



6325-39

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 211

RIN: 3206-AM79

Veterans' Preference

AGENCY: U.S. Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing an interim rule to implement statutory changes pertaining to veterans' preference. We are making this change 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 is updating its regulations to reference existing requirements for the order of consideration for traditional rating and ranking of candidates, as well as the alternative ranking and selection procedure called "category rating;" to more clearly state the existing requirements for order of consideration in excepted service hiring; and to add a reference to the end date of Operation Iraqi Freedom, which affected veteran status and preference eligibility. This action will align OPM's regulations with the existing statute.

DATES: Interim rule effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]; comments must be received on or before [INSERT 60 DAYS FROM PUBLICATION DATE].

ADDRESSES: You may submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this proposed rulemaking.

You may also send, deliver, or fax comments to Kimberly A. Holden, Deputy Associate Director for Recruitment and Hiring, Employee Services, U. S. Office of Personnel Management, Room 6351D, 1900 E Street, NW., Washington, DC 20415-9700; e-mail at employ@opm.gov or fax at (202) 606-2329.

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.

SUPPLEMENTARY INFORMATION:

Implementation of the Hubbard Act

On August 29, 2008, the Hubbard Act (the “Act”) was enacted as Public Law 110-317. The Act provides an amendment to the eligibility categories for veterans' preference purposes by adding subparagraph (H) to title 5, United States Code (U.S.C.) section 2108(3). The amendment provides a new preference eligible category that includes veterans discharged or released from a period of active duty from the armed forces by reason of sole survivorship. The Act applies with respect to any sole survivorship discharge or release from the armed forces granted after August 29, 2008.

Section 10(c) of the Act defines a “sole survivorship discharge” as the separation of a member from the armed forces, at the request of the member, pursuant to Department of Defense policy permitting the early separation of a member who is the only surviving child in a family in which the father or mother or one or more siblings (1) served in the armed forces; (2) was killed, died as a result of wounds, accident, or disease, is in a captured or missing in action status, or is

permanently 100 percent disabled or hospitalized on a continuing basis (and is not employed gainfully because of the disability or hospitalization); and (3) death, status, or disability did not result from the intentional misconduct or willful neglect of the parent or sibling and was not incurred during a period of unauthorized absence.

The Act added 5 U.S.C. 2108(3)(H) to state that a subclass of “veteran” as defined in 5 U.S.C. 2108(1) – those with a sole survivorship discharge or release – must be treated as preference eligibles. Yet preexisting provisions, 5 U.S.C. 2108(3)(A) and (B), already stated that a “veteran,” as defined in 5 U.S.C. 2108(1), must be treated as a preference eligible. A plain-language reading of the statute therefore renders section 2108(3)(H) superfluous. This is contrary to the statute’s clear purpose, however, which is to extend additional benefits to service members whose active duty service has been cut short by a sole survivorship discharge or release, as documented in the Act’s legislative history. See 154 Cong. Rec. H7276 (Feb. 29, 2008); 154 Cong. Rec. S8004 (Aug. 1, 2008). It is also contrary to the principle that laws should not be interpreted to render them superfluous, and that veterans’ statutes should be construed to the benefit of veterans. Pursuant to its interpretive authority in 5 U.S.C. 1302, OPM has therefore determined that 5 U.S.C. 2108(3)(H) affords preference to a service member who would meet the definition of a “veteran” in 5 U.S.C. 2108(1) if his or her qualifying periods of military service had not been interrupted by the sole survivorship discharge or release. OPM is adding a new paragraph (c) to section 211.102 of title 5, Code of Federal Regulations (CFR), to define a “sole survivor veteran” in accordance with this interpretation.

For example, 5 U.S.C. 2108(1)(D) requires 180 consecutive days of qualifying service, followed by a discharge or release under honorable conditions, for the individual to be a “preference eligible” under this part. Under paragraph (c) of this interim rule, an individual whose active duty is cut short at fewer than 180 days by a sole survivorship discharge or release,

and who meets the other requirements for veterans' preference eligibility, would still be entitled to preference eligibility.

As described in greater detail below, OPM is revising 5 CFR 211.102 to add a new paragraph (d)(4) to explain how veterans' preference applies during examinations that use alternative ranking and selection procedures (category rating). OPM is also revising this section to renumber, as paragraph (d)(1), a preexisting explanation of how veterans' preference applies during examinations that use traditional ranking and selection procedures, and to add, as paragraph (d)(2), a cross-reference to the existing provision, 5 CFR 332.401, that describes the order on registers in greater detail. OPM is adding paragraph (d)(3) to explain how veterans' preference applies when filling positions in the excepted service under 5 CFR part 302. This section also renumbers, as paragraph (d)(5), a preexisting explanation of how veterans' preference applies in reductions in force. Under these paragraphs, as prescribed by 5 U.S.C. 3309 and 3319, a person who acquires veterans' preference due to a sole survivorship discharge or release does not receive veterans' preference points, but is entitled to be listed ahead of non-preference eligibles under either numerical or category rating; and is also entitled to higher retention standing as a "preference eligible" in the event of a reduction in force as described in 5 CFR part 351 subpart E.

Although outside the scope of this rulemaking, OPM notes that a person who acquires veterans' preference due to a sole survivorship discharge or release also receives other important benefits, including, for example, the right to credit experience in the armed forces to meet the qualification requirements for Federal jobs under 5 U.S.C. 3311, and the right to "pass over" protections during the hiring process under 5 U.S.C. 3318 and 5 CFR 332.406.

OPM notes that to qualify for veterans' preference, a discharge or release from active duty must be under honorable conditions. OPM expresses no opinion on the circumstances under which a sole survivorship discharge or release could ever be under other than honorable

conditions and therefore disqualifying for veterans' preference eligibility. The Department of Defense is responsible for administering and characterizing discharges from the armed forces, as we note in section 211.102(g) of our interim rule. OPM plans to provide updated guidance in its Delegated Examining Operations Handbook, VetGuide, and all related materials.

Implementation of the VOW (Veterans Opportunity to Work) to Hire Heroes Act

On November 21, 2011, President Obama signed the VOW to Hire Heroes Act of 2011 (title II of Public Law 112-56). This Act amends chapter 21 of 5 U.S.C. by adding section 2108a, "Treatment of certain individuals as veterans, disabled veterans, and preference eligibles." In this section, Federal agencies are required to treat active duty service members as veterans, disabled veterans, and preference eligibles consistent with section 2108a when they submit, at the time they apply for a Federal job, a certification that they are expected to be honorably discharged or released from active duty within 120 days after the date of submission. Section 2108a applies, by its terms, to appointments in the competitive service, but the VOW to Hire Heroes Act did not amend 5 U.S.C. 3320, under which the veterans' preference requirements of 5 U.S.C. 3308 through 3318 also apply to the excepted service when possible. See 5 CFR part 302.

A member of the armed forces may start his or her civilian job search prior to discharge or release from active duty and thus will not have a Department of Defense (DD) Form 214, *Certificate of Release or Discharge from Active Duty*, when applying for Federal jobs. Section 2108a ensures that an individual does not lose the opportunity to be considered for Federal jobs (and awarded their veterans' preference entitlements) despite not having a DD Form 214 to submit along with a résumé.

Federal agencies must accept an application from, and consider for appointment and apply veterans' preference to, any service member who submits a "certification" in lieu of a DD Form 214, assuming he or she is otherwise eligible. Under 5 U.S.C. 2108a(a)(2) and (b)(2), the

“certification” is a “certification that the individual is expected to be separated from active duty service in the armed forces under honorable conditions not later than 120 days after the date of the submission of the certification.” Also, under 5 U.S.C. 2108a(a)(1)(B) and (b)(1)(B), the submission must be made “to the Federal officer making the appointment.” To comply with 5 U.S.C. 2108a, OPM is amending the existing definitions of a “veteran” and a “disabled veteran” in 5 CFR 211.102(a) and 211.102(b) to include a service member with a certification, as described in a new paragraph (h) of this section, that he or she is expected to be discharged or released from active duty in the armed forces under honorable conditions within 120 days.

However, OPM does not construe the statute to require the submission to be made in the first instance to the officer who makes the appointment. Veterans’ preference for Federal employment is not adjudicated and awarded by the appointing officer. Rather, by statute, veterans’ preference is awarded earlier in the hiring process, at the time of examination. See 5 U.S.C. 3313(2) and 3319(b). The specific requirements for documenting veterans’ preference, including the deadlines for submitting documentation, are prescribed by each agency in its job opportunity announcements under 5 U.S.C. 3330(c)(2) and 5 CFR 330.104(a)(13). Further, agencies operate under established application receipt procedures, pursuant to delegated examining agreements under 5 CFR 250.102. To require one class of applicants – those still in active duty service – to wait until the end of the appointment process to submit their veterans’ preference documentation, after veterans’ preference has already been awarded to the other applicants, would have the effect of either depriving this class of applicants of their preference, or of requiring disruptive retroactive corrections in the selection process. OPM therefore, in paragraph (h) of the regulations, construes the statute to require the submission of the certification at that stage of the examination when, by statute and regulation, it can actually be considered: during the hiring process, at the time of application and in the manner prescribed by the job opportunity announcement.

This rule supersedes OPM’s previous guidance issued on June 15, 2012 in a Chief Human Capital Officer memorandum – VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011), which defines “certification as 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 signed.” To clarify, under the interim rule, as well as the statute, the certification is of an expected discharge or release within 120 days after the certificate is submitted, not within 120 days after the certificate is signed. Further, under paragraph (h) of the rule, agencies are required to verify a qualifying separation from military service prior to appointment, through the DD 214 or other appropriate documentation.

OPM plans to clarify in implementing guidance that the certification letter should be on letterhead of the appropriate military branch of the service and contain 1) the military service dates including the expected discharge or release date; and 2) the character of service. The service member’s military service dates are necessary in order to determine whether he or she meets the definition of “veteran” under 5 U.S.C. 2108(1).

In the definition of a “disabled veteran,” OPM is retaining the reference to service members who have been “discharged or released,” even though the term used in 5 U.S.C. 2108a(b) is “separated.” This conforms to OPM’s longstanding interpretation that 5 U.S.C. 2108(2) extends disabled veterans’ preference eligibility to qualifying individuals who have been “discharged or released” from active duty under honorable conditions, even though that section, like section 2108a(b), refers only to those who have “separated.” See 72 FR 12031, 12032 (March 15, 2007); 71 FR 33375, 33376 (June 9, 2006). OPM does not propose to amend the requirements for proof of disability in 5 CFR 211.102(b). The VOW to Hire Heroes Act did not change the requirements related to proof of disability prescribed by 5 U.S.C. 2108(2).

OPM is amending section 211.102(d) to state that for reductions in force (RIFs), veterans' preference does not apply to persons not yet discharged or released from active duty. This is because the VOW Act, in 5 U.S.C. 2108a(a)(1) and 2108a(b)(1), makes such persons eligible for veterans' preference only for purposes of "making an appointment in the competitive service," not for retention standing during RIFs.

End of Operation Iraqi Freedom

Veterans' preference eligibility has also changed with President Obama's announcement of the official end of combat missions in Iraq (Operation Iraqi Freedom) as of August 31, 2010 (*see* Daily Comp. Pres. Docs., DCPD No. 201000716, p. 1). Under 5 U.S.C. 2108(1)(D), any individual serving on active duty for more than 180 days, any part of which occurred between September 11, 2001, and the end date of Operation Iraqi Freedom is entitled to veterans' preference, regardless of whether he or she was deployed to Iraq. Because the specific end date of August 31, 2010, has been set for Operation Iraqi Freedom, individuals whose initial active duty military service begins on or after September 1, 2010, will not be entitled to veterans' preference under section 2108(1)(D). OPM is therefore updating the definition of "*Veteran*" in 5 CFR 211.102(a)(6) by replacing the reference to the last day of Operation Iraqi Freedom with a specific reference to August 31, 2010. Veterans' preference is still available to service members whose initial active duty military service begins on or after September 1, 2010, under a separate provision of statute, 5 U.S.C. 2108(1)(A), if service is "during a war, [or] in a campaign or expedition for which a campaign badge has been authorized." This is reflected in paragraphs (a)(1) and (a)(2) of section 211.102 of the interim rule.

Category Rating

OPM is amending 5 CFR 211.102 to reference, in new paragraph (d)(4), the existing requirements for veterans' preference under the alternative ranking and selection procedure called "category rating." Under category rating, within each quality category established by the

agency, preference eligibles are listed ahead of individuals who are not preference eligibles. For other than scientific and professional positions at GS-9 (or equivalent) grade level or higher, qualified preference eligibles who have a compensable service-connected disability of 10 percent or more are listed in the highest quality category. The regulations governing category rating are in 5 CFR part 337, subpart C.

Excepted Service Examinations

Under 5 U.S.C. 3313, “[t]he names of preference eligibles shall be entered ahead of others having the same rating.” By operation of 5 U.S.C. 3320, OPM’s examining procedures in 5 CFR 302.304 for appointment in the excepted service must follow these requirements. Yet section 302.304 does not explicitly say that preference eligibles are to be listed ahead of persons with the same ratings who are not preference eligibles. OPM is adding a new paragraph (d)(3) in section 211.102 to state this requirement. Moreover, OPM notes its June 15, 2012 memo to agencies, titled “VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011,” stated that 5 U.S.C. 2108a does not apply to excepted appointments. OPM has reconsidered this position and has concluded that by operation of 5 U.S.C. 3320, section 2108a does apply to appointments in the excepted service. OPM has also clarified that preference eligibles are listed ahead of non-preference eligibles if numerical scores are not assigned.

Technical Amendments

OPM is amending the authority citation to add a reference to 5 U.S.C. 2108a. OPM is also amending 5 CFR 211.102(d) to state that a “preference eligible” is “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.” This amendment expands the regulatory definition to better conform to the statutory definition. OPM is removing the definition of “uniformed services.” The definition is unnecessary because the term is not used anywhere else in the regulation. Finally OPM is internally renumbering section 211.102.

Waiver of Notice of Proposed Rulemaking

Pursuant to 5 U.S.C. 553(b)(B), I find that good cause exists for waiving the general notice of proposed rulemaking. Waiver of advance notice is necessary to ensure that the regulations become effective immediately, and that agencies understand their obligations under 5 U.S.C. 2108(3) and 2108a and do not unwittingly deny veterans' preference based upon the outdated existing regulations. If OPM's regulations were permitted to remain as written while OPM solicited comments upon its proposed revisions, service members who expect to be honorably discharged within 120 days, or whose prior release or discharge from active duty was on the basis of sole survivorship, may be inadvertently denied veterans' preference in Federal hiring based upon the current language in regulations. Accordingly, the notice otherwise required is impracticable because it would impede due and timely execution of agencies' functions. The revised language in this interim rule will ensure service members receive their statutory entitlement to veterans' preference.

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.

Katherine Archuleta,
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 in the order prescribed by section 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 raking 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. 2014-30295 Filed 12/24/2014 at 8:45 am; Publication Date: 12/29/2014]