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**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Part 302**

**RIN 3206-AN30**

**Employment in the Excepted Service**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations governing employment in the excepted service. The rules will clarify the existing policy on exemptions from excepted service selection procedures and provide additional procedures for passing over a preference eligible veteran. The intended effect of these changes is to align the regulations with binding case law and thus strengthen the application of veterans' entitlements in the excepted service.

**DATES:** The final rule is effective [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

**FOR FURTHER INFORMATION CONTACT:** Katika Floyd by telephone at (202) 606-0960; by e-mail at [employ@opm.gov](mailto:employ@opm.gov); by fax at (202) 606-2329; or by TTY at (202) 418-3134.

**SUPPLEMENTARY INFORMATION:** On November 30, 2016 the Office of Personnel Management (OPM) issued a proposed rule (81 FR 86290) to clarify the existing policy on exemptions from excepted service selection procedures and provide additional procedures for passing over a preference eligible veteran in accordance with binding case law.

During the 60-day comment period between November 30, 2016, and January 30, 2017, OPM received three sets of comments, of which two were from individuals and one was from a Federal Agency.

Two individuals provided comments that were beyond the scope of the proposed rule. As summarized below, OPM is not adopting these comments:

- One individual suggested that OPM develop a new excepted service Schedule for positions in Schedules A and B in which the procedures of 5 CFR part 302 are required; all excepted service positions not listed by OPM would presumptively be exempt from part 302's appointment procedures. OPM is not adopting this comment because the current regulatory structure, in which exemptions are specifically listed, is more in keeping with the general rules for excepted service hiring in 5 U.S.C. 3320.
- One individual suggested OPM include a cross-reference to 5 CFR part 302 procedures in the listing of Schedule A and B authorities required by 5 CFR part 213. Another individual suggested that the annual Federal Register notice of the consolidated listing of Schedules A, B, and C exceptions include information about whether the individual positions are exempt from 302 procedures. OPM is not adopting this comment. The notice requirements in 5 C.F.R. 213.103 are unrelated to appointment procedures. The purpose of those requirements, promulgated pursuant to Civil Service Rule VI, 5 CFR 6.1, is to inform the public and agencies of OPM's decision granting the excepted appointing authority.
- One individual requested that OPM clarify the provisions for conversion to the competitive service of employees serving on Pathways appointments and Veterans Recruitment Appointments. OPM is not adopting this comment because the provisions

for conversion in 5 CFR part 307 and part 362 are a separate matter, and, in any event, we believe that they are sufficiently clear.

- One individual suggested that OPM revise 5 CFR part 302 to include Alternative Rating and Selection Procedures (i.e., category rating). We note that a change to this provision was not included in the proposed rule that OPM published in 2016. Moreover, it is not necessary for OPM to adopt this comment, because agencies already have the option, under § 302.105, of adopting category rating-like selection procedures, as long as those procedures provide preference eligibles with as much advantage in referral as they would otherwise receive under the methods specified in part 302. OPM will consider making this change in conjunction with a future package intended to address intervening statutory amendments.

#### Positions Exempt from Appointment Procedures

One individual suggested that for positions exempt from the appointment procedures in part 302, OPM clarify the phrase “each agency must follow the principle of veteran preference as far as administratively feasible” as used in § 302.101(c) or provide guidance in light of the Merit System Protection Board (MSPB) case, *Jarrard v. Social Security Administration*, 115 M.S.P.R. 397 (2010), *aff’d sub nom. Jarrard v. Department of Justice*, 669 F.3d 1320 (Fed. Cir. 2012). We see no need to amend the rule to explain the meaning of this phrase. This standard was discussed at length in *Patterson v. Department of the Interior*, 424 F.3d 1151 (Fed. Cir. 2005), a precedential decision in which the U.S. Court of Appeals for the Federal Circuit accepted the Government’s argument that it was not possible to give attorney applicants veterans’ preference points under 5 U.S.C. 3309 because an appropriations law prohibits the use of examination and rating in attorney hiring. In that litigation, OPM took the position that the phrase “follow the

principle of veteran preference as far as administratively feasible” means that veterans’ preference must be considered as a positive factor in the selection process. See *Patterson*, 424 F.3d at 1156-57. The Federal Circuit sustained OPM’s position. *Id.* at 1159-1160 (“The positive factor test, in turn, strikes us as a reasonable way of ‘follow[ing] the principle of veteran preference as far as administratively feasible,’ 5 C.F.R. § 302.101(c), in the case of a preference eligible applying for an excepted service attorney position.”). This is the test OPM continues to regard as appropriate for positions exempted by § 302.101(c). We note that this definition had previously been used by the Department of Justice, in a 1979 opinion addressing what is required for attorney hiring. 3 U.S. Op. Off. Legal Counsel 140, 1979 WL 16553 (O.L.C.), at 146-147 (“The Department routinely applies the Veterans Preference Act in a meaningful fashion to attorney-hiring. . . . That an applicant is a preference eligible is weighed as a positive factor in the Department's attorney-hiring program, [footnote omitted] . . . . When the veteran's other qualifications place him or her in close competition, the veteran is preferred over other applicants with substantially equal qualifications.”). We note one exception. As observed below, if OPM determines that part 302’s appointment procedures apply to an agency-specific appointing authority under § 302.101(c)(6), OPM’s approval of the appointing authority will address the procedures that apply.

One individual recommended that positions for readers for blind employees, interpreters for deaf employees and personal assistants for handicapped employees filled under 5 CFR 213.3102(l) should be exempt from the procedures in 5 CFR 302. The commenter noted that employees in the reader and assistant positions are used to fill positions that support disabled employees who may have been appointed under 5 CFR 213.3102(u) (which is exempt from 302 procedures), so the reader and personal assistant positions should also be exempt. OPM is not

adopting this recommendation. OPM has no basis or evidence which suggests that agencies cannot apply part 302 when filling positions under 5 CFR 213.3102(II), or that part 302 would otherwise create significant barriers to filling these positions. We note that no agency has contacted OPM for an agency-specific exemption for positions filled under 5 CFR 213.3102(II). A key distinction between the two hiring authorities is that under 5 CFR 213.3102(u) an applicant can demonstrate his or her ability to do the job during a trial period or temporary appointment. Such is not the case for positions filled using 5 CFR 213.3102(II).

One individual, commenting on OPM's proposal to amend 5 CFR 302.101(c)(6), expressed concern that "OPM with this change is in essence requiring 5 CFR 302 competition for positions for which it is impractical to examine." Section 302.101(c)(6) had stated that positions in schedule A of the excepted service were exempt from the appointment procedures in part 302 "when OPM agrees with the agency that the positions should be included hereunder." OPM proposed amending this text to state that positions in schedule A of the excepted service are exempt from the appointment procedures in part 302 when "OPM agrees with the agency that the positions should be included hereunder and states in writing that an agency is not required to fill positions according to the procedures in this part." As OPM explained in the accompanying *Federal Register* notice, this is a clarification, not a substantive change. See 81 FR 86290. The fact that "it is not practicable to examine" for a position, requiring its placement in schedule A of the excepted service, does not automatically make part 302 inapplicable; but rather, reflects the impracticability of applying "the qualification standards and requirements established for the competitive service" when hiring for the position. 5 CFR 213.3101. OPM's written approvals of schedule A appointing authorities specify whether any of the procedures in part 302 apply.

Applying Veterans Preference

One agency commented that Sole Survivorship Preference (as defined in 5 CFR part 211) needs to be addressed in §§ 302.201(b), 302.303(d), and 302.304(b)(5). OPM agrees and has updated these sections in the final rule accordingly.

This agency also asked OPM to clarify selections under § 302.401(a) when fewer than three candidates remain in the highest preference category. Section 302.401(c) states, in part, “an agency must make its selection from the highest available preference category, as long as at least three candidates remain in that group. When fewer than three candidates remain in the highest category, consideration may be expanded to include the next category.” In instances in which two preference categories are merged, an agency may select any preference eligible in the newly merged category. The order of selection is described elsewhere in the regulations. Because we believe the text of the rule is clear, we are not adopting the comment.

#### Technical Change Required by a Recently-Enacted Statute

The August 13, 2018 enactment of Public Law 115-232, the John S. McCain National Defense Authorization Act for FY 2019 (NDAA), requires a technical amendment. Sections 1107(b)(1)(B) and (d) of the NDAA provide that effective on the date when OPM issues a final rule to implement section 1107 of the NDAA, subsection (b)(7) of 5 U.S.C. 3319 will be redesignated as subsection (b)(6).

OPM has not yet issued a final rule to implement section 1107 of the NDAA, but when it does so, the reference to 5 U.S.C. 3319(c)(7) will become obsolete. To avoid the need for future technical and conforming amendments, this final rule replaces the specific reference to 5 U.S.C. 3319(c)(7) with a more general reference to 5 U.S.C. 3319(c).

#### **Regulatory Review**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated by OMB as a “significant regulatory action” but not an “economically significant” regulatory action as described under Section 3(f)(1) under Executive Order 12866.

### **Reducing Regulation and Controlling Regulatory Costs**

This rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this rule imposes no more than de minimis costs.

### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

### **Federalism**

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

### **Civil Justice Reform**

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

### **Unfunded Mandates Reform Act of 1995**

This rule 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.

### **Congressional Review Act**

This action is subject to the CRA, 5 U.S.C. 801 et seq., and OPM will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a not “major rule” as defined by 5 U.S.C. 804(2).

### **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.

### **List of Subjects in 5 CFR Part 302**

Government employees.

Office of Personnel Management.

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Alexys Stanley,  
Regulatory Affairs Analyst.

Accordingly, OPM is amending 5 CFR part 302 as follows:

### **PART 302 — EMPLOYMENT IN THE EXCEPTED SERVICE**

1. The authority citation for part 302 continues to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151, E.O. 10577 (3 CFR 1954-1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95-454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 et seq.

2. Amend § 302.101 by revising paragraph (c)(6) and adding paragraph (c)(11) to read as follows:

**§ 302.101 Positions covered by regulations.**

\* \* \* \* \*

(c) \* \* \*

(6) Positions included in Schedule A (see subpart C of part 213 of this chapter) for which OPM agrees with the agency that the positions should be included hereunder and states in writing that an agency is not required to fill positions according to the procedures in this part.

\* \* \* \* \*

(11) Appointment of persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities to positions filled under 5 CFR 213.3102(u).

3. Amend § 302.201 by revising paragraph (b) to read as follows:

**§ 302.201 Persons entitled to veteran preference.**

\* \* \* \* \*

(b) When eligible candidates are referred without ranking, the agency shall note preference as “CP” for preference eligibles under 5 U.S.C. 2108(3)(C), as “XP” for preference eligibles under 5 U.S.C. 2108(3)(D) through (G), as “SSP” for preference eligibles under 5 U.S.C. 2108(3)(H) and as “TP” for all other preference eligibles under that title.

4. Amend § 302.303 by revising paragraph (d) to read as follows:

**§ 302.303 Maintenance of employment lists.**

\* \* \* \* \*

(d) *Order of entry.* An agency shall enter the names of all applicants rated eligible under § 302.302 on the appropriate list (priority reemployment, reemployment, or regular employment) in the following order:

(1) *When candidates have been rated only for basic eligibility under § 302.302(a).*

(i) Preference eligibles having a compensable, service-connected disability of 10 percent or more (designated as “CP”) unless the list will be used to fill professional positions at the GS-9 level or above, or equivalent;

(ii) All other candidates eligible for 10-point veteran preference;

(iii) All candidates eligible for 5-point veteran preference;

(iv) All candidates eligible for sole survivorship preference and

(v) Qualified candidates not eligible for veteran preference.

(2) *When qualified candidates have been assigned numerical scores under § 302.302(b).*

(i) Preference eligibles having a compensable, service-connected disability of 10 percent or more, in the order of their augmented ratings, unless the list will be used to fill professional positions at the GS-9 level or above, or equivalent;

(ii) All other qualified candidates in the order of their augmented ratings. At each score, qualified candidates eligible for 10-point preference will be entered first, followed, second, by 5-point preference eligibles, third, by sole survivorship preference eligibles, and last, by nonpreference eligibles.

5. Amend § 302.304 by revising paragraph (b)(5) to read as follows:

**§ 302.304 Order of consideration.**

\* \* \* \* \*

(b) \* \* \*

(5) *Unranked order.* When numerical scores are not assigned, the agency may consider applicants who have received eligible ratings for positions not covered by paragraph (b)(4) of this section in either of the following orders:

(i) *By preference status.* Under this method, preference eligibles having a compensable service-connected disability of 10 percent or more are considered first, followed, second, by other 10-point preference eligibles, third, by 5-point preference eligibles, fourth by sole survivorship preference eligibles, and last, by nonpreference eligibles. Within each category, applicants from the reemployment list will be placed ahead of applicants from the regular employment list.

(ii) *By reemployment/regular list status.* Under this method, all applicants on the reemployment list are considered before applicants on the regular employment list. On each list, preference eligibles having a compensable service-connected disability of 10 percent or more are considered first, followed, second, by other 10-point preference eligibles, third, by 5-point preference eligibles, fourth by sole survivorship preference eligibles, and last by nonpreference eligibles.

6. Amend § 302.401 by revising paragraph (b) to read as follows:

**§ 302.401 Selection and appointment.**

\* \* \* \* \*

(b) *Passing over a preference applicant.* When an agency, in making an appointment as provided in paragraph (a) of this section, passes over the name of a preference eligible, it shall follow the procedures in 5 U.S.C. 3318(c) and 3319(c) as described in the Delegated Examining

Operations Handbook. An agency may discontinue consideration of the name of a preference eligible for a position as described in 5 U.S.C. 3318(c).

\* \* \* \* \*

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