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 315 and 752

RIN 3206–AL30

Career and Career-Conditional Employment and Adverse Actions

AGENCY: Office of Personnel Management.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Personnel Management (OPM) proposes to amend its regulations governing Federal adverse actions. The proposed regulations would conform the adverse action rules regarding employee coverage to binding judicial decisions interpreting the underlying statute.

DATES: Submit comments on or before July 2, 2007.

ADDRESSES: Send or deliver written comments to Ana A. Mazzi, Deputy Associate Director for Workforce Relations and Accountability Policy, Office of Personnel Management, 1900 E Street, NW., Room 7H28, Washington, DC 20415; by FAX to 202–606–2613; or by e-mail to *CWRAP@opm.gov.*

FOR FURTHER INFORMATION CONTACT: Sharon L. Mayhew by telephone at (202) 606–2930; by FAX at (202) 606–2613; or by e-mail at *CWRAP@opm.gov.*

SUPPLEMENTARY INFORMATION: Section 7514 of title 5, United States Code (U.S.C.), provides the statutory authority for OPM to prescribe regulations pertaining to adverse actions in the competitive or excepted service. In addition, these regulations are found at title 5, Code of Federal Regulations (CFR), part 752, subpart D, and are the subject of this interim final rule. Corresponding and related regulations pertaining to probationary periods are found at 5 CFR part 315, subpart H, and also are the subject of this proposed rule.

Amendments To Clarify Adverse Action Rules Regarding Employee Coverage

Background—New Interpretation of the Statute—Van Wersch and McCormick

Two decisions of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit or Court), *Van Wersch* v. *Department of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999) and *McCormick* v. *Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), *pet. for reh'g in banc denied*, 329 F.3d 1354 (Fed. Cir. 2003) caused us to revise the pre-existing interpretation of 5 U.S.C. 7511(a)(1), and invalidated portions of the adverse actions regulations at 5 CFR part 752. The effect of these Federal Circuit opinions is to provide additional procedural and appeal rights to individuals who are working in a probationary period in the competitive service and in a trial period in the excepted service. OPM is proposing to change its regulations to conform to the Court's interpretation of the statute.

The pertinent statutory text appears below:

5 U.S.C. Sec. 7511. Definitions; application
(a) For the purpose of this subchapter—
(1) ''Employee'' means—
(A) An individual in the competitive service—
(i) Who is not serving a probationary or trial period under an initial appointment; or
(ii) Who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
(B) A preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—
(i) In an Executive agency; or
(ii) In the United States Postal Service or Postal Rate Commission; and
(C) An individual in the excepted service (other than a preference eligible)—
(i) Who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
(ii) Who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

An individual who meets this definition of ''employee'' is entitled to certain procedural and appeal rights when he or she is the subject of an adverse action (*e.g.*, removal, certain types of suspension, reduction in grade, reduction in pay, and furlough of 30 days or less). These rights include: (1) At least 30 days' advance written notice of the reason for a proposed adverse action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing; (3) the right to be represented by an attorney or other representative; (4) a written decision and the specific reasons for the decision at the earliest practicable date; and (5) a right to appeal to the Merit Systems Protection Board (MSPB or the Board). Individuals who do not meet this definition are not afforded all of these rights.

Before the Court issued *Van Wersch* and *McCormick*, OPM and the MSPB interpreted the statute to exclude probationary or trial period employees from receiving the same rights as employees who have completed their probationary or trial period. Probationary and trial periods are essential for management to assess an individual's performance prior to granting full employment rights. Specifically, OPM regulations did not afford full employment rights to an individual in the competitive service who failed to meet one of the conditions of 5 U.S.C. 7511(a)(1)(A), or an individual in the excepted service who failed to meet one of the conditions of 5 U.S.C. 7511(a)(1)(C). Thus, for example, an individual in the competitive service serving in a probationary period was not an ''employee'' for purposes of 5 CFR part 752, nor was an individual who did not complete one year of current, continuous service under other than a temporary appointment limited to one year or less. Likewise, an individual in the excepted service serving a probationary or trial period was not an ''employee'' for purposes of 5 CFR part 752, nor was a nonpreference eligible who did not complete two years of current, continuous service under other than a temporary appointment limited to two years or less.

Contrary to this interpretation, the Federal Circuit in *Van Wersch* held that an individual in the excepted service could meet the definition of ''employee'' if he or she met *either* of the two conditions listed at 5 U.S.C. 7511(a)(1)(C). Ms. Van Wersch was removed from Federal employment for alleged unacceptable conduct. At the time of her removal, she was serving a probationary or trial period under an initial excepted service appointment

pending conversion to the competitive service and therefore was excluded from coverage under 5 U.S.C. 7511(a)(1)(C)(i). Ms. Van Wersch had been hired as a Clerk-Typist pursuant to 5 CFR 213.3102(u), which allowed agencies to appoint severely handicapped persons to excepted service positions. Employees hired under this authority may qualify for conversion to competitive status after they have completed two years of satisfactory service. Ms. Van Wersch served over two years in this position but was not converted to competitive status.

The Federal Circuit addressed the question of whether an individual, like Ms. Van Wersch, serving in a probationary or trial period and therefore excluded from the definition of ''employee'' under 5 U.S.C. 7511(a)(1)(C)(i), could still be considered an employee, with full adverse action rights, if she met only the criteria of 5 U.S.C. 7511(a)(1)(C)(ii). The Government argued that Congress had not intended to extend employee appeal rights to excepted service personnel, such as Ms. Van Wersch, who were serving in probationary or trial positions pending conversion to the competitive service. While recognizing that the Government made a compelling case for its reading of the statute based on the legislative history, the Court rejected the Government's argument, holding that Congress had not used language that effectuated the putative legislative intent and that courts are not authorized to look at Congressional intent when the language of the statute was clear and unambiguous. *Van Wersch* v. *Department of Health and Human Services*, 197 F.3d 1144, 1152 (Fed.Cir. 1999). Because Ms. Van Wersch literally met what the Court determined was an alternative definition of ''employee'' in 5 U.S.C. 7511(a)(1)(C)(ii), the Court concluded that she was an employee under the statute and therefore had the right to appeal her termination to the MSPB. *Id.* at 1151. The Federal Circuit also noted that ''if Congress determines that individuals in Ms. Van Wersch's position should not have the right to appeal adverse actions to the Board, it can amend § 7511(a)(1)(C) so as to compel a result different from the one we reach today.'' *Id.* at 1152.

The Federal Circuit applied the *Van Wersch* analysis to the competitive service in *McCormick* v. *Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), *pet. for reh'g denied*, 329 F. 3d 1354 (Fed. Cir. 2003) and found the appellant qualified as an employee under 5 U.S.C. 7511(a)(1)(A)(ii) even though she failed to qualify under (i). Ms. McCormick previously was a competitive service employee at the Department of Health and Human Services (DHHS) before voluntarily moving to a new position at the Department of the Air Force. Her new competitive service appointment was subject to a one-year probationary period. Ms. McCormick was terminated during this probationary period. On appeal, Ms. McCormick argued that, while she did not meet the definition of an employee under 5 U.S.C. 7511(a)(1)(A)(i), she did meet the definition of 5 U.S.C. 7511(a)(1)(A)(ii), based on her DHHS employment.

The Court held that ''[t]he panel is bound by the court's earlier decision in *Van Wersch*.'' *Id.* at 1342. Thus, the Federal Circuit concluded that Ms. McCormick met the definition of ''employee'' under 5 U.S.C. 7511(a)(1)(A)(ii), having completed more than 1 year of current or continuous service under other than a temporary appointment limited to 1 year or less, and therefore was to be afforded all the rights of an employee. *Id.* at 1343.

Conforming the Adverse Action Regulations to the New Statutory Interpretation

As yet, Congress has not accepted the Court's invitation to amend these provisions. Therefore, to eliminate potential confusion, OPM proposes to amend the regulations at 5 CFR part 752 to conform to the existing Federal Circuit case law described above.

[0]We therefore propose to make four amendments to the text of paragraphs (c) and (d) of 5 CFR 752.401, to clarify the definition of ''employee'' for purposes of the adverse action rules. Three amendments are required to conform to the holding in *McCormick*, and one amendment is necessary to conform to *Van Wersch*

First, to conform with *McCormick's* holding that an individual serving in the competitive service on a probationary period may meet the definition of an ''employee,'' we propose to amend paragraph (c)(1) at § 752.401, to state that a career or career conditional employee in the competitive service who is not serving a probationary or trial period is a covered employee. We propose adding the phrase, ''career or career conditional'' here to address recent cases in which individuals serving in positions not subject to a probationary or trial period have attempted to establish that they are ''employees'' within the meaning of the statute because they are not serving a probationary or trial period under an initial appointment. See e.g., *Johnson* v. *Department of Veterans Affairs*, 99 MSPR 362 (2005). Such a conclusion would produce an unreasonable result in that every temporary appointee would have a right to advance notice, an opportunity to respond, and the right of appeal, on his or her first day of work. This is contrary to OPM's interpretation of the phrase, ''who is not serving a probationary or trial period under an initial appointment,'' as applying only to individuals serving in positions that are subject to a probationary or trial period. The legislative history supports this interpretation and, accordingly, OPM explicitly continues its existing interpretation of the statute in this respect. We note that the MSPB adopted this interpretation in *Johnson*.

Second, we propose to add a new § 752.401(d)(13) to clarify that a competitive service employee who is serving a probationary or trial period does not meet the definition of ''employee'' unless he or she has completed one year of current continuous service under other than a temporary appointment limited to one year or less.

The *McCormick* decision also requires an amendment to paragraph (c)(2) of 5 CFR 752.401, which currently identifies as a covered employee, an individual ''in the competitive service serving in an appointment that requires no probationary or trial period, and who has completed one year of current continuous service in the same or similar positions under other than a temporary appointment limited to 1 year or less.'' We propose to remove the phrase, ''serving in an appointment that requires no probationary or trial period, and'' to comport with the Court's ruling in *McCormick*.

To comply with *Van Wersch*, the final amendment would add modifying language to paragraph (d)(11) to make it clear that a nonpreference eligible excepted service employee, who is serving a probationary or trial period pending conversion to the competitive service, does not meet the definition of ''employee'' unless he or she has completed two years of current continuous service under other than a temporary appointment limited to two years or less.

Conforming Part 315 to the New Statutory Interpretation

We are also proposing to change part 315, Career and Career Conditional Employment, to make the regulations governing probationary periods consistent with the change in the definition of ''covered employee.''

Additional Regulatory Clarification Required by Payano

OPM is proposing to remove the phrase ''in the same or similar positions'' from the regulation at the amended paragraph 5 CFR 752.401(c)(2), and also from the definition of ''current continuous employment'' at 5 CFR 752.402. This change addresses language in the current regulations concerning individuals in the competitive service that requires that ''continuous service'' be in ''the same or similar positions.'' That language is not found in the statute. This issue arose in administrative litigation before the MSPB. *See Payano* v. *Department of Justice*, 100 MSPR 74 (2005). The issue in that case was whether an employee could ''tack on'' the time served in another competitive service position that was not the same as or similar to the position from which he was removed, for the purpose of determining whether or not he was an employee. The MSPB held that an agency was required to take this time into account in determining whether a person in the competitive service was an ''employee.'' OPM has determined that this interpretation of the statute is the best one and is proposing to change the regulations to reflect that view.

Public Participation

OPM invites interested persons to participate in this proposed rulemaking by submitting written comments, data, or views.

Before finalizing these proposed amendments, we will consider all comments received on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these proposed amendments in light of the comments we receive.

E.O. 12866, Regulatory Review

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

Regulatory Flexibility Act

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

List of Subjects

5 CFR Part 315

Government employees.

5 CFR Part 752

Administrative practice and procedure, Government employees.

Office of Personnel Management.

Linda M. Springer,

Director.

Accordingly, OPM proposes to amend parts 315 and 752 of title 5, Code of Federal Regulations, as follows:

PART 315—CAREER AND CAREER CONDITIONAL EMPLOYMENT

1. The authority for part 315 continues to read:

Authority: 5 U.S.C. 1302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, unless otherwise noted; and E.O. 13162; secs, 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec 315.603 also issued under 5 U.S.C. 8151. Sec 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp., p. 111. Sec 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp., p. 303. Sec 315.607 also issued under 22 U.S.C. 2506. Sec 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp., p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(d). Sec 315.611 also issued under Section 511, Pub. L. 106–117, 113 Stat. 1575–76. Sec 315.708 also issued under E.O. 13318. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp., p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp., p. 264.

2. Revise § 315.803 to read as follows:

§ 315.803 Agency action during probationary period (general).

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

(b) Termination of an individual serving a probationary period must be taken in accordance with subpart D of part 752 of this chapter if the individual has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less and is not otherwise excluded by the provisions of that subpart.

3. Revise § 315.804 (a) to read as follows:

§ 315.804 Termination of probationers for unsatisfactory performance or conduct.

(a) Subject to § 315.803(b), when an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

* * * * *

4. Revise § 315.805 introductory text to read as follows:

§ 315.805 Termination of probationers for conditions arising before appointment.

Subject to § 315.803(b), when an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

* * * * *

PART 752—ADVERSE ACTIONS

1. The authority for part 752 continues to read:

Authority: 5 U.S.C. 7504, 7514, and 7543.

2. Revise § 752.401 (c)(1) and (2), (d)(11) and (12), and add (d)(13) to read as follows:

§ 752.401 Coverage.

(a) * * *

(b) * * *

(c) * * *

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period;

(2) An employee in the competitive service who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

* * * * *

(d) * * *

* * * * *

(11) A nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless they meet the requirements of paragraph (c)(5) of this section;

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code; and

(13) An employee in the competitive service serving a probationary or trial period, unless they meet the requirements of paragraph (c)(2) of this section.

3. Revise § 752.402 (b) to read as follows:

§ 752.402 Definitions.

(a) * * *

(b) Current continuous employment means a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.

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[FR Doc. E7–8061 Filed 4–30–07; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

7 CFR Part 810

RIN 0580–AA96

Request for Public Comment on the United States Standards for Soybeans

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are initiating a review of the United States Standards for Soybeans to determine their effectiveness and responsiveness to current grain industry needs. Numerous changes have occurred in the breeding and production practices of soybeans as well as in the technology used to harvest, process, and test soybeans, and in the marketing practices of soybeans. As a result, soybean producer groups have asked us to initiate a review of the soybean standards. In order to ensure that the standards and subsequent grading practices remain relevant, we invite interested persons to submit comments and supporting information to assist in the evaluation of current standards and grading practices for soybeans and in the development of any recommendations for change.

DATES: We will consider comments that we receive by July 2, 2007.

ADDRESSES: We invite you to submit comments on this advance notice of proposed rulemaking. You may submit comments by any of the following methods:

<bullet≤ *E-Mail:* Send comments via electronic mail to *comments.gipsa@usda.gov.*

<bullet≤ *Mail:* Send hardcopy written comments to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647–S, Washington, DC 20250–3604.

<bullet≤ *Fax:* Send comments by facsimile transmission to: (202) 690–2755.

<bullet≤ *Hand Delivery or Courier:* Deliver comments to: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1647–S, Washington, DC 20250–3604.

<bullet≤ *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

<bullet≤ *Instructions:* All comments should make reference to the date and page number of this issue of the **Federal Register**.

<bullet≤ *Read Comments:* All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Rebecca Riese at GIPSA, USDA, 1400 Independence Avenue, SW., Washington, DC 20250–3630; Telephone (202) 720–4116; Fax Number (202) 720–7883; e-mail *Rebecca.A.Riese@usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be exempt from the purpose of Executive Order 12866, and therefore has not been reviewed by the Office of Management and Budget (OMB).

We established the U.S. soybean standards on November 20, 1940, under the authority of the United States Grain Standards Act (7 U.S.C. 76). To further facilitate the marketing of U.S. soybeans, we revised the standards in 1994 and 2006. The 2006 revision becomes effective September 1, 2007.

In 1994, we revised the reporting requirements of splits (broken soybeans where more than one fourth of the soybean removed and that are not damaged), reduced the U.S. Sample Grade criteria for stones and glass, established a special grade Purple Mottled or Stained, eliminated the grade limitation on materially weathered soybeans, clarified references to Mixed soybeans, and established a cumulative total for U.S. Sample Grade factors. In 2006, we published a Final Rule (71 FR 52403–52406), to be effective September 1, 2007, that changes the minimum test weight per bushel (TW) from a grade determining factor to an informational factor. Various factors are identified for soybeans and are used to determine the level of the grade of the shipment of soybeans. TW will continue to be measured, but no longer used to determine grade; it will be provided as additional information on the certificate unless the applicant for inspection service for the soybeans indicates that the information is not needed. As an informational factor TW may continue to be of interest and specified in contracts for soybean shipments.

The standards serve as the fundamental starting point to define U.S. soybean quality in the global marketplace. They include definitions, the basic principles governing application of standards, such as the type of sample used for a particular quality analysis, grades and grade requirements, and special grades and special grade requirements, such as for Garlicky soybeans and Purple Mottled or Stained soybeans. Official procedures for how the various grading factors are determined are provided in the Grain Inspection Handbook, Book II, Chapter 10, ''Soybeans.'' Official procedures may be viewed and printed from the GIPSA Web site at: *http://archive.gipsa.usda.gov/reference-library/handbooks/grain-insp/grbook2/soybean.pdf.*) Also included are standardized procedures for additional soybean quality attributes not used to determine grade, such as oil and protein content. Together, the grading and testing standards allow buyers and sellers to communicate quality requirements for trade, compare soybean quality using equivalent forms of measurement, and assist in the establishment of price.

GIPSA's grading and inspection services, as provided through a network of federal, state, and private laboratories, determine the quality and condition of soybeans. These determinations are performed in accordance with applicable standards using approved methodologies, and can be applied at any point in the marketing chain. The current testing technology for quality attributes, such as oil and protein content, is rapid and reliable, yielding consistent results. In addition, GIPSA issues certificates describing the quality and condition of the graded soybeans that are accepted as evidence in all Federal courts. U.S. soybean standards, and the affiliated grading and testing services offered by GIPSA, verify that the seller's commodity meets specified requirements, and that customers receive the quality they expect.

Over time, numerous changes have occurred in the breeding and production practices of soybeans as well as in the technology used to harvest, process, and test soybeans, and in the marketing practices of soybeans. In this rapidly evolving market, we need to ensure that the U.S. soybean standards and associated grading procedures remain relevant. Therefore, we are issuing this advance notice of proposed rulemaking to invite comments from all interested persons for input and suggestions for