

Rules and Regulations

Federal Register

Vol. 61, No. 172

Wednesday, September 4, 1996

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

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 317 and 412

RIN 3602-AF96

Executive, Management, and Supervisory Development

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to eliminate the 3-year limitation on the validity of Qualifications Review Board (QRB) certification for appointment to the Senior Executive Service (SES). The Office is also revising its regulations governing executive and management development. The coverage has been expanded to include supervisory development. The revised regulations present broad program criteria on the systematic development of executives, managers, supervisors, and candidates for these positions. They also establish minimum requirements for formal SES candidate development programs. The revisions are intended to promote training and development activities which foster a corporate perspective of Government within the Federal executive cadre.

EFFECTIVE DATE: October 4, 1996.

FOR FURTHER INFORMATION CONTACT: Constance Maravell at 202-606-1832.

SUPPLEMENTARY INFORMATION: OPM published proposed regulations to make changes in parts 317 and 412 on December 11, 1995 (60 FR 63454). We received comments from 7 agencies, 1 individual, and the Senior Executives Association (SEA). Most comments were supportive of the changes. There were some reservations about requirements for SES candidate development programs.

Part 317—Employment in the Senior Executive Service

The proposed regulations included a change in 5 CFR 317.501(c)(5) which would have allowed Executive Resources Boards to refer to the selecting official all candidates as best qualified when there were less than 10 applicants for a position. This was proposed in response to a recommendation from the Executive Resources Management Group's (ERMG) Staffing Work Group, with the goal of simplifying and streamlining the merit staffing process. However, we recognize that such a provision presents difficulties in the context of other requirements of 5 CFR 317.501(c), calling for the "relative ranking of the candidates" and requiring selection "from among the candidates identified as best qualified." Two agencies as well as the Senior Executives Association raised concerns relating to the interpretation and application of the proposed revision. In evaluating the proposal and the subsequent comments, we placed primary emphasis on the language of the merit principle requiring selection and advancement "solely on the basis of relative ability, knowledge, and skills * * *" (5 U.S.C. 2301(b)(1)). In light of these considerations, the proposals has been deleted from the final regulation.

Another recommendation put forward by the ERMG's Staffing Work Group involves a larger role for agencies in the management of the QRB process. Two agencies commenting on these proposed regulations recommended that the QRB process be delegated to agencies or, alternatively, eliminated entirely. Our research of the legislative history of the Civil Service Reform Act indicates that Congressional intent in legislating Qualifications Review Boards was to assure an independent review of executive qualifications outside the selecting agency. This is incompatible with full delegation of the QRB process to agencies. We currently have an interagency advisory group reviewing the function and operations of the QRBs as they are presently conducted. If we conclude that the QRB process does not "add value" to the selection of Federal executives, we will recommend appropriate changes, including revisions to the statute if necessary.

Part 412—Executive, Management, and Supervisory Development

One agency raised a question about sabbaticals, which are spelled out in statute (5 U.S.C. 3396(c)) and which are not covered in this final rule. The question concerned whether agencies would have complete authority for deciding the merits of requests for sabbaticals. Agencies have always had complete decision-making authority regarding the use of sabbaticals. Agencies should continue to report the use of sabbaticals to OPM, including submission of appropriate documentation (currently OPM Form 1390, Executive Personnel Transaction).

One agency suggested including the role of "team leader" in the supervisory, managerial, and executive continuum. At this time the role of the team leader is still evolving and may vary widely, depending on the type of team or the specific agency. There is no prohibition barring an agency from setting whatever training policies it deems appropriate for the training of teams and team leaders. However, we are not broadening the scope of part 412 to incorporate such a requirement for all agencies.

Another agency asked for verification of its assumption that a person who leaves the Government and has been certified as qualified for the SES by a QRB retains that certification. Since the certification has no time limit, this is a correct assumption. The individual could use that certification to return to the Government and receive a noncompetitive appointment to the SES, provided that he or she had competed Governmentwide to enter the Candidate Development Program (CDP).

One agency commented that agencies should be encouraged to train their managerial corps as needed to meet their program needs rather than being required to provide managerial training generally. The regulations require that training and development programs be consistent with an agency's strategic plan. We would like to emphasize the importance of training for enhancing organizational achievement. Training and development play a critical role in assuring high quality customer service, information management, and improved management skills. This is widely recognized in the private sector as well as in Government. Furthermore, the requirements for managerial

development are flexible enough to allow agencies to comply within the limits of their financial resources.

Section 412.104 Formal Candidate Development Programs for SES Positions

OPM believes that formal SES Candidate Development Programs (CDPs) provide an excellent vehicle for creating and reinforcing a corporate perspective within the SES. The idea of a "corporate SES" originated with the Civil Service Reform Act of 1978 and was reinforced by the National Performance Review (NPR) in 1994. One agency asked us to clarify the concept of corporate SES perspective; another questioned whether it was a valid objective. We believe that a corporate SES (a Governmentwide executive service with shared values, a common identity, and a certain fundamental uniformity in personnel systems) contributes to stronger Government, and we will continue our efforts to promote a corporate SES culture in our policies and programs.

The essence of a corporate SES is shared values. These values must transcend a commitment to agency mission; they must extend beyond an executive's individual profession and aspirations. The SES values must respect and embrace the dynamics of American democracy, an approach to governance that provides a continuing vehicle for change. The NPR report on the SES captures the original vision of the SES:

to serve the twin objectives of change and continuity: On one hand helping the top officials of a new administration to steer their agencies in the direction set by the newly elected President; on the other hand carrying forward the institutional memory of government and maintaining high standards of public service.

We believe that this vision is still valid, and we believe that balancing continuity and change is the fundamental responsibility of the Senior Executive. Inherent in this responsibility is respect for both merit and diversity, both the dignity and importance of the individual and the richness and wisdom that diversity of individuals brings to organizations and societies.

Two agencies commented in favor of adding a provision to establish a cadre of "precertified" managers in order to expedite the filling of executive positions. The ERMG's Staffing Work Group has recommended that OPM examine ways to allow agencies to precertify the qualifications of executive candidates outside of the candidate development process. We are currently

considering the feasibility of possible options for implementing such a recommendation. We recognize that even experienced managers, who would otherwise meet the requirements for SES appointment, can benefit from the training and development provided through a formal CDP. However, given the limitations of formal training budgets, the CDP is not a cost-effective vehicle for certifying executive qualifications obtained outside a formal program.

One agency advocated substituting a general statement of purpose for formal candidate development programs, in place of the specific program requirements at § 412.104(e), saying that such specifications are "unnecessary and rigid." Another agency took exception to the requirement specifying the aggregate length of developmental assignment(s) outside the candidate's position of record. We do not find these requirements to be unnecessary, and it is not our intention to be rigid in their application or interpretation. In all cases except where competition for entry into the CDP is restricted to agency employees, QRB certification based on successful completion of an OPM-approved executive development program makes an individual eligible Governmentwide for noncompetitive appointment to the SES. Therefore, to support development of a corporate perspective in Government, there is a Governmentwide interest in assuring that a minimum level of training and development is shared by successful DCP participants. The regulations allow a great deal of flexibility in choosing the formal interagency training experience, and the 4 months of developmental assignments can be accomplished through a series of shorter assignments. Furthermore, OPM will work with agencies to develop program plans that are tailored to specific agency needs and circumstances, and we will permit individual participants to have development plans which deviate from their agencies' approved program plans, provided these deviations are approved by OPM in advance. We absolutely agree with the comment that developmental assignments should be "tailored to the individual developmental needs of each candidate."

At the same time, some work experiences would not normally provide the depth and breadth of experience needed to enhance a candidate's executive qualifications. For example, one agency asked if a candidate could stay in his/her current position and have extra duties added to that position. This does not go far

enough to achieve the principal goal of the developmental assignment, which is to have the person gain a broader perspective on his/her agency and the Federal Government. To achieve this requires experience in other lines of work and/or in different working relationships within the organization, or in different organizations. Adding duties to an existing position does not accomplish that purpose.

One agency commented that not all candidates have equivalent backgrounds and, therefore, that development should be based on individual requirements needed to reach a set level of expected job performance. As we have previously indicated, we agree that development plans should be tailored to the individual needs of each candidate. The regulations require that each candidate have a development plan prepared from a competency-based needs assessment. The minimum standards are sufficiently broad so that individual development plans can be tailored to meet each candidate's needs.

Another agency requested that OPM not restrict formal training to "interagency sources." In fact, the regulations do not restrict formal training to any particular source or sources. The regulations allow agencies to choose any source, including nongovernmental, for the required training experience, which must be Governmentwide or multi-agency in its nature and scope. The purpose of this requirement is to expose potential executives to multiple points of view and foster a corporate perspective.

One agency questioned the necessity of requiring OPM approval of agency programs prior to announcement for the first time under the new regulations. We believe these regulations are a significant departure from the superseded regulations, such that prior OPM review and approval will contribute to the development of agency programs that both meet minimum regulatory standards and are tailored to individual agency needs. We encourage agencies to meet with us early in the development of their programs so that the concerns of all parties can be surfaced and adequately addressed. By engaging in such discussion before agencies' programs are announced for the first time, we can minimize problems which might arise as individual candidates are submitted for QRB certification.

The Senior Executives Association (SEA) commented on the requirement that agencies' recruitment efforts comply with statutory merit principles (1) and (2) and also take "into consideration the goal of achieving a

diversified workforce" (412.104(b)). SEA believes "To provide additional emphasis will create an appearance that preferential treatment for some is the desired, but unclearly stated, goal." In *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), the Supreme Court ruled that all Federal programs which use race-based decision-making are subject to strict judicial scrutiny. However, the provision in question speaks to the recruiting process and not to the selection process. In a Department of Justice memorandum to General Counsels providing guidance on the *Adarand* decision (February 29, 1996), agencies were advised:

Adarand does not apply, however, to actions in which race is not used as a basis for making employment decisions about individuals. For example, action to increase minority applications for employment is not subject to *Adarand*. Outreach and recruitment efforts * * * which merely seek to expand the pool of qualified applicants generally would not be subject to strict scrutiny under *Adarand*.

Our purpose in highlighting the value of achieving a diversified workforce is not to influence selections or other employment decisions but to articulate the principle that members of all groups should have an opportunity for consideration.

The SEA suggested that we list in the regulations the 22 generic competencies identified in the Leadership Effectiveness Framework to assist potential candidates in assessing their qualifications for SES positions. For purposes of assessing an individual's executive qualifications, these 22 competencies are grouped into five "executive core qualification:" strategic vision, human resources management, program development and evaluation, resource planning and management, and organizational representation and liaison. It is against these five core qualifications that individuals are evaluated by Qualifications Review Boards to determine "demonstrated executive experience" and/or "likelihood of executive success," as required by 5 U.S.C. 3393. OPM has already published guidance which describes the five core qualifications and provides additional information on how to present a candidate's executive qualifications for consideration by a QRB.

Operational Issues

One agency raised a number of operational issues, such as the appropriate organizational level for seeking OPM approval of agency programs and the lowest organizational level appropriate for seeking exceptions

to Governmentwide recruitment under section 412.104(a)(2). We plan to discuss these and other procedural questions with all stake holders and issue operational guidance at the time the regulations become final.

Regulatory Flexibility Act

I certify that these regulations will not have significant economic impact on a substantial number of small entities because they affect only federal employees and agencies.

List of Subjects in 5 CFR Parts 317 and 412

Government employees.

James B. King,

Director, Office of Personnel Management.

Accordingly, the Office of Personnel Management is amending 5 CFR parts 317 and 412 as follows:

PART 317—EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE

1. The authority citation for part 317 continues to read as follows:

Authority: 5 U.S.C. 3392, 3393, 3393a, 3395, 3395, 3397, 3593, and 3595.

2. In subpart E, § 317.502, paragraph (c) is revised to read as follows:

Subpart E—Career Appointments

§ 317.502 Qualifications Review Board certification.

* * * * *

(c) Qualifications Review Board certification of executive qualifications just be based on demonstrated executive experience; successful completion of an OPM-approved candidate development program; or possession of special or unique qualities that indicate a likelihood of executive success. Any existing time limit on a previously approved certification is removed.

* * * * *

PART 412—EXECUTIVE, MANAGEMENT, AND SUPERVISORY DEVELOPMENT

3. Part 412 is revised to read as follows:

Subpart A—General Provisions

Sec.

412.101 Coverage.

412.102 Purpose.

412.103 Criteria for programs for the systematic training and development of executives, managers, supervisors, and candidates.

412.104 Formal candidate development programs for Senior Executive Service positions.

Subpart B—Senior Executive Service Status and Nonstatus Candidate Development Programs

412.201 Purpose.

412.202 "Status" programs.

412.203 "Non-status" programs.

Authority: 5 U.S.C. 3397, 4101, *et seq.*

Subpart A—General Provisions

§ 412.101 Coverage.

This subpart applies to all incumbents of or candidates for supervisory, managerial, and executive positions in the General Schedule, the Senior Executive Service (SES), or equivalent pay systems who are also covered by part 410 of this chapter.

§ 412.102 Purpose

(a) This subpart implements for supervisors, managers, and executives the provisions of chapter 41 of title 5 of the United States Code related to training and section 3396 of title 5 related to the criteria for programs of systematic development of candidates for the SES and the continuing development of SES members.

(b) The subpart identifies a continuum of preparation starting with supervisory positions and proceeding through management and executive positions Governmentwide. For this reason, the subpart establishes a comprehensive system that is intended to:

(1) Provide the competencies needed by supervisors, managers, and executives to perform their current functions at the mastery level of proficiency; and

(2) Provide learning through development and training in the context of succession planning and corporate perspective to prepare individuals for advancement, thus supplying the agency and the government with an adequate number of well prepared and qualified candidates to fill supervisory, managerial, and executive positions Governmentwide.

§ 412.103 Criteria for programs for the systematic training and development of executives, managers, supervisors, and candidates.

Each agency must provide for the initial and continuing development of individuals in executive, managerial, and supervisory positions, and candidates for those positions. The agency must issue a written policy to assure that their development programs:

(a) Are designed as part of the agency's strategic plan and foster a corporate perspective.

(b) Make assignments to training and development consistent with the merit

system principles set forth in 5 U.S.C. 2301(b) (1) and (2).

(c) Provide for:

(1) Initial training as an individual makes critical career transitions to become a new supervisor, a new manager, or a new executive consistent with the results of needs assessments;

(2) Continuing learning experiences, both short- and long-term, throughout an individual's career in order for the individual to achieve the mastery level of proficiency for his or her current management level and position; and

(3) Systematic development of candidates for advancement to a higher management level. Formal candidate development programs leading to noncompetitive placement eligibility represent one, but not the only, type of systematic development.

§ 412.104 Formal candidate development programs for Senior Executive Service positions.

Formal SES candidate development programs permit the certification of the executive qualifications of graduates by a Qualifications Review Board under the criterion of 5 U.S.C. 3393(c)(2)(B) and selection for the SES without further competition. The agency must have a written policy describing how the program will operate. The agency must obtain OPM approval of the program before it is conducted for the first time under these regulations and whenever there are substantive changes to the program. Agency programs must meet the following criteria.

(a) Recruitment.

(1) Recruitment for the program is from all groups of qualified individuals within the civil service, or all groups of qualified individuals whether or not within the civil service.

(2) Agencies may request an exception to the provision in paragraph (a) of this section if they can show that during the 5-year period prior to the announcement of a program they have made at least 15% of their career SES appointments from sources outside the agency. Notwithstanding this exception recruitment must be competitive and be announced at least agencywide. Graduates of these programs who have been certified by a QRB must then compete Governmentwide for entry to the SES, but do not have to obtain a second QRB certification before appointment.

(b) In recruiting, the agency, consistent with the merit system principles in 5 U.S.C. 2301(b) (1) and (2), takes into consideration the goal of achieving a diversified workforce.

(c) All candidates are selected through SES merit staffing procedures. The

number selected shall be consistent with the number of expected vacancies.

(d) Each candidate has an SES development plan covering the period of the program. The plan is prepared from a competency-based needs determination. It is approved by the Executive Resources Board.

(e) The minimum program requirements, unless an exception is obtained in advance of the beginning of the candidate's program, for an SES development plan are as follows:

(1) There is a formal training experience that addresses the executive core qualifications and their application to SES positions Governmentwide. The training experience must include interaction with a wide mix of Federal employees outside the candidate's department or agency to foster a corporate perspective but may include managers from the private sector and state and local governments. The nature and scope of the training must have Governmentwide or multi-agency applicability. If formal interagency training is used to meet this requirement, it must total at least 80 hours. If an interagency work experience is used, it must be of significantly longer duration than 80 hours.

(2) There are developmental assignments that total at least 4 months of full-time service outside the candidate's position of record. The purpose of the assignments is to broaden the candidate's experience and/or increase knowledge of the overall functioning of the agency so that the candidate is prepared for a range of agency positions.

(3) There is a member of the Senior Executive Service as a mentor.

(f) Each candidate's performance in the program is evaluated periodically, and there is a written policy for discontinuing a candidate's participation in the program. A candidate can be discontinued or may withdraw from the program without prejudice to his or her ability to apply directly for SES positions.

(g) Each candidate has a documented starting and finishing date in the program.

Subpart B—Senior Executive Service Status and Nonstatus Candidate Development Programs

§ 412.201 Purpose.

Section 3393 of title 5, United States Code, requires that career appointees to the SES be recruited either from all groups of qualified individuals within the civil service, or from all groups of qualified individuals whether or not

within the civil service. This subpart sets forth regulations establishing two types of SES candidate development programs, "status" and "non-status."

§ 412.202 "Status" programs.

Only employee serving under career appointments, or under career-type appointments as defined in § 317.304(a)(2) of this chapter, may participate in "status" candidate development programs.

§ 412.203 "Non-status" programs.

(a) *Eligibility.* Candidates are from outside Government and/or from among employees serving on other than career or career-type appointments within the civil service.

(b) *Requirements.*

(1) Candidates must be appointed using the Schedule B authority authorized by § 213.3202(j) of this chapter. The appointment may not exceed or be extended beyond 3 years.

(2) Assignments must be to a full-time position created for developmental purposes connected with the SES candidate development program. Candidates serving under Schedule B appointment may not be used to fill an agency's regular positions on a continuing basis.

(3) Schedule B appointments must be made in the same manner as merit staffing requirements prescribed for the SES, except that each agency shall follow the principle of veteran preference as far as administratively feasible. Positions filled through this authority are excluded under § 302.101(c)(6) of this chapter from the appointment procedures of part 302.

[FR Doc. 96-22366 Filed 9-3-96; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 210, 245a, 264, 274a and 299

[INS No. 1399 E-96]

RIN 1115-AB73

Introduction of New Employment Authorization Document

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: The Immigration and Naturalization Service (Service) is publishing a final rule introducing a more secure Employment Authorization Document (EAD), Form I-766. The