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Personnel Manual

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Material Transmitted:

HHS Instruction 302-1, Filling Excepted Positions

Material Superseded:

HHS Instruction 302-1 (all)

Background:

This Instruction has been revised consistent with recent changes in the organization of HHS, and in support of HHS administrative initiatives calling for more streamlined rules and greater delegations of authority. In this instance, we have engaged in the streamlining of the rules.

Any reference to "OPDIV" in this Instruction now includes the PHS agencies, the Office of the Secretary, the Program Support Center, HCFA, ACF, and AOA.

This issuance is effective immediately. Implementation of this issuance must be carried out in accordance with applicable laws, regulations, bargaining agreements, and Departmental policy.

Filing Instructions:

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Eugene Kinlow
Deputy Assistant Secretary for
Human Resources, OASMB

INSTRUCTION 302-1

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HHS INSTRUCTION 302-1
FILLING EXCEPTED POSITIONS

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302-1-00 PURPOSE

This Instruction sets forth Department policy and procedures concerning the filling of excepted service positions.

302-1-10 COVERAGE

This Instruction covers positions excepted by statute, Executive Order, and regulations. It does not cover the Public Health Service Commissioned Corps, the Senior Executive Service, Department positions filled under the Canal Zone Merit System or its successor, the appointment of experts and consultants, or PHS Fellowship Programs authorized in Title 42 U.S. Code.

302-1-20 REFERENCES

- A. 5 U.S. Code 2103 (law - definitions)
- B. 5 U.S. Code 3101 (law - general authority to employ)
- C. 5 U.S. Code 3320 (law - excepted service)
- D. 42 U.S. Code (law - Public Health Service Act)
- E. 5 CFR Part 213 (regulations - excepted service)
- F. 5 CFR Part 302 (regulations - employment in the excepted service)
- G. 5 CFR Part 752 (regulations - adverse actions)
- H. Office of Personnel Management Qualification Standards
- I. HHS Instruction 351-1 (reduction-in-force (RIF))

302-1-30 THE EXCEPTED SERVICE

5 Us. Code 2103 defines excepted service as "...those civil service positions which are not in the competitive service or the Senior Executive Service." By way of amplification, an excepted service position is one which has been removed from the competitive service and therefore may be filled without regard to the Office of Personnel Management (OPM) competitive examining procedures even though a competitive process may still be required. An excepted position may or may not be covered by the Classification Act and other civil service laws. Some positions, such as attorneys filled under Schedule A authority 213.3102(d), are always excepted regardless of the incumbent. Other positions are excepted only when filled by specific categories of individuals, such as severely physically handicapped individuals (213.3102(u)).

A. Methods of Excepting Positions

Positions may be excepted from the competitive service by law, Executive Order, or OPM action.

B. Determining Whether Positions are Excepted

1. When positions are excepted by law or Executive Order, there is usually a section which clearly states that appointments may be made without regard to civil service laws or the provisions of Title 5 of the U.S. Code.
2. Positions excepted by OPM are usually placed in Schedule B, or C. A list of these exceptions is published every year in the Federal Register.

C. Obtaining Exceptions

OPDIV-specific requests for new excepted appointment authorities or for changes in existing authorities must be directed to OPM. These requests must include the basis for the exceptions, the number of positions, the series and grade levels, and the geographic and organizational location(s). A copy of the request and the final OPM action on the request must be forwarded to the Office of the Deputy Assistant Secretary for Human Resources in the Office of Management and Budget (OASMB). Requests concerning authorities that affect more than one OPDIV- Assistant Secretary to OPM must be sent to the Office of the Deputy

D. for Human Resources, OASMB, for forwarding.

302-1-40 QUALIFICATION REQUIREMENTS

A. Basic Policy

The qualification requirements for excepted positions in this Department will be the same as set forth in the OPM qualification standards for competitive service positions, except as discussed below.

B. Selective Factors

Personnel offices may include selective factors as part of the basic qualification requirements for a position. These selective factors must meet the same criteria as selective factors in the competitive service. They may not include positive education requirements.

C. Written Tests

Written tests which are part of the qualification standards for competitive service positions will not be used for excepted service positions unless the particular excepted appointing authority requires them.

D. Positions Filled by Disabled Individuals

For positions filled by disabled individuals under Schedule A authorities 213.3102(t) and (u), a certification by a State vocational rehabilitation counselor (or Veterans Administration Counselor for the (u) authority only) may be substituted for the usual qualification standards. However, in most cases, applicants' qualifications should not vary substantially from those contained in the OPM qualification standards. In no case may a counselors certification be substituted for a positive education requirement.

E. Positions in the Indian Health Service

1. The Director of the Indian Health Service (IHS) may establish alternative qualification standards for positions in IHS; and
2. The Director of IHS may establish conditions under which qualification standards for positions in IHS may be waived when they are filled by Indians.

F. Positions With No Qualification Standards

There are some General Schedule (GS) and Federal Wage System (FWS) positions for which no qualification standards exist. In these cases, personnel offices must determine whether a standard for a similar series can be used. If this is not possible, the personnel office must develop its own standards which follow the general pattern of the OPM qualification standards. (This paragraph applies to the excepted service and does not authorize the development and

application of standards to the competitive service.) For positions which are not under GS or FWS, personnel offices must determine a comparable series and grade for the position and apply the appropriate standards. When this is not possible, personnel offices must develop basic qualification requirements for the position. Many of these positions are special research or intern positions, and the basic qualification requirement may include such factors as an applicant's interest in a particular area of study or his\her desire to enter a particular career field following completion of the internship.

G. Waivers of Qualification Standards

Personnel offices may waive qualification standards except that positive education requirements may not be waived.

H. Scientific and Professional Positions

Scientific and professional positions are those positions for which there is a positive education requirement in the basic OPM qualification standards, or which are designated as performing professional or scientific work.

I.

302-1-50 FILLING EXCEPTED POSITIONS BY EXTERNAL APPOINTMENT

A. External Appointment

An external appointment is:

1. the filling of an excepted position from outside the Department;
2. the filling of an excepted position without time limitation by conversion of an employee on a time-limited appointment or an appointment designated as indefinite except that this does not include the conversion of law clerks to attorneys following admittance to the Bar;
3. the filling of an excepted position with an employee in the competitive service; or
4. the movement of an employee from one excepted position to another when the appointing authority changes.

Actions described in section 302-1-90C below are not external appointments for purposes of this Instruction.

B. Prior Approval Requirements

Some excepted appointing authorities require prior OPM approval before they may be used. When this is the case, the requirement is contained in the authority itself.

C. Positions Not Covered by Title 5 of the U.S. Code

Positions excluded from Title 5 may be filled without regard to veterans preference and the requirement for priority consideration for employees on the Department's Priority Reemployment List. There is no prescribed rating process for these positions, but an OPDIV may elect to use one.

D. Positions Covered by Title 5 of the U.S. Code

When an excepted position is covered by the provisions of Title 5 of the U.S. Code, external appointments must be made in accordance with the standard rating procedures contained in 5 CFR 302.302(b). Additionally, these regulations discuss situations in which the rating procedures do not apply or may be modified. (See 5 CFR 302.102 (c) .) Modified rating procedures must be approved by OPM.

E. Exemptions and Modifications to Standard Rating Procedures.

1. 5 CFR 302 provides that Schedule A and similar positions are not covered by standard rating procedures when OPM agrees to this. This is not a blanket exemption for Schedule A positions. In fact, all other Schedule A positions must be filled under standard rating procedures if there are applicants entitled to veterans preference or priority consideration.
 - a. If no applicants entitled to veterans preference or priority consideration apply for a position, standard rating procedures do not have to be followed. However, personnel offices must still provide for a rating process which objectively assesses the qualifications of applicants, except as provided in b below. Such a process maybe as basic as qualified and well qualified or as complex as using precise numerical ratings.
 - b. If no applicants entitled to veterans preference or priority consideration apply under the Schedule A authorities 213.3102 (t), (u), and (11) and the Schedule B authorities for student employment, no rating or ranking is required, regardless of the number of applicants.

2. When positions (such as attorneys) are excluded from standard rating procedures, applicants with veterans preference or entitlement to priority consideration are still entitled to their rights. For example, if a categorical rating system is used and a veteran and a nonveteran are both ranked in the top category, the nonveteran may not be selected ahead of the veteran without a written explanation of the reasons why the veteran is being passed over. Upon request, these reasons must be made available to the veteran. (See section 302-1-501 below).
3. If all the applicants for a position will be selected, they need not be rated and ranked. However, they must all meet the basic qualification requirements for the position.

F. Priority Consideration

With respect to the application of external appointment procedures, priority consideration is the consideration given to excepted service employees who are entitled to be placed on the Department's Priority Reemployment List as required by 5 CFR 302.303. The Priority Reemployment List is Department-wide in a particular commuting area, and it will include nonpreference eligibles. With respect to the filling of attorney positions, priority consideration applies only to those employees who have recovered from work-related injuries as described in 5 CFR 302.303(b)(3). This is because employees who recover from work-related injuries are entitled to priority consideration on the basis of statute while the priority consideration given to other employees is based on OPM regulations. The Department of Justice has determined that OPM has no authority to regulate the filling of attorney positions.

Priority consideration described in this section is separate from priority consideration which sometimes is granted to remedy an employee's loss of consideration for a position. Generally, this latter type of priority consideration is granted by a personnel office and may not take precedence over priority consideration described above.

G. Rating Criteria

When it is necessary to rate and rank applicants, the rating criteria must be based on an in depth analysis of the requirements of the position. Ratings must be documented, and they must be based on an assessment of the applicant's knowledge, skills, and abilities in relation to the requirements of the position. Because these ratings are being made for external appointments, performance appraisals usually should not be obtained. However, this does not restrict a selecting official from obtaining references on an applicant before making a selection. For some intern and residency positions in the Public Health Service, letters of recommendation or appraisals from deans, professors, or supervisors may be used in the rating process. An interview may be part of the rating process if it is standardized and there is documentation to show which knowledge, skills, and abilities it was being used to assess.

H. Source of Applicants

Applicants for excepted positions may be located by the use of vacancy announcements, applicant supply files, or referral sources.

1. A vacancy announcement may have a specific opening and closing date (and must be open for at least 1 week), or it may be an open continuous announcement. In either case, the announcement must be distributed to sources outside the Department since it is being used to fill a position by external appointment.
2. Personnel offices may maintain applicant supply files for particular types of positions. These may be used in lieu of or in conjunction with vacancy announcements. Personnel offices may establish the time period during which applicants will receive consideration, but it must be at least 90 days. Applicants should be advised of the time period during which they will receive consideration. Personnel offices do not have to follow OPM instructions concerning applicant supply files, while they may be a useful guide.
3. In some cases, it may be appropriate to use only referrals from a particular source. For example, if an agency has a cooperative education agreement with one school, that school is the only appropriate source for applicants for cooperative education positions. If a disabled applicant is referred by a State vocational rehabilitation agency, there is no requirement that the position be announced in an attempt to locate other disabled applicants. However, if there are other disabled applicants in the applicant supply file who qualify for the position and are entitled to veterans preference or priority consideration, they must be considered and rated along with the referral from the State vocational rehabilitation agency.

I. Passing Over Veterans and Employees Entitled to Priority Consideration

1. When a veteran is passed over, there must be written documentation showing the basis for the passover. The passover must be based on objective criteria, and the justification must show the areas in which the selectee is better qualified than the applicant passed over.

Upon request, the reasons for the passover must be made available to the veteran. The passover must be reviewed by the management official above the selecting official, except in those cases where the selecting official is the Head of the OPDIV or STAFFDIV. In addition, the personnel officer must concur that the passover is justified. Personnel offices will keep all documentation for passovers for at least 2 years.

2. When an applicant entitled to priority consideration is passed over, the procedures contained in 5 CFR 302.304 must be followed.

J. Plans for Filling Positions

Personnel offices which have appointing authority over excepted positions must develop examining plans for making external appointments. These plans must conform to this Instruction. There may be different plans for different positions. For example, different plans would be appropriate for those positions not covered by Title 5 of the U.S. Code and those positions for which standard rating procedures are required.

302-1-60 ADVERSE ACTION PROTECTION

An excepted service employee with veterans preference acquires adverse action protection under 5 CFR Part 752 after completing 1 year of current continuous service in the excepted service regardless of whether that year was designated as a trial period. An employee in the excepted service who is a non-preference eligible who has completed 2 years of current continuous service in the same or similar position under other than a temporary appointment limited to 2 years or less is entitled to adverse action protection under 5 CFR Part 752. Non-preference employees in excepted positions which lead to conversion to the competitive service are in a probationary period for determining whether they have adverse action coverage no matter how many years of service they accrue under such an appointment. Therefore, they do not acquire adverse action protection. While the Department no longer prescribes a trial period, an OPDIV may elect to do so, but the use of a trial period has no effect on adverse action coverage.

302-1-70 TIME-IN-GRADE REQUIREMENTS

OPDIVs will apply time-in-grade requirements in the excepted service in the same manner as they are applied in the competitive service. Time-in-grade requirements may but do not have to be applied if an employee could have been previously appointed at the higher grade under external procedures, and this fact is documented. In a memorandum dated September 29, 1993, the authority to waive time-in-grade requirements in the excepted service - was delegated to the redelegation authorized.

302-1-80 TENURE GROUPS

The designation of tenure groups is intended only to be applicable to reduction in force standing and has no effect on any other rights.

A. Permanent Positions

Employees placed in permanent positions will be placed in Tenure Group II. After 3 years of substantially continuous service, they will be placed in Tenure Group I. The determination as to the completion of 3 years of substantially continuous service will be made in the same manner as for the competitive service except that the service must begin and end with permanent appointments in the excepted service. Once an employee has met the requirement for placement in Tenure Group I, he/she does not have to serve a new 3-year period regardless of any future breaks in service. The requirement may have been met in this Department or any other Department. Obtaining career tenure in the competitive service does not satisfy the requirement for being placed in Tenure Group I in the excepted service. (Such employees with career tenure in the competitive service but with no previous excepted service would be placed in Tenure Group II.) The instructions in this section do not apply to Schedule C employees. (See section 302-1-80B below.)

B. Schedule C Employees

A Schedule C employee whose appointment is not time-limited must be placed in Tenure Group I upon initial appointment.

C. Use of Tenure Group III

In the excepted service, an employee who has completed more than 1 year of service under temporary appointments is placed in Tenure Group III. In addition, employees whose appointments are designated as indefinite are in Tenure Group III. The indefinite designation should be used only when an employee is working in a situation which is not permanent although the specific termination date may not be known. The indefinite designation may not be used for a permanent position.

302-1-90 INTERNAL MOVEMENT OF EXCEPTED SERVICE EMPLOYEES

A. Applicability

When a Department employee in the excepted service is moved to another position and the action does not meet the definition for external appointment contained in section 302-1-50A, the provisions of this section apply.

B. Competitive Process

OPDIVs may but are not required to use a competitive process in filling excepted service positions.

C. Extensions and Changes in Tenure

The following actions may be taken without regard to the procedures contained in section 302-1-50:

1. Extension of time-limited appointments:
2. Conversion of excepted time-limited appointments to excepted indefinite or excepted permanent appointments when the conversion results from the removal of the time limitation from the appointing authority itself or when the position was originally announced as a permanent position, the selectee was within reach for a permanent appointment, but at the time management placed him\her on a time-limited appointment; and
3. Consecutive temporary appointments under the same authority when the authority permits or requires appointments to be made in 1-year increments, for example, appointment of students. In these cases, appointments may be made at higher grades.

D. Applicability of Veterans Preference

Veterans preference is not applicable to the movement of excepted service employees within the Department unless that movement is effected under external appointment procedures as described in section 302-1-50.

E. Right to Apply Under External Appointment Procedures

An excepted service employee of the Department has the right to apply for any position being filled by external appointment. In such a case, the employee is rated and ranked in the same manner as other applicants applying for external appointment. An employee who applies under external appointment procedures must still meet time-in-grade requirements, if an OPDIV elects not to waive the time-in-grade requirements. A Department employee being considered for a position in the Indian Health Service under Schedule A authority 213.3116(b) (8) under external appointment procedures does not have to meet time-in-grade requirements.

302-1-100 SPECIAL REQUIREMENTS IN THE INDIAN HEALTH SERVICE

This Instruction applies to the Indian Health Service (IHS) as well as to the rest of the Department. However, where any requirement of this Instruction conflicts with the requirement to provide Indian

preference, the latter requirement is controlling. Competition among Indians, or non-Indians where no Indians are available, is in accordance with this Instruction. For example, the same conditions apply to passing over an Indian with veterans preference by an Indian without veterans preference as apply to passing over a veteran with a nonveteran. The rights of an Indian not entitled to veterans preference are superior to those of a non-Indian who is entitled to veterans preference. Personnel offices which have appointing authority over excepted positions in IHS are responsible for developing and implementing procedures which comply with this Instruction and the requirements of Indian preference.