or evidence of a simple formula used to rate with no real assessment of potential. A good place to start is to look at the scores given to those on the BQ list. Do not confine yourself to examining the issues as stated above. Violations can occur in a number of different forms. Since your goal is to raise the score, you should never argue that a BQ candidate (who is also in the bargaining unit) was rated too high. You should argue that the employee you represent should have been rated that high too. Remember, the ranking panel must be uniform as much as practicable and evidence of inconsistencies or preference for types of employees (i.e., those with high scores in an element or those in certain positions) may be potential contract violations.

#### **STAGE 4: THE SELECTION**

At this stage, management chooses an employee to fill the vacant position. The previous stages should have produced a list of candidates with basic qualifications who scored the highest in an evaluation of current performance and potential. The selecting official has a substantial amount

of discretion in choosing from the list of best qualified employees. He/she has the power to decide not to select anyone at all. We are concerned here with the action in which the official chooses someone to fill the vacant position. You will look next at the method of distinguishing among the best qualified candidates and the reasons for the choice itself. At this stage, you will be seeking a retroactive promotion with back-pay and interest on the back-pay.

- Question: Was the selection proper?

Answer: A myth frequently repeated by management is: "You can't grieve non-selection." This myth is misleading, although it is true that you can't grieve non-selection (i.e., I wasn't selected so I'm filing a grievance solely because I wasn't selected). However, you can grieve non-selection if you prove improper consideration by the selecting official or you prove illegal discrimination.

The selecting official does have a great deal of discretion in selecting from the best qualified list. However, any selection technique, such as interviewing the best qualified candidates, must be uniformly applied. When this uniformity is breached, the grievant is entitled to relief.

If you can show that the selection decision included such improper factors as race, sex, age, religion, politics, marital status, or union activity you can win retroactive promotion for the employee passed over. Contact your National Field Representative if you think that an error has occurred at the selection stage of the promotion process.

- Question: Was the selection properly effected?

Answer: Generally, NTEU agreements specify the time period following a selection during which a promotion is to take effect. For example, the collective bargaining agreement might provide that promotion is to take effect no later than one complete pay period following the employee's selection.

## V. APPROPRIATE REMEDY

**The remedy available to the employee harmed will differ depending on the stage or stages at which the management violation occurred.**

### 1. **Priority Consideration**

In general, the main remedy an employee may receive is priority consideration for a subsequent position for which the employee is qualified.

This is the traditional remedy available when we are challenging whether an employee's performance appraisal and/or ranking in a promotion was not fair and objective. Priority consideration is designed to remedy an improper consideration in a past promotion by giving "priority" consideration for a subsequent position for which the employee is qualified. This would occur where the employee was erroneously left off the best qualified list, where an employee's ranking on the best

qualified list is improved as a result of the grievance, or where an employee was omitted from or improperly ranked on a roster.

Employees must recognize that receiving priority consideration does not automatically entitle them to a promotion. Instead, they will be considered before any other candidates for a vacancy that occurs in the future. An employee may, however, grieve the failure to be accorded proper - i.e., meaningful good faith consideration - when receiving priority consideration.

## **2. Retroactive Promotion**

Retroactive promotion remedies are normally found when an employee has been improperly denied a career ladder promotion or when there is a violation at the selection stage of a competitive promotion in the form of prohibited discrimination or anti-union animus.

**In addition to seeking specific remedies, always request:**

- 1. that the grievant be made whole to the maximum extent allowed by law; and**
- 2. "any other appropriate remedy".**

This provides the greatest freedom for fashioning a remedy to fit the harm suffered. Other possible remedies do include a re-evaluation of the employee or re-running the promotion action. These are usually not the preferred remedies but are options to consider and are covered when you request "any other appropriate remedy".

## **VI. GATHERING INFORMATION ABOUT THE PROMOTION ACTION**

Answering questions about the promotion action requires that you obtain and master the information available regarding the promotion action. You need such information as the vacancy announcement, the Grievant's performance appraisal, and the relevant qualification standards, to name but a few of the items. Your contract might specifically identify the information to which you are entitled in a promotion case. In addition, the Union is entitled to access to information under 5 U.S.C. 7114(b)(4) which gives us the right to information that is relevant and necessary to process grievances and to otherwise represent the interests of bargaining unit employees.

- Question: What information is management required to give me?

Answer: Generally, you would be entitled to the promotion packages for all HQ and BQ candidates and your grievant. However, there is little use for information about employees who are ranked lower than your grievant.

A promotion package will contain the performance appraisal with narratives, the ranking panel's evaluation with narratives, and any other evaluative material, such as records of experience, training, and awards. Much evaluative information will

generally be contained in the employee's Official Personnel Folder ("OPF").

To protect the privacy of other candidates, you will generally receive the information without the candidate's name or social security number. Request that management create a key which allows you to organize the information by "Employee A", "Employee B", "Employee C", and so on. This will allow for an organized discussion of the facts of the case.

If you challenge a selection by alleging consideration of improper factors, such as race, you are entitled to receive information about the race of each candidate and the selecting officials. You can also receive information about each employee's date of birth, sex, national origin, religion, entry on duty date, and service computation date. You must state that the information is "necessary and relevant" to the grievance or a potential grievance and state how the information will help you prove your case or eliminate a potential violation.<sup>6</sup> If management denies your information request, contact your National Field Representative for further advice.

In cases where the grievant made the BQ list, some contracts limit the information available to the Union to the promotion packages of the BQ candidates. However, if the grievant is challenging a determination of basic eligibility, the evaluative material of all applicants should be provided.

The analysis of this mass of information may be tedious, but it is central to the decision whether a valid grievance exists. Stewards have found the use of certain tools, such as spread sheets, to be very helpful in visualizing the available information.

#### **Examples of Types of Information to Request for Promotion Actions:**

1. A copy of the vacancy announcement;
2. A copy of the Standard Form 52 ("SF-52") requesting that the vacancy be filled;
3. A copy of the position description for the vacancy position;
4. Sanitized copies of all applications;
5. A copy of the relevant qualification standards, including time-in-grade requirements;
6. A statement citing the justification for any selective placement factors used;
7. A sanitized statement identifying the reasons each applicant, who was determined not to be eligible, failed to qualify;
8. Sanitized copies of all performance appraisals examined by the panel or ranking

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<sup>6</sup> For examples on how information request should be formatted and for case citations supporting such requests please refer to Chapter 8 of this Chapter Manual.

official;

9. Sanitized copies of all promotion appraisals prepared for other employees of the same series and grade, during the preceding twelve months;
10. A copy of the crediting plan or other statement of criteria for ranking the applicants. Request that the agency indicate on the copy of the plan the date on which the plan was initially prepared;
11. A list of the positions occupied by the ranking official(s);
12. A copy of the promotion roster;
13. A spread sheet showing the scores which the ranking panel or official assigned to each candidate for the following items: performance appraisal, past experience and training, relevant incentive awards, and any other criteria used;
14. A statement showing precisely what information and techniques the ranking panel or official used in the ranking process;
15. The ratings each panel member assigned to each candidate for each factor;
16. The combined ratings for each candidate;
17. The individual narrative statement prepared by each panel member for each candidate;
18. A statement describing the information which the selecting official used;
19. A list of each item in the promotion file that has not been included in the reply package.

## **VII. DRAFTING THE PROMOTION GRIEVANCE**

The three (3) basic rules you must follow are: watch your time limits, state your facts and violations, and request a remedy:

### **Rule 1: File the Grievance Before Your Time Runs Out**

The time for filing a grievance over a promotion action will run from the time that the employees not selected are notified. If proper notification is not made, the time will begin to run when the employees learn of the selections. It is a good practice to routinely review the promotion packages for each promotion action.

### **Rule 2: State the Facts and the Violations**

After analyzing the promotion process, conducting the necessary research, and developing your argument, write a brief, concise statement of the grievance, including the facts and the contract, statute, rule, and regulation violated.

If possible, analyze the promotion packages before filing the grievance. If all of the information is not available before the end of your time limits, write the grievance, including the facts and violations as you know them and add the following phrase: "The Union reserves the rights to amend, modify, delete from, and add to this grievance at the first step as management supplies the information requested on [DATE]".

Be sure to cite the appropriate sections of the promotion article and the performance appraisal article, including those sections which contain language requiring promotion actions to be "fair and objective," to be based on "merit principles," and to be processed in accordance with "systematic and equitable and uniform procedures". These general sections also preserve our right to challenge improper agency action(s) that are uncovered later in the grievance process.

### **Rule 3: Request a Remedy**

Always state that remedy requested. Failure to properly perform this task could damage severely a Grievant's opportunity to be made whole. It is advisable to ask for specific remedies (i.e., retroactive promotion, priority consideration) and always request "that the grievant be made whole to the maximum extent allowed by law and "any other appropriate remedy".

## **VIII. APPEALS TO THE EEOC OR MSPB**

In most situations, the negotiated grievance procedure will be the only authorized and most effective forum for processing promotion action complaints. However, other avenues of appeal are available. If we are alleging that illegal discrimination based on age, sex, race, creed, color, religion, handicap, or marital status are present in a promotion action, the case may be taken to the Equal Employment Opportunity commission (EEOC) or the Merit Systems Protection Board (MSPB) via the Special Counsel when there are prohibited personnel practices.

Prohibited personnel practices, listed at 5 U.S.C. Section 2302 include discrimination based on political affiliation, whistleblowing, and reprisal for exercising legal rights.

Promotion-based complaints may either be grieved under the contract, or appealed to the EEOC or MSPB if discrimination is present. Under some NTEU contracts, we have agreed not to pursue discrimination cases under the grievance procedure, and instead an employee's only recourse is to go to the EEOC or MSPB. In such situations, if discrimination is the sole basis for challenging the promotion, the only avenue may be the EEOC or MSPB.

**In summary, look to your negotiated grievance procedure as the most effective process to contest promotion actions. If allegations of improper selections or rankings have occurred due to discrimination, you are advised to discuss the options of a statutory appeal with your National Field Representative.**

## **IX. CITATIONS**

The following cases discuss the principles set forth above:

Fair and Objective Performance Appraisal:

Palewicz, IRS, Baltimore District (A-279), Cournoyer, IRS, Jacksonville (A-219), Hanley, IRS, National Computer Center (A-637), Holihan, Department of Energy (A-973); Vallante, IRS, Andover Service Center (A-1037); Costley, Bureau of Public Debt (A-1240); Crounce, IRS, Los Angeles (A-1300); NTEU Chapter 43, IRS, Springfield District (A-1315); Smith, IRS Atlanta Service Center (A-1341); Phillips, U.S. Customs, Chicago District (A-1383); Nelson, U.S. Customs (A-1385); Smola, IRS, Phoenix District (A-1413); Chase, HHS, Region IX (A-1415); Santos, IRS (A-2381); Petty, Kroemer & Escosa, FDIC(A-2492); IRS, Mazorol (A-2505); Customs, Segura-Minardi (A-1824);

Fair and Objective Ranking Panel Evaluations:

Beckham, IRS, Greensboro District (A-220); Etkin, IRS, Philadelphia District (A-278); Bagley, IRS, National Office (A-396), Minelli, IRS, Newark District (A-470); LeDuc, IRS Jacksonville District (A-480); Kilgore, IRS, Birmingham District (A-437); Scotti, IRS, Newark District (A-557); Matta, IRS, Pittsburgh District (A-592); Bodinus, IRS, Detroit District (A-679); Stevenson, IRS, Indianapolis District (A-776); Emerson, IRS, Indianapolis District (A-943); Dial, IRS, Des Moines District (A-1014), affirmed 35 FLRA No. 17 (1990); Rosenblum, IRS, Laguna Niguel (A-1307); Haydell, U.S. Customs, Savannah District (A-1424); Fuller-Alexander, HHS Region IV (A-1434); Fowler, IRS, (A-2149); Reynolds, IRS (A-2223); Chu, IRS (A-2278); Lockart, IRS (A-2549); Chapter 264, FSA (A-2690); Quintero, Customs (A-2488); Wholey, Customs (A-2646); Williams, Customs (A-2525)

Anti-Union Animus:

Blanchard, Department of Health and Human Services (A-929), affirmed 35 FLRA No. 59 (1990); Gunnell, FDIC, Chicago Region (A-991), affirmed 35 FLRA No. 28 (1990); Johnson, IRS, Denver District (A-1216); Hopps, U.S. Customs Pembina District (A-1324) affirmed 41 FLRA No. 110 (1991); Roth, Rector, and Brown, IRS (A-2541)

Prohibited Personnel Practice/Discrimination:

Esposito, IRS, Andover Service Center (A-1054); Underwood, Food and Drug Administration (A-1051); Enderle, IRS, Helena District (A-1181), affirmed 37 FLRA No. 114 (1990); Allen, FDIC, Chicago (A-1516); Chapter 19, IRS (A-2819)

Failure to Select With Priority Consideration:

Beckham, IRS, Columbia, South Carolina (A-331); Patchen, IRS, Brookhaven Service Center (A-264); Tipton, U.S. Customs Service, Blaine (A-283); HCFA, Baltimore, Maryland, 33 FLRA No. 11 (1990) (upholding arbitrator's order of promotion as soon as a vacancy exists; promotion when management failed to give employee priority consideration); Koch, IRS (A-0869); Volkman, IRS, (A-1838) aff'd 49 FLRA 129 (1994); Bell, IRS (A-2056);

Improper Selections:

Zumbolo, IRS, Albany District (A-750); White, IRS, Cincinnati District (A-1178) affirmed 39 FLRA No. 108 (1991); Brown, U.S. Customs, JFK (A-1229); Mason, U.S. Customs (A-1268); Simmons, IRS, Los Angeles (A-1439);

Career Ladder Promotion:

Wright, Department of Energy (A-270); McDermott, U.S. Customs, Pacific Region (A-850); Alderman, U.S. Customs, Southeast Region (A-1225); Christianson, U.S. Customs (A-1419); Graham, IRS, Detroit District (A-1444); Thomas, IRS (A-2382); Reffner, FEC (A-2197); Baumbusch, Blanchard, and Walter, HHS (A-1830); Stewart, IRS (A-2454); Jefferies, EPA (A-2647)