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## DEPARTMENT OF DEFENSE

### OFFICE OF PERSONNEL MANAGEMENT

#### 5 CFR Part 9901

RIN 3206-AL75

#### National Security Personnel System

**AGENCY:** Department of Defense; Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Department of Defense (DoD) and the Office of Personnel Management (OPM) are issuing the final regulations adding subpart E, Staffing and Employment, to the National Security Personnel System (NSPS) regulations published in the **Federal Register** on September 26, 2008. NSPS is a human resources management system for DoD, authorized by the National Defense Authorization Act for Fiscal Year 2004, amended by the National Defense Authorization Act for Fiscal Year 2008 and the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. These final regulations govern staffing and employment under NSPS.

**DATES:** This rule is effective March 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** For DoD, Bradley B. Bunn, (703) 696-5604; for OPM, Charles D. Grimes III, (202) 606-8079.

**SUPPLEMENTARY INFORMATION:** On December 3, 2008, the Department of Defense (DoD or "the Department") and the Office of Personnel Management (OPM) published in the **Federal Register** at 73 FR 73606 a proposal to add staffing and employment provisions to the National Security Personnel System (NSPS or "the System"), a human resources (HR) management system for DoD under 5 U.S.C. 9902, as enacted by section 1101 of the National

Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136, November 24, 2003), and amended by section 1106 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181, January 28, 2008), and by section 1106 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417, October 14, 2008).

#### I. Staffing and Employment—5 CFR 9901 Subpart E

This subpart provides DoD with authority, pursuant to 5 U.S.C. 9902(i), to waive or modify certain provisions of title 5 U.S.C. and CFR pertaining to methods for recruitment for, and appointments to, NSPS positions and the methods for the assignment, reassignment, detail, transfer, and promotion of employees into and within NSPS. This subpart revises the subpart E found in the NSPS regulations published November 1, 2005 at 70 FR 66116. The revisions reflect changes in NSPS authorized by amendments to 5 U.S.C. 9902 by the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) as further amended by the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417); provide specificity to the regulations based on existing implementation; reflect changes in subparts A through D of the regulations published on September 26, 2008; and make technical changes and improvements.

In order to meet its critical mission requirements worldwide and respond to a dynamic national security environment, the Department needs flexibility to attract, recruit, assign and retain a high quality workforce. The current Federal hiring system does not have the flexibility needed by DOD to meet all of its mission requirements. Subpart E of the final regulations preserves merit principles and veterans' preference requirements, while streamlining hiring and placement processes and providing DoD with flexible hiring tools to respond effectively to continuing mission changes and priorities and evolving labor markets. The public comment period ended on January 2, 2009. The following is a discussion of the comments received.

## II. Response to Public Comments

### A. Summary

The proposed rule was published in the **Federal Register** on December 3, 2008. In response to the proposed rule, the Department received 42 submissions during the 30-day public comment period. General comments fell into one of the following categories: collective bargaining and labor relations; publication date; fairness and equity; and whether the subpart implements too many or too few changes to staffing and employment procedures. Comments specific to staffing and employment fell into one of the following categories: Coverage of regulations; appointing authorities; probationary periods; competitive examining procedures; and internal placement. The 42 submissions included a total of 94 comments; 60 of those comments pertain to this subpart and are addressed below. We do not address the remaining comments because they concern other NSPS subparts published in 73 FR 56344, or do not relate to staffing and employment.

### B. General Comments

#### 1. Collective Bargaining and Labor Relations

Labor organizations contended that various matters should be subject to collective bargaining under 5 U.S.C. chapter 71. As noted in the publication of the final regulations for subparts A through D of this part, published on September 26, 2008, collective bargaining obligations are governed by Federal statute. DoD is committed to fulfilling its obligation to bargain in good faith consistent with governmentwide labor relations law under 5 U.S.C. chapter 71 and the requirements of 5 U.S.C. 9902, as well as section 1106(b) of Public Law 110-181 and section 1106 of Public Law 110-417. However, the Department seeks uniformity and consistency in its NSPS employment practices through issuance of regulations.

#### 2. Publication Date

One commenter questioned the timing of our proposed regulations, stating that we should allow the new Administration to review NSPS before implementing this rule. A labor organization expressed concern that these regulations were published on

December 3rd, requiring anyone interested in commenting to use time during the holidays to do so. The proposed regulations, which add subpart E to subparts A through D of the final enabling regulations published on September 26, 2008, are authorized by both the National Defense Authorization Act (NDAA) for Fiscal Year 2008 and the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, which clarified the staffing and employment authorities originally granted under 5 U.S.C. 9902 by Public Law 108-136. When Congress enacted NDAA 2008 in January 2008, OPM and DoD began developing these regulations, which was eleven months prior to their December 3, 2008 publication. However, Congress did not enact NDAA 2009 until October 14, 2008. The Department and OPM issued the proposed subpart E regulations less than two months after the NDAA 2009 became law. They were issued at that time to provide a complete regulatory structure for NSPS that reflects the most recent changes in law.

### 3. Fairness and Equity

Many commenters expressed concerns about the fairness and equity of the staffing and employment features of NSPS. These concerns were characterized by terms such as “favoritism” and “cronyism” implying that the greater flexibility in decision-making under NSPS would result in hiring or placement decisions on a basis other than merit.

A number of the fairness comments centered around the NSPS competitive examining flexibilities. For example, some commenters expressed concern regarding management’s ability to limit the area of consideration, when sufficient qualified applicants are available, to applicants in the local commuting area and other targeted recruitment sources, stating that these restrictions limit advancement opportunities for qualified candidates and prevent applicants who are willing to relocate from being considered for NSPS positions. They feared that management would use this flexibility to narrow the field of applicants to their favorites in order to select their “employee of choice.” Two commenters pointed out that it will now be easier than ever for military leaders to hire and promote retiring military members who would otherwise face unemployment at the expense of faithful, loyal, honest, and deserving civilians. Another commenter stated that limiting the pool of qualified applicants does not make sense if the department intends to hire the most qualified candidate for the

position. In response, we note that NSPS competitive examining procedures require acceptance of applications from all U.S. citizens, including current Federal employees. However, if there is a sufficient number of qualified applicants, initial consideration may be limited to candidates in the local commuting area and other targeted recruitment sources. In instances where the ease of filing an application or supply and demand forces generate a sufficient number of candidates, the ability to narrow the pool of applicants to be considered is necessary to streamline hiring processes. Streamlining hiring practices enables management to quickly fill positions and help ensure that the highest quality candidates are not lost to other employers due to length of time between the close of a job announcement and the job offer. This flexibility neither favors nor disfavors military members since all qualified applicants, whether civilian or military, in the local commuting area must be considered. Likewise, both civilian and military outside the local commuting area would equally be excluded from consideration. While organizations may limit the initial area of consideration, there is no requirement to do so. Apparent in many of the comments is the belief that the ability to narrow the area of consideration to the local commuting area would enable management to target “favorite” employees or friends or “cronies.” However, the regulations provide a safeguard against misuse of the smaller area of initial consideration. Specifically, the regulations require that, if sufficient qualified applications are not received from the local commuting area and other targeted recruitment sources, the area of consideration must be expanded to include all applicants for the vacancy. DoD will continue to comply with merit system principles and veterans’ preference when filling NSPS positions through NSPS competitive examining procedures.

A number of fairness-related comments revolved around the alternative promotion procedures, an NSPS internal placement flexibility. Commenters stated that these procedures will narrow promotion and career advancement opportunities for NSPS employees and that their use will result in a supervisor’s favorite employee or crony being selected, ensuring that the Federal Government will turn into a “who you know club” that does not consider diversity or qualifications in the selection process.

One commenter observed that absent a formal vacancy announcement, management would not be able to ensure that all employees are made aware of the opportunity for consideration. In other words, nothing would prevent management from singling out one or two favorite employees for consideration. With respect to consideration of qualifications in the selection process, under the alternative promotion procedures, the regulations require that employees selected meet qualification standards and either fall into the category of highly qualified or have received the highest level of performance rating for NSPS. While the regulations do not require formal advertisement (e.g., posting a job on USAJOBS), § 9901.516(c)(8) does require that employees be notified prior to use of alternative promotion procedures. Some methods that may be used include newsletters, bulletin boards, e-mail, and other forms of employee notification. Also, using alternative promotion procedures may not require employees to apply for positions. For example, the exceptional performance promotion procedure requires that all employees in the area of consideration be considered when their Level 5 rating of record is based on performance in the same occupational series and similar function as the vacancy being filled. Assessment boards may entail soliciting job experience information from employees in an organization or may simply be held in conjunction with or after the conclusion of the performance appraisal period.

Another commenter expressed the belief that the alternative promotion procedures are not competitive and/or do not comply with merit system principles. They are consistent with merit system principles and with the merit promotion requirements of 5 CFR part 335. In fact, procedures similar to the alternative promotion procedures are currently used by some DoD Components to fill non-NSPS positions. We have included each of these procedures in the regulations because not all of these flexibilities are currently authorized for use within each DoD Component. Including them under the NSPS Merit Promotion Program provides NSPS managers uniform and consistent access to these flexibilities. In addition to notifying all employees that these forms of competition may be used, each of these procedures requires analysis of the job to be filled to identify the knowledge, skills, abilities, and/or competencies necessary to successfully perform the duties of the position;

clearance of applicable programs for displaced or surplus employees, such as the DoD Priority Placement Program and the Reemployment Priority List; determination that selectees meet applicable OPM or DoD qualification standards for the positions being filled; and, selection of candidates determined to be best qualified for the positions. The identification, qualification, evaluation, and selection of candidates must be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nonqualifying physical handicap, or age, and must be based solely on job-related criteria. These alternative promotion procedures streamline the standard vacancy announcement process. Streamlining the process permits management to fill positions quickly by identifying and selecting highly qualified candidates in a timely manner.

Some commenters raised concerns about the exceptional performance promotion procedure which permits management to promote an employee whose most recent rating of record is Level 5 to a vacant position in the same occupational series (or related interdisciplinary/interoccupational series) and similar function as the position the employee held at the time he or she received the Level 5 rating. Commenters who objected to this procedure indicated they consider the NSPS pay pool process to be faulty. Commenters stated that the NSPS performance system is "far too subjective" and employees who perform at the Level 4 or Level 5 will never be considered for the exceptional performance promotion because ratings are forced down in a quota-like manner to Level 3. Another commenter suggested that using a severely flawed performance system's appraisals as a tool for selection undermines EEO and merit system principles.

As described in 5 CFR part 9901, subparts C and D, the pay pool process employs a number of checks and balances to ensure that employees who perform similar categories of work are measured consistently and that multiple levels of review occur. In addition, should a written justification not support a recommended rating of record, the Pay Pool Panel must afford the rating official an opportunity to provide further justification for the recommendation prior to adjusting the rating. This mechanism reinforces equity across and within pay pools and is a necessary safeguard when rewarding performance from a shared pay pool. Because supervisors may

interpret performance criteria differently, pay pools reconcile ratings to ensure the criteria are applied consistently throughout a pay pool in order to provide equity and fairness of ratings. Further, NSPS regulations strictly prohibit a forced distribution of ratings. NSPS performance criteria also make clearer distinctions in levels of performance, assess employee performance more rigorously, and set a higher bar for higher-level performance, ensuring that only the most highly performing employees achieve a Level 5 rating of record. Consequently, the NSPS performance management criteria often result in a different rating distribution than found under other performance management systems. It is precisely because of the rigor of the NSPS performance rating process and criteria that there is equity in NSPS performance ratings and distinctions in levels of performance. This rigor and these thoughtfully crafted performance criteria result in a small, distinguished group of high performers rated at the Level 5 NSPS rating level. As a result, a selectee from this pool of candidates has a record of proven performance, as demonstrated by award of the highest rating possible. Such an employee has demonstrated, through day-to-day performance that he or she possesses the applicable knowledge, skills, abilities and/or competencies to perform the duties of the vacant position in an exemplary manner.

In addition to the reconciliation process that takes place within the pay pool, NSPS has implemented numerous rules to guard against arbitrary performance rating decisions, enabling employees to challenge or seek review of key decisions and setting up accountability mechanisms to ensure that employees are treated fairly.

Use of the exceptional performance promotion procedure is not required; however, should management choose to utilize this procedure, the mechanisms and safeguards built into the NSPS performance appraisal and evaluation process ensure that only the highest performing employees receive a Level 5 rating.

Another commenter suggested that promoting employees based on only "one good rating regardless of experience" is not responsible and that promotions should award those with a "proven track record of exceptional performance." While only those with an exceptional performance rating can be considered through this procedure, selections are made based on factors in addition to the rating, such as experience, education, training, knowledge, skills, abilities,

competencies and other appropriate information consistent with merit system principles.

#### 4. Sufficient/Insufficient Change

Some commenters objected to waiving and/or modifying the various provisions of title 5, stating that current hiring flexibilities were sufficient. They also stated that the Department has not demonstrated why changes are needed in the staffing and employment areas or how these proposals would result in a less cumbersome or fairer hiring process. Another commenter suggested that our proposals do not provide enough hiring flexibilities. Yet another commenter applauded the streamlining of the direct hire authority approval process. The enabling legislation (5 U.S.C. 9902(i)) permits the Department to waive or modify specified sections of title 5 U.S.C. and CFR, essential to the development and implementation of a flexible system for hiring and assigning employees. NSPS staffing and employment flexibilities were designed and developed through a formal and rigorous process in coordination with OPM. The flexibilities strike a balance between enhancing the Department's ability to accomplish its many missions and preserving compliance with essential important civil service protections such as merit system principles and veterans' preference requirements. When a position is filled through the competitive examining process, we have provided the ability to limit the area of consideration to candidates in the local commuting area and other targeted recruitment sources in cases where sufficient qualified candidates are available. The regulations also provide the capability to convert non-permanent employees to permanent appointments in the competitive service provided certain requirements are met; provide flexibility for longer periods of temporary, term, and time-limited appointments; and provide alternative promotion procedures for internal placement actions. We are cognizant of the requirement to fully inform and train supervisors, managers, and human resources personnel regarding the various NSPS flexibilities so that they will be understood and used to the fullest advantage. We believe the identified flexibilities are sufficient at this time. However, if after a period of operation and evaluation of the benefits provided by the new flexibilities, we determine that other enhancements would be beneficial, we will explore additional regulatory authorities for hiring and assigning employees to meet critical national security missions.

### C. Specific Comments

#### 1. Coverage

A commenter noted that the proposed rule indicates that the regulations will apply to all DoD employees determined by the Secretary to be covered under § 9901.102(b). However, the commenter points out that the section speaks specifically to coverage determinations for subparts B through D of the NSPS regulations issued in 73 FR 56344 and recommends that § 9901.503 be amended to specifically address subpart E. We agree with this recommendation and have modified the regulations to reflect this change.

#### 2. Appointing Authorities

Competitive and excepted appointing authorities. Section 9901.511 authorizes the Secretary to continue using excepted and competitive appointing authorities under 5 U.S.C. chapter 33, Governmentwide regulations, Executive orders, and other statutes. Individuals hired under these authorities will be designated as career, career conditional, term, temporary, or time-limited employees, as appropriate.

A commenter asked if the provision for Schedule A hiring of the disabled is still in place. Yes; under NSPS, activities may continue to use the Schedule A hiring authority to appoint persons with disabilities to NSPS positions.

Several commenters requested clarification on the inclusion of career conditional appointments in NSPS. Previously, Public Law 108–136 permitted NSPS to establish its own workforce shaping rules. These rules did not make distinctions in tenure between permanent employees for the purpose of employee retention. Consequently, there was no need for a career conditional tenure at that time. However, Public Law 110–181 requires NSPS reductions in force (RIF) to comply with the Governmentwide regulations appearing at 5 CFR part 351. Under those regulations, the assignment of a specific tenure group is directly related to an employee's retention standing and it is necessary to have appointment types (career conditional and career) that align with the Governmentwide tenure group definitions to apply RIF procedures.

A commenter disagreed with the definition of *career employee*. Specifically, the commenter stated that the rule appears to take an employee who is currently “a career employee” after completing a 1-year probationary period and increase the requirement to 3 years. Under the current NSPS rules, an employee who receives a permanent

appointment is immediately considered a career employee and does not serve any “conditional” period. The initial probationary period requirement is a separate requirement. Under this final rule, a “career employee” is defined as “an individual appointed without time limit to a competitive service position in NSPS who has served 3 years of substantially continuous service as described in 5 CFR 315.201(b).” This definition requires that an employee's initial permanent appointment to an NSPS position in the competitive service be a conditional appointment and upon completion of the 3-year conditional period he or she be designated as career, unless the employee has previously completed a 3-year conditional service period in accordance with 5 CFR 315.201(b). Any NSPS employee on a career appointment in the competitive service who has not completed 3 years of substantially continuous service at the time these regulations become effective must be converted to a conditional appointment until the 3-year requirement is met. Time already served under an NSPS career appointment counts toward completion of the conditional period. No change was made to the regulations based on this comment.

Another commenter asked if NSPS employees who are career employees will be grandfathered in and remain career employees. It depends. On the effective date of the final regulations, NSPS employees on career appointments in the competitive service who do not meet the § 9901.504 or 5 CFR part 315 definition of career employee will be converted to a career conditional appointment. Time already served as a career employee under NSPS, as well as creditable time under 5 CFR 315.201, will count toward completion of the 3-year career conditional period. NSPS employees who meet the above-mentioned definitions will remain career employees.

Several commenters stated that it is unclear whether or not both career and career conditional appointments in NSPS have the same stature as those types of appointments in non-NSPS positions throughout the Federal Government, i.e., whether a former NSPS appointee would have reinstatement eligibility under 5 CFR 315.401. Yes, both career and career conditional employees within NSPS have the same “stature” as non-NSPS career or career conditional employees and a former NSPS appointee would have reinstatement eligibility under 5 CFR 315.401. Another commenter

questioned whether NSPS service is creditable toward career tenure in a non-NSPS position under 5 CFR 315.201(b)(1)(i) through (ix). Yes, service under career and career conditional appointments in NSPS competitive service positions is creditable in the same manner and to the same extent as service under the same type of appointments in non-NSPS positions. To minimize confusion regarding the creditability of NSPS service under career and career conditional appointments, additional guidance will be provided in implementing issuances.

A labor organization representative suggested that OPM should review the regulations in light of a recent court decision concerning veterans' preference. We have not revised the regulations in response to this comment. After further review of the regulatory text, we conclude that these regulations fully comply with applicable veterans' preference requirements.

Severe shortage/critical need hiring authority (direct hire authority). This section authorizes the Secretary to determine when a severe shortage or critical hiring need exists. A labor organization representative expressed concern that the Secretary, rather than OPM, has the authority to authorize direct hire authority for positions determined to have a severe shortage of qualified applicants or where there is a critical need. The representative stated that OPM should not abandon its role as a monitor of agency actions to ensure that merit principles are not violated and that no prohibited personnel practices take place, asserting that letting DoD develop its own appointing authorities runs the risk of creating opportunities for inequities, discrimination, and abuse and threatens the credibility of the system for employees. By design, and in keeping with the statutory objective of establishing a flexible system, these regulations give DoD considerable authority within the regulatory framework to design staffing and employment features. When the Secretary determines a severe shortage or critical hiring need exists, it is done using the same criteria that OPM uses under 5 CFR part 337. Also, OPM continues to have a role in overseeing the civil service system and in advising the President on civil service matters, including matters covered by these regulations. We believe the coordination and approval roles as defined in § 9901.105 allow OPM sufficient opportunity to fulfill its responsibilities. Requiring OPM approval for every action would undermine the intent to

create a flexible system, especially when the action is in response to a time-sensitive national security matter or critical need, which DoD is in the best position to assess. As a result, we have not revised the language in this section in response to these comments.

Non-permanent appointing authorities. This section authorizes the Secretary to make temporary and term appointments to NSPS positions in the competitive service and temporary and time-limited appointments to NSPS positions in the excepted service. It prescribes extended timeframes for such appointments and provides a mechanism for the noncompetitive conversion of certain nonpermanent employees to career conditional or career appointments in the competitive service, provided specific requirements are met. A labor organization representative objected to the extended timeframe for term appointments in the competitive service and asserted that some of the situations the regulations state as reasons for term appointments more appropriately justify a permanent appointment. The commenter stated that there is no good justification for extending the timeframe of term appointments for a longer period than Governmentwide regulations allow and that the primary justification for doing so seems to be to bring these employees on board through term appointment procedures and then convert them to competitive non-term appointments. We have not revised the regulations in response to these comments. Extended timeframes for term appointments provide a valuable tool to the Department for accomplishing its many mission requirements of a time-limited nature. Extended time limits for such appointments are essential in an organization driven by knowledge-based and other skills requirements that are difficult to attract and retain on a temporary basis. We also recognize that situations and/or work that are initially time-limited in nature may, in fact, evolve into permanent work. The ability to convert term employees to permanent appointments minimizes disruption while permitting the Department to retain a valued employee who has, in fact, gone through a competitive process and met additional requirements prior to conversion to a permanent position. For example, the first condition for conversion to a permanent appointment is that the employee be selected for the non-permanent appointment under NSPS competitive examining procedures from a vacancy announcement that includes information to all applicants about the

possibility of noncompetitive conversion. Further, the employee must have completed at least 2 years of continuous service at Level 3 (Valued Performer) or better and be converted to a career conditional or career position in the same pay schedule and band for which initially hired.

### 3. Probationary Periods

Section 9901.512 describes requirements for serving and successfully completing probationary periods upon appointment to an NSPS position in the competitive or excepted service or upon initial appointment to a supervisory position.

A labor organization representative expressed concern that the regulations could be read as requiring no less than 1 year. Section 9901.512(a)(3) clearly identifies the length of the probationary periods and does not intend the time period of 1 year to be interpreted as a minimum time period as feared by the commenter. Another commenter expressed concern that removing the ability of a supervisor to appeal being removed while on probation "assures that all supervisors will learn to be yes-men." This assertion has no basis. The NDAA for 2008 brought NSPS under certain Governmentwide rules, including the right of employees to appeal an adverse action such as removal from Federal employment. Additionally, § 9901.512(b)(2)(i) retains the same protection afforded under General Schedule that an employee who does not satisfactorily complete a probationary period is entitled to be assigned to a position at a grade or pay band and pay no lower than that held before assignment to the supervisory position. This protection coupled with the ability to remove the employee from the supervisory position balances the organization's need to ensure the capability of supervisory personnel while providing safeguards to the employee who fails his or her supervisory position. No change has been made to the regulations based on these comments.

A commenter questioned the provisions at §§ 9901.512(a)(4) and 9901.512(b)(1)(iii), which require that time spent in a non-pay status in excess of one workday during the probationary period (both initial and supervisory) extend the probationary period by an equal amount of time. These provisions are intended to allow management the full period to observe an employee's on-the-job performance and enable a manager to remove the employee without undue restriction. However, we have reviewed this provision in light of the requirements of 5 U.S.C. chapter 75

(which provides appeal rights to competitive service employees and preference eligible excepted service employees after 1 year and excepted service employees other than preference eligibles after 2 years) and have determined that this provision does not result in the intended goal. Therefore, we have revised the regulations to reflect an allowable absence in a non-pay status consistent with the provisions for non-NSPS employees covered under 5 CFR part 315, subpart H.

A labor organization representative suggested that the regulations clarify under § 9901.512(a)(4)(ii) that if an employee is successful on appeal in overturning a separation for performance or conduct, all time served in the initial probationary period must be restored and credited toward completion of the probationary period. Insofar as a separation is overturned, it ceases to exist. Therefore, the regulations provide sufficient clarity on this point. No change was made to the regulations based on this comment.

A commenter requested clarification regarding the length of the probationary period for preference eligibles with appeal rights. The commenter also suggested adding information to the regulations to address the limited appeal rights of Veterans' Recruitment Appointment appointees terminated during the initial probationary period. We agree and have modified the regulations accordingly.

A commenter questioned whether completion of a supervisory probationary period in a different Federal position would be creditable for an NSPS position. The regulations have been modified to state that the prior completion of the supervisory probationary period under these circumstances is creditable.

A commenter noted that the regulations require a supervisory probationary period and questioned whether a probationary period is required for an employee appointed to a managerial position. No change was made to the regulations based on this comment. NSPS does not require a managerial probationary period, since not all managerial positions have responsibility over subordinate positions. Consequently, a managerial position that is not titled and coded as supervisory is not subject to a probationary period.

### 4. Competitive Examining Procedures

Section 9901.515 provides DoD the authority to use competitive examining procedures to appoint applicants to career, career conditional, term, and

temporary appointments in the competitive service and provides that the Secretary will issue uniform policies, procedures, and guidance concerning competitive examining for NSPS positions. This section also discusses public notice requirements and the use of numerical rating and ranking procedures and alternative ranking and selection procedures (category rating). It retains OPM's authority to grant or deny a pass-over request of a preference eligible with a compensable service-connected disability of 30 percent or more as well as to make medical qualifications determinations pertaining to preference eligibles.

Under NSPS, DoD must accept applications from all U.S. citizens, including current Federal employees, for positions announced using competitive examining procedures. If sufficient qualified applicants are available, applicants from the local commuting area and other targeted recruitment sources may be considered first. A commenter recommended that we define what "sufficient" qualified candidates means and that we include a requirement for the agency to publicly disclose the total number of applications considered versus the total number of applications received. We disagree that the term needs further definition. The term is relative. Sufficiency depends on the specifics of each recruitment action, including the number of vacancies, the labor market and the type and level of position to be filled. These various factors all contribute to ensuring that there are a multiple number of quality choices from which to select. In response to the comment that we include a requirement to publicly disclose the number of applications considered versus the total number received, we note that Governmentwide rules do not require a similar disclosure, and we see no useful purpose served by this request. However, this information is available in the case file generated for each selection and is subject to internal review and audit as well as review by OPM.

A commenter noted that, under the numerical rating and ranking procedures (one of the methods for determining which applicants will be referred to the selecting official), the "rule of 3" should apply. We disagree. Under NSPS, DoD has waived chapter 33 of title 5 of the U.S.C., which among other things, mandates the rule of three. By waiving this statutory provision, DoD is able to broaden the pool of candidates from which to select and provide flexibility to acquire a

workforce tailored to its needs. No change was made based on this comment.

#### 5. Internal Placement

Section 9901.516 prescribes procedures regarding the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS. This section addresses level of work determinations for determining when an action is competitive or noncompetitive; contains information related to detailing NSPS employees; and describes the NSPS Merit Promotion Program, including competitive actions and exceptions to competition, alternative promotion procedures, grievances, and maintaining records for each promotion to a competitive service position filled through internal competitive procedures.

A labor organization representative observed that the definitions in § 9901.103 of "reassignment" and "reduction in band" are brief and do not contain enough detail to enable managers to make level of work determinations or to determine whether an action will be competitive or noncompetitive. The definitions the representative refers to appear in the NSPS regulations published on September 26, 2008. These definitions, while brief, are quite specific. A *reassignment* is described as a move to a different position or set of duties in the same or comparable pay band, and a *reduction in band* is described as a move from one pay band to a lower pay band while continuously employed. The definitions also describe when *reassignment* and *reduction in band* are appropriate for moves from positions outside of NSPS to a NSPS position. The definitions are further supplemented by definitions for *comparable pay band* or *level of work* and *lower pay band* or *level of work*. These additional definitions clarify that *reassignment* and *reduction in band* are based on level of work determinations inherent in the NSPS classification structure. The relationship of pay bands in the NSPS classification architecture and information on level of work determinations for moves from non NSPS positions to NSPS is described in the NSPS Classification and Qualification implementing issuances. Consequently, no change was made to the regulations based on this comment.

A labor organization representative stated that the NSPS definition of "promotion" is more concrete than the definitions of "reduction in band" and "reassignment." The representative observed that, with pay bands,

promotions are less frequent than they are under the GS system, meaning that far more mobility will take place as movement within a band. The representative expressed concern that movements within a pay band, or "reassignments," may involve an increase in base pay normally reserved for promotions under the GS system and that managers will be able to decide when to give a pay increase or whether to subject a movement to competition. They were particularly concerned that employees could be reassigned with pay increases and other employees would be given no notice or opportunity to compete.

The definitions of *reassignment* and *promotion* differ among different personnel systems. NSPS is designed to be a modern, contemporary, flexible, and agile human resources management system intended to help DoD meet the national security challenges of the 21st century, while following core merit system principles and protections. The NSPS pay band recognizes a broader range of work than a General Schedule grade within a single pay band also known as one discrete level of work. Classification architectures utilizing a *grade* concept describe narrower ranges of work for a single discrete level of work. Consequently, where movements in a graded system would result in *promotion* pay, the same movement in a pay-banded system may constitute a *reassignment*. While pay progression in grade-based systems is primarily based on promotions, pay progression in the NSPS pay-banded system is primarily based on performance and secondarily on promotion movements. In appropriate situations, as documented and authorized by Component procedures, management may provide a discretionary base salary increase to provide an incentive to employees to broaden skill sets, take on more responsibilities, accept assignments that require relocation, etc. To preserve the competitive procedures for promotion, such increases are limited to an amount less than the minimum percentage increase permitted by promotion rules. Providing an increase in pay for a reassignment is not required and, where provided, may be predicated on specific case information (e.g., the employee's salary in range, what skills the employee brings to the position). At the same time, the pay band structure recognizes that employees may be promoted to a position in a higher pay band containing a higher level of work. Consistent with merit promotion rules, promotion to a position in a higher pay band, or at a higher level of work, in the

competitive service requires competition.

With respect to the comment regarding managers deciding when reassignments will require competition or not, or when a notice of the vacancy will be given, we note that, as with the GS system, many NSPS positions to which employees are reassigned are advertised; however, some are not. As under the GS system, some reassignments are done competitively to increase the applicant base. Some reassignments are also done competitively if the position to which the employee will be reassigned ultimately leads to a position in a higher full performance pay band (*i.e.*, a higher level of work under the NSPS classification architecture). Whether a position is advertised or not, employees who are reassigned must be qualified for the position, unless they are reassigned as a result of reduction in force procedures and qualification requirements are waived. No change was made to these regulations based on this comment.

A labor organization representative expressed concern that details could “go on forever” without documentation and that “a manager could pick a favorite employee for a desirable detail with no record of the action,” making it “difficult if not impossible to track movement of employees in order to ensure that there is no prohibited discrimination.” In addition, the labor organization representative asked specifically about what documentation was required for a GS employee’s detail to an NSPS position.

Consistent with Governmentwide regulations, NSPS does not impose a specific timeframe that limits flexibility in accomplishing work. A detail, however, is limited in that it involves the temporary assignment of an employee to another position or set of duties to perform work on a time-limited basis with the expectation that the employee will return to the permanent position of record upon expiration of the detail. NSPS does require documentation of some details, in that details to higher pay bands beyond 180 days are subject to competition. Management must evaluate the situation and determine the appropriate assignment of employees. In some cases, it may be better to temporarily promote an employee or fill a position on a permanent basis.

The OPM Guide to Processing Personnel Actions provides technical guidance regarding when documentation is required for a GS employee’s detail. Documentation is not dependent on whether the employee is

detailed to a different personnel system but on the duties assigned, the organization or agency to which assigned, length of the detail, and the grade of the position. Additional guidance regarding the conditions surrounding a detail requiring documentation is in chapter 14 of the Guide.

A commenter asked for clarification of the exception to competition situation described at § 9901.516(e)(7), which permits a noncompetitive promotion to a higher pay band previously held on a permanent or term basis in the competitive service. The commenter asked that we make clear that holding a position on a term basis means on a term appointment, not a temporary promotion or temporary appointment. The commenter also suggested we state when the term appointment was held and for how long, to ensure consistency. Alternatively, the commenter suggested the regulations provide discretionary authority to Components to specify the conditions under which a term appointment could be used as the basis for a noncompetitive permanent action. Finally, the commenter noted that, during base realignment and closure and transformation efforts, term appointments and temporary promotions for extended periods are common and expressed concern that this provision seems to give an advantage to term applicants over permanent employees who have held a position in a higher pay band on a temporary basis for several years. We agree that this provision may be confusing and have deleted the words “or term” from this paragraph.

A labor organization representative expressed concern that the alternative promotion procedures bypassed competitive processes and merit principles creating “secret processes” to fill vacancies. Several commenters associated a formal vacancy announcement with competition, transparency and merit selection. The NSPS regulations on internal placement explicitly align with Governmentwide regulations by adopting the merit promotion requirements under 5 CFR 335.103(b). These merit promotion requirements provide the foundation for a systemic means of selection according to merit. They include analysis of the job to be filled to identify the knowledge, skills, abilities, and/or competencies necessary to successfully perform the duties of the position; clearance of applicable programs for displaced or surplus employees, such as the DoD Priority Placement Program and the Reemployment Priority List; determination that the selectees meet

applicable OPM or DoD qualification standards for the positions being filled; and, selection of candidates determined to be best qualified for the positions. Additionally, the identification, qualification, evaluation, and selection of candidates must be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nonqualifying physical handicap, or age, and must be based solely on job-related criteria. Employees selected under alternative promotion procedures have been judged on the recognized merit factors of qualifications and performance. Although formal advertisement is not required for selections under these procedures, the regulations require that employees are notified in advance of the intent to use these procedures.

A labor organization representative asked how absent employees or those not physically present might receive consideration for positions through these alternative means. The absence of an employee does not preclude consideration under these procedures precisely because these procedures do not necessarily require an application from the employee. For example, all employees eligible and within the area of consideration will automatically receive consideration through the exceptional performance promotion procedure. Each Component will determine specific processes for each procedure, and should a Component request applications for any of these alternative methods, they will also explain the provision and conditions for considering those who are absent. However, we have amended § 9901.516(e)(8) to clarify that when alternative promotion procedures are used, appropriate consideration must be given to employees within the area of consideration who are absent for legitimate reasons, (*e.g.*, on detail, on leave, at training courses, in the military service, etc.).

A labor organization representative asked specific questions regarding the execution of these alternative promotion procedures, including whether employees would be informed when specific jobs became available, whether employees would be informed of their ratings, whether employees could challenge their ratings, how employees would be informed of enough information to file a grievance if desired, and whether the rating outcomes would be available for potential grievance or EEO procedures. The goal of the alternative promotion procedures is to provide an efficient procedure for filling positions

competitively. While we have provided the framework and requirements for each alternative promotion procedure, Components will establish specific guidelines for their use of each alternative promotion procedure to be consistent with their merit promotion plans. It is important to emphasize that employing alternative promotion procedures does not negate merit promotion requirements. For example, like all other competitive procedures, case files will be kept for each position filled through these alternative procedures and will be made available for grievance and EEO purposes. In addition, Components will continue to provide necessary information to employees.

A labor organization representative asked for clarification regarding who determines if the by-name request is ranked within the highest quality group. The competitive process requires measuring the candidate against the job-related criteria. If the candidate meets the rating factors required for the highest level, the candidate may be selected for the position. The human resources office determines whether a candidate is ranked within the highest quality group.

Another commenter stated that the alternative promotion procedures may be used as a means of circumventing veterans' preference, particularly the hiring of disabled veterans. The application of veterans' preference is a requirement when conducting competitive examining, not in internal placement. The NSPS alternative promotion procedures are only used to place employees internally within the Department. NSPS upholds veterans' preference in the competitive examining process. We have not revised the regulations in response to this comment.

A labor organization representative questioned why the requirement to maintain internal placement files was based solely on the time frame of the grievance process and stated that this allowed "premature destruction" of records without considering the EEO process. The language regarding how long to maintain documents mirrors the language as it exists today for General Schedule employees in 5 CFR 335.103(b)(5). Governmentwide experience to date has not indicated a need for extending the time period for retention of these records. NSPS does not change the procedures currently in place with respect to meeting EEO or veterans' preference requirements. We have not changed the regulations in regard to these comments.

### III. Next Steps

The National Defense Authorization Act for Fiscal Year 2008 requires that this rule be considered a major rule for the purpose of section 801 of title 5, United States Code. Consequently, before it can take effect, the Department will submit to each House of the Congress and to the Comptroller General a report containing the rule, a general statement relating to the rule, and the proposed effective date of the rule. The rule may not be effective until the date occurring 60 days after the later of (1) Congressional receipt of the report, or (2) the date the rule is published in the **Federal Register**. This rule is subject to the procedures set forth in 5 U.S.C. 801–808.

#### *E.O. 12866, Regulatory Review*

DoD and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is significant public interest in the National Security Personnel System. DoD and OPM have analyzed the expected costs and benefits of the revised HR system, and that analysis was presented in the supplementary information published with the rule on September 26, 2008 (Volume 73 Number 188) on page 56389.

The primary benefit to the public of NSPS resides in the HR flexibilities that will enable DoD to attract, build, and retain a high-performing workforce focused on effective and efficient mission accomplishment. Staffing and employment regulations that streamline hiring processes provide additional hiring flexibilities which will result in a more qualified and proficient workforce and will generate a greater return on investment in terms of productivity and effectiveness. Taken as a whole, the changes included in these regulations will improve upon the original NSPS regulations and result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and supports the primary mission of DoD.

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

#### *Regulatory Flexibility Act*

DoD and OPM have determined that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

#### *Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)*

This final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### *E.O. 12988, Civil Justice Reform*

These regulations are consistent with the requirements of E.O. 12988. The regulations clearly specify the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

#### *E.O. 13132, Federalism*

DoD and OPM have determined these regulations will not have Federalism implications because they will apply only to Federal agencies and employees. The regulations will not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

#### *Unfunded Mandates*

These regulations will not result in the expenditure by State, local, or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

### List of Subjects in 5 CFR Part 9901

Administrative practice and procedure, Employment, Government employees, Labor-management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

**Michael W. Hager,**

*Acting Director, Office of Personnel Management.*

Department of Defense.

**Gordon England,**

*Deputy Secretary of Defense.*

■ Accordingly, under the authority of section 9902 of title 5, United States Code, the Department of Defense and the Office of Personnel Management are adding subpart E, part 9901, of title 5, Code of Federal Regulations, to read as follows:

### **PART 9901—DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL SYSTEM (NSPS)**

#### **Subpart E—Staffing and Employment**

##### **General**

Sec.  
9901.501 Purpose.  
9901.502 Scope of authority.

- 9901.503 Coverage.  
9901.504 Definitions.

#### External Recruitment and Internal Placement

- 9901.511 Appointing authorities.  
9901.512 Probationary periods.  
9901.513 [Reserved]  
9901.514 Non-citizen hiring.  
9901.515 Competitive examining procedures.  
9901.516 Internal placement.

Authority: 5 U.S.C. 9902.

### Subpart E—Staffing and Employment

#### General

##### § 9901.501 Purpose.

(a) This subpart sets forth policies and procedures for the recruitment for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (i).

(b) The Secretary will comply with merit principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302 (dealing with prohibited personnel practices).

(c) The Secretary will adhere to veterans' preference principles set forth in 5 U.S.C. 2302(b)(11), consistent with 5 U.S.C. 9902(i).

##### § 9901.502 Scope of authority.

When a specified category of employees, applicants, and positions is covered by the system established under this subpart, the provisions of 5 U.S.C. 3301, 3302, 3304, 3317(a), 3318 and 3319 (except with respect to veterans' preference), 3321 (except 3321(a)(2)), 3324, 3325, 3327, 3330, and 3341 are modified or waived and replaced with respect to that category except as otherwise specified in this subpart. In accordance with § 9901.101, the Secretary may prescribe implementing issuances to carry out the provisions of this subpart.

##### § 9901.503 Coverage.

(a) At his or her sole and exclusive discretion, the Secretary may decide to apply this subpart to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902. However, no category of employee may be covered by this subpart unless that category is also covered by subpart D of this part.

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 33 (excluding members of the Senior Executive Service); and

(2) Such others designated by the Secretary as authorized under 5 U.S.C. 9902.

##### § 9901.504 Definitions.

In this subpart—

*Career conditional employee* means an individual appointed without time limit to a competitive service position in NSPS who does not meet the definition of a career employee.

*Career employee* means an individual appointed without time limit to a competitive service position in NSPS who has served 3 years of substantially continuous service as described in 5 CFR 315.201(b).

*Competencies* has the meaning given that term in § 9901.103.

*Detail* means the temporary assignment, other than temporary reassignment or temporary promotion, of an employee to another position or set of duties with the expectation that the employee will return to the permanent position of record upon expiration of the assignment. For pay and benefits purposes and for the purpose of part 351 of this title, an employee continues to encumber the position from which the employee was detailed.

*Initial probationary period* means the initial period of service immediately following an employee's appointment to the competitive or excepted service, as specified in § 9901.512, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

*Local commuting area* is the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual place of employment.

*Promotion* has the meaning given that term in § 9901.103.

*Reassignment* has the meaning given that term in § 9901.103. For the purpose of part 351 of this title, an official position does not include a position to which an employee is reassigned on a temporary or time-limited basis.

*Reduction in band* has the meaning given that term in § 9901.103.

*Supervisory probationary period* means the first year of service immediately following an employee's initial appointment or placement in a supervisory position, as provided in 5 U.S.C. 3321(a)(2), during which an authorized management official determines whether the employee

fulfills the requirements of the position to which assigned.

*Temporary employee* means an individual in the competitive or excepted service who is employed for a limited period of time not to exceed 1 year. The individual's appointment may be extended, up to a maximum established under § 9901.511(d), to perform the work of a position that does not require an additional permanent employee.

*Term employee* means an individual in the competitive service who is employed for a period of more than 1 year up to a maximum established under § 9901.511(d).

*Time-limited employee* means an individual in the excepted service who is employed for a period of more than 1 year up to a maximum established under § 9901.511(d).

#### External Recruitment and Internal Placement

##### § 9901.511 Appointing authorities.

(a) *Competitive and excepted appointing authorities.* The Secretary may continue to use excepted and competitive appointing authorities under chapter 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals appointed under these authorities will be given career, career conditional, term or temporary appointments in the competitive service or permanent, time-limited, or temporary appointments in the excepted service, as appropriate. The competitive appointing authorities under this paragraph are subject to the procedures in part 330 of this title, except for 5 CFR 330.208 and 330.501.

(b) *Additional appointing authorities.* (1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including noncompetitive appointments, and excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service.

(2) DoD and OPM will jointly publish a notice, and request comments, in the **Federal Register** when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive service position.

(3) The Secretary will prescribe appropriate implementing issuances to administer a new appointing authority established under paragraph (b) of this section.

(4) At least annually, a consolidated list of all appointing authorities established under this section and currently in effect will be published in the **Federal Register**.

(c) *Severe shortage/critical need hiring authority.* (1) The Secretary will determine when a severe shortage of candidates or a critical hiring need exists, as defined in 5 CFR part 337, subpart B, for particular occupations, pay bands, career groups, and/or geographic locations. The Secretary may decide that such a shortage or critical need exists, or may make this decision in response to a written request from the head of a DoD Component. These authorities may be used without regard to competitive examination requirements described in § 9901.515. Public notice will be provided in accordance with 5 U.S.C. 3304(a)(3)(A).

(2) For each specific authority, the Secretary will document the basis for the severe shortage or critical hiring need, consistent with 5 CFR 337.204(b) or 337.205(b), as applicable.

(3) The Secretary may extend a direct hire authority if the Secretary determines there is or will continue to be a severe shortage of candidates or a critical hiring need for a particular position(s) as of the date the authority is due to expire.

(4) The Secretary will terminate or modify a specific authority to make appointments under this section when it is determined that the severe shortage or critical need upon which the authority was based no longer exists.

(5) The Secretary will notify OPM of determinations made under this paragraph.

(d) *Non-permanent appointing authorities.* (1) The Secretary may authorize appointments with time limits in the competitive or excepted service, as appropriate, when the need for an employee's services is not permanent. These appointments will be either temporary, term, or time-limited as defined below:

(i) *Temporary appointments.* Temporary appointments are for a specified period not to exceed 1 year and may be made in either the competitive or the excepted service. A temporary appointment may be extended for 2 additional years, in increments not to exceed 1 year, to a maximum of 3 years. Temporary appointments may be made and extended to positions involving intermittent or seasonal work without regard to the maximum time limits. The circumstances under which a temporary appointment is appropriate include, but are not limited to: Filling a position to address a temporary workload peak or

to complete a temporary project; meeting a temporary staffing need that is anticipated not to exceed a 1-year timeframe for reasons such as abolishment, reorganization, or contracting out of a function; anticipated reduction in funding; filling positions temporarily because the positions are expected to be needed for placement of permanent employees who would otherwise be displaced; or when the incumbent will be out of the position for a temporary period of time, but is expected to return. A temporary employee may be reassigned to another temporary position provided the total combined service under the temporary appointment does not exceed the maximum 3-year time limitation, the employee meets the qualification requirements of the position, and the conditions specific to the employee's appointing authority are met. Temporary appointments are made as follows:

(A) *Competitive service.* Temporary appointments to positions in the competitive service may be made using competitive procedures under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire authority procedures under 5 CFR part 337, as appropriate. Temporary appointments to positions in the competitive service also may be made noncompetitively, consistent with 5 CFR part 316, or by any noncompetitive appointing authorities granted to or by the Secretary.

(B) *Excepted service.* Temporary appointments to positions in the excepted service are made under the procedures prescribed in 5 CFR part 302.

(ii) *Term appointments in the competitive service.* (A) Term appointments are in the competitive service and will be for a period of more than 1 year, but not to exceed 5 years. The term appointment may be extended by an authorized management official for 1 additional year to a maximum of 6 years. The circumstances under which a term appointment is appropriate include, but are not limited to, project work, extraordinary workload, uncertainty of future funding, scheduled contracting out or abolishment of a function, the need to maintain permanent positions for placement of potential surplus employees, or when the incumbent will be out of the position for a significant period of time, but is expected to return. A term employee may be promoted, reassigned or reduced in band to another term position provided the total combined service under the term appointment

does not exceed the maximum 6-year time limitation and the employee meets the qualification requirements of the position.

(B) Term appointments may be made using competitive procedures under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire authority procedures under 5 CFR part 337, as appropriate. Term appointments also may be made noncompetitively consistent with 5 CFR part 316 or by any noncompetitive appointing authorities granted to or by the Secretary.

(iii) *Time-limited appointments in the excepted service.* Time-limited appointments are in the excepted service and will be for a period of more than 1 year. Time-limited appointments to positions in the excepted service are made under the procedures prescribed in 5 CFR part 302. A time-limited employee may be reassigned to another time-limited position in the excepted service provided the employee meets the qualification requirements of the position and the conditions specific to the appointing authority applicable to the employee.

(2) *Conversion to career conditional or career appointment.* A non-permanent employee serving in a competitive service position may be converted without further competition to a permanent position (*i.e.*, career or career conditional) if—

(i) The vacancy announcement met the requirements of § 9901.515(a) and included the possibility of noncompetitive conversion to a permanent position (*i.e.*, career or career conditional) at a later date;

(ii) The individual was appointed using the competitive examining procedures set forth in § 9901.515(b) and (c);

(iii) The employee completed at least 2 years of continuous service at Level 3 (Valued Performer) or better; and

(iv) The employee is converted to a career conditional or career position in the same pay schedule and band for which hired.

(e) *Tenure group.* For reduction in force purposes, NSPS employees appointed to the competitive service are placed in one of the tenure groups defined in 5 CFR 351.501(b) or, if appointed to the excepted service, one of the tenure groups defined in 5 CFR 351.502(b).

#### § 9901.512 Probationary periods.

(a) *Initial probationary period.* (1) An employee who is given a career, career conditional, or term appointment in the competitive service or a permanent or

time-limited appointment in the excepted service under this part is required to complete a probationary period when the employee:

(i) Is appointed from a competitive list of eligibles established under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire authority procedures under 5 CFR part 337; or

(ii) Is appointed to the competitive service either by special authority or by conversion under subpart F or G of 5 CFR part 315, unless specifically exempt from probation by the authority itself; or

(iii) Is reinstated, unless, during any period of service which affords a current basis for reinstatement, the employee completed an initial probationary period; or

(iv) Is appointed to a position in the excepted service under the procedures prescribed in part 302 of this title.

(2) An employee serving an initial probationary period at the time his or her permanent position is converted into NSPS, or at the time he or she is assigned from a non NSPS position to an NSPS position, or at the time he or she is reappointed through the DoD Priority Placement Program or Reemployment Priority List established under part 330 of this title after being involuntarily separated through no fault of the employee, will continue the probationary period; *i.e.*, the probationary period does not start over.

(3) The probationary period required by § 9901.512(a) is as follows:

(i) Competitive service—1 year

(ii) Excepted service—

(A) 2 years for non-preference eligibles;

(B) 1 year for preference eligibles.

(4) *Crediting Service.* (i) Absence in an approved nonpay status while on the rolls (other than for compensable injury or military duty) is creditable up to a total of 22 workdays.

(ii) Service during an initial probationary period from which an employee is separated for performance or conduct does not count toward completion of probation required under a subsequent NSPS appointment.

(iii) The probationary period for part-time employees is computed on the basis of calendar time, in the same manner as for full-time employees. For intermittent employees, *i.e.*, those who do not have regularly scheduled tours of duty, each day or part of a day in pay status counts as 1 day of credit toward the 260 days (actual “work days” in a year, excluding weekends) needed to complete the 1-year probationary period. The probationary period may

not be completed in less than 1 year calendar time.

(iv) Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full upon restoration to Federal service under part 353 of this title. An employee serving a probationary period who leaves Federal service to become a volunteer with the Peace Corps or the Corporation for National and Community Services serves the remainder of the probationary period upon reinstatement, provided the employee is reinstated within 90 days of termination of service as a volunteer or training for such service.

(5) *Termination of probationers for unsatisfactory performance and/or conduct.*

When an authorized management official proposes to terminate a competitive service employee during his or her initial probationary period because his or her performance and/or conduct during this period fails to demonstrate his or her fitness or qualifications for continued employment, the official will follow procedures at 5 CFR 315.804.

(6) *Termination of probationers for conditions arising before appointment.* When an authorized management official proposes to terminate a competitive service employee during his or her initial probationary or trial period for reasons based in whole or in part on conditions arising before the employee's appointment, the official will follow procedures at 5 CFR 315.805.

(7) *Appeals.* Under NSPS, a competitive service employee, who is terminated during the initial probationary period, will have limited appeal rights to the Merit Systems Protection Board (MSPB) under 5 CFR 315.806. In addition, any individual serving under a Veterans Recruitment Appointment, whose employment under the appointment is terminated within 1 year after the date of such appointment, will have the same right to appeal that termination as a career or career conditional employee has during the first year of employment in accordance with 5 CFR 315.806.

(b) *Supervisory probationary period.* Under NSPS, an employee is required to serve a probationary period upon initial appointment to a supervisory position. The supervisory probationary period is 1 year. An employee serving a supervisory probationary period at the time his or her permanent position is converted into NSPS will continue the probationary period in the new position; *i.e.*, the supervisory probationary period does not start over.

(1) *Crediting service toward completion of the supervisory*

*probationary period.* (i) An employee who is reassigned, transferred, promoted or reduced in band from one supervisory position to another while serving a supervisory probationary period is subject to the probationary period prescribed for the new position. Service in the former position is credited toward completion of the probationary period in the new position.

(ii) Temporary service in a supervisory position prior to the supervisory probation when there is no break in service is creditable toward completion of a supervisory probationary period. This includes service on temporary promotion or reassignment to another supervisory position while serving a supervisory probation. Service in a nonsupervisory position is not creditable.

(iii) Absence in an approved nonpay status while on the rolls (other than for compensable injury or military duty) is creditable up to a total of 22 workdays.

(iv) Service during a supervisory probationary period from which an employee was separated or demoted for performance and/or conduct does not count toward completion of a supervisory probationary period required under a subsequent appointment.

(v) Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full toward completion of a supervisory probationary period upon restoration to Federal service under part 353 of this title.

(vi) An employee who has completed a supervisory probationary period prior to movement into an NSPS position is not required to complete another supervisory probationary period.

(2) *Failure to complete the supervisory probationary period.* (i) Except as described in paragraph (b)(2)(ii) of this section, an employee who, for reasons of supervisory performance, does not satisfactorily complete the probationary period is entitled to be assigned to a position at a grade or pay band and pay no lower than that held before assignment to the supervisory position.

(ii) A nonsupervisory employee who is reduced in band into a position that requires a supervisory probationary period and who, for reasons of supervisory performance, does not satisfactorily complete the probationary period is entitled to be reassigned to a grade or pay band no lower than that held when serving the supervisory probation. The employee is eligible for repromotion in accordance with NSPS promotion rules under § 9901.516.

(iii) The agency must notify the employee in writing that he or she is being assigned for failure to complete the supervisory probationary period.

(iv) *Appeals.* (A) A competitive service employee, who, in accordance with the provisions of this section, is assigned to a nonsupervisory position, has no appeal right, except as provided in paragraph (b)(2)(iv)(B) of this section.

(B) A competitive service employee who alleges that a Component action under this section was based on partisan political affiliation or marital status may appeal to the MSPB under 5 CFR 315.908(b).

(v) *Relationship to other actions.* (A) If an employee is required to concurrently serve both a supervisory and an initial probationary period, the latter takes precedence.

(B) An action that demotes an employee to a pay band lower than the one the employee left to accept the supervisory position, for reasons other than supervisory performance, is governed by part 752 of this title.

#### **§ 9901.513 [Reserved]**

#### **§ 9901.514 Non-citizen hiring.**

The Secretary may establish procedures for appointing non-citizens to permanent, temporary, or time-limited positions in the excepted service, provided there is a demonstrated absence of qualified U.S. citizens and applicable immigration and security requirements are met. Non-citizens may not be promoted, reassigned, or reduced in band, except in situations where a qualified U.S. citizen is once again unavailable.

#### **§ 9901.515 Competitive examining procedures.**

(a)(1) Under NSPS, applicants are appointed to career, career conditional, term, and temporary appointments in the competitive service using competitive examining procedures consistent with part 300, subpart A of this title. In recruiting applicants from outside the civil service for competitive appointments to competitive service positions in NSPS, Components with examining authority may use either numerical rating and ranking or alternative ranking and selection procedures (*i.e.*, category rating). Components must decide which procedures to use prior to issuing a vacancy announcement and include this information in the vacancy announcement.

(2) The Secretary will issue uniform policies, procedures, and guidance concerning competitive examining for NSPS within the Department and may delegate in writing authority for

competitive examining for NSPS positions. All actions taken under competitive examining procedures will be made without regard to race, color, religion, age, gender, national origin, political affiliation, disability, sexual orientation, marital or family status, or other prohibited criteria, and will be based solely on job-related factors. These policies, procedures, and guidance will be consistent with the "Uniform Guidelines on Employee Selection Procedures" (1978) 43 FR 38290 (August 25, 1978) and part 332, subparts A and C of this title.

(b) *Public notice.* (1) Components will accept applications from all U.S. citizens, to include current Federal employees, and at a minimum, will consider applicants from the local commuting area. Components may concurrently consider applicants from other targeted recruitment sources, as specified in the vacancy announcement. A targeted recruitment source is a category or grouping of potentially qualified individuals, such as all students at a particular university in a particular field of study. Targeted recruitment sources will be selected with equal protection considerations in mind, such as whether the sources will reach a diverse applicant pool. If there are insufficient qualified candidates in both the local commuting area and targeted recruitment sources, Components may consider applicants from outside that area.

(2) When limiting consideration, the vacancy announcement will clearly state that consideration will be limited if sufficient qualified candidates are received from the local commuting area and other targeted recruitment sources. If sufficient candidates are not received from the local commuting area and other targeted recruitment sources, consideration will be expanded to all applicants; *i.e.*, the area of consideration will not be expanded incrementally.

(3) No minimum announcement opening period is required. The open period will be based on the type of position being filled and the availability of qualified candidates in the labor market.

(c) *Numerical rating and ranking procedures.* When filling positions using numerical rating and ranking, the procedures issued by the Secretary will be followed. All qualified applicants may be referred and selection may be made from among any referred applicant except that a preference eligible will not be passed over to select a non-preference eligible, unless procedures under 5 U.S.C. 3318 for passing over a preference eligible are followed.

(d) *Alternative ranking and selection procedures (category rating).* When filling positions using category rating, procedures issued by the Secretary will be followed in lieu of the procedures in part 337, subpart C, except for § 337.304, of this title.

(e) *Passing over preference eligibles.* OPM retains the authority to grant or deny a pass over request of a preference eligible with a compensable service-connected disability of 30 percent or more and to make medical qualifications determinations pertaining to preference eligibles. The Secretary has the authority to grant or deny a pass over request of a preference eligible with a compensable service-connected disability of less than 30 percent.

#### **§ 9901.516 Internal placement.**

(a) *Determining levels of work and movement within and across career groups.* The determination of when an action is a promotion, reassignment, or reduction in band for competitive or noncompetitive movement and related pay administration purposes, either between NSPS positions or to an NSPS position from a non NSPS position, must be made by applying the definitions of those terms at § 9901.103.

(b) *Eligibility for promotion to full performance band.* An employee with a rating of record of Level 1 or Level 2 is not eligible for promotion to the full performance band of the position until such time as the employee attains a rating of record of Level 3 or above. An employee who does not have an NSPS rating of record may be promoted to the full performance band of the position if an authorized management official conducts a performance assessment and determines that the employee is performing at the equivalent of Level 3 or above.

(c) *Time after competitive appointment restriction.* Restrictions on the movement of an employee immediately after the employee's initial appointment to Federal service as described in 5 CFR part 330, subpart E, are not applicable to NSPS positions.

(d) *Details.* There is no time limit on details or any requirement to extend them incrementally. An official personnel action is not required to document a detail unless the detail exceeds one year, crosses Component and/or Agency lines or assigns an employee from NSPS to another pay system within the Component (*e.g.*, NSPS to General Schedule), or documents developmental rotational assignments or deployment.

(e) *NSPS Merit Promotion Program.* In accordance with the Secretary's authority to prescribe regulations for the

assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS, the procedures below, in conjunction with the merit promotion requirements in 5 CFR 335.103(b) constitute the NSPS Merit Promotion Program. Internal placement actions may be made on a permanent or temporary basis using competitive and noncompetitive procedures.

(1) All actions taken under the NSPS Merit Promotion Program, whether involving the identification, qualification, evaluation, or selection of candidates, will be made without regard to race, color, religion, age, gender, national origin, political affiliation, disability, sexual orientation, marital or family status or other prohibited criteria and will be based solely on job-related factors.

(2) Vacancy announcements will identify areas of consideration that are sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered. Employees within the area of consideration who are absent for legitimate reason (e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments) must receive appropriate consideration, if they apply for a vacant position; i.e., they cannot be excluded from consideration because they are absent. Employees who are unable to apply for vacant positions while they are away may also make other appropriate arrangements for consideration.

(3) To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by either OPM or the Department, as appropriate. Prior to the recruitment process, authorized management officials will identify through job analysis the job-related criteria that will be used to evaluate and determine the best qualified candidates for referral. The job analysis will identify the basic duties and responsibilities of the position being filled; the knowledge, skills, abilities, and/or competencies required to perform the duties and responsibilities; and the factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics. Candidate evaluation will give due weight to performance appraisals and incentive awards. When evaluating a candidate's performance appraisals, consideration may be given

to the differences in performance appraisal systems. Job analysis requirements will conform to the Uniform Guidelines on Employee Selection Procedures in 29 CFR part 1607, and 5 CFR part 300, subpart A.

(4) Management has the right to select or not select from among a group of highly qualified candidates and to select from appropriate sources of candidates.

(5) Components will maintain a temporary record of each promotion to a competitive service position filled through internal competitive procedures to allow reconstruction of the placement action, including documentation on how candidates were rated, ranked, and referred. These records may be destroyed after 2 years or after the program has been formally evaluated by OPM (whichever occurs first) if the time limit for grievance has lapsed and destruction would otherwise be consistent with the Department's Priority Placement Program requirements.

(6) *Competitive actions.* (i) Except as provided in paragraph (e)(7) of this section, competitive procedures apply to promotion of an employee to a higher pay band (i.e., a higher level of work) and to the following actions:

(A) Temporary promotion or detail to a higher pay band for more than 180 days. Prior service during the preceding 12 months under noncompetitive temporary promotions or details to higher pay-banded positions counts toward the 180-day total. A temporary promotion may be made permanent without further competition, provided the temporary promotion was originally made under competitive procedures and the fact that the temporary promotion might lead to a permanent promotion was made known to all potential candidates;

(B) Reassignment or reduction in band to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction in force regulations at 5 CFR part 351);

(C) Transfer to a position at a higher pay band or with more promotion potential than a position previously held on a permanent basis in the competitive service; and

(D) Reinstatement to a permanent, term, or temporary position at a higher pay band or with more promotion potential than a position previously held on a permanent basis in the competitive service.

(ii) When determining whether the promotion potential of a General Schedule position is lower than that of the promotion potential of the NSPS

position to which an employee moves, the definitions of higher, lower, and comparable levels of work under § 9901.103 will be applied.

(7) *Exceptions to competition.* (i) Competitive procedures do not apply to:

(A) Promotion resulting from the upgrading of a position to a higher pay band level without significant change in the duties and responsibilities due to the issuance of a new NSPS classification standard or the correction of an initial classification error;

(B) Promotion resulting from an employee's position being classified at a higher pay band level because of additional duties and responsibilities;

(C) Promotion resulting from previous competitive selection for a position with documented potential to a higher pay band;

(D) Temporary promotion or detail to a higher pay band or a position with known promotion potential for 180 days or less;

(E) Promotion to a higher pay band previously held on a permanent basis in the competitive service from which an employee was separated or demoted for other than performance or conduct reasons;

(F) Promotion, reassignment, reduction in band, transfer, or reinstatement to a position having promotion potential no greater than the potential of a position an employee currently holds or previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an approved interchange agreement) and did not lose because of performance or conduct reasons;

(G) Consideration of a candidate not given proper consideration in a competitive promotion action;

(H) Placement resulting from reduction in force procedures under 5 CFR part 351; and

(I) The appointment of career SES appointees with competitive service reinstatement eligibility to any position for which they qualify in the competitive service at any salary level, consistent with 5 CFR part 317, subpart G.

(ii) When determining whether the promotion potential of a General Schedule position is lower than that of the promotion potential of the NSPS position to which an employee moves, the definitions of higher, lower, and comparable levels of work under § 9901.103 will be applied.

(8) *Alternative promotion procedures.* The Secretary may authorize the use of the following alternative procedures to fill NSPS positions. Use of these alternative procedures does not require

the posting of vacancy announcements; however, employees must be made aware that these processes may be utilized via newsletters, bulletin boards, websites, or other common methods of employee communication. Use of these alternative procedures is subject to the requirements of the DoD Priority Placement Program and the Reemployment Priority List. Employees within the area of consideration who are absent for legitimate reason (e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments) must receive appropriate consideration, i.e., they cannot be excluded from consideration because they are absent.

(i) *Assessment boards.* (A) Boards may convene to assess internal candidates for current and future advancement opportunities based on pre-established criteria. Pre-established criteria may include experience, training, awards, education, performance evaluation scores (ratings of record) or other appropriate information consistent with merit system principles and the "Uniformed Guidelines on Employee Selection Procedures."

(B) Boards will categorize employees into specific levels of candidates to generate referral lists of ranked candidates for occupational groups. These referral lists are valid for one year from the date generated. Selection from the referral list should be further justified based on specific job-related factors unique to the actual vacancy.

(C) Boards, which should be comprised of senior level managers (subject matter experts for each particular occupational group), may be convened on an ad hoc basis or may be held annually in conjunction with the performance evaluation process.

(ii) *Alternate certification.* A selecting official may make a by-name request for an individual from any appropriate source of Department or Component employees. The employee may be selected if ranked within the highest quality group as determined by rating factors established for the position.

(iii) *Exceptional performance promotion.* (A) An employee whose most recent rating of record is a Level 5 performance rating may be promoted to a vacant position in a higher pay band when the vacant position has the same occupational series (or related interdisciplinary/interoccupational series) and similar function as the position the employee held at the time he or she received the Level 5 rating.

(B) Selecting officials must determine and document the area of consideration, and must consider all employees in the area of consideration whose current Level 5 rating was based on performance in the same occupational series and similar function as the vacancy being filled.

(9) *Grievances.* Employees have the right to file a complaint relating to a promotion action. Such complaints will be resolved under appropriate grievance procedures. The standards for adjudicating complaints are set forth in 5 CFR part 300, subpart A. There is no right of appeal to OPM, but OPM may conduct investigations of substantial violations of OPM requirements.

[FR Doc. E9-899 Filed 1-15-09; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Parts 305 and 318

[Docket No. APHIS-2007-0052]

RIN 0579-AC70

#### Revision of the Hawaiian and Territorial Fruits and Vegetables Regulations

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are revising and reorganizing the regulations pertaining to the interstate movement of fruits and vegetables from Hawaii and the territories to consolidate requirements of general applicability and eliminate redundant requirements, update terms and remove outdated requirements and references, and make various editorial and nonsubstantive changes to the regulations to make them easier to use. We are also making substantive changes to the regulations including establishing criteria within the regulations that, if met, will allow us to approve certain new fruits and vegetables for interstate movement in the United States and to acknowledge pest-free areas in Hawaii and U.S. territories expeditiously, and removing the listing in the regulations of some specific commodities as regulated articles. These changes are intended to simplify and expedite our processes for approving certain regulated articles for interstate movement and acknowledging pest-free areas while continuing to allow for public participation in the processes. This final rule does not allow for the

interstate movement of any specific new fruits or vegetables, nor does it alter the conditions for interstate movement of currently approved fruits or vegetables. These changes will make our domestic interstate movement regulations more consistent with our fruits and vegetables import regulations. The changes in this final rule will not alter the manner in which the risk associated with a regulated article interstate movement request is evaluated, nor will they alter the manner in which those risks are ultimately mitigated.

**DATES:** *Effective Date:* February 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Lamb, Import Specialist, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737-1231; (301) 734-8758.

#### SUPPLEMENTARY INFORMATION:

##### Background

Under the regulations in 7 CFR part 318, "Hawaiian and Territorial Quarantine Notices" (referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA or the Department) prohibits or restricts the interstate movement of fruits, vegetables, and other products from Hawaii, Puerto Rico, the U.S. Virgin Islands, and Guam to the continental United States to prevent the spread of plant pests and noxious weeds that occur in Hawaii and the territories.

On June 17, 2008, we published in the **Federal Register** (73 FR 34202-34224, Docket No. APHIS-2007-0052) a proposal<sup>1</sup> to amend the regulations by revising and reorganizing those portions of the regulations pertaining to the interstate movement of fruits and vegetables to consolidate requirements of general applicability and eliminate redundant requirements, updating terms and remove outdated requirements and references, and making various editorial and nonsubstantive changes to the regulations to make them easier to use. We also proposed to make substantive changes to the regulations including: Establishing criteria within the regulations that, if met, would allow us to approve certain new fruits and vegetables for interstate movement in the United States and to acknowledge pest-free areas in Hawaii and U.S. territories expeditiously; and removing the listing in the regulations of some specific commodities as regulated

<sup>1</sup> To view the proposed rule and the comments we received, go to <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0052>.