

# Proposed Rules

Federal Register

Vol. 70, No. 7

Tuesday, January 11, 2005

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 213 and 315

RIN 3206-AK58

#### Excepted Service—Appointment for Persons With Disabilities and Career and Career-Conditional Employment

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing changes to existing regulations regarding the excepted appointments of persons with mental retardation, severe physical, and psychiatric disabilities. These changes will provide agencies the authority to determine, on a case-by-case basis, whether these individuals can receive an excepted appointment based solely on medical documentation submitted by the applicant. We also propose to consolidate three excepted appointing authorities for persons with the above disabilities into one authority.

**DATES:** We will consider comments received on or before March 14, 2005.

**ADDRESSES:** You may submit comments, identified by RIN number, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: [employ@opm.gov](mailto:employ@opm.gov). Include "RIN 3206-AK58" in the subject line of the message.

- Fax: (202) 606-2329.

- Mail: Mark Doboga, Deputy Associate Director for Talent and Capacity Policy, U.S. Office of Personnel Management, Room 6551, 1900 E Street, NW., Washington, DC 20415-9700.

- Hand Delivery/Courier: OPM, Room 6551, 1900 E Street, NW., Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:**

Larry Lorenz by telephone on (202) 606-0960, by fax on (202) 606-2329, by TDD

on (202) 418-3134, or by e-mail at [employ@opm.gov](mailto:employ@opm.gov).

**SUPPLEMENTARY INFORMATION:** In February 2001, President George W. Bush introduced the New Freedom Initiative (<http://www.whitehouse.gov/news/freedominitiative/freedominitiative.html>) to eliminate "the barriers to equality that face many of the 54 million Americans with disabilities." In so doing, the President stated that persons with disabilities "should have every freedom to pursue careers, integrate into the workforce, and participate as full members in the economic marketplace."

To further the objectives of the New Freedom Initiative, OPM reviewed the regulations governing the appointment of persons with disabilities to positions in the Federal Government. At present, those regulations permit agencies to make expedited Schedule A "excepted" appointments to persons with disabilities if they have been certified as having mental retardation (as that term is used in Executive Order 12125 dated March 15, 1979), or severe physical or psychiatric disability. However, the certification process is onerous and complicated, involving review by State and/or Federal agencies even where the disability has been clearly diagnosed by a licensed medical authority. After careful consideration of that certification requirement, we propose changing the current regulations to simplify the disability determination process in certain cases, consolidate the three existing Schedule A appointing authorities for persons with mental retardation, severe physical, or psychiatric disabilities, and thereby streamline the Federal hiring process for these deserving individuals.

OPM currently provides agencies three separate appointing authorities for individuals with mental retardation, severe physical, and psychiatric disabilities. The provisions for each authority were authorized under Executive Order (E.O.) 12125, as amended by E.O. 13124, and vary only slightly from one another. The proposed rules standardize and consolidate these provisions into one streamlined appointing authority.

In addition, the current regulations specify that, for purposes of these appointments, the certification that a person with a severe physical disability or a person with a psychiatric disability

is disabled and likely to successfully perform duties of the job for which he or she is applying (including Federal jobs) may be provided only by the Department of Veterans Affairs (VA) or an applicable State Vocational Rehabilitation Agency (SVRA). Similarly, only SVRAs may provide the required certification for a person with mental retardation. Thus, an individual with a disability determination from a Federal agency other than the VA may not use that documentation for purposes of obtaining eligibility for a Schedule A excepted appointment for a Federal job. The proposed rulemaking seeks to remedy this situation by delegating this certification authority to other Federal agencies under certain conditions.

OPM believes the proposed regulations will facilitate the Federal Government's ability to hire persons with disabilities, in furtherance of the President's New Freedom Initiative, introduced in February 2001, which was designed to increase employment opportunities for persons with disabilities. We seek comments on the proposed changes from all interested parties, but especially from agencies on their ability to determine the eligibility of applicants with disabilities for appointment under Schedule A and evaluating these applicants' likelihood of success in a specific job without certification from a state or Veterans Administration vocational rehabilitation counselor.

#### Proposed Amendments

Under these proposed regulations, one consolidated authority would replace the following:

Schedule A authority § 213.3102(t) for positions when filled by people with mental retardation; Schedule A authority § 213.3102(u) for positions when filled by people with severe physical disabilities; and

Schedule A authority § 213.3102(gg) for positions when filled by people with psychiatric disabilities.

Using the new program, agencies will appoint individuals under § 213.3102(u). The new Schedule A authority contains updated certification procedures, a temporary employment option, and requirements for non-competitive conversion to the competitive service.

Certification Procedures

This proposed rule will allow Federal agencies to certify, then immediately hire, disabled applicants who are likely to succeed as Federal employees.

The proposed certification procedures authorize any Federal agency to certify, on a case-by-case basis, that a particular applicant has provided sufficient evidence of mental retardation, severe physical, or psychiatric disability; such evidence may be certification from the Social Security Administration (SSA) or a licensed physician. In addition, the proposed procedures authorize the agency to determine whether a disabled applicant is likely to successfully perform the job for which he or she is applying. By authorizing agencies to make such certifications on a case-by-case basis, the proposed regulations will eliminate an unnecessary burden on disabled job applicants as well as potentially duplicative certification procedures. Agencies will retain the option of requiring VA or SVRA certification of a disabled applicant where the agencies are unable to make a determination based on documentation submitted by the applicant.

To determine whether to certify an individual, Federal agencies would be required to review medical documentation presented by the job applicant, such as a physician's statement or disability documentation from the SSA and/or an appropriate State Disability Determination Services agency (if the severe physical disability is not obvious), and all other relevant evidence needed to determine if the applicant is likely to succeed in the job (e.g., degrees from accredited colleges, work experience, tests, etc.).

Temporary Employment Option

The proposed regulations will retain a temporary employment option as an alternative to the certification procedures described above. Under this option, agencies may offer a Schedule A excepted appointment, without further certification, to people with disabilities who have already demonstrated their ability to perform duties satisfactorily under a temporary appointment.

Requirements for Non-Competitive Conversion

For a person with mental retardation, severe physical, or psychiatric disability, the proposed regulations also provide agencies the discretionary authority to convert such a person non-competitively to the competitive service, upon 2 years of satisfactory service in a Schedule A excepted

appointment made under the proposed regulations.

Appointments

The proposed rule contains only one authority, 5 CFR 213.3102(u), for appointments of persons with disabilities. When these regulations become effective, agencies will convert the appointments of individuals currently serving on appointments under the superseded authorities to 5 CFR 213.3102(u). OPM's Central Personnel Data File will continue to retain the legal authority code required by the Guide to Processing Personnel Actions for analysis by disability type.

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 and Federal employees.

Executive Order 12866, Regulatory Review

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

List of Subjects in 5 CFR Parts 213 and 315

Government employees, Reporting and recordkeeping requirements.

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, OPM proposes to amend 5 CFR parts 213 and 315 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, 47 FR 22931, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 et seq.; Pub. L. 105-339, 112 Stat 3182-83; and E.O. 13162.

2. Amend § 213.3102 by removing and reserving paragraphs (t) and (gg), and by revising paragraph (u) to read as follows:

§ 213.3102 Entire executive civil service.

\* \* \* \* \*

(u) Appointment for Persons With Disabilities. (1) Purpose. An agency may appoint a person with mental retardation, a person with a severe physical disability, or a person with a psychiatric disability who, on the basis of authoritative medical and other appropriate documentation submitted by or on his or her behalf, has been certified by the appointing agency, another Federal

agency, or a State Vocational Rehabilitation Agency (SVRA), as having from one or more of those conditions; and who has:

(i) Demonstrated his or her ability to perform satisfactorily the duties of the position for which he or she is applying by serving previously on a temporary appointment; or

(ii) Been certified by the appointing agency, another Federal agency, or a State Vocational Rehabilitation Agency (SVRA) as likely to succeed in the performance of the duties of the position for which he or she is applying.

(2) Non-competitive conversion. An agency may non-competitively 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.

\* \* \* \* \*

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

3. The authority citation for part 315 is revised to read as follows:

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.

Subpart B—The Career-Conditional Employment System

4. In § 315.201 revise paragraph (b)(1)(xii) to read as follows:

§ 315.201 Service requirement for career tenure.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(xii) The date of nontemporary appointment under Schedule A, § 213.3102(u) of this chapter, of a person with mental retardation, a severe physical disability, or a psychiatric disability, provided the employee's appointment is converted to a career or career-conditional appointment under § 315.709;

\* \* \* \* \*

## Subpart G—Conversion to Career or Career-Conditional Employment From Other Types of Employment

5. Revise § 315.709 to read as follows:

### § 315.709 Appointment for Persons With Disabilities.

(a) *Coverage.* An employee appointed under § 213.3102(u) of this chapter may have his or her appointment converted to a career or career-conditional appointment when he or she:

(1) Completes 2 or more years of satisfactory service, without a break of more than 30 days, under a nontemporary Schedule A appointment;

(2) Is recommended for such conversion by his or her supervisors;

(3) Meets all requirements and conditions governing career and career-conditional appointment except those requirements concerning competitive selection from a register and medical qualifications; and

(4) Is converted without a break in service of one workday.

(b) *Tenure on conversion.* An employee converted under paragraph (a) of this section becomes:

(1) A career-conditional employee, except as provided in paragraph (b)(2) of this section;

(2) A career employee if he or she has completed 3 years of substantially continuous service in a nontemporary appointment under § 213.3102(u) of this chapter, or has otherwise completed the service requirement for career tenure, or is excepted from it by § 315.201(c).

(c) *Acquisition of competitive status.* A person whose employment is converted to career or career-conditional employment under this section acquires a competitive status automatically on conversion.

[FR Doc. 05-456 Filed 1-10-05; 8:45 am]

BILLING CODE 6325-39-P

---

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 97

[Docket Number ST02-02]

RIN # 0581-AC31

### Plant Variety Protection Office, Supplemental Fees

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Agricultural Marketing Service (AMS) proposes supplemental fees for the Plant Variety Protection (PVP) Office covering a variety of administrative services that are not currently charged by the program. These include administrative service requests for: replenishment of seed low in

germination or seed number; submission of new application data after notice of allowance, but prior to certificate issuance; recording any revision, withdrawal, or revocation of an assignment; and protest to the issuance of a certificate. The allowance and issuance fee will be increased also to recover the costs of enhancing the PVP program's electronic archiving capabilities. Also, technical amendments are proposed which would revise or remove obsolete language.

**DATES:** Comments must be received on or before February 10, 2005.

**ADDRESSES:** Interested persons are invited to submit comments concerning this proposed rule. Comments should be sent in triplicate to Dr. Paul M. Zankowski, Commissioner, PVP Office, Room 401, NAL Building, 10301 Baltimore Avenue, Beltsville, MD 20705-2351, telephone (301) 504-5518, fax (301) 504-5291, and should refer to the docket title and number located in the heading of this document.

Comments received will be available for public inspection at the same location, between the hours of 10 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Janice M. Strachan, USDA, AMS, Science and Technology (S&T), PVP Office, 10301 Baltimore Avenue, NAL Room 401, Beltsville, MD 20705-2351, telephone (301) 504-5518, and fax (301) 504-5291.

**SUPPLEMENTARY INFORMATION:**

#### I. Executive Order 12866

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget (OMB).

#### II. Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the AMS has considered the economic impact of this action on small business entities. There are more than 800 potential users of the Plant Variety Protection (PVP) Office's service, of whom about 100 may file applications in a given year. Some of these users are considered small business entities under the criteria established by the Small Business Administration (13 CFR 121.201). The AMS has determined that this action would not have a significant economic impact on a substantial number of these small business entities.

The PVP Office administers the PVP Act of 1970, as amended (7 U.S.C. 2321

*et seq.*), and issues Certificates of Protection that provide intellectual property rights to developers of new varieties of plants. A Certificate of Protection is awarded to an owner of a variety after examination indicates that the variety is new, distinct from other varieties, genetically uniform, and stable through successive generations. The Act requires that reasonable fees be collected in order to maintain the program. This action will add new fees charged to users of plant variety protection for administrative services. AMS estimates that the proposed rule will yield an additional \$96,000 of new revenue in fiscal year (FY) 2006. The costs to private and public business entities will be proportional to their use of the administrative services. The PVP program is a voluntary service, so any decision by developers to discontinue the use of plant variety protection will not hinder private and public entities from marketing their varieties in commercial markets.

AMS regularly reviews its user-fee-financed programs to determine their fiscal condition. In a recent review of the PVP program, the cost analysis indicated that there are a number of administrative services for which there are no fees available to recover costs. AMS determined the new fees by analyzing the costs for providing the listed services, including salaries and materials.

The PVP Advisory Board has been informed of customer services for which the PVP Office is not reimbursed, and consulted on new supplementary fees in November 2001 and again in March 2003. The Board recommended that new supplemental fees be put in place. This proposed rule will make changes in the regulations to implement the supplemental fees.

Without the supplemental fees in FY 2006, the PVP Office revenues are projected at \$1,496,000, operational expenses are estimated at \$1,614,720, and trust fund balances would be down to \$966,458. On the other hand, if supplemental fees are established, the trust fund balance would be \$1,243,658 at the end of FY 2006, which would begin to replenish the program reserves.

#### III. Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect, nor will it preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the proposed rule. There are no administrative procedures that must be exhausted prior to any judicial