

HUMAN RESOURCES MANUAL

1

Instruction 302-1: Employment in the Excepted Service

Issuance Date: 01/30/2009

HUMAN RESOURCES MANUAL

Instruction 302-1: Employment in the Excepted Service

Issuance Date: 01/30/2009

Material Transmitted:

HHS Instruction 302-1, Filling Excepted Positions dated January 30, 2009

Material Superseded:

HHS Instruction 302-1, Filling Excepted Positions, dated April 2, 1996.

Background:

This Instruction has been revised to reflect changes in the Office of Personnel Management (OPM) requirements in the Excepted Service and recent changes in the organization of HHS.

This issuance is effective immediately. Implementation of this issuance must be carried out in accordance with applicable laws, regulations, bargaining agreements, and Departmental policy.

Antonia T. Harris
Deputy Assistant Secretary
for Human Resources

INSTRUCTION 302-1

SUBJECT: EMPLOYMENT IN THE EXCEPTED SERVICE

302-1-00	Purpose
302-1-10	References
302-1-20	Coverage and Exclusions
302-1-30	Definitions
302-1-40	Responsibilities
302-1-50	Order of Referral for Consideration
302-1-60	Priority Consideration Eligibles
302-1-70	Reappointment, Promotion, and Appeals
302-1-80	Documentation and Accountability

302-1-00 PURPOSE

This Instruction sets forth provisions relating to the examination, rating, and selection for employment in the excepted service of two categories of applicants: 1) veteran preference eligibles, and 2) priority consideration eligibles due to work-related compensable injuries. This policy also clarifies the rating procedures for priority consideration eligibles who are also entitled to veteran preference

302-1-10 REFERENCES

- A. 5 CFR 213 (Excepted Service)
- B. 5 CFR 302 (Employment in the Excepted Service)
- C. 5 USC § 2103 (law – the excepted service)
- D. 5 USC § 2108 (law – veteran; disabled veteran; preference eligible)
- E. 5 USC § 3320 (law – excepted service)
- F. 5 CFR 752 (law – Adverse Actions)
- G. 5 USC § 8101 *et seq.* (law – Compensation for Work Injuries)

302-1-20 COVERAGE AND EXCLUSIONS**A. Coverage**

With respect to priority consideration of restoration rights due to compensable injuries and appeals, all positions covered by 5 USC § 8101 that are in the excepted service. With respect to veteran preference, each position in the Executive Branch under Title 5, United States Code that is in the excepted service and is not addressed under Exclusions.

B. Exclusions

Instruction 302-1: Employment in the Excepted Service

Issuance Date: 01/30/2009

1. Positions or appointments that are required by the Congress to be confirmed by, or made with the advice and consent of the Senate.
2. Discretionary Exclusions. OPDIVs have the option to apply veteran preference procedures to the positions listed below. They are advised to follow the principle of veteran preference as far as administratively feasible, i.e., document reasons for nonselection of a qualified and available preference eligible applicant, furnish him/her with such reasons upon his/her request, and advise regarding appeal rights to the Merit Systems Protection Board.
 - a. Positions filled by persons appointed without pay or at pay of \$1.00 a year;
 - b. Positions outside the continental United States and outside the State of Hawaii and the Commonwealth of Puerto Rico when filled by persons resident in the locality, and positions in the State of Hawaii and the Commonwealth of Puerto Rico when paid in accordance with prevailing wage rates;
 - c. Positions which the exigencies of the national defense program demands be filled immediately before lists of qualified applicants can be established or used, but appointments to these positions shall be temporary appointments not to exceed 1 year which may be renewed for 1 additional year at the discretion of the agency;
 - d. Positions filled by appointees serving on an irregular or occasional basis whose hours or days of work are not based on a prearranged schedule and who are paid only for the time when actually employed or for services actually performed;
 - e. Positions paid on a fee basis;
 - f. Positions included in Schedule A and similar types of positions when OPM agrees with the Department that the positions should be included hereunder;
 - g. Positions included in Schedule C and positions excepted by statute which are of a confidential, policy-making, or policy-advocating nature;
 - h. Student Trainee positions when filled under Schedule B;
 - i. Attorney positions;
 - j. Positions filled by reemployment of an individual in the same OPDIV and commuting area, at the same or lower grade, and under the same appointing authority as the position last held, *provided that* there are no candidates eligible for the position on the reemployment priority list; and
 - k. Positions for which a critical hiring need exists.

C. Bargaining Unit Employees

The provisions of this Instruction pertaining to conditions of employment of bargaining unit employees- e.g., the filling of an excepted position within the scope of the bargaining unit – are fully negotiable in accordance with 5 USC Chapter 71. Therefore, when the provisions of this Instruction differ from the requirements contained in applicable collective bargaining agreement(s), the agreement takes precedence for bargaining unit employees.

302-1-30 DEFINITIONS

- A. Excepted position. A position in the excepted service.
- B. Excepted Service. Consists of those civil service positions which are not in the competitive service or the Senior Executive Service; includes all positions in the Executive Branch of the Federal Government which are specifically excepted from the competitive service by statute, by the President or by the Office of Personnel Management.
- C. Five-point preference (TP). Given to those honorably separated veterans (this means an honorable or general discharge) who served on active duty (not active duty for training) in the Armed Forces, as provided in 5 USC § 2108.
- D. Priority consideration. Preferential treatment granted employees furloughed or separated without misconduct, from a position without time limit, because of a compensable injury and whose recovery takes more than one year from the date compensation began. To be eligible, the person must apply for reappointment to his or her former agency within 30 days of the date of cessation of compensation.
- E. Priority Reemployment List. A list to give consideration to former employees who are non-veteran preference eligibles and have been furloughed or involuntarily separated from a continuing appointment without delinquency or misconduct.
- F. Reemployment List. A list to give consideration to current and former employees who are to be considered for future employment and who are not eligible for inclusion on the priority reemployment list.
- G. Reemployment Priority List. The mechanism used to give first priority reemployment consideration to former employees separated by reduction in force or fully recovered from a compensable injury after more than 1 year.
- H. Ten-point preference (CP) or (CPS). Given to those honorably separated veterans who qualify as disabled veterans because they have served on active duty in the Armed Forces (including training service in the Reserves or National Guard) at any time and have a present service-connected disability of more than 10%, but less than 30% or are receiving compensation, disability retirement benefits, or pension from the military or the Department of Veterans Affairs; or are Purple Heart recipients. A CPS eligible has a present service-connected disability of 30% or more.
- I. Ten-point preference (XP). Given to the spouse of a veteran unable to work because of a service-connected disability if he/she has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia, the unmarried widow or widower of certain deceased veterans, as defined in 5 USC § 2108(1)(A), or the

mother of a veteran who died in service or who is permanently and totally disabled is eligible for this preference only under certain conditions having to do with her marital status and the disability status of her husband, as set forth in 5 USC § 2108(3)(F) and (G).

302-1-40 RESPONSIBILITIES

A. OPDIVs are responsible for:

1. Ensuring the compliance of the requirements of this policy within their respective organizations;
2. Documenting reasons for non-selection of a veteran preference eligible or priority consideration eligible;
3. At the request of a qualified and available preference or priority consideration eligible, providing written reasons for non-selection and appeal rights to the Merit Systems Protection Board.
4. Informing a non-temporary competitive service candidate, in writing, of the loss of competitive service status and rights if appointed to an excepted service position;

B. Operating Human Resources Organizations (OHROs) are responsible for:

1. Advising OPDIV managers and supervisors on procedures for complying with veteran preference and priority consideration for employees with compensable injuries when filling excepted service vacancies;
2. Including a reasonable accommodation statement in announcements for vacancies in the excepted service;
3. Establishing definite rules regarding the acceptance, rating, and ranking of applications;
4. Documenting reasons to use ranked or unranked evaluation procedures and making such information available to an applicant upon his or her request;
5. Ensuring reasons are documented for non-selection of a veteran preference or priority consideration eligible;
6. Obtaining a statement from the competitive service candidate in writing, acknowledging s(he) is voluntarily leaving the competitive service to accept the position in the excepted service.

302-1-50 ORDER OF REFERRAL FOR CONSIDERATION

A. Ranking

OHROs shall enter the names of all applicants rated qualified for the position in order of numerical score, if used, and preference eligibility, in the following descending order:

1. Preference eligibles designated as (CP or CPS) (having a compensable, service-connected disability of 10 percent or more), for 10 point veteran preference, unless the vacancy is for a professional position at the GS-9 level or above, or equivalent;
2. All other candidates eligible for 10-point (XP) veteran preference;
3. All candidates eligible for 5-point (TP) veteran preference; and
4. Qualified candidates not eligible for veteran preference.
5. Military retirees at or above the rank of major or equivalent are not entitled to preference unless they qualify as disabled veterans.

B. Evaluation of Veteran Qualifications

1. The evaluation of qualifications may be a determination of eligibility or ineligibility based upon the requirements in the vacancy announcement, or may include qualitative rating of candidates. OHROs will document the rationale to use ranked or unranked procedures and make such information available to an applicant at his or her request.
2. OHROs must adopt procedures to ensure the consideration of preference eligibles in the order in which they would have been considered if all applicants had been assigned numerical ratings. Applicants must be furnished notices of the rating assigned upon their request.
3. The qualification requirements must include: 1) a waiver of requirements as to age, height, and weight for each preference eligible when the requirements are not essential to the performance of the duties of the position; and 2) a provision for waiver of physical requirements for each preference eligible when the OHRO, after giving consideration to the recommendation of an accredited physician, finds that the applicant is physically able to discharge the duties of the position.

302-1-60 PRIORITY CONSIDERATION ELIGIBLES

A. Priority Reemployment Lists

1. OHROs must establish a reemployment priority list that contains the names of any of the following applicants who are rated qualified and eligible to receive priority consideration for a vacant position in the excepted service:
 - a. The name of each former employee of the department who has been furloughed or separated from a continuing appointment without delinquency or misconduct, is a veteran preference eligible, and applies for reemployment. Candidates in this category are considered for positions in the commuting area where they were separated unless the OPDIV elects to provide broader consideration.
 - b. The name of each former employee of the Department who is found by the Merit Systems Protection Board to have been unjustifiably dismissed from an OPDIV, and is a veteran preference eligible, but who is not entitled to immediate restoration under the

Board's decision. Candidates in this category are considered in the commuting area from which separated unless the Board's decision specifies a broader or different area or the Department elects to afford broader geographic consideration.

- c. The name of each former employee of the Department who has been furloughed or separated due to compensable injury sustained under the provisions of 5 USC § 8101 *et seq.* who is not entitled to immediate restoration, and who is eligible for priority consideration under 5 C.F.R. Part 302. Candidates in this category are considered in the commuting area where they last served and, if the OPDIV determines that an appropriate vacancy is unlikely to occur in that area during the candidates' period of reemployment priority, in other locations for which they are available.
 - d. At the Department's discretion, the name of each former HHS employee who is not a preference eligible, has been furloughed or involuntarily separated from a continuing appointment without delinquency or misconduct, and applies for reemployment. Candidates in this category are considered in the geographic area specified by the Department.
2. The Department will maintain a Reemployment Priority List for a minimum of two years.

B. Reemployment List and Regular Employment List

1. The Department may establish a reemployment list to give additional consideration to former employees who are non-veteran preference eligibles and have been furloughed or involuntarily separated from a continuing appointment without delinquency or misconduct. OPDIVs may provide reemployment consideration after the Reemployment Priority List is exhausted to such employees who are not eligible for inclusion on the priority reemployment list. After consideration of applicants on the reemployment list, OPDIVs can consider applicants on the regular employment list.
2. OPDIVs must consider all qualified candidates on the HHS reemployment priority list before considering candidates from their reemployment list, if any, or regular employment list. OHRO's will establish Reemployment and/or regular employment lists and ensure OPDIVs consider such applicants who have been assigned eligible and qualified ratings, in Order A, Order B, or Order C, as described below, with the exception of applicants for professional and scientific positions at the GS-9 and above.
 - a. Order A. *First*, the name of each qualified preference eligible who has a compensable, service-connected disability and is entitled to 10-point preference (CP or CPS) in the order of his/her numerical ranking; and *second*, the name of each other qualified applicant in the order of his/her numerical ranking, if applicable. Order A must be used when there is not an established Reemployment List.
 - b. Order B. *First*, the name of each qualified preference eligible who has a compensable, service-connected disability and is entitled to 10-point preference (CP) and whose name appears on the agency's Reemployment list in the order of his/her numerical ranking; *second*, the name of each qualified preference eligible who is entitled to 10-point

- preference (CP) and whose name appears on the agency's regular employment list, in the order of his/her numerical ranking; *third*, the name of each other qualified applicant on the agency's Reemployment list, in the order of his/her numerical ranking; and *fourth*, the name of each other qualified applicant on the agency's regular employment list, in the order of his/her numerical ranking.
- c. Order C. *First*, the name of each qualified preference eligible who is entitled to 10-point preference (CP) and whose name appears on the agency's Reemployment list, in the order of his/her numerical ranking; *second*, the name of each other qualified applicant on the agency's Reemployment list, in the order of his/her numerical ranking; *third*, the name of each qualified preference eligible who is entitled to 10-point preference (CP, and whose name appears on the agency's regular employment list, in the order of his/her numerical ranking; and *fourth*, the name of each other qualified applicant on the agency's regular employment list, in the order of his/her numerical ranking.
3. Consideration of Professional and Scientific positions. OPDIVs will consider applicants who have been assigned eligible numerical score ratings for professional and scientific positions at the GS-9 level and above, or equivalent, in the following order:
 - a. Applicants on the Department's Reemployment list, if any. If numerical scores have been assigned, the applicants will be considered in the order of their augmented scores. If numerical scores have not been assigned, all preference eligibles will be considered together regardless of the type of preference, followed by all other priority reemployment candidates; and/or
 - b. Applicants on the Department's regular employment list. If numerical scores have been assigned, the applicants will be considered in the order of their augmented scores. If numerical scores have not been assigned, all preference eligibles will be considered together regardless of the type of preference, followed by all other candidates.
- C. Selection
1. When making an appointment from a priority reemployment, reemployment, or regular list on which candidates have not received numerical scores, the OPDIV must make a selection from the highest available preference category, as long as at least three candidates remain in that group. When fewer than three candidates remain in the highest category, consideration may be expanded to include the next category.
 2. When making an appointment from a list on which candidates have received numerical scores, the OPDIV must make its selection for each vacancy from not more than the highest three names available for appointment in the order provided in section 302-1-60(B)(2)(a)-(c), unless category rating was used.
 3. Under either of the above selection methods, an OPDIV is not required to accord an applicant on its priority reemployment or reemployment list the preference consideration required if the list on which the applicant's name appears does not contain the names of at least three preference eligibles.

D. Nonselection

When an OPDIV passes over the name of a preference eligible who is entitled to priority consideration and selects a nonpreference eligible, it must record its reasons for so doing and shall furnish a copy of those reasons to the preference eligible or his/her representative on request, along with notification of his or her right to appeal to the Merit Systems Protection Board. An OPDIV may discontinue consideration of the name of a preference eligible for a position if, on three occasions, the OPDIV considered him/her for the position and passed over his/her name and recorded its reasons for so doing.

302-1-70 REAPPOINTMENT, PROMOTIONS, AND APPEALS

- A. OPDIVs may reappoint a current or former permanent employee of the executive branch of the Federal Government who is a preference eligible to a vacant position without regard to the names of qualified applicants on the HHS priority reemployment, reemployment, or regular employment list.
- B. HHS will waive requirements such as age, height, and weight in determining qualifications for a promotion for a preference eligible unless the qualification(s) is/are essential to the performance of the duties of the position; and
- C. HHS will waive physical requirements if an accredited physician recommends that the preference eligible is physically able to perform efficiently the duties of the position of the promotion.
- D. Individuals entitled to priority consideration may appeal a violation of his/her restoration rights to the Merit System Protection Board.

302-1-80 DOCUMENTATION AND ACCOUNTABILITY

- A. OPDIVs will document and maintain records of nonselection of veteran preference eligibles and priority consideration eligibles for three years following the appointment date of the selection. OHROs will also maintain copies of the nonselections.
- B. OHROs will document and maintain records of the reasons for the decision to use ranked or unranked selection referral procedures and, for ranked actions, the quality ranking factors used for three years following the appointment date of the selection.
- C. Office of Human Resources/Assistant Secretary for Administration and Management will conduct periodic accountability reviews to analyze compliance with the administration of veteran preference and priority consideration requirements governing excepted appointments and conduct case reviews to ensure that all appointments adhere to regulations.