



January 28, 2013

William D. Spencer
Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Re: Comments to Notice in 77 Federal Register 71640 (December 3, 2012) –
Revised MSPB Form 185

Dear Mr. Spencer:

Please accept the following comments of the United States Postal Service to the Notice in 77 Federal Register 71640 (December 3, 2012) involving the revised MSPB Form 185.

I. MSPB Form 185, Proposed Instructions for Completing Your Appeal, Time Limits for Filing an Appeal

Appellants at times file an appeal with the Board before the effective date of the personnel action they are contesting, which then requires the agency having to file a motion to dismiss for lack of jurisdiction without prejudice to re-file once the action has actually been effected. For instance, employees at times file a reduction in force (“RIF”) appeal during the 60-day period between the time they are issued a Specific RIF Notice and the effective date of the RIF action that will be effected against them (which 60-day notice period is required by the Office of Personnel Management’s (“OPM’s”) RIF regulations).

Therefore, we suggest that MSPB Form 185 in the proposed Instructions for Completing Your Appeal, Time Limits for Filing an Appeal, be revised to notify appellants that they should not file their appeal with the Board prior to the effective date of the personnel action they are contesting.

II. MSPB Form 185, Proposed Part 1, Block 8

The MSPB Form 185 in the proposed Part 1, Block 8, provides as follows:

Are you entitled to veterans’ preference? See 5 U.S.C. § 2108.

[] Yes [] No

We suggest that the above be revised to reflect the comments set forth below.

A. Veterans’ Preference Eligibility for Non-RIF Purposes

We believe that the general veterans’ preference statute at 5 U.S.C. § 2108 is not the only statute that governs whether an individual is veterans’ preference eligible for non-RIF purposes. We believe that the other statute is the minimum active duty service requirement statute at 38 U.S.C. § 5303A. This is indicated in the “Types of Preference” subsection of the “Veterans’ Preference in Appointments” section of the OPM’s VetGuide (see the highlighted portion of the enclosed OPM

VetGuide, Excerpt 1). OPM's general veterans' preference regulations at 5 C.F.R Part 211 implement the general veterans' preference statute at 5 U.S.C. § 2108.

B. Veterans' Preference Eligibility for RIF Purposes

We believe that whether an individual is veterans' preference eligible for RIF purposes is governed by the RIF statute at 5 U.S.C. § 3501(a) in addition to the general veterans' preference statute at 5 U.S.C. § 2108 and the minimum active duty service requirement statute at 38 U.S.C. § 5303A. This is indicated in the "Eligibility for Veterans' Preference in RIF" subsection of the "Veterans' Preference in Reduction in Force" section of OPM's VetGuide (see the enclosed OPM VetGuide, Excerpt 2), and Love v. United States Postal Serv., 76 M.S.P.R. 490 (1997), and Castro v. Dep't of Defense, 79 M.S.P.R. 152 (1998). OPM's RIF regulation at 5 C.F.R. § 351.501(d) implements the RIF statute at 5 U.S.C. § 3501(a).

III. MSPB Form 185, Proposed Appendix A; IRS, USERRA, and VEOA Appeals; VEOA Appeals

The MSPB Form 185 in the proposed Appendix A; IRS, USERRA, and VEOA Appeals; VEOA Appeals, provides as follows:

VEOA Appeals. A VEOA appeal is one in which a preference eligible (defined in 5 U.S.C. § 2108) . . . alleges that a federal agency violated his or her rights under any statute or regulation relating to veterans preference.

As discussed above in Section II.A., we believe that whether an individual is veterans' preference eligible for non-RIF purposes is governed by the minimum active duty service requirement statute at 38 U.S.C. § 5303A in addition to the general veterans' preference statute at 5 U.S.C. § 2108. Therefore, we suggest that the portion of Appendix A referred to above be revised to reflect this.

We also suggest that the Board correspondingly revise its VEOA regulation at 5 C.F.R. § 1208.4(b), which currently provides as follows:

§ 1208.4 Definitions.

. . . .

(b) *Preference eligible.* "Preference eligible" is defined in 5 U.S.C. 2108.

Very truly yours,



Elaine K. Champi
Attorney

Enclosures

VETERANS SERVICES VET GUIDE

Introduction

The Office of Personnel Management (OPM) administers entitlement to **veterans' preference** in employment under title 5, United States Code, and oversees other statutory employment requirements in titles 5 and 38. (Title 38 also governs Veterans' entitlement to **benefits** administered by the Department of Veterans Affairs (VA).)

Both title 5 and title 38 use many of the same terms, but in different ways. For example, service during a "war" is used to determine entitlement to Veterans' preference and service credit under title 5. OPM has always interpreted this to mean a **war declared by Congress**. But title 38 defines "period of war" to include many non-declared wars, including Korea, Vietnam, and the Persian Gulf. Such conflicts entitle a veteran to VA **benefits** under title 38, but not necessarily to **preference or service credit** under title 5. Thus it is critically important to use the correct definitions in determining eligibility for specific rights and benefits in employment.

For additional information, including the complete text of the laws and regulations on Veterans' rights, consult the references cited.

Veterans' Preference in Appointments

Why Preference is Given

Since the time of the Civil War, veterans of the Armed Forces have been given some degree of preference in appointments to Federal jobs. Recognizing their sacrifice, Congress enacted laws to prevent veterans seeking Federal employment from being penalized for their time in military service. Veterans' preference recognizes the economic loss suffered by citizens who have served their country in uniform, restores veterans to a favorable competitive position for Government employment, and acknowledges the larger obligation owed to disabled veterans.

Veterans' preference in its present form comes from the Veterans' Preference Act of 1944, as amended, and is now codified in various provisions of title 5, United States Code. By law, veterans who are disabled or who served on active duty in the Armed Forces during certain specified time periods or in military campaigns are entitled to preference over others in hiring from competitive lists of eligibles and also in retention during reductions in force.

In addition to receiving preference in **competitive** appointments, veterans may be considered for special **noncompetitive** appointments for which only they are eligible. See Chapter 4.

When Preference Applies

Preference in hiring applies to permanent and temporary positions in the competitive and excepted services of the executive branch. Preference does not apply to positions in the Senior Executive Service or to executive branch positions for which Senate confirmation is required. The legislative and judicial branches of the Federal Government also are exempt from the Veterans' Preference Act **unless** the positions are in the competitive service (Government Printing Office, for example) or have been made subject to the Act by another law.

Preference applies in hiring from civil service examinations conducted by the Office of Personnel Management (OPM) and agencies under delegated examining authority, for most excepted service jobs including Veterans Recruitment

Appointments (VRA), and when agencies make temporary, term, and overseas limited appointments. Veterans' preference does not apply to promotion, reassignment, change to lower grade, transfer or reinstatement.

Veterans' preference does not require an agency to use any particular appointment process. Agencies have broad authority under law to hire from any appropriate source of eligibles including special appointing authorities. An agency may consider candidates already in the civil service from an agency-developed merit promotion list or it may reassign a current employee, transfer an employee from another agency, or reinstate a former Federal employee. In addition, agencies are required to give priority to displaced employees before using civil service examinations and similar hiring methods.

Civil service examination: 5 U.S.C. 3304-3330, 5 CFR Part 332, OPM Delegation Agreements with individual agencies, OPM Examining Handbook, OPM Delegated Examining Operations Handbook; Excepted service appointments, including VRA's: 5 U.S.C. 3320; 5 CFR Part 302; Temporary and term employment: 5 CFR Parts 316 and 333; Overseas limited employment: 5 CFR Part 301; Career Transition Program: 5 CFR Part 330, Subparts F and G.

Types of Preference

To receive preference, a veteran must have been discharged or released from active duty in the Armed Forces under honorable conditions (i.e., with an honorable or general discharge). As defined in 5 U.S.C. 2101(2), "Armed Forces" means the Army, Navy, Air Force, Marine Corps and Coast Guard. The veteran must also be eligible under one of the preference categories below (also shown on the Standard Form (SF) 50, *Notification of Personnel Action*).

Military retirees at the rank of major, lieutenant commander, or higher are not eligible for preference in appointment unless they are disabled veterans. (This does not apply to Reservists who will not begin drawing military retired pay until age 60.)

For non-disabled users, active duty for training by National Guard or Reserve soldiers does not qualify as "active duty" for preference.

For disabled veterans, active duty includes training service in the Reserves or National Guard, per the Merit Systems Protection Board decision in *Hesse v. Department of the Army*, 104 M.S.P.R.647(2007).

For purposes of this chapter and 5 U.S.C. 2108, "war" means only those armed conflicts declared by Congress as war and includes World War II, which covers the period from December 7, 1941, to April 28, 1952.

When applying for Federal jobs, eligible veterans should claim preference on their application or resume. Applicants claiming 10-point preference must complete Standard Form (SF) 15, *Application for 10-Point Veteran Preference*, and submit the requested documentation.

The following preference categories and points are based on 5 U.S.C. 2108 and 3309 **as modified by a length of service requirement in 38 U.S.C. 5303A(d)**. (The letters following each category, e.g., "TP," are a shorthand reference used by OPM in competitive examinations.)

5-Point Preference (TP)

Five points are added to the **passing** examination score or rating of a veteran who served:

- During a war; **or**
- During the period April 28, 1952 through July 1, 1955; **or**

This does not apply to hiring for positions (e.g., attorneys) exempt from part 302 procedures pursuant to 5 CFR 302.101(c). The Gingery panel did not overrule *Patterson v. Department of Interior*, which sustained section 302.101 (c), and OPM's adoption of the standard that agencies filling positions that are exempt from Part 302 requirements need only follow the principle of veterans' preference as far as administratively feasible, i.e., consider veteran status as a positive factor when reviewing applications.

Office of Personnel Management regulations governing the application of Veterans' preference in excepted appointments are in 5 CFR Part 302.

5 U.S.C. 3320 and 5 CFR Part 302

Administration and Enforcement of Veterans' Preference

Office of Personnel Management (OPM) is charged with prescribing and enforcing regulations for the administration of Veterans' preference in the competitive service in executive agencies. OPM is charged with prescribing regulations for the administration of Veterans' preference in the excepted service in executive agencies. Agencies themselves are generally responsible for enforcement.

5 U.S.C. 1302

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Veterans' Preference in Reduction in Force

Veterans have advantages over nonveterans in a reduction in force (RIF). Also, special provisions apply in determining whether retired military members receive preference in RIF and whether their military service is counted. This chapter deals with RIF in the competitive service; some, but not all, of the provisions apply in the excepted service.

Eligibility for Veterans' Preference in RIF

Determinations of Veterans' preference eligibility are made in accordance with the information under **Preference in Appointments** in Chapter 2, except that a **retired member** of a uniformed service must meet an additional condition to be considered a preference eligible for RIF purposes. This condition differs depending on the rank at which the individual retired from the uniformed service. Uniformed service as defined in 5 United States Code (U.S.C.) 2101 means the Armed Forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

Retirees below the rank of major (or equivalent) get preference if:

- Retirement from the uniformed service is based on disability that either resulted from injury or disease received in the line of duty as a direct result of armed conflict, or was caused by an instrumentality of war and was incurred in the line of duty during a period of war as defined in section 101(11) of title 38, U. S. C. "Period of war" includes World War II, the Korean conflict, Vietnam era, the Persian Gulf War, or the period beginning on the date of any future declaration of war by the Congress and ending on the date prescribed by Presidential proclamation or concurrent resolution of the Congress; **or**
- The employee's retired pay from a uniformed service is not based on 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training; **or**

- The employee has been continuously employed in a position covered by the 5 U.S.C. chapter 35 since November 30, 1964, without a break in service of more than 30 days.

Retirees at or above the rank of major (or equivalent) get preference if they are disabled veterans as defined in 5 U.S.C. 2108(2) (includes XP, CP, and CPS) and also meet one of the criteria above for a person retired below the rank of major.

A preference eligible who at age 60 becomes eligible as a reservist for retired pay under 10 U.S.C. chapter 1223 (previously chapter 67) and who retires at or above the rank of major (or equivalent) is considered a preference eligible for RIF purposes at age 60 only if he or she is a disabled veteran as defined in 5 U.S.C. 2108(2) (includes categories XP, CP, and CPS). Receipt of retired pay under chapter 1223 meets the requirement that retired pay not be based on 20 or more years of full-time active service. Eligibility for retired reservist pay occurs at age 60; up to that time a reservist is not considered a retired member of a uniformed service and, if otherwise eligible, is a preference eligible for reduction in force purposes.

5 U.S.C. 3501, 3502; 5 CFR 351.501

RIF Retention Standing

Employees are ranked on retention registers for competitive levels (groups of similar jobs) based on four factors: tenure, Veterans' preference, length of service, and performance.

First they are placed in Tenure Group I, II, or III, depending on their type of appointment. Within each group, they are placed in a subgroup based on their veteran status:

- Subgroup AD includes each preference eligible who has a compensable service-connected disability of 30 percent or more.
- Subgroup A includes all other preference eligibles not in Subgroup AD, including employees with derived preference (see Chapter 2).
- Subgroup B includes all employees not eligible for Veterans' preference.

Within each subgroup, employees are ranked in descending order by the length of their creditable Federal civilian and military service, augmented by additional service according to the level of their performance ratings.

When a position in a competitive level is abolished, the employee affected (released from the competitive level) is the one who stands the lowest on the retention register. Because veterans are listed ahead of nonveterans within each tenure group, they are the last to be affected by a RIF action.

Employees are not subject to a reduction in force while they are serving in the uniformed services. After return from active duty, they are protected from RIF action. If they served for more than 180 days, they may not be separated by RIF for 1 year after their return. If they served for more than 30 but less than 181 days, they may not be separated by RIF for 6 months.

5 U.S.C. 3502; 5 CFR 351.404(a), 351.606(a), and Subpart E

Assignment Rights (Bump and Retreat)

When an employee in Tenure Group I or II with a minimally successful performance rating is released from a competitive level within the competitive area where the RIF takes place, he or she is entitled under certain circumstances to displace another employee with lower retention standing. The superior standing of preference