Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 302

RIN 3206–AN30

Employment in the Excepted Service

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing to revise its regulations governing employment in the excepted service. The proposed 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 proposed changes is to strengthen the application of veterans' entitlements in the excepted service.

DATES: Comments must be received on or before January 30, 2017.

ADDRESSES: You may submit comments, identified by Regulation Identification Number (RIN) ''3206–AN30'' using any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or Regulation Identification Number (RIN) for this rulemaking.

Email: employ@opm.gov. Include ''RIN 3206–AN30, Excepted Service'' in the subject line of the message.

Fax: (202) 606–2329.

Mail: Kimberly A. Holden, Deputy Associate Director for Recruitment and Hiring, U.S. Office of Personnel Management, Room 6551, 1900 E Street NW., Washington, DC 20415–9700.

Hand Delivery/Courier: U.S. Office of Personnel Management, Room 6500, 1900 E Street NW., Washington, DC 20415–9700.

FOR FURTHER INFORMATION CONTACT: Katika Floyd by telephone at (202) 606–0960; by email at *employ@opm.gov;* by fax at (202) 606–2329; or by TTY at (202) 418–3134.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is proposing to revise the regulations governing employment in the excepted service. OPM is proposing these changes to clarify the existing policy on exemptions from excepted service selection procedures, and provide additional procedures for passing over a preference eligible veteran.

Background

All Federal civilian employees occupy positions in the competitive service, the excepted service, or the Senior Executive Service. The main differences between the three employment systems are in the manner that candidates apply for jobs and in the opportunity for appointees to move within the Federal service. Each employment system is covered by different laws and regulations.

The term ''excepted service'' covers a variety of situations. Entire agencies may be placed in the excepted service by statute. Positions in large parts of agencies (such as components or offices within agencies) as well as individual positions may be placed in the excepted service. If positions are placed in the excepted service (by law, Executive order, or OPM regulation), it means they have been excepted from certain requirements of the competitive service or the Senior Executive Service. However, the reasons for and scope of the exceptions will vary, depending on the circumstances surrounding their exception and who is authorizing the exception. If positions are not in the competitive service and are subject to the provisions of Title 5, United States Code, or are subject to a statutory requirement to follow veterans preference provisions of Title 5, then the agencies with such positions must follow the employment procedures outlined by OPM in its regulations (which are the ones addressed in this proposed regulation).

Positions Exempt From Appointment Procedures

OPM can exempt positions from the appointment procedures for the excepted service. The reasons for exemption will vary based on the reasons why the rating and ranking procedures outlined in OPM's regulation would be difficult for an agency to implement. The positions that OPM has exempted from the appointment procedures of 5 CFR part 302 are listed at 5 CFR 302.101(c). Per 5 CFR 302.101(c), agencies must follow the principle of veterans' preference as far as administratively feasible when filling an ''exempted'' position in the excepted service.

We propose clarifying the exemption listed at 5 CFR 302.101(c)(6). This exemption is for, ''positions included in Schedule A (see subpart C of part 213 of this chapter) and similar types of positions when OPM agrees with the agency that the positions should be included hereunder.'' As so written, this exemption may be construed to suggest that all Schedule A appointing authorities are exempt from the excepted service appointment procedures of part 302, however, such a construction is not correct. Therefore, we propose revising this exemption to say, ''Positions included in Schedule A (see subpart C of part 213 of this chapter) for which OPM states in writing that an agency is not required to fill the positions according to the procedures in this subpart.'' We believe this clarification will eliminate any potential ambiguity that all Schedule A positions are subject to the application of veterans' preference only as far as administratively feasible. Additionally, we are proposing to clarify that positions filled under 5 CFR 213.3102(u) by persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities are exempt from the procedures of part 302.

Passing Over a Preference Eligible

We propose modifying the regulations for the passing over of a preference eligible adding specific procedures. The change will require that an agency must follow the procedures in 5 U.S.C. 3318(c) (which also apply to category rating under 5 U.S.C. 3319(c)(7)) which are described in the *Delegated Examining Operations Handbook.* We are making this change in response to the U.S. Court of Appeals for the Federal Circuit's decision in *Gingery* v. *Department of Defense,* 550 F.3d 1347 (Fed. Cir. 2008). Under *Gingery,* when excepted service positions are not exempted from the hiring requirements in 5 CFR 302.101, and applicants are

hired from certificates—including through category rating—the pass over rules in 5 U.S.C. 3318 generally apply. See *also Dean* v. *Department of Labor,* 808 F.3d 497, 507 (Fed. Cir. 2015); *Jarrard* v. *Department of Justice,* 669 F.3d 1320, 1323 (Fed. Cir. 2012). The court in *Gingery* ruled that the current text in 5 CFR 302.401(b) is invalid, on grounds that it does not provide pass-over protections generally available to preference-eligible applicants under 5 U.S.C. 3318(b)(1) (since renumbered as 5 U.S.C. 3318(c)(1)), or the pass-over protections specifically available to preference eligibles with 30-percent or more compensable service-connected disabilities under 5 U.S.C. 3318(b)(2) and (b)(4) (since renumbered as 5 U.S.C. 3318(c)(2) and (c)(4)). *See* 550 F.3d at 1353–54.

OPM issued guidance on the *Gingery* decision on February 9, 2009, and clarified this guidance on March 12, 2009. However, OPM has not yet amended the text of the regulation. We are proposing to amend section 302.401(b) of our regulations to conform to the pass-over procedures in 5 U.S.C. 3318(c).

OPM notes that Public Law 114–137, the Competitive Service Act of 2015, recently amended 5 U.S.C. 3318 and 3319 to permit the use of shared certificates. This proposed rule does not address the Competitive Service Act. OPM will initiate a separate regulatory action to implement the Competitive Service Act.

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 302

Government employees.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM is proposing to revise 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, 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 to revise paragraph (c)(6) and to add 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. Revise § 302.401(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)(7) 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).

[FR Doc. 2016–28783 Filed 11–29–16; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1240

[EOIR No. 180; AG Order No. 3780–2016]

RIN 1125–AA25

Procedures Further Implementing the Annual Limitation on Suspension of Deportation and Cancellation of Removal

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice proposes to amend the regulations of the Executive Office for Immigration Review (EOIR) governing the annual statutory limitation on cancellation of removal and suspension of deportation decisions. First, the rule proposes to eliminate certain procedures created in 1998 that were used to convert 8,000 conditional grants of suspension of deportation and cancellation of removal to outright grants before the end of fiscal year 1998. The need for such procedures ceased to exist after the end of fiscal year 1998. Second, the Department proposes to authorize immigration judges and the Board of Immigration Appeals (Board) to issue final decisions denying applications, without restriction, regardless of whether the annual limitation has been reached. This proposed amendment would decrease the high volume of reserved decisions that results when the annual limitation is reached early in the fiscal year; reduce the associated delays caused by postponing the resolution of pending cases before EOIR; and provide an applicant with knowledge of a decision in the applicant's case on or around the date of the hearing held on the applicant's suspension or cancellation application.

DATES: Written comments must be submitted on or before January 30, 2017. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight Eastern Time at the end of that day.

ADDRESSES: Please submit written comments to Jean King, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125–AA25 or EOIR docket No. 180 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Jean King, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 605–1744 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. EOIR also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. To provide the most assistance