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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 213

RIN 3206–AM07

Excepted Service—Appointment of Persons With Intellectual Disabilities, Severe Physical Disabilities, and Psychiatric Disabilities

AGENCY: U.S. Office of Personnel Management.

ACTION: Final regulation.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final regulation pertaining to the appointment of persons with intellectual disabilities, severe physical disabilities, and psychiatric disabilities. The regulation removes an unnecessary burden for these individuals when applying for Federal jobs and modernizes the terminology used to describe people with disabilities.

DATES: This final rule is effective March 25, 2013.

FOR FURTHER INFORMATION CONTACT: Phillip Spottswood by telephone on (202) 606–1389, by FAX on (202) 606–4430, by TDD on (202) 418–3134, or by email at *phil.spottswood@opm.gov.*

SUPPLEMENTARY INFORMATION: On February 7, 2012, OPM issued a proposed regulation at 77 FR 6022 to implement changes to the regulations in 5 CFR 213.3102(u) governing the appointment of people with mental retardation, severe physical disabilities, and psychiatric disabilities. As noted in the proposed rule, § 213.3102(u)(3)(i) currently requires all applicants seeking either a permanent or time-limited appointment to supply a ''certification of job readiness.'' This certification has been used as the basis for determining that an applicant can be reasonably expected to perform in a particular work environment. Persons with disabilities today, however, often have work, educational, and/or other relevant experience that an agency may rely upon to determine whether they are likely to succeed in a particular work environment. Consequently we believe that a requirement that applicants provide a separate ''certification of job readiness'' is not necessary.

Elimination of the requirement that applicants supply a certification of job readiness will speed the hiring process for agencies by removing an unnecessary burden on applicants with disabilities. This is consistent with the policy outlined in the President's Memorandum of May 11, 2010 regarding the elimination of unnecessary complexities and inefficiencies in the Federal hiring process. Consequently, the proposed regulation eliminated the requirement that an applicant supply a ''certification of job readiness'' when seeking employment under this authority. The proposal also sought to modernize terminology used in the regulation herein by replacing the phrase ''mental retardation'' with ''intellectual disability.''

OPM received 12 sets of comments in response to the proposed changes to the regulation in 5 CFR 213.3102(u). Comments on the proposed changes were received from private citizens, two Federal agencies, a university law center, a professional organization, and a disability advocacy group.

One individual suggested OPM retain the ''certification of job readiness'' requirement as it currently exits. This commenter was concerned that agencies may be reluctant to hire an individual with a disability, even on a temporary basis, if the applicant had little or no work experience, or no work experience since becoming disabled. The commenter believes the ''certification of job readiness'' provides an objective basis for agencies to make hiring decisions, compared to the subjective and discretionary nature of the temporary employment option set out in section 213.3102(u)(5). Although we appreciate the concerns raised by this commenter, OPM is not adopting the suggestion to retain the ''certification of job readiness'' requirement. We believe the advantages of eliminating the ''certification of job readiness'' outweigh the potential disadvantages. These advantages, which will be realized by both people with disabilities and Federal agencies, include a speedier hiring process and the removal of a paperwork burden on job applicants.

Three commenters supported the proposed changes as being improvements to the employment of people with disabilities. One commenter noted that the certification had been ''a source of delay and red tape'' in the past and that this change was long overdue. One disability advocacy group stated that removing the certification of job readiness would both normalize and improve the timeliness of the hiring process. A professional organization agreed with both of the proposed changes. It noted that there had been confusion regarding the meaning of ''job readiness.'' The remaining comments from the professional organization are addressed below.

An individual agreed with the elimination of the ''certification of job readiness'' requirement and the change in terminology to ''intellectual disabilities.'' The commenter also suggested, however, that OPM establish in the final rule a time period during which agencies must determine whether an individual serving on temporary appointment under § 213.3102(u)(5) can perform the duties of the position. This commenter expressed concern that individuals on temporary appointments would remain on these appointments for overly long durations in the absence of a determination period. OPM is not adopting this suggestion because it is unnecessary. A temporary appointment in the excepted service is, by definition, limited to 1 year or less and may be extended for no more than 1 additional year (5 CFR 213.104). Therefore, we do not foresee instances of overly long temporary appointments. In addition, because each case may be unique, agencies may need varying amounts of time to determine the job readiness of individuals serving on temporary appointments.

The same individual suggested OPM provide guidance to help agencies determine the appropriateness of making a temporary appointment versus a permanent appointment. Because the circumstances pertaining to each applicant will be unique, OPM cannot provide guidance to assist agencies with every potential circumstance. Therefore, OPM is not adopting this suggestion.

Agencies may make temporary appointments when the agency cannot otherwise determine (based on available information) whether the applicant is likely to succeed in a particular work environment, or in instances when the work to be performed is truly of a temporary nature (e.g., short-term project work).

This individual also suggested that OPM provide a mechanism to ensure people with disabilities are given a full opportunity to display their abilities through education or experience as measured against specific criteria. We agree with the suggestion but note it is already in place. People with disabilities appointed under this authority are already subject to agency-developed qualification standards, against which their performance is measured (in the same fashion as any Federal employee).

One Federal agency suggested we change the phrase ''intellectual disability'' to ''severe intellectual disability'' on the basis that ''intellectual disability'' includes minor intellectual impairments which do not constitute ''mental retardation.'' OPM is not adopting this suggestion. OPM is constrained in implementing the Executive Orders underlying this regulation by the scope of those Orders themselves. OPM's change was prompted by Congress's enactment, on October 6, 2010, of ''Rosa's Law,'' which changed references from ''mental retardation'' to ''intellectual disability,'' and a desire to use similar, less stigmatizing terminology here without changing the underlying scope of coverage of the regulation.

The same Federal agency recommended that OPM retain the ''certification of job readiness'' but establish its use as optional under these provisions. OPM is not adopting this suggestion. As noted above, we believe elimination of the ''certification of job readiness'' benefits both applicants and agencies by better facilitating the entry of people with disabilities into Federal service.

Lastly, several responses contained comments and/or suggestions (in whole or in part) that were beyond the scope of the proposed changes. As a result, OPM is not addressing these comments, beyond acknowledging their receipt:

- An agency suggested we reword the last sentence in § 213.3102(u)(5)(i) by inserting the word ''successfully'' before the word ''perform'' in the phrase, ''* * * whenever the agency determines the individual is able to perform the duties of the position.''
- A university law center questioned the overall effectiveness of the proposed changes to schedule A hiring rules for people with disabilities.
- One individual claimed his employer discriminated against him and separated him due to his disability.
- One commenter expressed difficulty in applying for and obtaining a Federal job.
- An individual commented that the proposed changes will not contribute to successful implementation of Executive Order 13548 titled, ''Increasing Federal Employment of Individuals with Disabilities,'' because these provisions are discretionary and many agencies choose to fill their positions via merit (or internal) promotion procedures. The commenter proposed the following changes:
  - OPM should change the word ''may'' to ''shall'' in § 213.3102(u)(2)(ii), to require agencies to accept the documentation described in that paragraph as proof of disability; change ''may'' to ''shall'' in § 213.3102(u)(4) regarding authority for permanent or time-limited appointments; and change ''may'' to ''shall'' in § 213.3102(u)(6)(ii), regarding crediting time spent under a temporary appointment towards eligibility for noncompetitive conversion to the competitive service; and
  - OPM should require agencies to use these provisions for no less than 2 percent of all hires.
- The same individual submitted a second comment in which it proposed reopening the rule in order to model it after the ''Pathways Programs'' established under 5 CFR part 362.
- An agency suggested that OPM revise the criteria pertaining to ''proof of disability'' in § 213.3102(u)(3)(ii). The agency also suggested OPM require Federal agencies to accept and process applications made under this hiring authority, rather than allow agencies to redirect applicants (in some instances) to the USAJOBS Web site.
- The professional organization also requested clarification as to documentation for ''proof of disability'' and the authorized signatories for the Schedule A certification letter.

OPM is adopting the proposed rule as final, with only a few very minor editorial corrections.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain potential applicants for Federal jobs.

Executive Order 12866, Regulatory Review

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

List of Subjects in 5 CFR Part 213

Government employees, Individuals with disabilities.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM is amending 5 CFR part 213 as follows:

PART 213—EXCEPTED SERVICE

■ 1. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; Sec. 213.101 also issued under 5 U.S.C. 2103. Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 13318, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 *et seq.;* Pub. L. 105–339, 112 Stat 3182–83; E.O. 13162; E.O. 12125, 3 CFR 1979 Comp., p. 16879; and E.O. 13124, 3 CFR 1999 Comp., p. 31103; and Presidential Memorandum—Improving the Federal Recruitment and Hiring Process (May 11, 2010).

■ 2. In 213.3102 revise paragraph (u) to read as follows:

§ 213.3102 Entire executive civil service.

* * * * *

(u) *Appointment of persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities*—(1) *Purpose.* An agency may appoint, on a permanent, time-limited, or temporary basis, a person with an intellectual disability, a severe physical disability, or a psychiatric disability according to the provisions described below.

(2) *Definition.* ''Intellectual disabilities'' means only those disabilities that would have been encompassed by the term ''mental retardation'' in previous iterations of this regulation and the associated Executive order, Executive Order 12125, dated March 15, 1979.

(3) *Proof of disability.* (i) An agency must require proof of an applicant's intellectual disability, severe physical disability, or psychiatric disability prior to making an appointment under this section.

(ii) An agency may accept, as proof of disability, appropriate documentation

(e.g., records, statements, or other appropriate information) issued by a licensed medical professional (e.g., a physician or other medical professional duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine); a licensed vocational rehabilitation specialist (State or private); or any Federal agency, State agency, or an agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

(4) *Permanent or time-limited employment options.* An agency may make permanent or time-limited appointments under this paragraph (u)(4) where an applicant supplies proof of disability as described in paragraph (u)(3) of this section and the agency determines that the individual is likely to succeed in the performance of the duties of the position for which he or she is applying. In determining whether the individual is likely to succeed in performing the duties of the position, the agency may rely upon the applicant's employment, educational, or other relevant experience, including but not limited to service under another type of appointment in the competitive or excepted services.

(5) *Temporary employment options.* An agency may make a temporary appointment when:

(i) The agency determines that it is necessary to observe the applicant on the job to determine whether the applicant is able or ready to perform the duties of the position. When an agency uses this option to determine an individual's job readiness, the hiring agency may convert the individual to a permanent appointment in the excepted service whenever the agency determines the individual is able to perform the duties of the position; or

(ii) The work is of a temporary nature.

(6) *Noncompetitive conversion to the competitive service.* (i) An agency may noncompetitively convert to the competitive service an employee who has completed 2 years of satisfactory service under this authority in accordance with the provisions of Executive Order 12125, as amended by Executive Order 13124, and § 315.709 of this chapter, except as provided in paragraph (u)(6)(ii) of this section.

(ii) Time spent on a temporary appointment specified in paragraph (u)(5)(ii) of this section does not count towards the 2-year requirement.

* * * * *

[FR Doc. 2013–04095 Filed 2–21–13; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 245 and 272

RIN 0584–AE10

National School Lunch Program: Direct Certification Continuous Improvement Plans Required by the Healthy, Hunger-Free Kids Act of 2010

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends the National School Lunch Program (NSLP) regulations to incorporate provisions of the Healthy, Hunger-Free Kids Act of 2010 designed to encourage States to improve direct certification efforts with the Supplemental Nutrition Assistance Program (SNAP). The provisions require State agencies to meet certain direct certification performance benchmarks and to develop and implement continuous improvement plans if they fail to do so. This rule also amends NSLP and SNAP regulations to provide for the collection of data elements needed to compute each State's direct certification performance rate to compare with the new benchmarks. Improved direct certification efforts would help increase program accuracy, reduce paperwork for States and households, and increase eligible children's access to school meals.

DATES: This rule is effective March 25, 2013.

FOR FURTHER INFORMATION CONTACT: Vivian Lees or Patricia B. von Reyn, State Systems Support Branch, at (703) 305–2590.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legislative History Leading up to This Rulemaking

Section 104 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265) amended section 9(b) of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1758(b)) to require all local educational agencies (LEAs) that participate in the NSLP and/or School Breakfast Program to establish, by school year (SY) 2008–2009, a system to directly certify as eligible for free school meals children who are members of households receiving benefits under SNAP.

Section 4301 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) (42 U.S.C. 1758a) requires the Secretary of Agriculture, beginning in 2008, to assess the effectiveness of State and local efforts to directly certify such school-age children for free school meals and to provide annual reports to Congress. (See the *Direct Certification in the National School Lunch Program: State Implementation Progress* (Report to Congress) for 2008, 2009, 2010, and 2011 at *http://www.fns.usda.gov/ora/menu/Published/CNP/cnp.htm*.)

Section 101(b) of Public Law 111–296, the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), amended section 9(b)(4) of the NSLA (42 U.S.C. 1758(b)(4)) to establish and define required percentage benchmarks for directly certifying children who are members of households receiving benefits under SNAP. Section 101(b) further amended the NSLA to require that, beginning with SY 2011–2012, each State that does not meet the benchmark for a particular school year must develop, submit, and implement a continuous improvement plan (CIP) aimed at fully meeting the benchmarks and improving direct certification for the following school year. It also requires that the Secretary provide technical assistance to State agencies in developing and implementing CIPs.

These provisions of section 101(b) of the HHFKA, which were effective October 1, 2010, were implemented through USDA Food and Nutrition Service (FNS) Memorandum SP 32–2011, *Child Nutrition Reauthorization 2010: Direct Certification Benchmarks and Continuous Improvement Plans,* dated April 28, 2011, available at *http://www.fns.usda.gov/cnd/governance/Policy-Memos/2011/SP32–2011.pdf*.

On January 31, 2012, FNS published a proposed rule, *National School Lunch Program: Direct Certification Continuous Improvement Plans Required by the Healthy, Hunger-Free Kids Act of 2010,* in the **Federal Register** (77 FR 4688) to solicit comments on the incorporation of these and other direct certification improvement provisions into regulations governing the determination for eligibility for free and reduced price meals at 7 CFR part 245. The proposed rule also solicited comments on the paperwork burden for the new form FNS–834, *State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report,* which will collect two of the data elements for the formula to compute direct certification performance rates.

B. Summary of Mandated Provisions in the Proposed Rule

In summary, the January 2012 proposed rule sought to incorporate the