



U.S. Department of Justice

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Washington, D.C. 20530

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM: Lee J. Lofthus 
Assistant Attorney General
for Administration

SUBJECT: Appointments and Awards during the 2008 Presidential
Election Period

On March 17, 2008, the Director, Office of Personnel Management (OPM) issued the attached memorandum which instituted a requirement for a pre-appointment review of all competitive service actions that involve the appointment or conversion of a Schedule C or Noncareer Senior Executive Service employee. Additionally, the memorandum serves as a reminder of the prohibition on awards to certain appointees. Under 5 U.S. C 4508, an incentive award may not be given during the period beginning June 1, 2008, through January 20, 2009, to a senior politically appointed officer.

During a Presidential election year, it is most important that agencies pay careful attention to ensure they are in compliance with merit principles, including the requirement for fair and open competition. As a reminder, the Merit System Principles, Prohibited Personnel Practices, and applicable Civil Service Rules are included in OPM's memorandum.

The OPM memorandum prescribes the guidelines on processing certain appointments and awards during the 2008 election period. Procedures described will be used for the pre-appointment review of certain competitive service actions **before** they are effective. Prior to affecting any of the covered actions, you will be required to provide your case documentation to Rod Markham, Deputy Director, Personnel Staff, Justice Management Division for pre-appointment review and coordination with OPM. Each case record will be reviewed to insure it is complete prior to being forwarded to OPM. Please provide two copies of your documentation.

Thank you for your attention to this matter. If you have questions, please contact Rod Markham, at 202-514-4350, who will be glad to assist you.

Attachment



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

FROM: LINDA M. SPRINGER
DIRECTOR

A handwritten signature in black ink, appearing to be "LMS", written over the printed name of Linda M. Springer.

Subject: Appointments and Awards During the 2008 Presidential Election Period

During this Presidential election year, I would like to remind agency heads of the need to ensure all personnel actions remain free of political influence or other improprieties and meet all relevant civil service laws, rules, and regulations. All official personnel records should clearly document continued adherence to Federal merit principles and remain free of any prohibited personnel practices. In particular, any appointments of Schedule C and Noncareer Senior Executive Service (SES) employees to competitive service positions or to SES positions by career appointment require careful attention to ensure they comply with merit principles regarding fair and open competition.

As the U.S. Office of Personnel Management (OPM) has done in the past, I am instituting a requirement for the pre-appointment review of all competitive service appointment actions that involve the appointment or conversion of a Schedule C or Noncareer SES employee.

During this period, OPM will continue the current practice of conducting merit staffing reviews of proposed SES selections of Schedule C and Noncareer SES appointees before those selections are presented to a Qualifications Review Board for certification of executive qualifications. OPM will also suspend the processing of Qualifications Review Board cases during Agency Head transitions.

I have attached additional guidance concerning competitive service and SES appointments, incentive awards, and other employment matters, as well as instructions for submitting requests for pre-appointment review. If you have questions or need further information, please contact me at (202) 606-1000. Staff inquiries should be referred to your agency's OPM Human Capital Officer.

Attachments

1. Guidelines on Processing Certain Appointments and Awards during the 2008 Election Period
2. Pre-Appointment Review Checklist
3. Merit System Principles, Prohibited Personnel Practices, Civil Service Rules
4. Dos and Don'ts for Converting Schedule C and Noncareer SES Employees to the Competitive Service

cc: Chief Human Capital Officers
Human Resources Directors

GUIDELINES ON PROCESSING CERTAIN APPOINTMENTS AND AWARDS DURING THE 2008 ELECTION PERIOD

The U.S. Office of Personnel Management (OPM) and Federal agencies share basic responsibility for ensuring all personnel actions adhere to the Federal merit principles at 5 U.S.C. 2301 and remain free of any prohibited personnel practices set forth at 5 U.S.C. 2302. During an election period, these requirements demand particularly close attention. OPM has provided guidance concerning the special considerations that apply during an election period to ensure all agency personnel actions adhere faithfully to these principles.

This guidance identifies personnel actions that require particular attention and establishes procedures for the pre-appointment review of certain competitive service appointment actions before they go into effect.

I. Appointing Excepted Service Employees to the Competitive Service

OPM will conduct a pre-appointment review of the following competitive service appointment actions to ensure they comply with all applicable civil service laws, rules, and regulations. In no case may an agency make an appointment covered by this section prior to receiving specific authorization from OPM:

- A. Proposed competitive service appointment actions that involve a current or former (within the last five years) incumbent of an executive branch position excepted from the competitive service under Schedule C.
- B. Proposed competitive service appointment actions that involve a current or former (within the last five years) Noncareer Senior Executive Service (SES) appointee.

Note: Schedule C employees may not be detailed to competitive service positions without prior OPM approval [see 5 CFR 300.301(c)] and no competitive service vacancy should be created for the sole purpose of selecting a Schedule C or Noncareer SES employee.

Agencies should use the attached Pre-Appointment Review Record of Proposed Competitive Service Appointment to request OPM review of a competitive service appointment action involving a Schedule C or Noncareer SES employee.

II. Appointing Employees to the Senior Executive Service

OPM will continue to conduct merit staffing reviews of proposed SES selections that involve a current or former Schedule C or Noncareer SES appointee before such cases are formally presented to a Qualifications Review Board. Agencies should carefully review all actions which would result in the Career SES appointment of a Schedule C or Noncareer SES before such cases are forwarded to OPM.

Note: All SES vacancies to be filled by initial Career appointment must be publicly announced (5 CFR 317.501). Only a Career SES or career-type non-SES appointee may be detailed to a Career-Reserved position (5 CFR 317.903(c)).

In addition, OPM will suspend the processing of Qualifications Review Board cases when an Agency Head leaves office or announces his or her intention to leave office, or if the President has nominated a new Agency Head. OPM imposes a moratorium on Qualifications Review Board cases as a courtesy to a new Agency Head when it learns of an Agency Head's planned departure. However, OPM will consider requests for exceptions to such a moratorium on a case-by-case basis. When a presidential transition occurs, OPM will determine the disposition of QRB cases based upon the policy of the new Administration.

III. Prohibition on Awards to Certain Appointees

Under 5 U.S.C 4508, an incentive award may not be given during the period beginning June 1, 2008, through January 20, 2009, to a senior politically appointed officer, defined as:

1. An individual who serves in an SES position and is not a career appointee as defined in 5 U.S.C. 3132(a)(4); or,
2. An individual who serves in a position of a confidential or policy determining character as a Schedule C employee.

Because Limited Term/Limited Emergency appointees are not "career appointees," they meet this definition of senior politically appointed officer and cannot receive incentive awards during the 2008 election period.

For additional guidance regarding appointments and awards during the 2008 Presidential election period, please contact the Deputy Associate Director for your agency in OPM's Human Capital Leadership and Merit System Accountability Division by calling 202-606-1575. Staff inquiries should be referred to the appropriate OPM Human Capital Officer.

PRE-APPOINTMENT REVIEW CHECKLIST

Agency: _____
Selectee: _____
Current (or former) Position/Appt. Authority: _____ _____
Proposed Position/Appt. Authority: _____

Please submit the documentation cited below along with a dated cover letter signed by the agency HR Director that provides: (1) certification from the appointing authority that the proposed action meets all merit and fitness requirements in 5 U.S.C. 2301 and 2302 and Civil Service Rules 4.2 and 7.1 (see attachment 3); and (2) an agency point of contact for follow-up questions.

- The position description for the candidate's current or former appointment and the position description for the proposed appointment. Please include fully executed OF 8s or equivalents that document why and how the respective positions were established. Explain any relationship between the two positions.
- A statement explaining the disposition of the proposed selectee's current Schedule C or Noncareer SES position, if vacated.
- The complete case file for the proposed merit selection, including:
 - The vacancy announcement published in USAJOBS on OPM's Internet Web site (preferably the USAJOBS printed version; if not, include the USAJOBS control number)
 - Recruiting sources and advertising methods used in addition to USAJOBS
 - The job analysis, justification of any selective factor, and rating schedule/crediting plan
 - Applications from all who applied and information showing how each was rated
 - Information showing how regulatory requirements of the Interagency Career Transition Assistance Program (ICTAP) were met
 - The referral list or lists issued to the selecting official and the completed referral list documenting the tentative selection
- A description of candidate sources considered other than from a competitive vacancy announcement and the resulting referral lists forwarded to the selecting official, if any.
- The name of the selecting official and his or her title, telephone number, and type of appointment (e.g., career SES, Schedule C, Presidential Appointee).

Please contact your agency's OPM Human Capital Officer for additional guidance on submitting requests for Pre-appointment Review

MERIT SYSTEM PRINCIPLES, PROHIBITED PERSONNEL PRACTICES, CIVIL SERVICE RULES

§ 2301. Merit system principles

(a) This section shall apply to--

- (1) an Executive agency; and
- (2) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

- (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge and skills, after fair and open competition which assures that all receive equal opportunity.
- (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
- (3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.
- (4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
- (5) The Federal work force should be used efficiently and effectively.
- (6) Employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
- (7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.
- (8) Employees should be--
 - (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter--

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section--

(A) "personnel action" means--

- (i) an appointment;
- (ii) a promotion;
- (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
- (iv) a detail, transfer, or reassignment;
- (v) a reinstatement;
- (vi) a restoration;
- (vii) a reemployment;
- (viii) a performance evaluation under chapter 43 of this title;
- (ix) a decision concerning pay, benefits, or awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
- (x) a decision to order psychiatric testing or examination; and

(xi) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action --

- (i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
- (ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; and

(C) "agency" means an Executive agency and the Government Printing Office, but does not include--

- (i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8);
- (ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or
- (iii) the Government Accountability Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(1) discriminate for or against any employee or applicant for employment--

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of --

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

- (i) a violation of any law, rule, or regulation, or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of--

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under--

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law;

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f), 7281(e), and 7802(e) of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

Civil Service Rule 4.2

Prohibition against racial, political or religious discrimination. No person employed in the executive branch of the Federal Government who has authority to take or recommend any personnel action with respect to any person who is an employee in the competitive service or any eligible or applicant for a position in the competitive service shall make any inquiry concerning the race, political affiliation, or religious beliefs of any such employee, eligible, or applicant. All disclosures concerning such matters shall be ignored, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, political affiliation, or religious beliefs, except as may be authorized or required by law.

Civil Service Rule 7.1

Discretion in filling vacancies. In his discretion, an appointing officer may fill any position in the competitive service either by competitive appointment from a civil service register or by noncompetitive selection of a present or former Federal employee, in accordance with the Civil Service Regulations. He shall exercise his discretion in all personnel actions solely on the basis of merit and fitness and without regard to political or religious affiliations, marital status, or race.

**Do's and Don'ts for Converting Schedule C and
Noncareer SES Employees to the Competitive Service**

OPM will conduct pre-appointment reviews of Schedule C and Noncareer SES employee appointments to the competitive service beginning with the date of this memorandum through January 20, 2009. OPM seeks to ensure that the merit system principle of fair and open competition is protected. With this in mind, the two most common reasons for OPM not to approve an appointment or a conversion are:

1. the new position appears to have been designed solely for the individual who is being converted; and/or
2. competition has been limited inappropriately.

Below are "Do's" that will help agencies with the conversion approval process:

- **Do** make a public announcement through OPM's USAJOBS when filling competitive service vacancies from candidates outside your own agency's competitive service workforce.
- **Do** carefully consider the Interagency Career Transition Assistance Plan for Displaced Employees regulations (5 CFR 330, Subpart G) before making selections.
- **Do** ensure the Chief Human Capital Officer and Human Resources Director closely review all such proposed actions to determine if they meet the test of merit.
- **Do** ensure the Chief Human Capital Officer and Human Resources Director gather all necessary internal agency approvals before a case is presented to OPM for review.

And Don'ts:

- **Don't** create or announce a competitive service vacancy for the sole purpose of selecting a current or former Schedule C or Noncareer SES employee.
- **Don't** remove the Schedule C or Noncareer SES elements of a position solely to appoint the incumbent into the competitive service.