



# National Federation of Federal Employees

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## Forest Service Council

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## Unfinished Business: Temporary Employment Reform

### Executive Summary

Congress and federal agencies responsible for oversight of the civil service and the merit system principles upon which it is based have grappled with temporary employment reform for decades. Between 1991 and 1993, Congressional hearings and an Office of Personnel Management (OPM) study showed that permanent work was being performed by employees working under a series of temporary appointments. Congressional efforts to reform temporary employment reached a crescendo in 1994. OPM promulgated regulations in 1994 intended to address the misuse of consecutive temporary appointments; however, in so doing they noted that:<sup>1</sup>

- the 1994 reform was “an interim measure... pending more comprehensive reform”;
- they supported the National Performance Review (NPR) recommendations to provide benefits, within-grade increases, and standing to compete under merit promotion procedures to temporary employees, but lacked the authority to implement them by regulation; and
- they expected legislation to be proposed based on NPR recommendations within a few months.

Legislative efforts bore no fruit. OPM’s “interim measure” has been the extent of reform for over fifteen years now... and counting.

Under the 1994 reform, a temporary position is limited to two years within a three year period. The supervisor must certify that the employment need is truly temporary. However, seasonal work is exempted from these requirements, as long as fewer than 1040 hours (six months) is worked. Employees call these appointments “1039 appointments” because they are limited to this amount of work in a season.

In its 1992 report on the subject, OPM identified that the problems and challenges around temporary employment in the federal government were greater in the land management agencies due to the inherently seasonal work. This is still true today. The Forest Service hires approximately 15,000 temporary employees every year.<sup>2</sup> During the field season, this represents 35-40% of the total workforce. In response to employee concerns, we conducted an internet-based survey of employees last fall. Thousands of employees responded. Most were either current temporary employees or permanent employees who had previously served under temporary appointments. Survey results showed that a substantial number of employees work under temporary appointments for many seasons. 53% of the employees serving under temporary appointments in 2009 who responded to our survey had been hired under temporary appointments for five or more seasons. On average, an employee in this group had worked for 12 seasons as a temporary. These “long-term temps” are truly invisible employees, in the sense that current statutes and regulations do not recognize they exist. They are trapped in an endless series of temporary appointments, with no health insurance benefits, no retirement benefits, and no job security. Many current and former temporary employees reported that much of the work performed by temporary employees, including these long-term temps, is regular and recurring seasonal work of greater than six months duration. However, they are terminated each season to conform with the regulatory 1039-hour limit.

*Congressional White Paper, May 10, 2010. For more information, contact Mark Davis, Chair, NFFE Forest Service Council Legislative Committee, at 608-231-9474 or mwdavis01@fs.fed.us.*

Much of the work described in the survey responses would be more appropriate for permanent seasonal appointment. Title 5 of the Code of Federal Regulations (5 CRF 340.402) describes the appropriate use of this type of appointment as follows: “Seasonal employment allows an agency to develop an experienced cadre of employees under career appointment to perform work which recurs predictably year-to-year. Consistent with the career nature of the appointments, seasonal employees receive the full benefits authorized to attract and retain a stable workforce.”

History, culture, incentive structures, and regulatory barriers have combined to relegate much of this work in land management agencies to temporary employees. The result is the performance of much of the agency’s critical land management work by two groups of temporary employees:

- long-term temps who come back year after year because of their love for the work and/or their attachment to their rural communities, and
- a high-turnover pool of employees who are expensive to orient and train and who leave before acquiring the experience and local knowledge required to be effective.

Neither outcome is beneficial. Effective and efficient land management depends on more than the number of boots on the ground. As noted in the CFR, it requires that the employees in those boots have the skills, knowledge, and dedication to get the job done and get it done right.

We recommend statutory and regulatory reform to ensure that permanent seasonal appointments, not a series of temporary appointments, are used to accomplish regular and recurring permanent seasonal work. However, to avoid casting aside long-term temps during this transition, which would not only be unjust but also a reckless waste of irreplaceable knowledge, it is critical that an effective “pathway to permanence” for these employees be put in place before their temporary positions are abolished. In addressing these issues, we found the work of those who have gone before us to be invaluable. Our proposals to achieve these goals are consistent with those developed and supported in 1994 by the Merit System Protection Board (MSPB), the National Partnership Council, the NPR, and OPM.

## **A Brief History of Reform Efforts: Well-Begun**

The issue of misuse of the temporary hiring authority, particularly by land management agencies, garnered much attention in the early 1990s. Reform efforts were well-begun but in large part left undone.

- 1991: A series of Congressional hearings reveal wide-spread abuse of the federal temporary hiring authority.
- July, 1992: OPM study of temporary employment in the land management agencies concludes that “in practice [temporary employment] has expanded to become quasi-permanent employment for many. In contravention of OPM rules, temporary employees are being utilized to perform ongoing work.” OPM concludes that land management agencies were using temporary employees to perform permanent work in order to avoid the cost of providing benefits.<sup>3</sup>
- June 23, 1993: At hearing, House Civil Service Subcommittee Chair Frank McCloskey observes, “The blatant abuse of temporary employees in Federal agencies is one of the most disturbing occurrences I have encountered during my time in Government... OPM regulations leave endless possibilities for the manipulation of temporary workers. Agencies can easily circumvent OPM's regulations... The fact that a temporary worker has been employed for 20 years without any rights is heinous and must not be allowed to continue... There is a dire need for reform.”<sup>4</sup>

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- July 5, 1993: James Hudson dies after working three eight-hour shifts over two days. Mr. Hudson, a decorated Vietnam veteran, was a National Park Service employee who supervised other Parks employees and cared for the Lincoln Memorial. An eight-year employee, he was classified as “temporary,” and thus ineligible for benefits granted permanent workers. His widow and seven children receive nothing upon his death. Subsequently, Congress approves a payment of \$38,400, the amount his widow would have received had Mr. Hudson been able to obtain the life insurance benefit offered to permanent employees.<sup>5</sup>
- July 15, 1993: James Hudson Temporary Employee Equity Act of 1993 is introduced, under which federal “long-term temporary” employees would be eligible for the same health insurance, life insurance, and retirement benefits as their permanent coworkers. James Hudson’s widow observes, ““Something good has come out of the death of my husband. This legislation means no one else will have to go through what this family went through last week.”<sup>6</sup> The bill subsequently dies in Committee.
- July 6, 1994: Fourteen federal firefighters are killed in the line of duty, battling the Storm King (also called South Canyon) fire in Colorado. Twelve were temporary employees, ineligible for the health insurance, life insurance, and retirement benefits provided to permanent employees.
- September, 1994: MSPB releases a report on temporary federal employment.<sup>7</sup> They conclude that “temporary employment policy should be based on the assumption that the employment will normally be on a one-time, short-duration basis. To proceed on any other basis would serve to create a permanent underclass in the federal workforce...” The report discusses proposals and bills that would provide temporary employees with:
  - retirement and health and life insurance benefits, and
  - competitive status for transfer, reassignment, or merit promotion procedures, in recognition of the fact that “legal and procedural barriers... often preclude the consideration of many temporary employees for permanent positions regardless of how well they have performed.”<sup>8</sup>
- November 14, 1994: New OPM regulations on temporary employment are implemented. The duration of a temporary appointment is reduced from four to two years, and a requirement that the supervisor must certify that the employment need is truly temporary is added. However, seasonal work of less than six months’ duration is exempted from these requirements, meaning that for seasonal work there is “no limit on the number of extensions or noncompetitive reappointments, as long as the employees [are] paid for less than 1,040 hours each year.”<sup>9</sup>
- March, 2002: The General Accounting Office (GAO) releases a report on temporary federal employment.<sup>10</sup> GAO concludes, “OPM stated that its intention in revising the regulations was to help ensure that temporary limited employees would be used to meet truly short-term needs and not serve for years without many of the benefits afforded other long-term employees. However, the regulations do not preclude agencies from hiring temporary limited employees to work in a series of extensions, reappointments, and appointments. Thus, there seems to be an inconsistency between OPM’s stated intent and what is permissible under the provisions of its regulations. The regulations allow agencies to continue a pattern of repetitive temporary appointments that result in long-term temporary limited employees not receiving many of the benefits available to other long-term employees.” Among the findings are:
  - neither OPM nor any of the agencies studied (accounting for 92% of federal temporary hires) had monitored the total years of temporary employment by individuals, and
  - In 2000, 60% of the 16,232 temporary employees hired who had 5 years or more of service,<sup>11</sup> and 67% of the 8,873 who had 10 years or more of service, were hired into temporary seasonal/intermittent positions.

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## Survey of Forest Service Employees

The internet-based survey was conducted from September 27, 2009 through November 22, 2009. Forest Service employees were informed about the survey by emails distributed through Local Union officials and directly to employees using a bargaining unit mailing list.

The survey was accessed 3,926 times. 3,463 of those who accessed the survey answered some of the questions. Of these, 967 identified themselves as current temporary employees and 2167 identified themselves as having previously served under temporary appointments.

Employees were asked to indicate each year between 1970 and 2009 they had served in temporary appointments. 913 respondents who self-identified themselves as current temporary employees provided this employment history data. 61% indicated they had served in temporary appointments for four or more seasons. On average, an employee in this group had served as a temporary employee for 11 seasons.

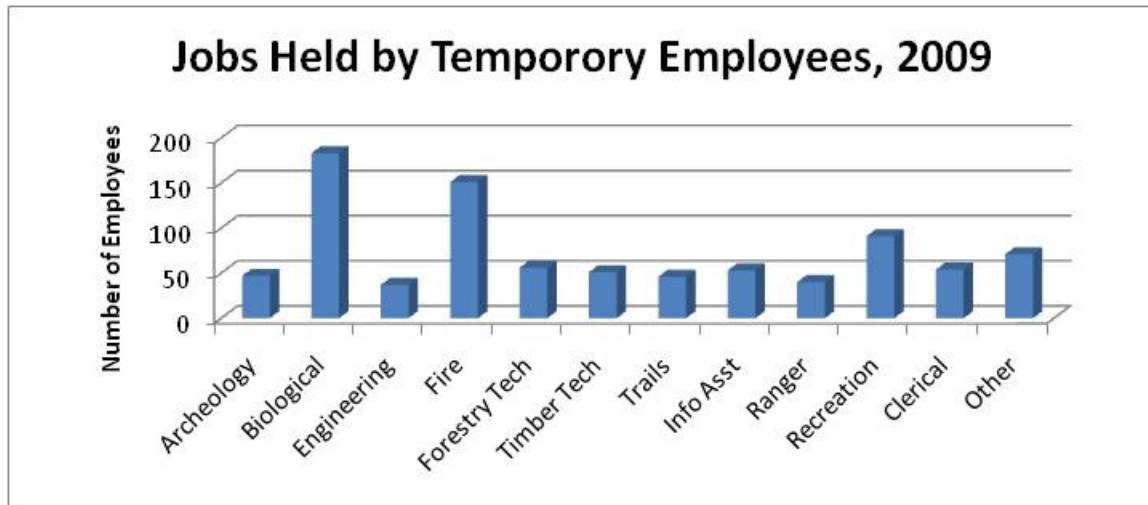


Each season, the agency hires approximately 15,000 temporary employees. Therefore, the survey response rate for temporary employees was approximately 6.1%.<sup>12</sup> If those responding to our survey were representative of the agency as a whole, these results would indicate that the number of temporary employees who have served as such for four or more seasons would number in excess of 9,000. We have no reason to believe our population is representative and therefore we do not claim the number is this high.<sup>13</sup> However, even a conservative extrapolation from these results indicates that thousands of employees are in this category. Agency length of service data agree with this general conclusion. Of the 9,513 temporary employees on the roles on September 16, 2009, length of service data suggest that 2,734 had served for four or more seasons.<sup>14</sup>

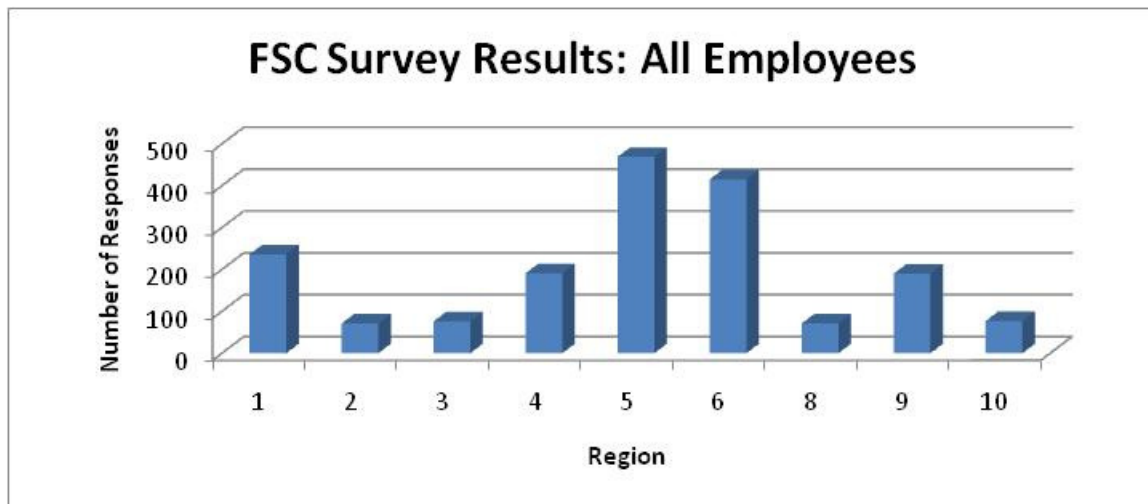
It should be noted that the Forest Service is not alone in its reliance on temporary employees. Temporary employees made up 35% of the National Park Service (NPS) workforce in 2008 (8,546 out of 24,091 employees).<sup>15</sup> While we have no data on the length of service of these temporary employees, we do have anecdotal accounts of similar use of long-term temps. The other land management agencies perform recurring seasonal work that is similar to that performed by the Forest Service, and do so within a similar regulatory and budgetary framework. It is likely that long-term temps are treated similarly from one land management agency to another.

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The type of work accomplished by Forest Service temporary employees is diverse. It includes firefighting, recreation, engineering, timber, trails, clerical, and a wide variety of technical/biological work. A breakdown of survey results on the work performed by temporary employees in 2009 is shown.



Finally, the number of survey responses from both current and previous temporary employees by region is shown. If response rate is indicative of concern about the issue, these data provide a general if limited picture of the geographic distribution of this concern. Although these data do support the general conclusion that significant concerns exist across all regions, they should not be interpreted as a reliable measure of the extent of concern. They are also affected by other factors, among them the influence and reputation of the union in that particular region.



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## The Role of Temporary Employees<sup>16</sup>

A substantial amount of core agency work is performed by either long-term temps with no career path or by short-term temps who do not stay to acquire the necessary skills and knowledge to be effective. Current regulations at 5 CFR 340.402 state that a permanent seasonal appointment is appropriate when “work which occurs predictably year-to-year” is “expected to last at least six months.” However, the operational reality is that agencies are in compliance with the seasonal temporary hiring regulations as long as their temporary employees do not exceed the 1039-hour limit in a season. The field told us loud and clear that temporary employees were performing permanent work – that it was the 1039-hour limit and not the nature of the work that set the duration of their seasons. Here are some examples of employee responses to our survey:

- *Our seasonal 1039 employees constitute a significant share of our workforce. A significant problem arises every year when we need these (trained and skilled) employees beyond their 1039 (6 month) tour.<sup>17</sup>*
- *As a fire manager, the 1039 appointments no longer work for us. With longer fire seasons and continually escalating training & currency requirements, we need our folks for a longer period of time each year - more than the 1039 will allow. It's high time we started treating our people like the valuable asset they are. During my 16 years as a temp, I watched many quality folks leave government service, as they could not provide for themselves and their families with short term employment and no benefits.<sup>18</sup>*
- *Another problem in the Recreation department is the 1039 limitations. Our seasonals have to be laid off just when hunting season begins and there is a lot of dispersed camping issues. If we bring our seasonals on later in the season, they are not available then to help in hazard tree falling and removal and in assisting in opening campgrounds for the upcoming season.<sup>19</sup>*
- *Lay-offs had nothing to do with a lack of work. As a botanist, there was always work to do and project meetings would take place without me being there which sometimes caused problems down the road, or projects would go through that I had no knowledge of and my resource would be affected in a negative way. Now our seasonals get laid off about the time we could use them for data entry, herbarium work and other office work. Some of our temporary people would like to work more, but have to be careful they don't mess up their 1039 for the next season.*
- *As an employer of 1039s as well as having done my time as a temp, I see that the FS takes advantage of people who are willing to come back season after season without any benefits provided by the agency. Without experienced 1039s, our agency would come to a screeching halt, yet most forests refuse to give these deserving people a permanent position. I currently have a crew leader who has been here for 7 seasons without any benefits or step increases, or any reason to come back other than the love of the work and the area. I am trying to get him a 13/13 position but will most likely be denied... If we hire a position every year for more than 5 years, we obviously have shown a need for the position and should make it a permanent position. The fact that the FS does not take the initiative to hire these long-term temporary employees is a shame and reflects poorly on the agency and the government as a whole.<sup>20</sup>*

## Employee Morale

The Forest Service scored 206 out of 216 federal agencies in the Best Places to Work rankings, which are based on OPM survey data.<sup>21</sup> A recent House National Parks, Forests and Public Lands Subcommittee

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hearing focused on this issue in the context of how to rebuild the federal public lands workforce.<sup>22</sup> While there are undoubtedly many reasons for this ranking, the fact that 35-40% of the agency's employees serve under temporary appointments is among the most significant. Temporary employees work side by side with permanent employees, often performing the same duties and in some cases even effectively supervising them. Yet, they are denied a wide range of benefits other federal employees take for granted, including:

- Health insurance
- Retirement benefits
- Life insurance
- Within-grade increases (GS employees)
- Career advancement possibilities
- Merit standing to apply for permanent jobs
- Any expectation of due process and protections or job security

Direct effects on short-term temps are easily measured by high turn-over rates. Direct effects on long-term temps, though more difficult to quantify, are readily understood, as illustrated by these comments from temporary employees:

- *Morale is low. Even though you're told you are valued, respected and have the same rights as permanent employees, the truth is you don't. It's easier to get rid of you than a permanent employee (even when the permanent employee is a complete dud.) 1039's are "second class citizens" to be sure. They must be very, very careful not to take much initiative, be innovative or ask many questions. Basically, a 1039 is a disposable tool, when it doesn't work anymore through abuse, overworking it or keeping it updated, it is simply discarded and replaced with another 1039.*<sup>23</sup>
- *We risk our lives to save people, property, and homes for 6 months out of the year, only to be left with weakened and worn down bodies and no possible way to obtain proper health care to treat serious medical problems or conditions... Without the 1039 temporary employees our agencies would not be able to function. Most projects, goals, and accomplishments are completed because of the hard work and determination of these employees. The current system uses these employees up, spits them out, and leaves them high and dry, with battered and beaten bodies, low morale, and very few options.*<sup>24</sup>
- *I have been a temporary Forest Service employee, for 20 seasons... We 'Temps' have a saying on the district. "Temps don't get hurt, they just don't get hired back the next season." We live with the certain knowledge that if we get hurt on the job, we will be on our own to find a different way to make a living, someplace else. We've seen that many times, with co-workers who've had injuries that kept them from doing field work, out in the woods. I've gotten cash awards and outstanding performance awards nearly every season that I've worked for the Forest Service. My local supervisors are great at verbally letting me know how much they appreciate my good work, in the woods. But it is not backed up by a permanent job... I feel like a tool, and as long as I'm able to do hard physical labor, out in the woods, there will be a job for me.*<sup>25</sup>
- *Since I have been a seasonal for over 25 years, with a 4 year degree in Biology, I always expected to eventually get an appointment. It does make me feel used and useless at times. I do get very frustrated with the agency. I see younger people being offered a job with little or no experience. I am very familiar with the forest I work on since I have been here so long. I do*

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*see a time coming when employees of this agency won't know the ground at all and make their decisions from their desks. This is actually already happening.<sup>26</sup>*

Lack of access to health care during the long federal careers of long-term temps, in addition to being unjust, has direct effects on productivity. Fire suppression and other field-going jobs are physically challenging, sometimes dangerous. We received numerous comments on how this affects employees' morale and, in addition, their physical well-being and productivity:

- *In 1994 I twisted my ankle off duty, and did not have health insurance, and had many previous medical bills resulting from my daughter's birth in 1993. I felt there was no way I could afford even a clinic visit to have my ankle diagnosed. I did nothing, except try and stay off it, it hurt for over 8 months before it became healed enough to have no pain. It wasn't until 2003, well after I had received a permanent seasonal appointment that I sought medical attention due to pain in my knee. At that time it was determined that the pain in my knee was a direct result of having broken my ankle 9 years earlier and it healed crooked, with significant permanent disability. I will have issues with this in my knees, hip, and ankle for the rest of my life because I had no insurance go seek medical attention when the incident first happened in 1994. At that time, I had been a 1039 temporary employee since 1988. The birth of my daughter in 1993 is another long story in itself. She was born 6 weeks premature and incurred over \$100,000 in medical bills in the first 4 weeks of her life. I would have been ruined financially for a very long time, but by luck those bills were covered by Medicaid, because my temporary employment income was low enough to qualify.<sup>27</sup>*
- *After 15 years of sprained ankles and general wear and tear on my body of being in the field, I gradually became unable to do the job in the field. I took a downgrade from a GS7 to a GS4 to get on permanent where I could have health and retirement benefits. I now work in business administration. When I hear folks in government talk about Americans who do not have health insurance, it makes me laugh. The government is the biggest offender!<sup>28</sup>*
- *I had NO insurance due to being a seasonal hire in 1994. It was discovered that my wife had a small brain tumor which could be removed with no complications at the time of it being discovered. The surgeons were urgent to get the removal procedure done right away. So having no insurance I needed something to have the operation as soon as possible. So I applied for Medi-Cal. This was supposed to be easy, but I ran into delay after delay with Medi-Cal, allowing a brain tumor to continue to grow. After 9 months and finally qualifying my wife was able to have the operation done, but now due to the size and complications from the size of the tumor my wife died one day after the operation. I understand the 1039 appointments but not year after year! I hope long time seasonals get some help!<sup>29</sup>*

Effects on morale and effectiveness extend beyond those directly affected to their brothers and sisters on the fire lines and on the Forests – permanent employees who bear witness to the manner in which they are treated. These effects are illustrated by comments from permanent employees:

- *Because seasonal employees don't have the same rights as an employee with a [permanent] appointment they are frequently abused by the agency and treated as disposable employees. Seasonal employees are often afraid to speak up for the types of employment abuse they face because that will hurt their chances of getting an appointment.<sup>30</sup>*
- *1039 appointments create a class of marginalized employees in the FS... I've noticed over the years that 1039's are often ignored – even when they have perfectly good ideas.<sup>31</sup>*

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- *Reliance on 1039's to accomplish almost all field work creates a caste system for employees. 1039's live in precarious position where many of their supposed workers rights are unenforceable, because their continued employment is at the whim of their direct supervisor. They are often treated as disposable, which is an insult to their service.<sup>32</sup>*
- *It is an injustice to people to hire them year after year with no benefits. These are the people doing the "real work" out in the field and we treat them unfairly... I've tried making presentations to my leadership team justifying the need for a permanent seasonal position but this hasn't worked so I continue as is. It affects my own morale as a permanent, full-time employee because I can't really build a program around a workforce that may not be here next year. I've tried using contractors but that only increases my workload and sometimes doesn't get the work done any more efficiently.<sup>33</sup>*
- *I am simply fed up with the whole 1039, 24/36, and term abuse of qualified people who simply want to work, exhibit a connection to the land and the local communities, and deserve much more recognition. This deficiency reaches the ground and we are profoundly falling short of "Caring for the Land and Serving People". My people bust their butts because of their love for the work, the landscapes, their service to the public in the front line, and their self respect of working hard. I am very frustrated to not be able to provide them with ANY security. And I lose good people far too frequently.<sup>34</sup>*

## Agency Effectiveness and Efficiency<sup>35</sup>

**Workforce Capacity.** Knowledge of place is particularly important for land management work. Much of the critical knowledge needed to be effective is site-specific and can only be acquired through experience. Their permanent coworkers testify to the value of the human capital represented by the agency's long-term temps:

- *I have worked with a seasonal employee for the last 9 seasons at my current district. Our district has benefited by her experience, work ethic, and the skills and training she has picked up on our district. She is very well liked and her work ethic and safety record is very well respected. Her broad skill set as a technician and her knowledge of the agency make her a very valuable person in meeting our district targets as well as the forest service mission. There is not one person on our district that doesn't think that it is a travesty that she is not given the chance to become full time. Over the last several years our forest has recognized the need to fill the position that she has occupied with a full time appointment. Once the leadership team even had the vacancy out on the USA Jobs website, only to be taken off a day later for some unknown reason. Now, it seems that our long-term seasonal is about ready to look for a new job. And no one can blame her. If she does, this is what I think may happen. We would not be able to train a new person in the safe use of chain saws, reforestation surveys, GPS and GIS, fire fighting, engine operations, contract administration, timber cruising, and agency policy fast enough to accomplish the year's target. Our district will lose a trusted and competent member of our timber and fire program. Our small district will watch a friend and co-worker leave without ever giving her a chance at applying for the same job that she worked in for 9 seasons.<sup>36</sup>*
- *I was seasonal for thirteen years before becoming permanent... I became a GS 13 District Ranger... [I don't have] a degree, just very solid experience. The agency should not continue the practice of 1039 year after year for the same position. It has had a tremendous effect and created a very negative impact for transitional planning in bringing new employees into the*

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*agency. The agency has lost the ability to transition long term knowledge to up and coming employees.<sup>37</sup>*

- I work on a helicopter firefighting crew that was established in 1969. We currently hire about 24 people for the fire season. Half of them are 1039 appointments. Some of these people have worked here for over eight seasons. We have spent tens of thousands of dollars apiece training these individuals. They are a highly trained bunch of individuals that we rely on to be Incident commanders, Helicopter Managers, Crew Bosses and many other important jobs in Fire. If did not have all of these 1039 employees with all of the experience they have we would be a lot less effective organization. I think that it reflects badly on the Forest Service that we expect so much out of these employees and that we give them so little in return.<sup>38</sup>*
- I have hired, trained, and worked dozens of temporary employees that were outstanding employees, many of them often returned for several years. Many of them loved working for the Forest Service, loved their job, but found it necessary to seek other employment because of lack of health insurance, retirement coverage, or other benefits. Very valuable, top notch employees left the agency because they saw no hope of change in the future, taking with them all the training and experience they had gained over the years.<sup>39</sup>*

In the case of seasonal positions filled by the same long-term temp year after year, we can measure the permanence of the position by the longevity of the employee. However, many of these positions are filled with short-term temps. This does not mean the position is not permanent in nature; it merely means the individual who filled it has moved on, presumably to a real employer of choice. If these positions were to be considered as the permanent seasonal positions they really are, then there would undoubtedly be concerns expressed about retention problems. Their categorization as temporary positions may keep this discourse from occurring, but it does not change the reality on the ground, as expressed in the following employee comments:

- When we first hire seasonal employees, it takes at least a month to train them with just the required trainings. I have taught Cruiser school to seasonal employees for 17 years. It can be a hard course to get through. Our seasonal employees end up working possibly one or two years after becoming certified as cruisers then move on. At today's rates the cost of sending one GS-4 to Cruiser school would be about \$1,000. Expand that to cover the time for the instructors, class rooms, supplies, etc across the nation, and the cost would surprise you... I would rather see us give quality individuals with permanent appointments and retain their skills. This is just one example.<sup>40</sup>*
- The most obvious impact [depending on a temporary workforce is] the inability to build an efficient program. We always have the uncertainty of not knowing if we will have a position and who would fill it. Consequently, as I plan the field season work in the off season, I have to develop back up plans to be sure of meeting targets. This becomes wearing year after year. I also have to be very careful about how I design the tasks – for instance build in more time for redundancy and orientation/training – I cannot count on the fact that the employee assigned will be familiar with the geographic area, the work area, unit policies. This is especially time-consuming when jobs are technical in nature.<sup>41</sup>*
- The only time I've seen a worthwhile use of the 1039 appointment was after the large 2000 fire year on our Forest, when we needed extra people to get work done for 2 or 3 seasons post-fire. Other than that, we seem to be hiring the same seasonal positions year after year. Relying on a temporary seasonal workforce means you never know what type of workforce you will have from one summer to the next. People come and go as they find other, better jobs with benefits*

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*or just decide to try another working in a new area. We spend money training them and they really have no incentive (rightly so) to stay around, so we spend money again the next year training another seasonal.*<sup>42</sup>

- *Tracking the hours across years and various appointments takes time that our few remaining human resources personnel don't have. The supervisor's and employees' time is also affected... This continual jerking around of our long-term employees is bad for the agency and for the morale of the seasonal workforce and the permanent workforce as well. It contributes to performance and safety issues as we constantly replace long-term personnel who have "run out of time" with lesser experienced people who require more training and supervision.*<sup>43</sup>

**Flexibility.** In discussing flexibility, it is important to define what we mean by the term. Permanent seasonal positions actually provide more flexibility in meeting the work requirements presented by variations in seasonal workloads. A 13/13 permanent seasonal employee is guaranteed 13 pay periods (six months) of employment, after which they may be either furloughed or retained in duty status, depending on agency needs. A temporary employee must be terminated after six months, regardless of agency needs, in order for the temporary position to be maintained in future years. For example, 13/13 employees may be retained in a bad fire season, whereas temporary employees may not.<sup>44</sup> Let us be clear that the "flexibility" afforded by use of temporary appointments is not related to accomplishment of unpredictable seasonal workloads. Rather, it is the flexibility to shed staff in the event of budget downturns. It is the flexibility of operating outside of merit system principles and protections.

Here is what employees had to say about the lack of flexibility inherent in temporary appointments:

- *The current policy is abusive at best. As a program lead, it makes things very difficult when planning staffing levels because of the 1039-hour limit. If the weather cooperates and the field season is extended, seasonal workers run out of time and must be laid off and, if replaced with another 1039, the new appointment will often barely begin when the snow hits and closes the woods. Sometimes the 1039 employee must be laid off earlier in the season in order to preserve enough hours in their service year to bring them back early the following spring for planting. This is always a gamble...*<sup>45</sup>
- *As a supervisor of a temporary work force, I find it very restrictive to hire '1039's'. They are only allowed to work their 1039 hours. The work I have available is mostly field work but that runs greater than the 1039 timeframe. I cannot work someone throughout the year, but I certainly can work people longer than the 1039 timeframe. I am always struggling to find a workforce early and late in the field season to get my funded work accomplished. Right now, in fact, I am trying to find field crews. One of my current employees has a multiple 1039 appointment so he can keep working. The paperwork associated with jumping between two different jobs is ridiculous. His morale is very low. He is doing a great job for me but he is wondering why he bothers. He has put in 6 years of his time with the federal government but he has absolutely nothing to show for it...*<sup>46</sup>
- *The Agency fails to accomplish many fuels projects before and after the planned fire season which seasonal fire personnel are trained to do, but are unable due to the 1039 limitation. Higher graded PFT and PSE personnel are left to complete projects or to even shovel snow due to the fact that seasonal personnel are laid off and drawing unemployment even though they would be willing to do the work.*<sup>47</sup>
- *As a full time employee responsible for summer and winter operations, the 1039 hour appointment does not provide me the flexibility I need to efficiently manage my field work with*

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*seasonal employees. Our trail work season runs from April through October. A permanent seasonal 13/13 appointment would solve this issue and is a solution available to me. However, my immediate problem is with an inability to accurately track 1039 hour balances. Our district time keeper has one running record she keeps for each seasonal employee. This figure is never the same as the balance which appears on the employees T&A nor is it the same as the balance provided by ASC. I will work the seasonal employees right up to their 1039 hour limit. The problem is the folks keeping track of that all have a different balance. This is compounded by different service year dates for each employee. If ASC can't keep track of it how am I or the employee suppose to do it..? It is in the agency's best interest to have a workforce which provides maximum flexibility to meet the agency's goals while providing a career path opportunity for long term seasonals.<sup>48</sup>*

- *Often because of the 1039, some continuity is lost: temp employees often do a great deal of field recon, but the permanents who are still around are the ones who need to write resource reports and finish the documentation - which can be hard if you do not have the person who collected the data sitting there to ask questions of. I have been in both of those spots - the temp trying to leave good notes and have good communication at the end of the season, and the permanent employee that ends up with some piece of info missing.<sup>49</sup>*

Field managers may yearn for a more permanent and experienced workforce they can use with greater flexibility, but managers up the line face a different set of pressures and incentives. The use of a temporary workforce allows them to easily shed workers in the event of budgetary downturns. Indeed, they operate within the scope of management discretion afforded them by the current regulatory framework. However, the shifting of all risk onto the backs of temporary employees comes at a cost:

- *We have had at least 5 timber marking crew members working full field seasons (April-November) on our district for the last 14 years since I have been here. We have had, at most, 3 permanent-part time positions filled (with a total of 12 crew members at that time) and now only have one permanent employee, who leads the 5 person crew. All of the current crew members have completed full 1039 or NTE seasons for the last 5 years, some of them for 7 or 8 years. The district has been pushing to fill all of these positions as permanent-part time but has not been allowed to by the Forest Leadership Team... The argument is that with these positions filled we have less flexibility to adjust our work force. Our timber program has been fairly stable for the last 8 years. I don't think the forest should be abusing these people just to keep their options open. We have invested a lot of training in these people and we should not take that knowledge base for granted.<sup>50</sup>*
- *I have a person working for me who has worked on this forest for at least 23 seasons, usually 4-6 months per year. I would keep him on longer, but he runs out of his 1039 hours. He is very loyal, a hard worker, and very dependable. His technical skills are not replaceable and he knows this country very well, which is very useful for performing his field duties. He "supervises" a crew of 3-5 other seasonals, taking care of the timesheets and making sure the crew works safely and gets their mandatory training completed... Every season we turn back funding that could be used to finance this and other positions. I have taken my case to the leadership team, but they say we are limited in the number of FTEs the forest can have. This just doesn't make sense to me. We have a lot of training wrapped up in this person, and we could never replace his knowledge and skills with regard to his position.<sup>51</sup>*

## Proposals for Reform

As noted by MSPB in 1994, “temporary employment policy should be based on the assumption that the employment will normally be on a one-time, short-duration basis. To proceed on any other basis would serve to create a permanent underclass in the federal workforce...”<sup>52</sup> As has been documented herein, using temporary appointments for permanent seasonal work has brought about precisely this outcome. Reform is needed to ensure compliance with merit system principles. Compliance with merit system principles will lead to a workforce with higher morale and improved knowledge, skills, and abilities. It will lead to a more capable workforce and a more effective agency. It will lead to better value for the American taxpayer.

However, reform will not be as easy as flipping a switch. It has taken decades for the current situation in which land management agencies find themselves to develop. A significant portion of their workforce is made up of long-term temps. As noted by MSPB, “legal and procedural barriers... often preclude the consideration of many temporary employees for permanent positions regardless of how well they have performed.”<sup>53</sup> Many of these long-term temps have no pathway to permanence. To abruptly convert the temporary positions in which they have worked for years to permanent seasonal positions would be to discard them after their many years of service. It would be the height of injustice to make these dedicated and faultless public servants pay the price for the government’s misclassification of the nature of their positions. It would also diminish the capacity of the agency at the field level, where many units depend upon the institutional and local knowledge of their long-term temps.<sup>54</sup> Thus, it is critical that reform be done in two sequential stages. First, a pathway to permanence must be put in place for long-term temps. Second, regulations must be modified to ensure that temporary appointments are not used for permanent seasonal work.

Our proposals are modeled on those put forward in 1994 by the Merit System Protection Board (MSPB),<sup>55</sup> the National Partnership Council,<sup>56</sup> the NPR,<sup>57</sup> and OPM.<sup>58</sup>

**Step 1: A Pathway to Permanence.** In 1994, there was broad agreement that “long-term temporaries who have demonstrated their abilities on the job should not have to compete with the public for permanent vacancies.”<sup>59</sup> As noted by House Civil Service Subcommittee Chair Frank McCloskey, “It is simply unfair that after years of employment a temporary applying for a permanent position job is no better off than someone off of the street applying for a permanent job. Agencies could save large sums of money on education and training by hiring more temporary employees for permanent positions.”<sup>60</sup> We propose development and enactment of legislation to:

- Allow temporary employees hired under competitive procedures, with a minimum of 18 months of aggregated service<sup>61</sup> under any combination of temporary appointments, to compete for permanent positions under agency merit promotion procedures
- Give priority consideration to temporary employees for a permanent position that is effectively a successor position<sup>62</sup> of the temporary position in which they have successfully served for an aggregate of 18 months
- Provide a reasonable mechanism for long-term temps to obtain service credit for the time they served as temporaries<sup>63</sup>

**Step 2: Permanent Jobs for Permanent Work.** It is clear that the current regulatory framework does not prevent the use of temporary appointment to achieve regular and recurring seasonal work. However, we recognize there are situations in which temporary appointments are appropriate. We propose development and enactment of legislation to:

- Limit temporary appointments to 120 days (693 hours) annually<sup>64</sup>
- Temporary work of longer duration may be achieved through use of term appointments. Allow term employees with a minimum of 18 months of aggregated service under any combination of term appointments to compete for permanent positions under agency merit promotion procedures
- Give priority consideration to term employees for a permanent position that is effectively a successor position of the term position in which they have successfully served for an aggregate of 18 months
- Prohibit the severing of regular and recurring duties that could be bundled to provide a permanent position for the purpose of substituting temporary or term employees for permanent employees
- Make it a prohibited personnel practice to staff work of a permanent nature with temporary or term employees as a substitute for use of permanent employees
- Provide MSPB appeal rights to any employee with a minimum of 12 months of aggregated service under any combination of appointments within a 36 month period

Here, we have diverged somewhat from 1994 proposals. We have done so because the 1994 regulations that were intended to limit the use of temporary employees on a long-term basis failed to achieve its intended effect. Under the restrictions we propose, agencies could accomplish short-term temporary and seasonal work using temporary appointments. Permanent seasonal appointments would be used for regular and recurring seasonal work. Term appointments would be used for longer-term temporary work. If this framework were to be adopted, the pathway to permanence for temporary employees (Step 1 above) would be replaced with one for term employees. Under this proposal, The Step 1 provisions for current temporary employees would be sunset after a transition period, since tighter restriction and accountability measures should suffice to prevent the generation of a new generation of long-term temps.

To conclude, we offer these proposals in the spirit of collaboration exemplified by Presidential Executive Order 13522. We look forward to working with Congress and the Administration to refine them and complete the unfinished business of 1994.

## Notes

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<sup>1</sup> See 59 Federal Register 46897 (<http://www.gpo.gov/fdsys/pkg/FR-1994-09-13/html/94-22447.htm>).

<sup>2</sup> See USDA Forest Service, “Fiscal Year 2010 Temporary Employment Recruitment Plans” (letter dated Jan. 20, 2010 ([http://www.nffe-fsc.org/committees/legislative/temps/FS\\_100120\\_TemporaryRecruitment.pdf](http://www.nffe-fsc.org/committees/legislative/temps/FS_100120_TemporaryRecruitment.pdf))).

<sup>3</sup> OPM’s conclusions are cited in MSPB, “Temporary Federal Employment: In Search of Flexibility and Fairness,” (Sept. 1994) at 23 ([http://www.nffe-fsc.org/committees/legislative/temps/MSPB\\_9409\\_TempRpt.pdf](http://www.nffe-fsc.org/committees/legislative/temps/MSPB_9409_TempRpt.pdf)). We have been unable to locate the original study, OPM, “Temporary Employment within Land Management Agencies of the Federal Government,” (July, 1992).

<sup>4</sup> See Hearing before the Subcommittee on the Civil Service, Committee on Post Office and Civil Service, House of Representatives, 103<sup>rd</sup> Congress, “Use of Temporary Employees in the Federal Government,” (June 22, 1993). ([http://www.archive.org/stream/useoftemporaryem00unit/useoftemporaryem00unit\\_djvu.txt](http://www.archive.org/stream/useoftemporaryem00unit/useoftemporaryem00unit_djvu.txt))

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<sup>5</sup> See The Washington Post, “Lincoln Caretaker’s Death Brings House-Passed Benefits” (July 16, 1993). ([http://www.nffe-fsc.org/committees/legislative/temps/WashPost\\_930716.pdf](http://www.nffe-fsc.org/committees/legislative/temps/WashPost_930716.pdf))

<sup>6</sup> See “Lincoln Caretaker’s Death Brings House-Passed Benefits”, *supra* note 5, and HR 2643 of the 103<sup>rd</sup> Congress, “The James Hudson Temporary Employee Equity Act of 1993. ([http://www.nffe-fsc.org/committees/legislative/temps/Congress\\_103\\_HR\\_2648.pdf](http://www.nffe-fsc.org/committees/legislative/temps/Congress_103_HR_2648.pdf).)

<sup>7</sup> See “Temporary Federal Employment: In Search of Flexibility and Fairness,” *supra* note 3.

<sup>8</sup> One such example is provided by Forest Service Council (FSC) survey response # 21401: “I am a permanent full-time employee. When I arrived there was a seasonal employee that had been working here for about 30 years. He has helped me so much and he knows the job here so well. I found out later that he applied for my job and another job this year but because he is 1039 he cannot compete in the forest service sector [under merit promotion procedures]...”

<sup>9</sup> See 59 Federal Register, “Temporary and Excepted Service Employment: Proposed Regulations” (Feb. 1, 1994). (<http://frwebgate3.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=0890385616+0+1+0&WAISaction=retrieve>) See 59 Federal Register 46897, *supra* note 1, for the final regulations, which did not differ in this regard. In rushing implementation, OPM stated, “In view of Congressional and employee concerns and evidence that under existing limits some employees have, indeed, served for years under a succession of temporary appointments, we believe it is critical to make the revised limits effective as soon as possible.” Ironically, this situation has persisted for 15 years. (<http://frwebgate3.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=0890385616+2+1+0&WAISaction=retrieve>)

<sup>10</sup> See GAO, “OPM Data Do Not Identify if Temporary Employees Work for Extended Periods,” (March, 2002). Note: GAO was subsequently renamed the Government Accountability Office. (<http://www.gao.gov/new.items/d02296.pdf>)

<sup>11</sup> For a seasonal temp, five years of service generally equates to at least ten seasons of service, since they are limited to less than six months of work per appointment per year. The exception is if the employee is appointed to a second temporary position that is not a “successor” position under the regulations at 5 CFR 316.401, in which case the employee can work the entire year as a temporary employee. This can be done indefinitely under current regulations.

<sup>12</sup> Unfortunately, many employees serving on temporary appointments have little to no access to Forest Service computers. Obviously, this adversely affected the response rate. The best we could do under these challenging circumstances was to ask permanent employees (who do have fairly reliable access) and Local Union officials to pass the word along to temporary employees. In addition, we set the survey up so that it could be accessed outside of the Forest Service firewall from any computer with access to the internet.

<sup>13</sup> For example, it is reasonable to expect that long-term temps would, as a result of their status, be more motivated to participate in a survey on this topic. In addition, it is reasonable to expect that first-time temps would lack both motivation and access, and therefore would be underrepresented. Accordingly, we do not claim that the population represented in our survey results is representative of the population temporary employees as a whole and that extrapolation from these results would provide a precise measure of the whole population. Likewise, we are confident that not each and every long-term temp employed by the agency responded, so the absolute numbers are clearly underestimates. Thus, while these data are not sufficient to precisely measure the problem, they do demonstrate that it is substantial.

<sup>14</sup> Since seasonal temporaries are generally limited to less than six months of work per year, we multiplied each employee’s LOS by 2 to derive an estimate of the number of seasons worked. It should be noted that the use of LOS data for the purpose is somewhat unreliable. See “OPM Data Do Not Identify if Temporary Employees Work for

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Extended Periods,” *supra* note 10, for a discussion of the limitations of available data to track the duration of service of temporary employees.

<sup>15</sup> See National Park Service, “Equal Employment Opportunity Program Plan: Accomplishments for FY 2008 and Updates for FY 2009” at 12-13 ([http://www.nffe-fsc.org/committees/legislative/temps/NPS\\_EEO\\_Rpt\\_FY2008.pdf](http://www.nffe-fsc.org/committees/legislative/temps/NPS_EEO_Rpt_FY2008.pdf)).

<sup>16</sup> All comments in this Section are from employees who previously served under temporary appointments but have since obtained permanent jobs, some full-time and some seasonal. As such, they have no direct interest in the outcome of our advocacy work on behalf of current temporary employees.

<sup>17</sup> FSC survey response 22786

<sup>18</sup> FSC survey response 23972

<sup>19</sup> FSC survey response 23561

<sup>20</sup> FSC survey response 23532

<sup>21</sup> See the website, “The Best Places to Work in the Federal Government” (2009). The site provides “comprehensive and authoritative rating of employee satisfaction and commitment in the federal government, [as] produced by the Partnership for Public Service and American University’s Institute for the Study of Public Policy Implementation (ISPPi).” ( <http://data.bestplacestowork.org/bptw/overall/sub>)

<sup>22</sup> See Hearing before the Subcommittee on National Parks, Forests And Public Lands, Committee on Natural Resources, House of Representatives, 111<sup>th</sup> Congress, “Restoring The Federal Public Lands Workforce” (March 19, 2009). ([http://resourcescommittee.house.gov/index.php?option=com\\_jcalpro&Itemid=32&extmode=view&extid=235](http://resourcescommittee.house.gov/index.php?option=com_jcalpro&Itemid=32&extmode=view&extid=235))

<sup>23</sup> FSC survey response 22817

<sup>24</sup> FSC survey response 24434

<sup>25</sup> FSC survey response 24553

<sup>26</sup> FSC survey response 24667

<sup>27</sup> FSC survey response 21115

<sup>28</sup> FSC survey response 21564

<sup>29</sup> FSC survey response 24364

<sup>30</sup> FSC survey response 22385

<sup>31</sup> FSC survey response 22539

<sup>32</sup> FSC survey response 23725

<sup>33</sup> FSC survey response 21830

<sup>34</sup> FSC survey response 24055

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<sup>35</sup> All comments in this Section are from employees who previously served under temporary appointments but have since obtained permanent jobs, some full-time and some seasonal. As such, they have no direct interest in the outcome of our advocacy work on behalf of current temporary employees.

<sup>36</sup> FSC survey response 21336

<sup>37</sup> FSC survey response 21455

<sup>38</sup> FSC survey response 24274

<sup>39</sup> FSC survey response 21115

<sup>40</sup> FSC survey response 21520

<sup>41</sup> FSC survey response 23412

<sup>42</sup> FSC survey response 21830

<sup>43</sup> FSC survey response 21653

<sup>44</sup> Temporary employees may be retained beyond the 1039-hour limit only with OPM approval. Reportedly, this has been done on a number of occasions to keep adequate numbers of firefighters in the field to deal with bad fire seasons and other national emergencies. Although we cannot provide the historical data on this point, we are aware that such an exception was granted in 2007 to meet “critical wildland fire suppression needs.” See US Forest Service Human Capital Management, “Approval to Waive 1039 Limitation,” (letter dated August 31, 2007). ([http://www.nffe-fsc.org/committees/legislative/temps/FS\\_070831\\_1039\\_Waiver.pdf](http://www.nffe-fsc.org/committees/legislative/temps/FS_070831_1039_Waiver.pdf)) Seeking a waiver from OPM is a high barrier, and thus is not pursued for regular and recurring land management work. Any non-emergency work assigned to temporary employees that is not accomplished within the 1039-hour limit, including fire suppression needs that do not rise to an extreme level and fuels reduction projects designed to reduce the threat of future wildfires, is simply put off until next year.

<sup>45</sup> FSC survey response 22957

<sup>46</sup> FSC survey response 24582

<sup>47</sup> FSC survey response 24831

<sup>48</sup> FSC survey response 24923

<sup>49</sup> FSC survey response 22311

Negative effects on agency scientific work have been noted by the National Association of Forest Service Retirees (NAFSR), who in a letter to Senator Bingaman state, “The agency has become increasingly dependent on short-term appointments and Post-Doc appointments. This decline affects the quality of the scientific work that is being done. It significantly reduces the ability of Forest Service Research to provide sound scientific advice to the agency, to the forest management community, and to the Congress.” See NAFSR, “FY2011 Appropriation for the U.S. Forest Service” (letter dated March 1, 2010). ([http://www.nffe-fsc.org/committees/legislative/temps/NAFSR\\_100310.pdf](http://www.nffe-fsc.org/committees/legislative/temps/NAFSR_100310.pdf))

<sup>50</sup> FSC survey response 21762

<sup>51</sup> FSC survey response 21805

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<sup>52</sup> See “Temporary Federal Employment: In Search of Flexibility and Fairness” at 27, *supra* note 3.

<sup>53</sup> See “Temporary Federal Employment: In Search of Flexibility and Fairness” at 8, *supra* note 3.

<sup>54</sup> A major factor contributing to the problematic consolidation of Human Resources (HR) by the Forest Service was loss of human capital. Many HR specialists and assistants were not willing to locate; therefore, consolidation was accompanied by an exodus of trained and experienced employees. It was only after consolidation that the value of their institutional knowledge was appreciated.

<sup>55</sup> See “Temporary Federal Employment: In Search of Flexibility and Fairness,” *supra* note 3.

<sup>56</sup> The National Partnership Council’s conclusions are cited in MSPB, “Temporary Federal Employment: In Search of Flexibility and Fairness,” *supra* note 3. We have been unable to locate their original study: National Partnership Council, “A Report to the President on Implementing Recommendations of the National Performance Review,” (January 1994).

<sup>57</sup> See NPR, Report HRM01, “Reinventing Human Resource Management: Create a Flexible and Responsive Hiring System,” (September 1993). (<http://govinfo.library.unt.edu/npr/library/reports/hrm01.html>)

<sup>58</sup> OPM’s conclusions are cited in MSPB, “Temporary Federal Employment: In Search of Flexibility and Fairness,” *supra* note 3. We have been unable to locate the original study: OPM, “Temporary Employment within Land Management Agencies of the Federal Government,” (July, 1992).

<sup>59</sup> See 59 Federal Register 46897, *supra* note 1.

<sup>60</sup> See “Use of Temporary Employees in the Federal Government,” *supra* note 4.

<sup>61</sup> Since temporary seasonal appointments are limited to one hour less than six months, this effectively means that they may compete for permanent jobs during or after their fourth season as a temporary.

<sup>62</sup> The term successor position is as defined in 5 CFR 316.401(c), *i.e.*, a position that replaces and absorbs the position to which an individual was originally appointed.

<sup>63</sup> Credit for time served is an absolutely critical issue for firefighters. Permanent firefighter positions have a maximum entry age of 37. Without credit for time served, or some other solution, many long-term temporary firefighters would be ineligible for a permanent successor position. Under one 1994 proposal, temporary employees would have been able to “buy in” to the Federal Employees Retirement System (FERS) if they had a certain aggregate level of temporary service. It is noteworthy that Public Law 103-82 allows Peace Corps and VISTA volunteers to “buy in” to either the FERS or the Civil Service Retirement System (CSRS). This is an important issue for many former temporary employees as well, who feel that they have been wrongfully denied retirement benefits because the work they performed for years was misclassified as temporary.

<sup>64</sup> This is consistent with employer obligations under the Patient Protection and Affordable Health Care Act to provide health insurance coverage to temporary employees if employed for greater than 120 days annually.