



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

AUG 5 2004

MEMORANDUM TO OPERATING AND STAFF DIVISION HEADS
HUMAN RESOURCES CENTER DIRECTORSFROM: Ed Sontag
Assistant Secretary for Administration and Management

SUBJECT: DEPARTMENTAL POLICY ON USE OF TITLE 42 AUTHORITY

Attached is HHS Personnel Instruction 42-1, which establishes a Department-wide policy for filling scientific positions in all Operating and Staff Divisions where such positions are appropriate. Appointments under 42 USC 209(f) may only be used to fill scientific positions. The authority is to be used only when recruitment or retention efforts under other available personnel systems, including Title 5 USC, the Senior Biomedical Research Service and the PHS Commissioned Corps, have failed to yield candidates that possess critical scientific expertise. These recruitment and retention efforts must be documented prior to making an appointment under 42 USC 209(f).

The policy establishes minimum qualification and eligibility standards and standardizes issues related to pay increases, pay caps, incentives, benefits, awards, performance management, base salary limitations and other administrative matters where a common approach is necessary within the Department.

The Instruction incorporates current best practices within the Department and presents a "One HHS" approach to the use of this important authority. The policy is effective upon issuance.

If you have questions, please call Dianne Thomas at 202-690-6073 or email her at Dianne.Thomas@hhs.gov.

A handwritten signature in black ink, appearing to read "Ed Sontag".

Ed Sontag
Assistant Secretary for Administration and
Management

Attachment

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FINAL
Effective August 2004

HHS Instruction
Personnel Manual
HHS Transmittal

HHS PERSONNEL INSTRUCTION 42-1
APPOINTMENT OF 42 USC 209(f) SCIENTISTS

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42-00 Purpose

The purpose of this Instruction is to state the Department's policies concerning use of 42 United States Code (USC) Section 209(f).

42-10 References

42 USC Section 209(f)

42-20 Coverage

Appointments under 42 USC 209(f) may only be used to fill scientific positions. The authority will be used only when recruitment or retention efforts under other available personnel systems, including Title 5 USC, the Senior Biomedical Research Service and the PHS Commissioned Corps, have failed to yield candidates that possess critical scientific expertise. These recruitment and retention efforts must be documented prior to use of an appointment under 42 USC 209 (f).

42-30 Tenure

- A. All appointments, including conversions from other civil service appointments, to positions under Title 42, 209(f), are in the excepted service. Work schedules may be full-time, part-time, or intermittent.
- B. Appointments may be indefinite. That is, they do not have a stated time limit so one may serve an entire Federal career under an indefinite appointment.
- C. Appointments may be temporary for any period up to 5 years with any number of extensions. Non-citizens on time-limited employment visas may only be given temporary appointments.

42-40 Qualifications

- A. All appointees must meet positive education requirements for the type of scientific position being filled, which must include, at a minimum, a bachelor's degree in a scientific discipline directly related to the position. In addition, appointees must have professional experience and stature that is commensurate with the duties of the position being filled.
- B. Appointees must furnish proof that they meet all positive education requirements. HR staff will be responsible for ensuring that all foreign education is appropriately evaluated.
- C. In order to determine qualifications, supervisors must prepare a narrative statement fully describing the scientific duties and responsibilities and the education and experience required to perform those duties. The title and series assigned will be based on the duties and must be documented in writing and made a part of the appointment package. Official position descriptions are not required.

42-50 Compensation

- A. Salaries for individuals appointed on a full-time schedule will be set on a per annum basis commensurate with the applicants' qualifications and experience. Appointments that are on other than a full-time basis will be paid on a pro-rata basis of an annualized salary.
- B. For purposes of this program, the appointee's compensation is the base salary for pay, leave, and benefits. Base salary excludes retention allowances, recruitment/relocation bonuses, and awards. Base salary will be set at the lowest rate necessary to recruit the candidate. In determining the base salary, management must consider such factors as:
 - Current salary;
 - Competing offer of employment, either written or verbal;
 - Stature of individual in his/her professional field;
 - Average salary from a published salary survey;

- Urgency of the program;
- Role and impact of the individual in the program;
- Recruitment efforts, e.g., turnover rates, labor market factors, recruitment/retention statistics;
- Specialized skills/training, and experience that the applicant may possess that will benefit the agency/program;
- Compensation for cost of living disparity as reflected in a salary comparison;
- Complexity of duties;
- Consistency of pay with others in the organization;
- Responsibilities within organization

C. Base salary may be set up to \$250,000 per annum at the discretion of the Operating Division (OPDIV) head. Recommendations for base salary above \$250,000 must be submitted by the OPDIV head to the Assistant Secretary for Administration and Management (ASAM), for approval by the Secretary. Such requests must be fully justified and documented.

D. Pay Increases

1. Automatic cost of living adjustments do not apply to Title 42 appointments. All pay increases will be performance based, will be consistent with the employee's annual performance appraisal, and will be limited to one increase per year. Any pay increase outside of the normal performance cycle requires an exception authorized by the OPDIV head. Such exceptions must be fully documented and justified.
2. Performance based pay increases will normally be limited to a maximum of six percent. OPDIV heads may authorize higher increases where performance clearly warrants. All pay increases must be fully documented and justified.
3. Recommended pay increases that will increase base salary to \$250,000 per annum or above must be submitted by the OPDIV head to ASAM for approval by the Secretary. Such requests must be fully documented and justified.

E. Pay Caps

1. Base salary cannot exceed \$250,000 in a calendar year unless a higher rate is approved by the Secretary.
2. Total compensation (including recruitment bonuses, retention allowances, and cash awards) cannot exceed \$275,000 in a calendar year without the prior approval of the Secretary.

F. Pay Incentives

1. Employees appointed under Section 209(f) are eligible to receive recruitment, retention, and relocation bonuses under the same criteria as Title 5 employees.
2. Employees appointed under Section 209(f) cannot receive special salary rates, Physician's Comparability Allowances (PCAs), or Physician Special Pay (Title 38). No exceptions are authorized.

42-60 Conversions from Other Pay Systems

- A. Conversions are only to be used in exceptional circumstances as outlined in this policy. A scientist may only be converted to this Title 42 program from another pay system if he/she is appropriately peer-reviewed according to OPDIV procedures and determined to meet all the following criteria:
1. Evidence of recognition as a national or international expert in the field, such as: invited manuscripts, presentations, and consultations; receipt of honors and awards; or other recognition for noteworthy performance or contributions to the field.
 2. Evidence of original scientific or scholarly contributions of major significance in the field.
 3. Evidence of leadership in the field equivalent to a full tenured professor in academia.
 4. Special knowledge and skills of benefit to the agency.
- B. Conversions from the Commissioned Corps are allowed if the officer meets the criteria (including peer review) specified in 42-60A, above, under the following circumstances:
1. Following mandatory retirement (after at least 30 years of creditable service [or after 25 years with at least four years at flag rank], or based on disability). Upon appointment, Title 42 pay cannot exceed Corps total pay.
 2. Following voluntary retirement (after at least 20 years of creditable service). In rare circumstances, an outstanding scientific officer may be allowed to retire early and convert to Title 42 after a 90-day break in service. Such requests must be fully justified and documented and must be submitted by the OPDIV head to ASAM for approval by the Secretary.

42-70 Benefits

Employees appointed under Section 209(f) for more than 12 months (with the exception of non-citizens in overseas locations) will receive benefits equivalent to those of employees appointed under Title 5.

42-80 Awards

Employees appointed under Section 209(f) are eligible for the following categories of awards: performance-based cash awards, one time special act awards (including on the spot and time off awards), and honorary awards.

42-90 Performance Management and Conduct

- A. All Title 42 employees must be on a performance plan that meets all requirements of the appropriate Departmental performance system. Ratings under the performance plan will be used as the basis for pay decisions.
- B. Title 42 employees must maintain acceptable performance and conduct in order to be retained in their positions.

42-100 Other Actions

- A. If an employee voluntarily or involuntarily separates from a Title 42 position and seeks to return to a non-Title 42 position, the employee may be considered in accordance with all civil service requirements. Pay of Title 42 employees, upon converting to a non-Title 42 position, will be set no higher than the maximum General Schedule pay limitations under Title 5.
- B. Prior to appointment or conversion to a Title 42 position, employees must be informed in writing that they are not entitled to Merit Systems Protection Board (MSPB) appeal rights.

42-200 Conduct Laws and Regulations

Title 42 employees must comply with all ethical and conduct-related laws and regulations applicable to other Executive Branch employees. These include laws concerning financial interests, financial disclosure, and conduct regulations promulgated by the Department, by the Office of Government Ethics, and other agencies.

42-300 Documentation Requirements for Appointment/Conversion

- A. **Initial and Subsequent Appointments.** Requests to appoint and/or convert individuals using Title 42, 209(f) will be processed in accordance with the Office of Personnel Management (OPM) Guide to Processing Personnel Actions.
- B. Employees appointed or converted to a Title 42 209(f) position must sign a statement documenting their understanding that they are accepting an excepted service appointment and to acknowledge that they are not entitled to Merit Systems Protection Board (MSPB) appeal rights.

- C. Appointment of Non-citizens. Non-citizens may be appointed as permitted by law. The non-citizen must have an appropriate employment visa.

42-400 Program Review and Evaluation

The ASAM, Office of Human Resources, will periodically review appointments made under the Title 42 209(f) authority.



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Assistant Secretary for Administration and Management

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