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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 332

RIN 3206-AL13

Recruitment and Selection Through Competitive Examination

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations pertaining to recruitment and selection through the competitive examination process. The purpose of this rule is to clarify the distinction among objections, pass overs, and suitability determinations. OPM is also adopting two new definitions to further clarify the distinction between an objection and a pass over request. Additionally, OPM is removing an obsolete section in this part dealing with filling certain postmaster positions.

DATES: The final rule is effective on July 27, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Watson by telephone at (202) 606-0830; by fax at (202) 606-2329; by TTY at (202) 418-3134; or by e-mail at linda.watson@opm.gov.

SUPPLEMENTARY INFORMATION: On September 2, 2008, OPM published a proposed rule with request for comments in the *Federal Register* at 73 FR 51245 to amend its regulations governing recruitment and selection through competitive examination, primarily to clarify the distinction among objections, pass over requests, and suitability determinations. OPM also proposed to add two new definitions, of "objection" and "pass over request," to further clarify the differences and relationship between them and to improve the readability of section 332.102. In addition, OPM

proposed to remove section 332.103 because it contained outdated information concerning filling positions in the U.S. Postal Service.

Background

Pursuant to provisions codified in title 5, United States Code (U.S.C.), and Executive orders issued pursuant to those provisions, Congress and the President have delegated to OPM several authorities related to the recruitment and selection process for individuals seeking competitive service positions in the Federal Government. Under 5 U.S.C. 3318, Congress confers upon OPM the authority to rule on any objection or pass over request filed by a Federal agency seeking to fill vacancies for such positions. In recent years, OPM has delegated examining authority to Federal agencies to adjudicate most objections and pass over requests. OPM retains exclusive authority to (a) make medical qualification determinations pertaining to preference eligibles and (b) grant or deny an agency's pass over request of a preference eligible with a compensable service-connected disability of 30 percent or more. Except for OPM's exclusive authority, Federal agencies with delegated examining authority under 5 U.S.C. 1104(a)(2) have the authority to adjudicate objections and pass over requests pertaining to applicants for positions in their agencies, but do not have such authority with respect to positions elsewhere in the Federal Government.

An objection is a request to remove a candidate from consideration on a particular certificate, and a pass over request is an objection filed against a preference eligible that results in the selection of a non-preference eligible. (Throughout this discussion, the use of the term "objection" in this document should be read to encompass pass overs, even if pass overs are not explicitly mentioned.) OPM promulgated regulations in section 332.406 of title 5, Code of Federal Regulations (CFR), in which it describes the circumstances under which an objection will be sustained or a pass over request granted.

In addition to its authority for adjudicating objections and pass overs, OPM is authorized to regulate the fitness of applicants for competitive service positions and for career appointment in the Senior Executive

Service, as well as the conduct of employees in competitive service and Senior Executive Service positions. OPM, exercising this authority, published regulations governing suitability determinations, which are located at 5 CFR part 731. As with objections and pass over requests, OPM has delegated to Federal agencies the authority to make most suitability determinations.

Although the statutory schemes related to suitability determinations and objections are separate and distinct from each other, OPM has, in the recent past, unintentionally mingled the two, possibly giving rise to the impression that the objection regulations and the suitability regulations were connected in some way. The Merit Systems Protection Board's (MSPB) decisions in *Edwards v. Department of Justice*, 86 MSPR 365 (2000) and 87 MSPR 518 (2001), which, to some extent, erased the distinction between the two regulatory schemes, led OPM to conclude that it was essential to restore clarity to these two important and distinct features of the Federal personnel system. To dispel any confusion that has been created, OPM is proposing to revise this regulation to clarify that an agency's objection (including its pass over requests) do not constitute suitability actions and that decisions on these objections are not suitability actions. Consequently, when an objection or pass over request is made, the regulation at 5 CFR 332.406 applies, and the procedures set forth in 5 CFR part 731 do not apply. OPM has also clarified its regulations in 5 CFR part 731 to ensure that the intended distinction between the two procedures is understood and maintained (see 73 FR 20149 (April 15, 2008)). To demonstrate the basis for the distinction between these two statutory schemes, a brief review of each of these schemes is helpful.

Objections/Pass Overs

In general, agencies may select candidates for vacancies in the competitive service in one of two methods: the traditional "Rule of Three" method, in which an agency selects from the highest three eligibles available for appointment, drawing from a list of candidates who have been rated and ranked by numerical scores; or alternate ranking and selection procedures,

pursuant to which a category rating system for evaluating candidates is established. The differences are straightforward.

When OPM or an agency's delegated examining office (DEO) uses the traditional "Rule of Three" ranking and selection procedures, the selecting official requests a list of eligible candidates who meet the minimum qualification requirements. OPM or the DEO is required to provide either a list of all qualified candidates, appropriately rated and ranked, or enough names from the top of a register of qualified candidates, appropriately rated and ranked, to permit an agency to consider at least three candidates for appointment with respect to each vacancy that the agency intends to fill (5 U.S.C. 3317(a)). Under this procedure, eligible candidates are assigned numerical scores, including veterans' preference points of 5 points or 10 points, as applicable (5 U.S.C. 3309, 3313). An appointing official must select from the highest three candidates available for appointment on the certificate furnished by OPM or the DEO, except as discussed below (5 U.S.C. 3318(a)).

When an agency uses a category-based rating method to assess, rate, and rank job applicants for positions filled through the competitive examination process, applicants who meet the minimum qualification requirements are ranked by being placed in two or more pre-defined quality categories instead of being ranked in numeric score order. Veterans' preference is applied by listing preference eligibles ahead of non-preference eligibles within the same quality category in which they were assigned based upon the job-related assessment tool(s). No points are assigned. Qualified preference eligibles with a compensable service-connected disability of 30 percent or more and those with a compensable service-connected disability of at least 10 percent but less than 30 percent are placed at the top of the highest quality category (except with respect to scientific or professional positions at or above the GS-9 level), regardless of the quality category in which they would be placed based upon their examination results. Under category rating, an appointing official may select from any of the candidates in the highest quality category (or, if fewer than three candidates have been assigned to the highest category, from a merged category consisting of the highest and the second highest quality categories), except that, generally, all the preference eligible choices must be exhausted before an agency may select a non-

preference eligible candidate (5 U.S.C. 3319).

Congress gave agencies the right to object to any candidate for employment whose name appears on a certificate, whether the agency is using the traditional "Rule of Three" or category rating. The procedures are the same, regardless of the method of selection. As prescribed in 5 U.S.C. 3318(a), OPM or an agency with delegated examining authority may sustain an objection that is based on a "proper and adequate reason under regulations prescribed by the Office (OPM)." To ensure that all applicants for competitive service positions possess the necessary health, character, and ability for the employment sought, OPM has determined that any of the reasons set forth as criteria for making suitability decisions in 5 CFR part 731 or as bases for disqualification by OPM in 5 CFR part 339 (Medical Qualification Determinations) constitutes a "proper and adequate reason." In addition, OPM has reserved to itself the ability to set forth in its Delegated Examining Operations Handbook additional reasons that constitute "proper and adequate" reasons for objections.

As previously indicated, a request for a pass over is a specific type of objection. As with any objection, an agency may not pass over a preference eligible (with respect to a Rule-of-Three selection process) or select a non-preference eligible ahead of a preference eligible in the same quality category (with respect to a category rating selection process) unless OPM or the appropriate DEO grants the agency's pass over request under 5 U.S.C. 3318(b)(1). See also 5 U.S.C. 3319(c)(2). When an agency seeks to pass over a preference eligible candidate who is a 30 percent or more compensably disabled veteran, only OPM possesses the authority to adjudicate the agency's pass over request. The standard for adjudicating a pass over request is identical to the standard for adjudicating any other objection. Consequently, an agency's pass over request will be granted if that request is based on "proper and adequate reasons," including those reasons derived from 5 CFR part 339 or 731.

There is no statutory or regulatory right to appeal from a decision sustaining an objection, including granting a pass over request. For that reason, an individual has no right of appeal to MSPB from an OPM, agency or DEO decision to sustain an objection or grant a pass over request, regardless of the reason for the decision.

Suitability Actions

In 5 U.S.C. 7301, Congress conferred upon the President the authority to prescribe regulations for the conduct of employees in the executive branch. In addition, pursuant to 5 U.S.C. 3301, the President may "(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service; [and] (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought * * *." Executive Order 10577 directs OPM to examine "suitability" for competitive Federal employment.

Pursuant to 5 CFR part 731, OPM, an agency, or the DEO, as appropriate, may cancel an individual's eligibility, remove an individual from Federal employment, and/or debar an individual from future Federal employment when it determines the action will protect the integrity or promote the efficiency of the civil service. A non-selection (e.g., objection or pass over pursuant to 5 CFR part 332) for a specific position, however, is not a suitability action even if the non-selection is based on reasons set forth in 5 CFR 731.202(b).

Prior to taking a suitability action, OPM or an agency with delegated authority must notify the applicant, appointee, or employee in writing of the proposed action and must specify the reasons for this action. Under 5 CFR 731.302 and 731.402, the notice must also include information on the individual's right to answer to the notice in writing. After considering the answer of the individual, if any, OPM or an agency with delegated authority then renders a final decision. In 5 CFR 731.501, an individual against whom a suitability action has been taken is given the right of appeal to MSPB.

In light of these two separate and distinct statutory and regulatory schemes, an agency that wishes, for reasons set forth in 5 CFR 731.202(b), not to appoint an individual on a certificate has two options. First, the agency may make a suitability determination under 5 CFR part 731 with respect to the individual. Alternatively, the agency may object to or request to pass over the candidate pursuant to 5 CFR 332.406. Under this latter authority, an agency may choose not to appoint a candidate if its objection is sustained or its pass over request is granted. An agency may pursue either route, but must satisfy the standards applicable to the chosen procedure. It is permissible for an agency to object or request to pass over

a candidate on a certificate of eligibles and then, if the objection is sustained or the pass over request is granted, to refer the candidate's application for suitability review and adjudication under 5 CFR part 731. When an agency objects to an individual on the basis of a material, intentional false statement or deception or fraud in examination or appointment, and the objection is sustained, an agency *must* also refer the candidate's application to OPM for any suitability action that may be warranted, because of the significance of these factors and to ensure uniformity throughout the Federal Government.

OPM is revising 5 CFR 332.406 to make it clear that the procedure for requesting objections is not part of the suitability process. OPM is also clarifying that an individual may not appeal an OPM or agency decision to sustain an objection or pass over request to MSPB under 5 CFR part 731, even if the decision is based on reasons set forth in 5 CFR 731.202(b).

In section 332.102, OPM is adding two new definitions of "objection" and "pass over request" to clarify the process that applies to objections and pass over requests and distinguish that process from the suitability process. OPM is also updating the definitions of "active military duty" and "certificate."

OPM is revising the definition of "active military duty" to reflect a recent change to this definition based on OPM's published final rule on October 29, 2008. On February 6, 2007, the Merit Systems Protection Board (MSPB) issued a decision in *Edward Thomas Hesse v. Department of the Army* (AT-3443-05-0936-I-1) that affects the eligibility criteria for veterans' preference based on a service-connected disability under 5 U.S.C. 2108(2). On July 27, 2007, OPM issued an interim rule with request for comments (**Federal Register** at 72 FR 41215) to amend the definition of "active duty or active military duty" for veterans' preference entitlement. On October 29, 2008, OPM issued a final rule (**Federal Register** at 73 FR 64179) amending the definition of "active duty or active military duty" in 5 CFR 211.102(f). The revised definition of "active military duty" in section 332.102 refers to 5 CFR 211.102(f) as the appropriate definition for the purpose of consistency.

OPM is removing 5 CFR 332.103, *Filling certain postmaster positions*. This section is obsolete due to the passage of Public Law 91-375, the Postal Reorganization Act (Act). The Act transformed the former Post Office Department into the United States Postal Service (USPS) and made it a Government corporation of the

executive branch of the Federal Government. The USPS subsequently established its own examining and hiring system.

OPM received two written comments on the proposed rule. Because these comments from two agencies supported OPM's clarification and revisions of 5 CFR part 332, we are issuing the final rule with only a few minor changes in wording for clarity, including clarifying some references to objections and pass over requests so that they are more consistent with the way we have defined those terms (*i.e.*, reflecting the fact that pass over requests are a subset of objections).

E.O. 12866, Regulatory Review

This 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 because they would apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 332

Government employees.
U.S. Office of Personnel Management.
John Berry,
Director.

■ Accordingly, OPM is amending 5 CFR part 332 as follows:

PART 332—RECRUITMENT AND SELECTION THROUGH COMPETITIVE EXAMINATION

■ 1. The authority citation for part 332 is revised to read as follows:

Authority: 5 U.S.C. 1103, 1104, 1302, 2108, 3301, 3302, 3304, 3312, 3317, 3318, 3319; E.O. 10577; 3 CFR, 1954-1958 Comp., p. 218; SOURCE: 33 FR 12426, Sept. 4, 1968, unless otherwise noted.

Subpart A—General Provisions

■ 2. Revise § 332.102 to read as follows:

§ 332.102 Definitions.

In this part:

Active military duty has the meaning given that term in 5 CFR 211.102(f).

Certificate means a list of eligibles from which an appointing officer selects one or more applicants for appointment.

Objection means an agency's request to remove a candidate from consideration on a particular certificate.

Pass over request means an objection filed against a preference eligible that results in the selection of a non-preference eligible.

§ 332.103 [Removed]

■ 3. Remove § 332.103.

* * * * *

Subpart D—Consideration for Appointment

■ 4. Revise § 332.406 to read as follows:

§ 332.406 Objections to eligibles.

(a) *Delegated authority.* Except as specified in paragraphs (a)(1) and (a)(2) of this section, OPM has delegated to agencies the authority to adjudicate objections to eligibles, including pass over requests.

(1) OPM retains exclusive authority to approve the sufficiency of an agency's request to pass over preference eligibles who are thirty percent (30%) or more compensably disabled. Such persons have the right, in accordance with 5 U.S.C. 3318, to respond to the pass over request before OPM makes a final decision.

(2) OPM also retains the exclusive authority to approve the sufficiency of an agency's reasons to medically disqualify or medically pass over a preference eligible or disabled veteran in certain circumstances, in accordance with part 339 of this chapter.

(3) An agency must refer any objection (including a pass over request) that is based on material, intentional false statement or deception or fraud in examination or appointment to OPM for a suitability action where warranted, under part 731 of this chapter.

(b) *Standard for objections.* An agency is not required to consider an individual for a position when an objection to (including a request to pass over) the particular individual is sustained or granted. An objection, including a pass over request, may be sustained only if it is based on a proper and adequate reason. The reasons set forth for disqualification by OPM in part 339 of this chapter constitute proper and adequate reasons to sustain an objection. Similarly, the criteria for making suitability determinations in part 731 of this chapter constitute proper and adequate reasons to sustain an objection. In addition, reasons published by OPM in the Delegated Examining Operations Handbook constitute proper and adequate reasons to sustain an objection.

(c) *Sufficiency of the reasons for a pass over.* Subject to the exception set forth in paragraph (e) of this section, an agency may not pass over a preference eligible to select a non-preference eligible unless OPM or an agency with delegated authority also makes a determination that the sufficiency of the

reasons is supported by the evidence submitted for the pass over request.

(d) *Agency's obligation while request for objection is pending.* Subject to the exception set forth in paragraph (e) of this section, if an agency makes an objection against an applicant for a position (including seeking to pass over the applicant), and the individual that the agency wishes to select would be within reach of selection only if the objection is sustained, or the pass over granted, that agency may not make a selection for the position until a final ruling is made.

(e) *Applicability of paragraphs (c) and (d).* Paragraphs (c) and (d) of this section do not apply if the agency has more than one position to fill from the same certificate and holds open (in the event the objection is not sustained or the pass over request is denied) a position that could be filled by the individual against whom an objection or a pass over request has been filed.

(f) *Procedures for objections and pass overs.* Agencies must follow the procedures for objecting to or requesting to pass over an eligible that are published by OPM in the *Delegated Examining Operations Handbook*.

(g) *No appeal rights to Merit Systems Protection Board (MSPB).* An individual may not appeal to the MSPB a decision by OPM or an agency with delegated authority to sustain an objection pursuant to this part, including a decision to grant a pass over request, irrespective of the reason for the decision.

[FR Doc. E9-15184 Filed 6-25-09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

15 CFR Part 301

[Docket No. 080102004-9266-02; FDMS Docket No. ITA-2009-0002]

RIN 0625-AA75

Changes in Procedures for Florence Agreement Program

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Departments of Commerce and Treasury ("the Departments") and Customs and Border Protection ("CBP") issue this rule to amend the regulations governing the duty-free entry of scientific instruments and apparatus into the United States by

educational and nonprofit institutions to implement technical changes required by the passage of the Miscellaneous Trade and Technical Corrections Act of 2004, to update the regulations to comport with current CBP practices and changes made in the Harmonized Tariff Schedule of the United States ("HTSUS"), to add a Web site address for Statutory Import Programs Staff ("SIPS"), and to remove references to spectrometers pursuant to Presidential Proclamation 7011 of June 30, 1997. We also amend the regulations to reflect the nomenclature changes made necessary by the transfer of the legacy Customs Service of the Department of the Treasury to the Department of Homeland Security.

DATES: This rule is effective July 27, 2009.

FOR FURTHER INFORMATION CONTACT: Jesse Cortes, (202) 482-3986, Room 3712, U.S. Department of Commerce, 14th Street and Constitution Ave., NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

The Departments and Customs and Border Protection (CBP), Department of Homeland Security, issue this rule to amend the regulations found in Part 301, Chapter III, Subtitle B of Title 15 of the Code of Federal Regulations (CFR) relating to their responsibilities under the Educational, Scientific, and Cultural Materials Importation Act of 1966 (the "Act") (Pub. L. 89-651, as amended by Pub. L. 106-36; 80 Stat. 897). The Act implements U.S. treaty obligations under Annex D of the Florence Agreement, relating to the import of scientific instruments and apparatus. Treaty signatories agreed to waive duties on such imports if there is no scientifically equivalent instrument being manufactured in the country of importation and the instrument is to be used by a nonprofit institution established for scientific research or educational purposes.

The purpose of this rulemaking is to update the regulations by implementing various proposed technical and conforming changes to part 301 of title 15 of the CFR. Section 10.114 of the CBP regulations (19 CFR 10.114) cross-references the location of the consolidated regulations of the Commerce and Treasury Departments relating to the entry of instruments and apparatus for educational and scientific institutions in 15 CFR part 301. A brief overview of the amendments to part 301 of title 15 of the CFR is set forth below. A more detailed discussion on the background of these amendments may

be found in the preamble to the notice of proposed rulemaking (73 FR 76571, December 17, 2008).

Explanation of Amendments

This document amends 15 CFR 301 by making technical changes to replace "U.S. Customs Service" and similar references throughout the regulations with its new designation, "Customs and Border Protection" or CBP. This document also amends 15 CFR 301.8(a)(4) by deleting, in its entirety, any reference to the 180-day time period for the suspension of liquidation of entries of scientific instruments classified under subheading 9810.00.60 Harmonized Tariff Schedule of the United States (HTSUS) due to the subsequent amendments to 19 U.S.C.1504 since section 301.8(a)(4) was promulgated. Section 301.8(c) is amended to delete references to the 90-day protest period for such entries due to the statutory amendments made by the Miscellaneous Trade and Technical Corrections Act of 2004 to 19 U.S.C. 1514(c)(3). A technical change is made to section 301.3(b) by including the Statutory Import Programs Staff (SIPS) Web site address to let interested parties know that the application for duty-free entry of scientific instruments (Form ITA-338P) may be obtained from that Web site. Finally, sections 301.2(j) and (o) are amended to remove the references to spectrometers since the Presidential Proclamation 7011 of June 30, 1997, made spectrometers free of duty.

Conclusion

In light of the fact that no comments were submitted in response to the solicitation of public comment on the proposed rule published in the **Federal Register** (73 FR 76571) on December 17, 2008, the Departments are adopting the proposed regulations without change.

Administrative Law Requirements

Regulatory Flexibility Act. In accordance with the Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, the Chief Counsel for Regulation at the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration, that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received on the certification or on the economic effects of the rule more generally.

Paperwork Reduction Act. This rulemaking does not contain revised