

Rules and Regulations

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 230, 301, 316, 337, and 410

RIN 3206-AJ99

Organization of the Government for Personnel Management, Overseas Employment, Temporary and Term Employment, Recruitment and Selection for Temporary and Term Appointments Outside the Register, Examining System, and Training

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is revising its regulations to implement certain Governmentwide human resources flexibilities contained in the Chief Human Capital Officers Act of 2002 (Title XIII of the Homeland Security Act). These regulations provide agencies with: The ability to appoint qualified candidates for positions in the competitive service using direct-hire procedures; increased flexibility in assessing applicants using alternative (category-based) rating and selection procedures; the authority to pay or reimburse the costs of academic degree training from appropriated or other available funds under specified conditions; and increased flexibility to use academic degree training to address agency-specific human capital requirements and objectives. This final regulation also removes Recruitment and Selection for Temporary and Term Appointments Outside the Register, and all related references including temporary appointments pending establishment of a register (TAPER) authority.

EFFECTIVE DATES: July 15, 2004.

FOR FURTHER INFORMATION CONTACT: On alternative rating and selection

procedures, Ms. Linda Watson by telephone at (202) 606-0830, fax at (202) 606-2329 or by e-mail at *lmwatson@opm.gov*. On direct-hire authority, emergency indefinite appointments, overseas employment, TAPER, and outside the register appointments, Mr. Larry Lorenz by telephone at (202) 606-0830, fax at (202) 606-2329 or by e-mail at *dmtyrrel@opm.gov*. On academic degree training, Ms. LaVeen M. Ponds by telephone at (202) 606-1394, fax at (202) 606-2329 or by e-mail at *lmponds@opm.gov*. Ms. Watson, Ms. Tyrrell and Ms. Ponds may also be contacted by TTY at (202) 418-3134.

SUPPLEMENTARY INFORMATION: On June 13, 2003, OPM published interim regulations at **Federal Register** 68 FR 35265, to implement provisions of the Chief Human Capital Officers Act of 2002 (Title XIII of the Homeland Security Act). The Chief Human Capital Officers Act of 2002 (Act) provides Federal agencies with a number of human resources (HR) flexibilities. These flexibilities include direct-hire authority and alternative (that is, category) rating and selection procedures, which will aid in recruitment and hiring. The Act also provides Federal agencies with the authority to pay or reimburse employees for the costs of academic degree training. For additional background information on these flexibilities, please refer to the interim regulations.

During the comment period, OPM hosted four briefings to introduce the new flexibilities. We received written and oral comments from six Federal agencies, one employee union, a Federal program director, one private sector company, and numerous Federal employees and human resources professionals. Based on these comments, we have made several changes in the final regulations to adopt suggestions or to clarify intent. We have addressed these comments as they apply within each flexibility.

Additional information on direct-hire and category rating and selection procedures has been added to OPM's Delegated Examining Operations Handbook. Information on approved Governmentwide direct-hire authorities can be obtained by visiting OPM's Web site at <http://www.opm.gov> and accessing the document entitled "Primary Appointing Authorities for

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Career and Career Conditional Employees" from the Web site index. We have also posted fact sheets on our Web site that address many of the questions received on these new flexibilities. To access these fact sheets, refer to the individual flexibility in the Web site index.

Direct-Hire Authority

Section 3304(c) of title 5, United States Code, provides agencies with the authority to appoint candidates directly to jobs for which OPM determines that there is a severe shortage of candidates or a critical hiring need.

We asked agencies to comment on whether OPM should combine the requirements and justification for direct-hire authorities in a single section of the regulations, or whether we should continue to publish them in separate sections. Three of the four agencies responding to our request recommended we retain this information in separate sections. Therefore, this information will remain in separate sections in the final regulation.

The final regulation provides that OPM may independently decide that a severe shortage of candidates or a critical hiring need exists, either Governmentwide or in specified agencies, for one or more specific occupational series, grades (or equivalent), or geographic locations. Alternatively, an agency may, in a written request to OPM, identify the position(s) for which it believes a severe shortage or a critical hiring need exists. The agency must support its request with relevant evidence, as described below. Agencies that use this direct-hire authority must adhere to public notice requirements, as set forth in 5 U.S.C. 3327 and 3330, and 5 CFR part 330, subpart G.

Discussion of Comments

Two agencies suggested that the authority to approve the use of direct-hire authority be delegated to agencies, and if not delegated, that the regulation require requests be submitted from the agency headquarters level. Based on our experience to date, there are widely varying interpretations of the appropriate use of direct-hire authority. OPM will, therefore, retain approval authority. However, for consistent application within individual agencies, requests for direct-hire authority should be submitted by the agency.

headquarters level. We have added this requirement to the regulation.

One agency suggested we include, in the definition portion of the regulation, the same language explaining when a "critical need" exists that was published in the interim regulation supplementary information. In addition, it was suggested that we substitute "difficult to identify" for "unable to identify" in the definition of "severe shortage of candidates" to more realistically describe a severe shortage situation. We have added these language changes in the regulation for clarity.

We received several agency comments and questions about the ability to use a direct-hire authority if a delegated examining unit (DEU) is not present. Although an agency using direct-hire authority must have a delegated examining authority, the agency is not required to have a DEU in place. We have clarified this in the regulation.

One agency commented that the required justification for a direct-hire authority based on a critical hiring need is excessive and burdensome. The agency recommended the regulation provide for agencies to use direct-hire based on a critical hiring need to prevent a staffing crisis rather than to address an existing one. This comment is outside the scope of the provisions of the Act and the regulation. The legislative language provides for direct-hire authority, outside the merit system, when a critical hiring need exists. We want to emphasize, however, that the regulation provides a number of criteria that can be used to evidence a critical hiring need, as they apply to a specific situation. These criteria, not necessarily all-inclusive, present examples of the type of information that will support reasonable evidence that the agency is experiencing a critical situation.

A union objected to the use of direct-hire authority for a severe shortage of candidates unless a special salary rate had been established for the position. Special salary rates are one of the many flexibilities agencies have to address their recruitment difficulties. Establishing a special salary rate is not a prerequisite for obtaining approval for a direct-hire authority. Special salary rates were included in the regulation as an example of a flexibility an agency may use to support its justification for a severe shortage of candidates. We have added language to clarify our intention.

The same union also noted that the regulation requires agencies to submit supporting evidence when requesting direct-hire authority based on a severe shortage of candidates or a critical hiring need, but does not require the same evidence from OPM when

deciding on its own that a need exists. In addition, the union commented that similar evidence from OPM to support the need for an extension of existing direct-hire authority should be required. We agree that these additions should be included in the regulation and have added clarifying language.

The union also commented that the "periodic" review of existing direct-hire authorities should adhere to a specific schedule and that the content of reviews and the requirement for publication should be identified. We have determined it to be impractical to regulate a schedule for reviewing direct-hire authorities. However, we will ensure that these reviews will take place often and will focus on continued adherence to regulatory intent. We have not adopted this suggestion.

Elimination of Outside-the-Register Procedures

OPM has eliminated 5 CFR part 333, Recruitment and Selection for Temporary and Term Appointments Outside the Register, based on its conclusion that this hiring authority is now obsolete.

One Federal agency submitted comments opposing the elimination of the outside-the-register procedures. The comments did not adequately explain why using other merit-based hiring authorities does not enable the agency to meet its hiring needs. Nor did the agency provide any compelling independent reason for retaining outside-the-register procedures. The comments have not been adopted and the outside-the-register procedures are eliminated.

Elimination of the TAPER Regulation

Based on the elimination of the outside-the-register procedure, OPM has also eliminated the Temporary Appointments Pending the Establishment of a Register (TAPER) regulation.

One Federal agency submitted comments opposing the elimination of the TAPER regulation. The comments did not adequately explain why the agency cannot use other merit-based hiring authorities to meet its hiring needs. Nor did the agency provide any compelling independent reason for retaining the ability to make TAPER appointments. As described in the interim regulation's supplemental information, this regulation has been shown to have outlived its usefulness, and other appropriate appointing authorities are available for use in its place. The comments have not been adopted and the TAPER regulation is eliminated.

Eliminating the TAPER regulation will not adversely affect employees currently serving under TAPER appointments. These individuals will continue under these appointments until they have completed the 3 years of service that entitles them, under 5 U.S.C. 3304a, to be converted to career appointments.

Category Rating and Selection Procedures

Background

Agencies have authority under 5 U.S.C. 3319 to develop a category-based rating method as an alternative way of assessing job applicants for positions filled through the competitive examining process. Traditionally, applicants for Federal jobs are assigned numerical scores, including veterans' preference points, if appropriate, and are considered for selection based on the "rule of three" (5 U.S.C. 3318(a)). The category rating method prescribed by the Act does not add veterans' preference points or apply the "rule of three" but protects the rights of veterans by placing them ahead of non-preference eligibles within each category. Preference eligibles who meet minimum qualification requirements and who have a compensable service-connected disability of at least 10 percent must be listed in the highest quality category, except when the position being filled is scientific or professional at the GS-9 grade level or higher. When using category rating, agencies must follow veterans' preference procedures as specified in 5 U.S.C. 3319(b) and (c)(2). Consistent with this requirement and with 5 U.S.C. 2302(e)(1)(G), OPM intends to promulgate a regulation in the near future designating section 3319(b) and (c)(2) as a "veterans' preference requirement" for purposes of the prohibited personnel practice described in 5 U.S.C. 2302(b)(11). Please refer to the interim regulations' supplementary information in **Federal Register** dated June 13, 2003, 68 FR 35265 for a full discussion of the category rating method.

Discussion of Comments

Based on the complexity of the comments on category rating, we have organized them into topic areas for clarity and for ease of reference.

General

One agency requested that the regulations specify that category rating may be used for term and temporary appointments. Category rating is a method for evaluating applicants under

a competitive examining system. It is not a separate appointing authority. Category rating may be used to fill any competitive service position, including a position filled through a term or temporary appointment. This is reflected in sections 316.302 and 316.402 of the regulation.

One agency requested clarification on the proper placement of the word "competencies" in relation to the words "knowledge, skills, or abilities" cited in § 337.302(b). We have modified that section to clarify our meaning. This agency also suggested we change the wording in § 337.303(b) to read "based on job analysis" instead of "through job analysis." We did not adopt this suggestion because the chosen phrase is consistent with the language in other guides issued by OPM.

Vacancy Announcement

Three agencies and several Federal employees suggested clarification of what is required in the vacancy announcement when using category rating.

The current vacancy announcement requirements of 5 CFR part 330 and Executive Order 13078, requiring the agency to state how applicants will be rated, have not changed. However, agencies have a choice in their basis of rating. Agencies must decide on rating and selection procedures in advance of posting a vacancy announcement. Once a procedure is chosen, it must be described in the vacancy announcement.

Traditionally, agencies described rating procedures in general terms under the "Basis of Rating" heading in the vacancy announcement. Under category rating procedures, agencies will continue to use the "Basis of Rating" as a means of communicating rating procedures to applicants. Agencies can simply state whether the rating is based on numerical rating procedures or category rating procedures and how veterans' preference will be applied.

Also, agencies were concerned that the statement "Describe each quality category in the job announcement * * *" is ambiguous and could be read as tantamount to a requirement to publish the crediting plan and benchmarks in the vacancy announcement. No such requirement applies.

When describing each quality category, agencies may continue to use the "Qualification Requirement" heading to describe each quality category. This description could vary from naming the quality categories to describing the competencies or the

knowledge, skills, and abilities required for each quality category. OPM does not expect agencies to disclose crediting plans and/or rating schedules with scoring keys to the general public because doing so would jeopardize the integrity and validity of the assessment. These issues are addressed in OPM's Delegated Examining Operations Handbook (DEOH). No changes in the regulation are necessary to respond to this comment.

Veterans' Preference

Two agencies requested that OPM clarify how to use category rating procedures to rank preference eligibles with a service-connected disability of 10 percent or more.

Under the traditional numerical rating and ranking procedures, 5 U.S.C. 3313 instructs agencies to place preference eligibles, who meet the minimum qualification requirements, at the top of the list of eligibles, regardless of their numerical scores, for all positions except scientific and professional positions at the GS-09 (and equivalent) grade level or higher. When filling scientific and professional positions at the GS-09 (and equivalent) grade level or higher, these preference eligibles are ranked according to their numerical scores, including points added under 5 U.S.C. 3309.

Under category rating, the same concept applies. The Act instructs agencies to place preference eligibles, who meet the minimum qualification requirements, in the highest quality category when filling all positions except scientific and professional positions at the GS-09 (and equivalent) grade level or higher. These preference eligibles are placed above the non-preference eligibles. When filling scientific and professional positions at the GS-09 (and equivalent) grade level or higher, these preference eligibles are placed above the non-preference eligibles within the quality category in which they were assessed.

Within a quality category, agencies may list preference eligibles above non-preference eligibles in any order (such as type of preference, alphabetical order, Social Security number, etc.). An example of how to rank preference eligibles with a service-connected disability of 10 percent or more is in Chapter 6 of the DEOH.

Several agencies and Federal employees suggested that OPM explain how to remove preference eligibles from the list after three considerations under category rating.

Currently, 5 U.S.C. 3317(b) allows an appointing official to remove a preference eligible from further

consideration after considering and passing over the preference eligible three times. This same rule applies under category rating. A preference eligible within a quality category must receive three bona fide considerations before he or she may be eliminated from further consideration. We intend to address the possibility of adding information about how this rule applies to preference eligibles and whether it applies to non-preference eligibles in an upcoming amendment to this regulation, which will be published with a request for comments.

Reporting Requirements

One agency suggested that OPM include the category rating reporting requirements in the regulation. For convenience and clarity, we added the reporting requirements in § 337.306 of the final regulation. These reporting requirements are also located in Chapter 5 of the DEOH. One agency noticed that the reporting requirements did not include all minority groups in the annual report to Congress. The Act requires that agencies submit information on the impact category rating has on hiring veterans and particular minorities. Because the Act does not include all minority groups in the list of minorities, we may not require agencies to add to the specific groups included in the Act. An agency may do so on its own.

Several Federal employees asked for specific information on where agencies should send their annual reports on category rating. We have added this information at § 337.305 of the final regulation and to the DEOH.

One agency suggested, for reporting consistency, that OPM develop a standard reporting form for use by all agencies. We do not plan to develop a reporting form at this time. Each agency is responsible for developing its own reporting format.

One agency suggested that OPM develop a training module on category rating for its managers. We did not adopt this suggestion because it is outside the scope of the regulation.

Merging Quality Categories

Four agencies and several Federal employees suggested that OPM explain the merging of quality categories. The Act allows agencies to merge the highest quality category with the next lower quality category, if the highest quality category has fewer than three candidates. Merging quality categories is optional. When merging quality categories, preference eligibles from the next lower quality category are placed

above the non-preference eligibles in the newly merged quality category.

Additional information on merging quality categories is described in the DEOH.

Use of Numerical Scores

Three agencies requested clarification on using examinations that produce numerical scores (e.g., Luevano Consent Decree examination or rating schedule) with category rating. We did not include this information in the final regulation, but will publish guidance on this issue that will be posted on OPM's Web site at <http://www.opm.gov>.

Accountability

One professional organization commented that in order to promote accountability, an agency that decides to use category rating should first be required to publicize the data upon which it relied in reaching its decision.

Agencies with delegated examining authority are required to establish an accountability system in compliance with all examining laws and regulations, including category rating. Additionally, OPM has oversight responsibility to ensure that each agency complies with competitive examining laws and regulations. OPM plans to add the alternative ranking and selection procedures to its evaluation agenda to ensure that agencies are complying with the category rating regulations. Because periodic oversight is a sufficient mechanism for accountability, we chose not to adopt the recommendations that agencies should be required to publish their data.

Wage Grade Positions

An agency asked whether category rating may be used for rating and ranking candidates for wage grade positions. Neither the Act nor these regulations bar the use of category rating for wage grade positions.

Excepted Service Positions

A Federal employee suggested that agencies should be able to use category rating to fill excepted service positions. We have not adopted this suggestion. The Act authorizes agencies with delegated examining authority under 5 U.S.C. 1104(a)(2) to develop a category rating system for jobs filled through competitive examining. This authority cannot be extended to the excepted service. However, 5 CFR part 302 gives agencies the flexibility to develop procedures similar to category rating to fill excepted service positions.

Expanded Academic Degree Training Authority

Section 1331(a) of the Act amended the provisions of 5 U.S.C. 4107 by expanding the agency's authority to pay or reimburse employees for the cost of academic degree training when such training contributes significantly to meeting an identified agency training need, resolving an identified agency staffing problem, or accomplishing goals in the agency's human capital management strategic plan.

Discussion of Comments

One agency suggested the reference to 5 CFR 335.103(c)(1)(iii), which requires competition for certain training opportunities that lead to promotion, be added to the requirement for selecting employees for academic degree programs. We agree and have added the reference 5 CFR 335.103(c)(1)(iii) to § 410.308(c). The same agency questioned whether Career Transition Assistance Plan (CTAP) requirements should be followed concerning details for training assignments that may become permanent. The scenario presented by the agency concerning CTAP and detail assignments is outside the scope of the regulation.

A union suggested that OPM redraft the regulation to reincorporate constraints on the use of academic degrees as previously written in 5 CFR 410.308 to guard against the abusive spending of funds for closely related purposes. The wording in the interim regulation does not remove protection against abusive use of funds. Agencies continue to be required to establish written training policies and procedures to support and document the use of this expanded authority in accordance with the criteria in law. Agencies are also required to maintain records on the use and efficacy of their academic degree training programs. However, we have rephrased § 410.308(c) to address specific criteria concerning the use of this authority.

Two agencies commented that sections 410.309 and 410.310 need clarification in light of the expanded authority to pay for academic degrees. They indicated that if the authority is to be a useful tool for retention, it should not require an agency paying for a four-year degree to commit the beneficiary to a 12-year service obligation. Although these sections do not specifically address the expanded academic degree authority, they are integral to the implementation of this authority. Therefore, we have considered the comments and concur that sections 410.309 and 410.310 should be clarified

to explain agencies' flexibilities when using this academic degree training authority. We have added a definition to § 410.101 and a new paragraph (d) to § 410.310 to provide an additional method to compute time in training. These changes allow agencies more flexibility in establishing effective continued service requirements following training. Additional information and an example on how to apply section 410.310(d) can be found on the OPM Web site at <http://www.opm.gov/hrd/lead/pubs/handbook/opminro.asp>.

Other Comments, Including Those on Overseas Employment

One agency and one union commented on the need for clarification of overseas limited appointing authority. We have revised § 301.201 to clarify its meaning.

Two Federal agencies commented that restating referenced sections of title 5, U.S.C., instead of referencing them, would make the regulations clearer and easier to apply. We have adopted this suggestion throughout the regulation.

Executive Order 12866, Regulatory Review

This final rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities (including small businesses, small organizational units, and small governmental jurisdictions) because they only apply to Federal agencies and employees.

List of Subjects in 5 CFR Parts 230, 301, 316, 337, and 410

Civil defense, Education, Government employees.

U.S. Office of Personnel Management.

Kay Coles James,
Director.

■ Accordingly, under the authority of 5 U.S.C. 3304, 3319, and 4107, the interim rule (68 FR 35265) amending 5 CFR parts 230, 301, 316, 337, and 410 is adopted as final with the following changes:

PART 230—ORGANIZATION OF THE GOVERNMENT FOR PERSONNEL MANAGEMENT

■ 1. The authority for part 230 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577; 3 CFR 1954–1958 Comp., p. 218; § 230.401 also issued under 5 U.S.C. 1104.

Subpart D—Agency Authority To Take Personnel Actions in a National Emergency

- 2. Revise § 230.402(c), (h)(1), and (h)(2) to read as follows:

§ 230.402 Agency authority to make emergency-indefinite appointments in a national emergency.

* * * * *

(c) *Appointment under direct-hire authority.* An agency may make emergency-indefinite appointments under this section using the direct-hire procedures in part 337 of this chapter.

* * * * *

(h) * * * (1) The term *indefinite employee* includes an emergency-indefinite employee or an employee under an emergency appointment as used in the following: parts 351, 353 of this chapter, subpart G of part 550 of this chapter, and part 752 of this chapter.

(2) The selection procedures of part 337 of this chapter apply to emergency-indefinite appointments that use the direct-hire authority under paragraph (c) of this section.

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PART 301—OVERSEAS EMPLOYMENT

- 3. The authority citation for part 301 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218, as amended by E.O. 10641, 3 CFR 1954–1958 Comp., p. 274, unless otherwise noted.

Subpart B—Overseas Limited Appointment

- 4. Revise § 301.201 to read as follows:

§ 301.201 Appointments of United States citizens recruited overseas.

When there is a shortage of eligible applicants, as defined at § 337.202 of this chapter, resulting from a competitive announcement that is open to applicants in the local overseas area, an agency may give an overseas limited appointment to a United States citizen recruited overseas for a position overseas.

- 5. Revise § 301.205 to read as follows:

§ 301.205 Requirements and restrictions.

The requirements and restrictions in subpart F of part 300 of this chapter apply to appointments under this subpart.

PART 316—TEMPORARY AND TERM EMPLOYMENT

- 6. The authority citation for part 316 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Subpart C—Term Employment

- 7–8. Revise paragraph (a) of § 316.302 to read as follows:

§ 316.302 Selection of term employees.

(a) *Competitive term appointment.* An agency may make a term appointment under part 332 of this chapter, by using competitive procedures, or under part 337 of this chapter, by using direct-hire procedures, as appropriate.

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Subpart D—Temporary Limited Employment

- 9. Revise paragraph (a) of § 316.402 to read as follows:

§ 316.402 Procedures for making temporary appointments.

(a) *Competitive temporary appointments.* In accordance with the time limits in § 316.401, an agency may make a temporary appointment under part 332 of this chapter, by using competitive procedures, or under part 337 of this chapter, by using direct-hire procedures, as appropriate.

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PART 337—EXAMINING SYSTEM

- 10–11. Revise the authority citation for part 337 to read as follows:

Authority: 5 U.S.C. 1104(a)(2), 1302, 3301, 3302, 3304, 3319, 5364; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; 33 FR 12423, Sept. 4, 1968; and 45 FR 18365, Mar. 21, 1980.

- 12. Revise subpart B to read as follows:

Subpart B—Direct-Hire Authority

Sec.

- 337.201 Coverage and purpose.
- 337.202 Definitions.
- 337.203 Public notice requirements.
- 337.204 Severe shortage of candidates.
- 337.205 Critical hiring needs.
- 337.206 Terminations, modifications, extensions, and reporting.

§ 337.201 Coverage and purpose.

OPM will permit an agency with delegated examining authority under 5 U.S.C. 1104(a)(2) to use direct-hire authority under 5 U.S.C. 3304(a)(3) for a permanent or nonpermanent position or group of positions in the competitive service at GS-15 (or equivalent) and below, if OPM determines that there is either a severe shortage of candidates or a critical hiring need for such positions. It is not required that this direct-hire authority be exercised by a delegated examining unit. Requests for direct-hire authority must be submitted by the

agency's Chief Human Capital Officer (or equivalent) at the agency headquarters level. OPM will determine the length of the direct-hire authority based on the justification.

§ 337.202 Definitions.

In this subpart:

(a) A *direct-hire authority* permits hiring without regard to the provisions of 5 U.S.C. 3309 through 3318; part 211 of this chapter; and subpart A of part 337 of this chapter.

(b) A *severe shortage of candidates* for a particular position or group of positions means that an agency is having difficulty identifying candidates possessing the competencies or the knowledge, skills, and abilities required to perform the job requirements despite extensive recruitment, extended announcement periods, and the use, as applicable, of hiring flexibilities such as recruitment or relocation incentives or special salary rates.

(c) A *critical hiring need* for a particular position or group of positions means that an agency has a need to fill the position(s) to meet mission requirements brought about by circumstances such as, but not limited to, a national emergency, threat, potential threat, environmental disaster, or unanticipated or unusual event or mission requirement, or to conform to the requirements of law, a Presidential directive or Administration initiative.

§ 337.203 Public notice requirements.

Agencies must comply with public notice requirements as prescribed in 5 U.S.C. 3327 and 3330, and subpart G of part 330 of this chapter with respect to any position that an agency seeks to fill using direct-hire authority.

§ 337.204 Severe shortage of candidates.

(a) OPM will determine when a severe shortage of candidates exists for particular occupations, grades (or equivalent), and/or geographic locations. OPM may decide independently that such a shortage exists, or may make this decision in response to a written request from an agency.

(b) An agency when requesting direct-hire authority under this section, or OPM when deciding independently, must identify the position or positions that are difficult to fill and must provide supporting evidence that demonstrates the existence of a severe shortage of candidates with respect to the position(s). The evidence should include, as applicable, information about:

(1) The results of workforce planning and analysis;

- (2) Employment trends including the local or national labor market;
- (3) The existence of nationwide or geographic skills shortages;
- (4) Agency efforts, including recruitment initiatives, use of other appointing authorities (e.g., schedule A, schedule B) and flexibilities, training and development programs tailored to the position(s), and an explanation of why these recruitment and training efforts have not been sufficient;
- (5) The availability and quality of candidates;
- (6) The desirability of the geographic location of the position(s);
- (7) The desirability of the duties and/or work environment associated with the position(s); and
- (8) Other pertinent information such as selective placement factors or other special requirements of the position, as well as agency use of hiring flexibilities such as recruitment or retention allowances or special salary rates.

§ 337.205 Critical hiring needs.

- (a) OPM will determine when there is a critical hiring need for particular occupations, grades (or equivalent) and/or geographic locations. OPM may decide independently that such a need exists or may make this decision in response to a written request from an agency.
- (b) An agency when requesting direct-hire authority under this section, or OPM when deciding on its own, must:
 - (1) Identify the position(s) that must be filled;
 - (2) Describe the event or circumstance that has created the need to fill the position(s);
 - (3) Specify the duration for which the critical need is expected to exist; and
 - (4) Include supporting evidence that demonstrates why the use of other hiring authorities is impracticable or ineffective.

§ 337.206 Terminations, modifications, extensions, and reporting.

- (a) *Termination and modification.* On a periodic basis, for each direct-hire authority, OPM will review agency use of the authority to ensure proper administration and to determine if continued use of the authority is supportable. OPM will terminate or modify a direct-hire authority if it determines that there is no longer a severe shortage of candidates or a critical hiring need. Likewise, when an agency finds there are adequate numbers of qualified candidates for positions previously filled under direct-hire authorities, based on severe shortage of candidates, the agency is required to report this change of events

to OPM. OPM may also terminate an agency's authority when the agency has used an authority improperly.

(b) *Extension.* OPM may extend direct-hire authority if OPM determines, based on relevant, recent, and supportable data, that there is or will continue to be a severe shortage of candidates or a critical hiring need for particular positions as of the date the authority is due to expire. In their requests for extensions of direct-hire authorities, agencies must include an update of the supporting evidence that demonstrated the need for the original authority.

(c) *Reporting requirement.* On a periodic basis, OPM may request information from agencies regarding their use of these direct-hire authorities. The requested information may include numbers of positions, title, series, and grade of positions advertised under the direct-hire authority, the number of qualified applicants, the specific qualification criteria, and the number of applicants appointed under the authority.

- 13. Revise Subpart C to read as follows:

Subpart C—Alternative Rating and Selection Procedures

Sec.

- 337.301 Coverage and purpose.
- 337.302 Definitions.
- 337.303 Agency responsibilities.
- 337.304 Veterans' preference.
- 337.305 Reporting requirements.

§ 337.301 Coverage and purpose.

This subpart implements the category rating and selection procedures at 5 U.S.C. 3319. This law authorizes agencies with delegated examining authority under 5 U.S.C. 1104(a)(2) to develop a category rating method as an alternative process to assess applicants for jobs filled through competitive examining.

§ 337.302 Definitions.

In this subpart:

(a) *Category rating* is synonymous with alternative rating as described at 5 U.S.C. 3319, and is a process of evaluating qualified eligibles by quality categories rather than by assigning individual numeric scores. The agency assesses candidates against job-related criteria and then places them into two or more pre-defined categories.

(b) *Quality categories* are groupings of individuals with similar levels of job-related competencies or similar levels of knowledge, skills, and abilities.

§ 337.303 Agency responsibilities.

To use a category rating procedure, agencies must:

(a) Establish a system for evaluating applicants that provides for two or more quality categories;

(b) Define each quality category through job analysis conducted in accordance with the “*Uniform Guidelines on Employee Selection Procedures*” at 29 CFR part 1607 and part 300 of this chapter. Each category must have a clear definition that distinguishes it from other categories;

(c) Describe each quality category in the job announcement and apply the provisions of part 330, subparts B, F, and G of this chapter;

(d) Place applicants into categories based upon their job-related competencies or their knowledge, skills, and abilities; and

(e) Establish documentation and record keeping procedures for reconstruction purposes.

§ 337.304 Veterans' preference.

In this subpart:

(a) Veterans' preference must be applied as prescribed in 5 U.S.C. 3319(b) and (c)(2); and

(b) Veterans' preference points as prescribed in section 337.101 of this part are not applied in category rating.

§ 337.305 Reporting requirements.

Any agency that uses category rating must forward to OPM a copy of the annual report that it must submit to Congress pursuant to 5 U.S.C. 3319(d). Agencies must send their annual reports to the Speaker of the House and the President of the Senate. The report must include the following information:

(a) The number of employees hired under the system;

(b) The impact that system has had on the hiring of veterans and minorities, including those who are American Indian or Alaska Natives, Asian, Black or African American, and native Hawaiian or other Pacific Islanders; and

(c) The way managers were trained in the administration of category rating.

PART 410—TRAINING

- 14. Revise the authority citation in part 410 to read as follows:

Authority: 5 U.S.C. 4101, et seq.; E.O. 11348, 3 CFR, 1967 Comp., p. 275.

Subpart C—Establishing and Implementing Training Programs

- 15. Amend § 410.101 to add paragraph (i) to read as follows:

§ 410.101 Definitions.

* * * * *

(i) *Established contact hours* are the number of academic credit hours assigned to a course(s) times the number

of weeks in a term times the number of terms required to complete the degree.

■ 16. Revise § 410.308 to read as follows:

§ 410.308 Training to obtain an academic degree.

(a) An agency may authorize training for an employee to obtain an academic degree under conditions prescribed at 5 U.S.C. 4107(a).

(b) Colleges and universities participating in an academic degree training program must be accredited by a nationally recognized body. A “nationally recognized body” is a regional, national, or international accrediting organization recognized by the U.S. Department of Education. The listing of accrediting bodies is available through the Department.

(c) The selection of employees for an academic degree training program must follow the requirements of § 335.103(b)(3), § 335.103(c)(1)(iii), and subpart A of part 300 of this chapter. The selection and assignment must be accomplished to meet one or more of the criteria identified in 5 U.S.C. 4107(a). Therefore, an agency may competitively select and assign an employee to an academic degree training program that qualifies the employee for promotion to a higher graded position or to a position that requires an academic degree.

(d) Agency heads must assess and maintain records on the effectiveness of training assignments under this section.

(e) On a periodic basis, OPM may request agency information on the use and effectiveness of training assignments under this section.

■ 17. Add paragraph (b)(3) to § 410.309 to read as follows:

§ 410.309 Agreements to continue in service.

* * * * *

(b) Requirements. * * *

(3) The head of an agency shall establish procedures to compute length of training period for academic degree training programs in accordance with § 410.310(d).

■ 18. Amend § 410.310 to add paragraph (d) to read as follows:

§ 410.310 Computing time in training.

* * * * *

(d) When an employee is pursuing an academic degree through an agency academic degree training program, an agency may compute the length of the academic degree training period based on the academic institution's established contact hours.

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831 and 842

RIN 3206-AJ82

Voluntary Early Retirement Under the Homeland Security Act of 2002

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final voluntary early retirement authority regulations. These regulations implement the voluntary early retirement authority provisions of the Homeland Security Act of 2002, which apply to most executive branch agencies. They explain how an agency requests authority from OPM to offer voluntary early retirement to its employees.

DATES: These regulations are effective June 14, 2004.

FOR FURTHER INFORMATION CONTACT: Charles W. Gray at 202-606-0960, FAX at 202-606-2329, TTY at 202-418-3134, or e-mail at cwgray@opm.gov.

SUPPLEMENTARY INFORMATION: OPM published interim voluntary early retirement authority regulations on June 13, 2003 (**Federal Register**, volume 68, number 114, fr13jn03-2). As a result, agencies may now receive OPM approval to use voluntary early retirement authority to reshape their workforces for reasons other than downsizing. The alternative to reshaping the workforce through voluntary measures such as early retirement is generally a reduction in force—a tool that can be disruptive and costly, both to employees and agencies. Agencies with a need for downsizing or reshaping their workforces can benefit from the ability to use the voluntary early retirement authority flexibilities that the final version of these regulations will provide.

Section 1313(b) of the “Homeland Security Act of 2002” (Public Law 107-296, 116 Stat. 2135) provides agencies the option to offer voluntary early retirement when restructuring as well as downsizing. Previously, voluntary early retirement was only available to agencies when they needed to downsize. To obtain voluntary early retirement authority, unless an agency has a separate statutory authority, it must request approval from OPM. The request must provide the information required by section 1313(b) of Public Law 107-296. OPM will review the agency's request, and, if it meets

requirements, issue voluntary early retirement authority. The agency must have OPM approval before using voluntary early retirement authority.

The voluntary early retirement provisions are the same under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS). Section 831.114 of title 5, Code of Federal Regulations, is revised to implement the voluntary early retirement provisions under CSRS that were amended by section 1313(b)(1) of Public Law 107-296 and codified in 5 U.S.C. 8336(d)(2). Section 842.213 of title 5, Code of Federal Regulations, is revised to implement the voluntary early retirement provisions under FERS that were amended by section 1313(b)(2) of Public Law 107-296 and codified in 5 U.S.C. 8414(b)(1). The regulations explain which employees are potentially eligible for voluntary early retirement, how an agency requests voluntary early retirement authority from OPM, and how the agency manages the voluntary early retirement authority after approval.

An agency's human capital plan and/or voluntary separation incentive payment implementation plan may be used to satisfy the requirements for requesting a voluntary early retirement authority if it contains the information required in the voluntary early retirement authority regulations.

The revised sections 831.114 and 842.213 expand the definition of “specific designee” and describe how agencies are to inform employees returning from military leave about the voluntary early retirement offers they may have missed while they were away. The definition of “specific designee” in the interim regulations provided only two examples. It was felt that agency officials might believe that only individuals in one of the two types of positions described in those examples could serve as specific designees. The definition is expanded in the final rule to reduce the possibility of such an error.

During the comment period described in the interim regulations, we received only one comment. It came from a labor organization concerned with the manner in which agencies may limit voluntary early retirement offers. Because the comment conflicted with existing law, and was outside the scope of these regulations, OPM is not adopting the suggestion made by the labor organization in its comments.

After the comment period, two agencies raised questions about employees on military leave who would have, but for their current military service, received voluntary early