

# Rules and Regulations

Federal Register

Vol. 81, No. 224

Monday, November 21, 2016

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 211

RIN 3206-AM79

#### Veterans' Preference

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing a final rule that implements statutory changes pertaining to veterans' preference. These changes were made in response to the Hubbard Act, which broadened the category of individuals eligible for veterans' preference; and to implement the VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011, which requires Federal agencies to treat certain active duty service members as preference eligibles for purposes of an appointment to the competitive service, even though the service members have not been discharged or released from active duty and do not have a Department of Defense (DD) Form 214, *Certificate of Release or Discharge from Active Duty*. In addition, OPM has updated its regulations to reference existing requirements for the alternative ranking and selection procedure called "category rating," and to add a reference to the end date of Operation Iraqi Freedom, which affected veteran status and preference eligibility. This action aligns OPM's regulations with existing statutes.

**DATES:** This rule will be effective December 21, 2016.

**FOR FURTHER INFORMATION CONTACT:** Michael Gilmore by telephone on (202) 606-2429, by fax at (202) 606-4430, by TTY at (202) 418-3134, or by email at [Michael.gilmore@opm.gov](mailto:Michael.gilmore@opm.gov).

**SUPPLEMENTARY INFORMATION:** On December 29, 2014, OPM issued an

interim rule at 79 FR 77833, which implemented statutory changes pertaining to veterans' preference. This action was taken to align OPM's regulations with existing statutes. Specifically, the interim rule (1) was issued in response to the Hubbard Act, which establishes a new category of preference for veterans discharged or released from active duty by reason of a sole survivorship discharge; (2) implemented the VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011, which provides for treatment of certain applicants as veterans or disabled veterans if they have not been separated or discharged from active duty, but submit a certification that they are expected to be discharged or released under honorable conditions within 120 days; (3) referenced the existing requirements for the alternative ranking and selection procedure called "category rating;" and (4) added a reference to the end date of Operation Iraqi Freedom.

During the 60-day comment period between December 29, 2014, and February 27, 2015, OPM received a total of 12 sets of comments, of which 4 were from individuals and 8 were from Federal agencies.

#### Discussion of Comments

##### *Operation Iraqi Freedom*

Six agencies sought guidance on corrective actions and remedies for applicants who may have erroneously received veterans' preference after the ending date of Operation Iraqi Freedom. These comments are outside the scope of the rulemaking. OPM notes that corrective actions and remedies are already addressed in the *Delegated Examining Operations Handbook* (DEOH) and in our guidance pertaining to Variations on the OPM Web site. Remedial actions are also addressed in Interagency Delegated Examining Agreements.

Four agencies asked OPM to amend the rule to extend preference eligibility to any persons who erroneously received preference after the end of Operation Iraqi Freedom, at least until December 29, 2014 (the date of the interim rule). OPM lacks authority to change the end date of Operation Iraqi Freedom or to create a category of veterans' preference that is not prescribed by law.

#### *Implementation of the VOW (Veterans Opportunity To Work) To Hire Heroes Act*

One agency commented that implementation of the VOW act may delay the hiring process while the hiring agency verifies the service member's character of discharge from the military. This agency believes the veteran has 120 days (from receipt of the veteran's job application) during which he or she can be considered for a federal job, and this 120-day period will extend an agency's time-to-hire. The commenter specifically asked if an agency must now hold a vacancy open until each veteran applicant has been discharged or released from active duty under honorable conditions.

OPM disagrees that implementation of the VOW act will result in delays in the hiring process. The certification letter is a statement that the individual is *expected* to be separated from active duty in the armed forces under honorable conditions not later than 120 days after the certification statement is submitted as part of the service member's job application package. The certification statement ensures that veterans who are expected to be discharged or released in the near term are not denied their preference in the early stages of the hiring process; agencies are to award such veterans with tentative preference until the job seeking veteran provides his or her DD Form 214 indicating character of service qualifying for preference, prior to appointment.

However, submission of the certification letter does not extend the hiring process. The VOW to Hire Veterans Act of 2011 does not require agencies to hold positions open until every applicant has been discharged or released from active duty or to delay hiring selections.

Four agencies asked OPM to specify the format and contents of a certification letter in greater detail. As described in the supplementary information accompanying the interim rule, the certification letter should be on the letterhead of the appropriate military branch in which the veteran served, and it should specify the veteran's military service dates, the veteran's expected date of release or discharge from active duty service, and the veteran's expected character of service. Commenters requested that OPM also require that the

certification be signed by a commanding officer, list the applicants' campaign badges, and list the applicant's final rank, pay grade, and expected type of separation, *e.g.*, retirement, to assist in adjudicating preference eligibility. Because the certification letter is a military document issued by the Armed Forces, OPM is not mandating specific format and content requirements in the final rule. However, we will confer with the Department of Defense and provide more detail in the VetGuide and the Delegated Examining Operations Handbook.

One of these agencies asked how hiring agencies should publicize the contents of the certification letter to applicants. This comment is outside the scope of the rulemaking. However, OPM notes that agencies have the discretion to describe the VOW certification letter contents in their job opportunity announcements, or describe the contents of these letters on the agency's Web site. Agency headquarters human resources offices can circulate information about the certification letter to agency components, delegated examining units, Veterans Employment Program Offices (VEPOs), etc.

One agency suggested that the last sentence of § 211.102(h) be revised to state that before appointment, "the service member's character of service and qualifying discharge or release must be verified through a DD Form 214 or equivalent DD form," or that OPM provide examples of documents agencies may consider to be the equivalent of a DD Form 214. The current text refers to "equivalent documentation" instead of an "equivalent DD form." OPM is not adopting this suggestion. The reference to "equivalent documentation" was intended to include documentation such as disability letters issued by the Department of Veterans Affairs, and other official documents issued by a branch of the armed forces which may not be designated as a Department of Defense form but may help a veteran establish his or her entitlement to veterans' preference.

Another agency suggested that OPM require the certification letter to be dated within 120 days of the closing date of the job announcement to which the veteran is applying. OPM cannot adopt this suggestion. The Vow to Hire Veterans Act of 2011 (at 5 U.S.C. 2108a(a)(2) and (b)(2)) specifies that a certification is an expectation that the service member will be "discharged or released from active duty in the armed forces under honorable conditions not later than 120 days after the date of the

submission of the certification" (emphasis supplied).

The same agency asked OPM to clarify how agencies should adjudicate veterans' preference for individuals who submit certification letters showing that the expected date of discharge or release from active duty has already passed. The agency recommended that OPM amend the regulation to treat such "expired" certificates as conclusive evidence that the service member has been discharged or released from active duty under honorable conditions. OPM does not accept this recommendation because the certification expresses only an expectation, and cannot be conclusive evidence that the expected event has in fact occurred.

#### *Implementation of the Hubbard Act*

One agency suggested that OPM add a clause to the final rule which "grandfathers" or grants veterans' preference based on a sole survivorship discharge to individuals who met the requirements of the Hubbard Act prior to the effective date of the interim regulation. (The President signed the Act on August 29, 2008. OPM's interim rule became effective on December 29, 2014). In response, section 211.102(c) of the interim regulation already recognized, as qualifying, discharges or releases from active duty after August 29, 2008 by reason of a sole survivorship discharge. Therefore no additional changes are needed in the final rule to address the agency's comment.

Another agency asked where a sole survivorship discharge would be documented on an individual's Department of Defense (DD) form 214. While this comment is outside the scope of the rulemaking, OPM notes that an individual's sole survivorship discharge may be indicated on the DD-214 in several places: The block pertaining to "character of service," the section pertaining to "service data," or the section labeled "remarks." Individuals receiving sole survivor releases or discharges from their active duty service may have separate documentation which they can submit along with their resumes in order to claim preference.

#### *Implementation of Category Rating*

One individual asked OPM to identify the types of positions classified as scientific and professional positions, for purposes of 5 U.S.C. 3319(b), which states, with respect to category rating, that "[f]or other than scientific and professional positions at GS-9 of the General Schedule (equivalent or higher), qualified preference-eligibles who have a compensable service-connected

disability of 10 percent or more shall be listed in the highest quality category." This comment is outside the scope of the rulemaking. In addition, OPM notes that adopting the recommendation would result in an unnecessarily lengthy listing in the Code of Federal Regulations and would be subject to periodic change. OPM already publishes a list of scientific and professional job series and titles in appendix K of the *Delegated Examining Operations Handbook*, which is available on OPM's Web site.

The same individual also recommended that we amend the rule to allow certain disabled veterans to "float" (*i.e.*, be listed at the top of a certificate of eligibles under the numerical ranking process, or placed in the highest quality category under the category rating process), even for scientific and professional positions at GS-9 and higher, if they have certain scientific and professional skills. This recommendation is outside the scope of the rulemaking. In addition, OPM cannot adopt this recommendation because it would conflict with statutory requirements in 5 U.S.C. 3313(1) and 3319(b).

#### *General Comments*

Two individuals and one agency expressed their support for and approval of the interim rule. The agency noted that the rule's provision implementing the VOW to Hire Heroes Act of 2011 is consistent with the existing practice of granting "tentative preference" to applicants who have not yet been separated or discharged from active duty.

One agency recommended that OPM amend section 211.102(d)(5) of the interim rule to clarify the retention standing, during a reduction in force, of a Federal employee who is still in a terminal leave status with the military. OPM addressed this in the supplementary information accompanying the interim rule. We stated that veterans' preference does not apply to persons not yet discharged or released from active duty. As a result, such individuals would not receive veterans' preference during a reduction in force.

Four commenters asked whether (or when) OPM would update its implementing guidance pertaining to the provisions in the interim regulation. These comments are outside the scope of the rulemaking. OPM notes in response that it has updated the VetGuide, our Federal Employment Policy Handbook: Veterans and the Civil Service.

One agency recommended that OPM amend the rule to delegate veterans' preference adjudication for the government solely to the Department of Labor or the Department of Veterans Affairs, not to each delegated examining agency, for purposes of quality and consistency. This comment is outside the scope of the rulemaking. Moreover, OPM believes that it would complicate the hiring process if each agency had to refer its veterans preference adjudication decisions to other agencies, and no case has been presented to OPM for designating any particular agency or agencies to conduct consolidated adjudication services.

Another agency suggested OPM remove the second or consecutive occurrence of the word "in" which appears in section 211.102(d)(2), and that we change the word "rating" to "rating" in section 211.102(d)(4). OPM has adopted these suggestions.

#### 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 this regulation would not have a significant economic impact on a substantial number of small entities because it affects only Federal employees.

#### List of Subjects in 5 CFR Part 211

Government employees, Veterans.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM revises part 211 of title 5, Code of Federal Regulations, to read as follows:

### PART 211—VETERAN PREFERENCE

Sec.

211.101 Purpose.

211.102 Definitions.

211.103 Administration of preference.

**Authority:** 5 U.S.C. 1302, 2108, 2108a.

#### § 211.101 Purpose.

The purpose of this part is to define veterans' preference and the administration of preference in Federal employment. (5 U.S.C. 2108, 2108a)

#### § 211.102 Definitions.

For the purposes of preference in Federal employment, the following definitions apply:

(a) *Veteran* means a person who has been discharged or released from active duty in the armed forces under honorable conditions, or who has a certification as defined in paragraph (h)

of this section, if the active duty service was performed:

(1) In a war;

(2) In a campaign or expedition for which a campaign badge has been authorized;

(3) During the period beginning April 28, 1952, and ending July 1, 1955;

(4) For more than 180 consecutive days, other than for training, any part of which occurred during the period beginning February 1, 1955, and ending October 14, 1976;

(5) During the period beginning August 2, 1990, and ending January 2, 1992; or

(6) For more than 180 consecutive days, other than for training, any part of which occurred during the period beginning September 11, 2001, and ending on August 31, 2010, the last day of Operation Iraqi Freedom.

(b) *Disabled veteran* means a person who has been discharged or released from active duty in the armed forces under honorable conditions performed at any time, or who has a certification as defined in paragraph (h) of this section, and who has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or a pension because of a statute administered by the Department of Veterans Affairs or a military department.

(c) *Sole survivor veteran* means a person who was discharged or released from a period of active duty after August 29, 2008, by reason of a sole survivorship discharge (as that term is defined in 10 U.S.C. 1174(i)), and who meets the definition of a "veteran" in paragraph (a) of this section, with the exception that he or she is not required to meet any of the length of service requirements prescribed by paragraph (a).

(d) *Preference eligible* means a veteran, disabled veteran, sole survivor veteran, spouse, widow, widower, or mother who meets the definition of "preference eligible" in 5 U.S.C. 2108.

(1) Preference eligibles other than sole survivor veterans are entitled to have 5 or 10 points added to their earned score on a civil service examination in accordance with 5 U.S.C. 3309.

(2) Under numerical ranking and selection procedures for competitive service hiring, preference eligibles are entered on registers in the order prescribed by § 332.401 of this chapter.

(3) Under excepted service examining procedures in part 302 of this chapter, preference eligibles are listed ahead of persons with the same ratings who are not preference eligibles, or listed ahead

of non-preference eligibles if numerical scores have not been assigned.

(4) Under alternative ranking and selection procedures, *i.e.*, category rating, preference eligibles are listed ahead of individuals who are not preference eligibles in accordance with 5 U.S.C. 3319.

(5) Preference eligibles, other than those who have not yet been discharged or released from active duty, are accorded a higher retention standing than non-preference eligibles in the event of a reduction in force in accordance with 5 U.S.C. 3502.

(6) Veterans' preference does not apply, however, to inservice placement actions such as promotions.

(e) *Armed forces* means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard.

(f) *Active duty or active military duty:*

(1) For veterans defined in paragraphs (a)(1) through (3) and disabled veterans defined in paragraph (b) of this section, means active duty with military pay and allowances in the armed forces, and includes training, determining physical fitness, and service in the Reserves or National Guard; and

(2) For veterans defined in paragraphs (a)(4) through (6) of this section, means full-time duty with military pay and allowances in the armed forces, and does not include training, determining physical fitness, or service in the Reserves or National Guard.

(g) *Discharged or released from active duty* means with either an honorable or general discharge from active duty in the armed forces. The Department of Defense is responsible for administering and defining military discharges.

(h) *Certification* means any written document from the armed forces that certifies the service member is expected to be discharged or released from active duty service in the armed forces under honorable conditions not later than 120 days after the date the certification is submitted for consideration in the hiring process, at the time and in the manner prescribed by the applicable job opportunity announcement. Prior to appointment, the service member's character of service and qualifying discharge or release must be verified through a DD form 214 or equivalent documentation.

#### § 211.103 Administration of preference.

Agencies are responsible for making all preference determinations except for preference based on a common law marriage. Such a claim must be referred to OPM's General Counsel for decision.

[FR Doc. 2016-27886 Filed 11-18-16; 8:45 am]

BILLING CODE 6325-39-P