



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

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Memorandum for Heads of Executive Departments and Agencies

From: Robert H. Shriver, III, Acting Director

Subject: Implementing Guidance for Upholding Civil Service Protections and Merit System Principles Regulations

On April 9, 2024, the U.S. Office of Personnel Management (OPM) issued regulations to reinforce and clarify longstanding civil service protections and merit system principles, codified in law, as they relate to the involuntary movement of Federal employees and positions from the competitive service to the excepted service, or from one excepted service schedule to another.

Shortly after taking office, President Biden expressed in Executive Order 14003 that “[c]areer civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government” and that it is the “policy of the United States to protect, empower, and rebuild the career Federal workforce.” This final rule supports this policy and the nonpartisan, merit-based, career civil service which has been a hallmark of American government for over 140 years.

The regulations became effective on May 9, 2024. The final rule is accessible at [89 FR 24982](#).

The final rule advances these important policy goals by—

- 1) Clarifying that the status and civil service protections an employee has accrued cannot be taken away through an involuntary move from the competitive service to the excepted service or from one excepted service schedule to another. Once a career civil servant earns status or protections, that employee keeps them unless they are waived voluntarily.
- 2) Clarifying that the phrase “confidential, policy-determining, policy-making, or policy-advocating”—a term of art to describe positions excepted from civil

service protections—means noncareer, political appointments. The rule prevents that exception from being misapplied to career civil servants.

- 3) Establishing procedural requirements for moving positions from the competitive service to the excepted service and within the excepted service. This change increases transparency and establishes an appeals process for Federal employees when any such movement is involuntary and characterized as stripping individuals of their status or civil service protections.

OPM issued the final rule after reviewing and responding to more than 4,000 comments submitted by the public in an open and transparent rulemaking process.

The following implementing guidance is meant to assist agencies and employees in interpreting and applying certain requirements of the rule. Agency Chief Human Capital Officers (CHCOs) and/or Human Resources Directors should contact OPM for any additional information using the following contact information:

EmployeeAccountability@opm.gov, with respect to 5 CFR Parts 432 and 752; and

Employ@opm.gov, with respect to 5 CFR Parts 210, 212, 213, and 302.

Employees should contact their agency human resources offices for assistance.

cc: CHCOs, Deputy CHCOs, and Human Resources Directors

Attachments:

Appendix A: Questions and Answers on Upholding Civil Service Protections and Merit System Principles

Appendix B: Requirements for Moving Employees and Positions

Appendix C: Agency Submission for Moving Positions and Employees from the Competitive Service to the Excepted Service or from One Excepted Service Schedule to Another Pursuant to 5 CFR 302.602

Appendix D: Sample Notice for Involuntarily Moving Incumbents of Positions from the Competitive Service to the Excepted Service or from One Excepted Service Schedule to Another

Appendix A: Questions and Answers on Upholding Civil Service Protections and Merit System Principles

Please note—the following answers are based on the preamble to the final rule. Further analysis and information are available at 89 FR 24982.

1. Does the final rule apply to members of the career Senior Executive Service?

This rule generally applies to career employees in the competitive and excepted services covered under title 5, U.S. Code. The Senior Executive Service (SES) is a separate service, governed by statutory provisions distinct from those governing competitive and excepted service employees. The final rule therefore does not apply to the SES.

Members of the career SES have a different set of statutory adverse action protections than those at issue in OPM's final rule. Because, pursuant to the definitions in 5 U.S.C. § 7541, those adverse actions are limited to "career" employees, there was no need, unlike with the rules governing adverse actions for employees in the General Schedule, to call out and exclude positions of "a confidential, policy-determining, policy-making or policy-advocating character," and thus there is no reference to such positions in the SES provisions at section 7541-7543.

Instead, chapter 75's adverse action procedures for the SES, codified at 5 U.S.C. § 7543, indisputably apply to any career appointee in the SES who has completed the relevant probationary period in the SES or had accrued adverse action protections while serving in the competitive or excepted services prior to joining the SES. Accordingly, even though SES employees engage in important policy-related work, the phrase "confidential, policy-determining, policy-making or policy-advocating character," as used to describe positions that are excepted from chapter 75's adverse action protections, does not apply to the SES.

Further, in addition to providing explicit adverse action protections for career SES—with no exceptions for certain types of career SES positions—Congress also sought to protect and preserve a career SES free from undue partisan political influence in other ways, including by setting strict limits on the number of SES positions that could be designated as "noncareer" (i.e., political).

2. Is OPM expanding the number of employees who have appeal rights for adverse actions under 5 U.S.C. chapter 75 and performance-based actions under 5 U.S.C. § 4303?

No, the final rule does not provide appeal rights for adverse actions or performance-based actions to any group of employees that did not already have this protection.¹ The rule amends 5 CFR part 752 (Adverse Actions) to clarify that civil servants in the competitive service or excepted service who qualify as “employees” under 5 U.S.C. §§ 7501 or 7511(a) will retain the rights previously accrued upon an involuntary move from the competitive service to the excepted service, or from one excepted service schedule to another, or any subsequent involuntary move, unless the employee relinquishes such rights or status by voluntarily encumbering a position that explicitly results in a loss of, or different, rights. For example, a career employee can choose to voluntarily seek and accept a position as a Schedule C political appointee which would result in the loss of status and/or rights accrued as a career employee. The rule makes a similar conforming change to 5 CFR part 432 (Performance Based Reduction in Grade and Removal Actions).

OPM did, however, revise subpart B of 5 CFR part 752 to conform to the Federal Circuit’s decisions in *Van Wersch v. Department of Health and Human Services* and *McCormick v. Department of the Air Force*. These cases relate to the application of 5 U.S.C. § 7511(a)(1), which defines employees who have the right to appeal major adverse actions to the MSPB.

3. How is OPM defining the phrases “confidential, policy-determining, policy-making, or policy-advocating” and “confidential or policy-determining” in the regulations?

¹ An employee earns adverse action rights after fulfilling their probationary/trial period requirement or durational requirement, assuming they are not excluded from the definition of “employee” by 5 U.S.C. § 7511(b).

As explained at length in the final rule, OPM amends 5 CFR part 210 (Basic Concepts and Definitions (General)) to define the proper scope of the exception in 5 U.S.C. § 7511(b)(2) and clarify any confusion that may have been introduced by prior executive action. The rule interprets the phrases “confidential, policy-determining, policy-making, or policy advocating” and “confidential or policy-determining” to reinforce the longstanding meaning of these phrases. These terms of art—which apply throughout OPM’s Civil Service Regulations in 5 CFR chapter 1, subchapter B—describe positions of the character generally excepted from the protections of chapter 75. In the rule, OPM explains that, in creating this exception in 5 U.S.C. § 7511(b)(2), Congress intended to except noncareer, political appointees from civil service protections. The rule prevents the exception from being misapplied to career civil servants.

The rule makes conforming changes on this matter to 5 CFR part 213 (Excepted Service), 5 CFR part 302 (Employment in the Excepted Service), 5 CFR part 432 (Performance Based Reduction In Grade and Removal Actions), 5 CFR part 451 (Awards), and 5 CFR part 752 (Adverse Actions).

4. How is an employee’s competitive status impacted if the employee’s position is moved involuntarily?

The rule amends 5 CFR part 212 to establish that an employee who is moved involuntarily to a position in the excepted service remains in the competitive service for the purposes of any previously accrued status, adverse action, or appeal rights while the employee occupies that excepted service position or any other positions to which the employee is moved involuntarily.

5. What procedures must agencies follow for moving individuals or positions from the competitive service to the excepted service, or from one excepted service schedule to another?

Please see Appendix B—Requirements for Moving Employees and Positions—for additional information.

6. When is a movement from the competitive service to the excepted service, or from one excepted service schedule to another, considered voluntary or involuntary for purposes of relinquishing civil service status and protections?

A voluntary movement is generally characterized by an employee initiating a reassignment or transfer by pursuing and accepting an offer to serve in a different position, either at the employee's own agency or another Federal agency. A voluntary move may extinguish accrued rights, depending on the circumstances of each situation. On the other hand, if an agency initiates an action to move the employee's position from the competitive service to the excepted service or from one schedule in the excepted service to another, (because, for example, the nature of the position or to better meet agency needs), that movement will be regarded as involuntary vis-à-vis the incumbent and should not affect previously accrued status or rights.

7. OPM's regulations provide appeal rights to the Merit Systems Protection Board (MSPB) for employees who are involuntarily moved from the competitive service to the excepted service or from one excepted service schedule to another. Does management not have the right to reassign employees? What are the MSPB appeal rights in the final rule?

Yes, management generally has the right to reassign employees from one position to another position at the same agency for which they are qualified. This rule clarifies, however, that an employee retains any accrued status or rights upon an involuntary move. An employee may be entitled to adverse action rights if the move results in a demotion or loss of pay.

Also, the President, OPM, or Congress may move an employee's underlying position from the competitive service to the excepted service, or from one schedule in the excepted service to another, in which case, the agency will be required to comply with that direction. The final rule provides MSPB appeal rights in such situations so that an affected individual is afforded an avenue for immediate correction if an agency asserts that involuntarily moving the encumbered position from the competitive service to the excepted service or from one schedule in the excepted service to another will eliminate

competitive status or any procedural or appeal rights that the employee had previously accrued.

In such a situation, the affected individual may request that MSPB issue an order directing the agency, except to the extent that any such order would be inconsistent with an applicable statute: (A) to correct the notice to the employee to provide that any accrued status or procedural or appeal rights under those provisions continue to apply, and (B) to comply with the requirements of either 5 U.S.C. chapter 75, subchapter II, or 5 U.S.C. § 4303 in pursuing any action available under those provisions. Also, where an agency fails to comply with certain procedural requirements in 5 CFR 302.602(c)(1) by failing to supply the requisite notice, the affected individual may appeal the failure to provide the requisite notice and request an order directing the agency to comply with that provision. Finally, an individual may appeal on the basis that (A) a facially voluntary move was coerced or otherwise involuntary or (B) a facially voluntary move to a new position would require the individual to relinquish their competitive status or any civil service protections and the move was coerced or was otherwise involuntary.

Appendix B: Requirements for Moving Employees and Positions

OPM’s regulation creates a new Subpart F to part 302 of title 5, Code of Federal Regulations, that covers the movement of employees and positions from the competitive service to the excepted service, or from one excepted service schedule to another. Because part 302 applies to **movements** of employees and positions it does not cover hiring someone directly into an excepted service schedule under an authority already granted (e.g., hiring an attorney into Schedule A).

The chart below summarizes the provisions and agency requirements under 5 CFR 302.601 and 602. In addition, we are providing a template that may be used for submissions to OPM, when required by Subpart F (see Appendix C).

Agency Requirements Before Moving Employees and Positions	
Agencies must comply with the following requirements when moving an employee from the competitive service to the excepted service or within the excepted service whether pursuant to statute, an Executive Order, or OPM issuance, to the extent that the subpart is not inconsistent with applicable statutory provisions.	
In general: An agency is required to identify the types, numbers, and locations of positions that the agency proposes to move into or within the excepted service and document the basis for its determination that movement of the positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.	
If	Then
If the directive explicitly delineates the specific positions that are covered...	Create a list of the positions to be moved in accordance with that directive and their location within the organization. Provide the list to OPM using the contact information listed below after completing the additional requirements of Subpart F.

<p>If the directive requires the agency to select the positions to be moved pursuant to criteria articulated in the directive...</p>	<p>Provide OPM with a list of the positions to be moved in accordance with those criteria, denote their location in the organization, and explain, upon request from OPM, why the agency believes the positions met those criteria as established by the directive. Provide the list to OPM using the contact information listed below after completing the additional requirements of Subpart F.</p>
<p>If the directive confers discretion on the agency to establish objective criteria for identifying the positions to be covered, or which specific slots of a particular type of position the agency intends to move...</p>	<p>Provide OPM with a list of positions or specific slots of particular types of positions to be moved, denote their location in the organization, the objective criteria to be used, and an explanation of how these criteria are relevant and consistent with the standards set forth by the directive. Provide the list to OPM using the contact information listed below after completing the additional requirements of Subpart F.</p>
<p>Additional Agency Requirements Before Moving Positions</p>	
<p>Obtain certification from the agency's Chief Human Capital Officer (CHCO) that the documentation is sufficient, and movement of the position(s) is consistent both with the standards set forth by the directive, as applicable, and with merit system principles.</p>	
<p>Submit the CHCO certification and supporting documentation listed above to OPM, which OPM will then review and consider, in advance of using the excepted service authority.</p>	

- For exceptions effectuated by the President or OPM, list positions to the appropriate schedule of the excepted service only after obtaining written approval from OPM to do so.
- For exceptions created by the President or OPM, initiate any hiring actions under the excepted service authority only after OPM publishes any such authorizations in the Federal Register, to include the types, numbers, and locations of the positions moved to the excepted service.
- For exceptions created by Congress, inform OPM of the positions excepted either before the effective date of the provision, if the statutory provisions are not immediately effective, or within 30 days thereafter.

Agency Requirements Before Involuntarily Moving Incumbents of Positions

An agency that seeks to move an encumbered position from the competitive service to the excepted service, or from one excepted service schedule to another, must—

- Provide written notification to the employee occupying that position of the intent to move the position no less than 30 days prior to the effective date of the position being moved.
- If the movement was involuntary, notify the employee that the employee retains any earned competitive status or procedural or appeal rights accrued under chapter 75, subchapter II, or section 4303 of title 5, United States Code, notwithstanding the movement of the position, and inform the employee of appeal rights conferred under 5 CFR 302.603 and the timing for exercising such appeal rights. (See Appendix D for a sample employee notice).

Other Considerations

- In addition to applying to the movement of positions, the requirements of Subpart F also apply to the movement of employees with respect to any earned competitive status, any accrued procedural rights, or any appeal rights.
- Notwithstanding the use of plural words, Subpart F applies if the directive of the President, Congress, OPM, or a designee thereof affects only one position or one individual.

OPM Point of Contact for Submitting Information Required by 5 CFR 302.602

U.S. Office of Personnel Management
Associate Director for Workforce Policy and Innovation
1900 E Street, NW, Room 7460
Washington, DC 20415

Email: Employ@opm.gov

In the subject line, include: Agency Submission under 5 CFR 302.602.

Appendix C: Agency Submission for Moving Positions and Employees from the Competitive Service to the Excepted Service or From One Excepted Service Schedule to Another Pursuant to 5 CFR 302.602

1. Agency:
2. Agency Address:
3. Name, Title, and Contact Information of Requesting Agency Official:
4. Identify the basis for moving the positions from the competitive service for placement in the excepted service under Schedule A, B, or C, or any schedule in the excepted service created after May 9, 2024, or to move positions from a schedule in the excepted service to a different schedule in the excepted service.

Template for Agency Submissions					
Organizational Unit	Position (i.e., title, series, grade)	From: Competitive or Excepted	To: Competitive or Excepted	Encumbered Yes or No If yes, provide name of employee.	<p>Justification: List the Executive Order, directive from OPM, or statute</p> <p>Indicate whether the positions were listed in the underlying directive; whether the positions were to be determined by your agency in response to criteria in the underlying document; or whether the positions were to be determined by your agency in response to criteria your agency was required to develop.</p> <p>List the criteria.</p> <p>Explain how the position meets the criteria.</p>

Example of Agency Submission for Moving Positions based on Presidential Directive					
Human Resources Office	Human Resources Specialist GS-0201-12	Competitive	Excepted, Schedule G	Yes - Deidre Hall	Presidential Directive – EO xxxx identified the positions to be moved from the competitive service to the excepted service under Schedule G.

CHCO Certification:	
Name of CHCO:	
Explanation certifying that the documentation provided meets the requirements of 5 CFR 302.602 and that the identified move(s) is/are consistent with the applicable directive and with merit system principles:	
Signature:	
Date:	

Appendix D: Sample Notice for Involuntarily Moving Incumbents of Positions From the Competitive Service to the Excepted Service or From One Excepted Service Schedule to Another

Memorandum

To: [Employee Name]

From: [Name of Agency Official]
[Title of Agency Official]

Subject: Movement of Position Into the Excepted Service [or From One Excepted Service Schedule to Another]

[The President, Congress, or the U.S. Office of Personnel Management, or their designees] has directed that your position of [insert position title, pay plan, series, and grade] be moved from the competitive service to Schedule [X] of the excepted service [or be moved from Schedule X of the excepted service to Schedule Y of the excepted service]. Pursuant to 5 CFR 302.602(c)(1)(i), this letter provides you the required 30 days advanced notice of the agency's intent to move your position to Schedule [X] of the excepted service. The effective date of this action will be no earlier than 30 days after your receipt of this notification unless you elect to waive the notification period.

Since this movement of your position to Schedule [X] of the excepted service is involuntary, 5 CFR 302.602(c)(1)(ii) requires us to inform you that you retain any competitive status and procedural and appeal rights you may have previously accrued under chapter 75, subchapter II, or section 4303 of title 5, United States Code, notwithstanding the movement of your position.

Employees who believe the requirements of 5 CFR 302 have not been correctly applied may appeal to the Merit Systems Protection Board (MSPB) as discussed below. Matters which may be appealed pursuant to 5 CFR 302.603 are:

- 1) An agency assertion that an involuntary (including a facially voluntary, but alleged to be involuntary) movement or placement of a competitive service employee into the excepted service will eliminate competitive status or any procedural and appeal rights that you have previously accrued;
- 2) An agency assertion that an involuntary (including a facially voluntary, but alleged to be involuntary) movement or placement of an excepted service

- employee into a different schedule of the excepted service will eliminate competitive status or any procedural and appeal rights that you have accrued; or
- 3) An agency's failure to provide the required notice, under 5 CFR 302.602(c)(1), of the effect of the above-described movements or placements on your status or procedural and appeal rights.

MSPB Appeal: If you have the right to appeal to MSPB and wish to appeal this action to MSPB, you must file the appeal within 30 calendar days after the effective date of the movement of your position into Schedule [X] of the excepted service, or 30 days after the date of your receipt of this decision notice, whichever is later.¹ If you wish to file an appeal, you may obtain information about the appeals process and a copy of the appeals form from the MSPB website at: [U.S. Merit Systems Protection Board | How to File an Appeal \(mspb.gov\)](https://www.mspb.gov). If you cannot access the internet, please notify [insert name and contact information] and a paper copy of MSPB's appeal form and regulations will be provided to you. MSPB requires an appeal to be filed within the MSPB regional or field office serving the area where your duty station was located when the action was taken. Based on your duty station, the appropriate regional or field office is [identify appropriate office]. MSPB encourages employees to file electronically with MSPB's e-Appeal electronic filing system at [MSPB e-Appeal 2.3.0.19 - Sign On](https://www.mspb.gov/e-appeal). Employees have a right to representation in this matter and may be represented by an attorney or other person of their choosing. MSPB requires that attorney representatives register as e-filers with MSPB and file all pleadings using MSPB's e-Appeal. If you submit an appeal to MSPB, the agency official to whom MSPB should send the Acknowledgement Order and copy of the appeal is [insert the official's name or title, physical mailing address, email address, and telephone].

Please acknowledge receipt of this notice and return to [insert the official's name or title, physical mailing address, and email address]. Acknowledgment of receipt does not indicate agreement with this action. Questions concerning this action should be directed to [insert official's name]. They can be reached at [insert telephone number and/or email address].

¹ These appeal rights are in addition to, and not in derogation of, any right you would otherwise have to appeal a subsequent personnel action undertaken without following appropriate procedures under [chapter 75, subchapter II](#), or [section 4303 of title 5, United States Code](#).

Receipt Acknowledged:

- I hereby waive the 30-day notice and request that the movement into Schedule [X] of the excepted service be effective as soon as practicable.
- I do not wish to waive the 30-day notice and request that the movement into Schedule [X] of the excepted service be effective at least 30 days after my receipt of your memorandum advising me of this movement into Schedule [X] of the excepted service. The movement into Schedule X of the excepted service will not be effective before [insert date here].

Date:

Signature:

Name: