



DEPARTMENT OF COMMERCE

[Docket No.: 200130-0038]

RIN 0690-XC008

Commerce Alternative Personnel System

AGENCY: Office of Administration, Office of Human Resources Management, Department of Commerce.

ACTION: Notice of modifications to the Commerce Alternative Personnel System Project Plan.

SUMMARY: This notice announces modifications of the provisions of the Commerce Alternative Personnel System, formerly the Department of Commerce Personnel Management Demonstration Project, published in the Federal Register on December 24, 1997. This notice makes permanent the three-year probationary period, a hallmark of the original Department of Commerce Demonstration Project and later the Commerce Alternative Personnel System.

DATES: The modified Commerce Alternative Personnel System is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Department of Commerce – Sandra Thompson, U.S. Department of Commerce, 1401 Constitution Avenue NW., Room 51020, Washington, DC 20230, (202) 482-0056 or Valerie Smith at (202) 482-0272.

SUPPLEMENTARY INFORMATION:

Background

Under 5 U.S.C. 4703, the Office of Personnel Management (OPM) may authorize Federal agencies to conduct demonstration projects that waive various provisions of Title 5 of the United States Code that pertain to Federal employees' conditions of employment. On December 24, 1997, OPM announced it had approved a Department of Commerce (DoC) demonstration project for an alternative personnel management system and published the final plan in the Federal Register (62 FR 67434). The demonstration project was designed to simplify current classification systems for greater flexibility in classifying work and paying employees; establish a performance management and rewards system for improving individual and organizational performance; and improve recruiting and examining to attract highly qualified candidates. The purpose of the project was to strengthen the contribution of human resources management and test whether the same innovations conducted under the National Institute of Standards and Technology alternative personnel management system would produce similarly successful results in other DoC environments. The project was implemented on March 29, 1998. A provision in the Consolidated Appropriations Act, 2008 (Public Law 110-161, Division B, section 108) made the demonstration project permanent (extended it indefinitely) and eliminated the cap on the number of individuals who could be included in the project. The project was subsequently renamed the Commerce Alternative Personnel System (CAPS).

CAPS provides for modifications to be made to the project plan as experience is gained, results are analyzed, and conclusions are reached on how the system is working. Since its initial implementation, DoC's project plan has been modified fourteen times to clarify certain authorities, and to extend and expand the demonstration project/alternative personnel system: 64 FR 52810 (September 30, 1999); 68 FR 47948 (August 12, 2003); 68 FR 54505 (September

17, 2003); 70 FR 38732 (July 5, 2005); 71 FR 25615 (May 1, 2006); 71 FR 50950 (August 28, 2006); 74 FR 22728 (May 14, 2009); 80 FR 25 (January 2, 2015); 81 FR 20322 (April 7, 2016); 81 FR 40653 (June 22, 2016); 81 FR 54787 (August 17, 2016); 82 FR 1688 (January 6, 2017); 83 FR 54707 (October 31, 2018); and 84 FR 22807 (May 20, 2019).

This notice announces that DoC is modifying the CAPS project plan to make the three-year probationary period, a feature of the original demonstration project, permanent for all employees in the competitive and excepted service in the Scientific and Engineering (ZP) Career Path assigned to research and development (R&D) positions, identified by the Functional Classification Code assigned through the classification process.

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Table of Contents

I. Executive Summary

II. Basis for CAPS Project Plan Modification

III. Changes to the CAPS Project Plan: Authorities and Waiver of Required Laws and Regulations

I. Executive Summary

CAPS is designed to (1) improve hiring and allow DoC to compete more effectively for high-quality candidates through direct hiring, selective use of higher entry salaries, and selective use of recruitment incentives; (2) motivate and retain staff through higher pay potential, pay-for-performance, more responsive personnel systems, and selective use of retention incentives; (3) strengthen the manager's role in personnel management through delegation of personnel authorities; and (4) increase the efficiency of personnel systems through the installation of a simpler and more flexible classification system based on pay banding through reduction of guidelines, steps, and paperwork in classification, hiring, and other personnel systems, and through automation.

The current participating organizations include 1 office of the Deputy Secretary in the Office of the Secretary, 6 offices of the Chief Financial Officer/Assistant Secretary for Administration in the Office of the Secretary; the Bureau of Economic Analysis; 2 units of the National Telecommunications and Information Administration (NTIA): the Institute for Telecommunication Sciences and the First Responder Network Authority (an independent authority within NTIA); and 12 units of the National Oceanic and Atmospheric Administration: Office of Oceanic and Atmospheric Research, National Marine Fisheries Service, the National Environmental Satellite, Data, and Information Service, National Weather Service — Space Environment Center, National Ocean Service, Program Planning and Integration Office, Office

of the Under Secretary, Marine and Aviation Operations, Office of the Chief Administrative Officer, Office of the Chief Financial Officer, the Office of Human Capital Services , formerly the Workforce Management Office, and the Office of the Chief Information Officer.

II. Basis for CAPS Project Plan Modification

A. Three-Year Probationary/Trial Period

CAPS is designed to provide supervisors/managers at the lowest organizational level the authority, control, and flexibility to recruit, retain, develop, recognize, and motivate its workforce, while ensuring adequate accountability and oversight.

Since its initial project plan was published in 1997, DoC has had a provision, first in its OPM approved demonstration project and later in its approved CAPS, requiring employees in the Scientific and Engineering (ZP) Career Path performing R&D work to serve a probationary period of three years, with the flexibility of the supervisor/manager to determine, at any time after one year, that the R&D employee has successfully completed the probationary period. The purpose of the three-year probationary period is to allow a manager/supervisor to view the full cycle of a research assignment before making a final decision on retaining the employee. The full cycle of R&D work typically extends years from the assignment of a research project through the publication of results; thus, the one-year probationary period or trial period (term employees) in the competitive service and the two-year probationary or trial period in the excepted service are insufficient for management to evaluate a new employee's performance and conduct to determine whether his/her continued employment is in the best interest of DoC.

However, DOC's ability to fully utilize this extended probationary period has in recent years been constrained by changes in how a key statutory term has been interpreted by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit or Court), and by the subsequent

adoption of this interpretation by OPM in its regulations. Specifically, the Federal Circuit, in two decisions, held that the definition of “employee” in 5 U.S.C. 7511(a)(1) included individuals serving in a probationary or trial period as long as those individuals had completed one year (in the case of individuals in the competitive service) or two years (in the case of non-preference individuals in the excepted service) of current continuous federal service in the same or similar position. *See Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999); *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002). As “employees” have the right to appeal adverse actions to the Merit Systems Protection Board under 5 U.S.C. 7701(a), this interpretation meant those individuals who were performing R&D work would have the right to appeal adverse employment decisions after as little as one year – effectively negating the three-year probationary period for R&D employees provided for under CAPS. After the Federal Circuit’s rulings, OPM revised its regulations, making conforming changes to 5 CFR parts 315 and 752 (73 FR 7187 (February 7, 2008)).

B. Waivers

Under 5 U.S.C. 4703, DoC has the authority to waive 5 U.S.C. 7511(a)(1), as it has been interpreted by the Federal Circuit, as well as OPM’s revised regulations which implement that interpretation. By this notice, we announce that we are doing so.

At the time DoC’s original plan for the demonstration project that was to become CAPS was approved and implemented, probationary employees were not afforded procedural and appeal rights under 5 CFR part 752; only employees who had successfully completed their probationary period were afforded procedural protections and appeal rights. As a result of the Federal Circuit’s subsequent interpretation of 5 U.S.C. 7511, and OPM’s concomitant revised interpretation, employees were granted procedural protections and appeal rights prior to the

conclusion of the three-year probationary period established in CAPS. Thus, DoC can no longer fully use the three-year probationary period established in CAPS to determine employees' fitness for Federal service. The waivers of law and regulations provided for by this notice restore the basic intent of the three-year probationary period included in DoC's 1997 plan, which is to allow management sufficient time to assess an employee's work performance and conduct to ensure that employees who are retained beyond probation are capable of carrying out the full cycle of R&D work, thus contributing to the objectives of high-quality hires and a high-performing workforce.

III. Changes to the CAPS Project Plan: Authorities and Waiver of Laws and Regulations Required

The subsection of the CAPS project plan titled "Authorities and Waiver of Laws and Regulations Required" (62 FR 67434, December 24, 1997) is modified to revise or add the following waivers of law and regulations:

- Waive 5 U.S.C. 4303(f)(2), Actions based on Unacceptable performance, as follows:
For research and development positions in the Scientific and Engineering Career Path only, waiving the language "or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less".
- Waive 5 U.S.C. 4303(f)(3) as follows:
For research and development positions in the Scientific and Engineering Career Path only, waiving the language "the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions."
- Waive 5 U.S.C. 7501(1), Adverse actions, as follows:

For research and development positions in the Scientific and Engineering Career Path only, waiving the language “or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less”.

- Waive 5 U.S.C. 7511(a)(1)(A)(ii), 7511(a)(1)(B), 7511 (a)(1)(C)(ii), Adverse Actions as follows:
waived only for research and development positions in the Scientific and Engineering Career Path.
- Revise and Waive 5 CFR 315.802, Length of probationary period; crediting service as follows:
revised from “waived only for positions in the Scientific and Engineering Career path” to waived only for research and development positions in the Scientific and Engineering Career Path.
- Waive 5 CFR 315.803(b), Agency action during probationary period (general) as follows:
waived only for research and development positions in the Scientific and Engineering Career Path.
- Waive 5 CFR 315.805, Termination of probationers for conditions arising before appointment as follows: waived only for research and development positions in the Scientific and Engineering Career Path.
- Waive 5 CFR 315.806, Appeal rights to the Merit Systems Protection Board as follows:
waived only for research and development positions in the Scientific and Engineering Career Path.

- Waive 5 CFR 752.401(c)(2), 752.401(c)(3), 752.401(c)(5), Coverage as follows:
waived only for research and development positions in the Scientific and Engineering Career Path.
- Waive 5 CFR 752.401(d)(11), Coverage as follows:
For research and development positions in the Scientific and Engineering Career Path only, waiving the language “unless he or she meets the requirements of paragraph (c)(5) of this section”.
- Waive 5 CFR 752.401(d)(13), Coverage as follows:
For research and development positions in the Scientific and Engineering Career Path only, waiving the language “unless he or she meets the requirements of paragraph (c)(2) of this section”.
- Department Administrative Order (DAO) 202-302, Employment in the Excepted Service as follows:
For research and development positions in the Scientific and Engineering Career Path only, waiving the language in Section 1. PURPOSE, .02 “changes the trial period for excepted service positions from one (1) year to two (2) years, except when regulations require a shorter period.”
For research and development positions in the Scientific and Engineering Career Path only waiving the language in Section 7. TRIAL PERIODS, .01 “Department policy requires satisfactory completion of a two-year (2) trial period for employees in the excepted service, except for appointments where regulation requires a shorter period.”
- DAO-202-315, Probationary and Trial Periods as follows:

For research and development positions in the Scientific and Engineering Career Path only waiving the language in Section 1. PURPOSE, .02 “In addition, this revision clarifies that the trial period for excepted service positions is two (2) years, unless a shorter period is required by regulation.”

For research and development positions in the Scientific Engineering Career Path only waiving the language in Section 3. PROBATIONARY AND TRIAL PERIODS FOR INITIAL APPOINTMENTS, .02, Coverage, “Each employee serving under a career/career-conditional or term appointment in the competitive service will serve a probationary or trial period prescribed by 5 CFR, Parts 315, Subpart H and Subpart I, and 5 CFR 316.304, respectively, and by this Order. Each employee serving under a career/career-conditional appointment in the excepted service will serve a two-year (2) trial period.”

For research and development positions in the Scientific and Engineering Career Path only waiving the language in Section 3.03 Length, b. Excepted Service, “All trial periods for employees in the excepted service are for two (2) years, except for appointments where regulation requires a shorter period.” and “For intermittent employees (i.e., those who do not have a regularly scheduled tour of duty), the trail period is two (2) calendar years.”

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