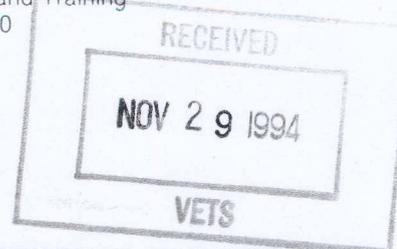


U.S. Department of Labor

Office of the Assistant Secretary for  
Veteran's Employment and Training  
Washington, D.C. 20210

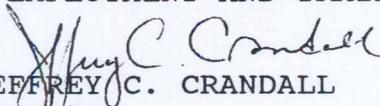


November 25, 1994



DIRECTOR'S MEMORANDUM NO. 7-95

MEMORANDUM FOR: ALL REGIONAL ADMINISTRATORS FOR VETERANS'  
EMPLOYMENT AND TRAINING

FROM:   
JEFFREY C. CRANDALL  
Director  
Office of Field Operations

SUBJECT: Further Guidance on the Implementation of the  
DOL/VETS OPM MOU

BACKGROUND: In June of 1990, VETS and the OPM signed an MOU to effect the discharge of responsibilities of both agencies for the implementation of the provisions of Sections 4103(c)(13) and (14) of Title 38 United States Code, enacted as the Veterans' Employment, Training and Counseling Amendments of 1988, Pub. L. 100-323, 102 Stat. 565 (May 20, 1988).

On April 3, 1992, Veterans' Program Letter (VPL) 3-92 provided you with guidance and information on the implementation of the MOU. Subsequently, Director's Memorandum No. 27-93 (March 11, 1993) and VPL 3-92, Change No. 1 (August 27, 1993) were issued to provide specific clarification in identified areas.

In the interim, the OPM decided that it was not going to develop a Technical Assistance Guide to which VETS had been introduced (entitled A JUST REWARD) and which we considered to have potential for offering considerable assistance to us. Instead, the OPM prepared the attached "INTERAGENCY ADVISORY GROUP" memorandum which was sent to all Federal Agency Directors of Personnel. VETS requested that the Office of the Solicitor provide us additional clarification in the form of a legal opinion on questions we had, related to excepted agencies and excepted positions covered by the MOU. Both documents are attached to this DM.

ACTION TO BE TAKEN: Please assure that copies of these documents are provided to your staff to further assist with their understanding of their responsibilities under the statute and the MOU.

INQUIRIES: If you have questions regarding this matter, they should be directed to Tom Bush on (202) 219-9105.

Attachments

Kem

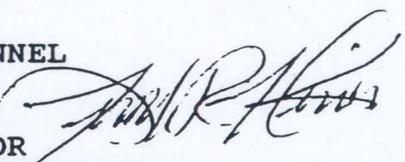
# INTERAGENCY ADVISORY GROUP

UNITED STATES  
OFFICE OF PERSONNEL MANAGEMENT  
WASHINGTON, DC 20415

Secretariat  
1900 E St., NW

JAN 18 1994

MEMORANDUM FOR DIRECTORS OF PERSONNEL

FROM: LEONARD R. KLEIN   
ASSOCIATE DIRECTOR  
FOR CAREER ENTRY GROUP

SUBJECT: Special Employment Complaint Procedure for  
Veterans Under 38 U.S.C. 4103

This memorandum discusses a complaint procedure available to certain veterans under a joint Memorandum of Understanding (MOU) between the Department of Labor (DOL) and OPM, and explains its effect on agencies.

## BACKGROUND

As a result of DOL testimony that Federal managers might not be familiar with the laws concerning the Federal employment of veterans, Congress enacted, as part of the Veterans' Employment Training, and Counseling Amendments (Public Law 100-323), two provisions which are now codified as section 4103 (c) (13) and (14) of title 38, United States Code. These provisions require DOL to monitor the application of veterans' preference in agencies and the posting of job vacancies with the State Employment Service, as required by 5 U.S.C. 3327 (b). Failure by an agency to carry out its responsibilities are to be reported to OPM for possible corrective action.

To carry out these provisions, OPM and DOL entered into an agreement or Memorandum of Understanding (MOU) which delineates the respective roles of the two agencies. (See the attachment to this memorandum for a summary of the MOU and the text of the law.) In accordance with the MOU, OPM and DOL have established a complaint procedure for veterans that is described in this memorandum.

## APPLICATION IN THE COMPETITIVE AND EXCEPTED SERVICE

Although the law applies to positions in both the competitive and excepted service, the MOU and this memorandum apply only to positions in the competitive civil service -- except as noted below. Complaints from veterans in the excepted service will be handled in much the same way as discussed herein, except that there will be no OPM involvement; DOL will work directly with the agency concerned to resolve the complaint.

For purposes of this memorandum, Veterans' Readjustment Appointments (VRA) are considered to be in the competitive service.

The above excepted service exclusion from OPM involvement does not apply when a provision of law makes an excepted service agency subject to OPM's jurisdiction for specific matters, e.g., Postal Service passovers of 30 percent or more disabled veterans for medical reasons (these cases are reviewable by OPM under 5 U.S.C. 3312 (b) and 3318), or in a reduction in force situation (most executive branch agencies are subject to OPM's regulations under 5 U.S.C. 3501 (b)).

#### THE COMPLAINT PROCEDURE FOR VETERANS

Who is eligible to file a complaint - To be eligible to file a complaint a veteran must:

- have served on active duty for more than 180 days (other than for training) and been released or discharged with other than a dishonorable discharge,
- have been released or discharged from active duty because of a service-connected disability, or
- as a member of a Reserve component ordered to active duty under 10 U.S.C. 672 (a), (d), or (g), or 673, or 673b, have served on active duty during a period of war or in a campaign or expedition for which a campaign or expeditionary medal is authorized, such as Lebanon, Grenada, Panama, and Southwest Asia (Desert Shield/Storm), and been released or discharged from active duty with other than a dishonorable discharge.

(NOTE: The above definition is different from and considerably broader than the definition of preference eligible in 5 U.S.C. 2108.)

Actions complaints can cover - For a complaint to be accepted, it must concern an issue that is covered by the MOU. The following are appropriate subjects of complaint:

- failure of an agency to list with OPM and the State Employment Service, as required by 5 U.S.C. 3327 (b), competitive vacancies for which it is soliciting "outside" candidates;
- failure of an agency to accord veterans' preference in initial employment, provided the veteran is entitled to preference under 5 U.S.C. 2108 (a different definition from who is eligible to file a complaint); and
- failure of an agency to promote the maximum of employment and job advancement opportunities for disabled veterans and veterans eligible for a VRA as required by 38 U.S.C. 4214 (a).

Issues not covered by the MOU - There are many potential areas of disagreement that are not covered under the MOU because they are not within the purview of the statutes that it implements. For example, the veterans' preference laws do not give veterans preference in promotion. Thus, a veteran who is not promoted may not seek redress under the MOU. If the veteran believes he or she was improperly excluded from the best qualified group, the proper remedy is to file a grievance under normal agency grievance procedures.

Section 4214 of title 38 requires action of agencies to "promote the maximum of employment and job advancement opportunities for veterans." However, it does not give veterans any preference or priority that is not already provided for in law. Basically, it requires agencies to:

- 1) provide placement consideration under special noncompetitive hiring authorities for VRA eligibles and 30 percent or more disabled veterans,
- 2) ensure that all veterans are considered for employment and advancement under Merit System rules, and
- 3) establish an affirmative action plan for the hiring, placement and advancement of disabled veterans.

Similarly, not all vacancies are subject to the posting requirements of 5 U.S.C. 3327 (b). This provision requires an agency to post with the State Employment Service vacancies for which it "seeks applications from persons outside the Federal service." Job vacancies open to the public are entered weekly into OPM's Federal Job Opportunities List (FJOL) data base and made available to each State Employment Office through the Interstate Job Bank (a private corporation attached to the N.Y. State Employment Service which operates under contract with DOL). (Merit promotion vacancies open to status candidates are not included in this listing; they are listed separately with OPM and publicized through printed reports in OPM's Job Information Centers, on OPM's electronic bulletin board, and on automated telephone lines.)

Agencies have broad authority under law to hire from any appropriate source of eligibles, of which competitive examinations covered by 5 U.S.C. 3327 (b) is but one. Agencies may, for example, elect to fill a vacancy by appointing an eligible under a noncompetitive entry authority such as the VRA, reinstating a former Federal employee, or promoting an employee. When vacancies are filled in this manner, they do not have to be posted with the State Employment Service.

The MOU also does not apply to matters which are grievable or appealable to other third parties such as arbitrators, the Merit Systems Protection Board, the Equal Employment

Opportunity Commission, and the Office of the Special Counsel (e.g., failure of an agency to consider a disabled veteran because of a handicap). The MOU is not an additional or alternative source of redress in such cases.

Finally, the MOU does not apply to rights already provided under the Veterans' Reemployment Rights statute for employees performing military duty, and it does not apply to alleged discrimination against a veteran that is not directly related to the denial of a right or benefit provided for under the MOU.

Time limits for filing a complaint - A complaint under these provisions must be presented within 45 days of the date of the action that is the subject of the complaint. Exceptions to this time limit will be permitted when the veteran is able to show that he or she:

- 1) was not aware of any time limits and reasonably should not have known them despite due diligence,
- 2) did not know or reasonably should not have known of the adverse consequences of the action until more than 45 days had elapsed, or
- 3) was otherwise precluded from presenting a complaint for reasons beyond his or her control.

Where complaints should be directed - Before proceeding with a complaint under the MOU, the veteran first should attempt to resolve the matter informally by discussing it fully with responsible agency personnel. If this does not resolve the issue, the veteran should contact a Local Veterans' Employment Representative (LVER) or Disabled Veterans' Employment Representative (DVOP) through the local State Employment Service Office. The LVER or DVOP is an impartial fact finder who will forward all pertinent information about the allegation to DOL's State Director for Veterans' Employment and Training (DVET). A veteran may also elect to file a complaint directly with the DVET. A complaint must be in writing. The complainant may be represented by anyone of his or her choosing.

#### COMPLAINT PROCESSING AND RESOLUTION

DOL's role - The DOL representative is an impartial fact finder and does not represent the complainant or the agency. The DOL representative will ensure that:

- the subject of the complaint is covered under the MOU and this memorandum, and
- the complainant is eligible, as described in this memorandum, to bring a complaint.

After ascertaining that the above two criteria are met, the DVET will forward complete information about the complaint to

the appropriate agency Personnel Director and request a written agency response within 30 days.

The agency's role - When an agency receives a written complaint from a DOL representative, it must act expeditiously to determine the facts in the case. Frequently, a complaint can result from a misunderstanding of what is actually required of agencies under the law, or from miscommunication. If the agency is able to resolve the complaint, either by taking action that satisfies the complainant, or by satisfying the complainant that there was no failure to provide the entitlements sought, it will notify DOL accordingly. If the complaint cannot be resolved, the agency will submit a report to DOL outlining its efforts in the case. The agency must respond to DOL within 30 days of the receipt of the complaint.

OPM's role - If resolution cannot be achieved, the DVET will forward the complaint to the local OPM Service Center Director. This official will:

- obtain additional information if needed to make a decision,
- decide whether other OPM offices need to be involved,
- make a decision on the case (If the finding is for the complainant, this could include remedial action intended to make the person whole and could also include sanctions.), and
- provide a written response to the complainant, the agency, and the DVET within 30 days on the resolution of the complaint issues.

The response from the OPM Service Center Director to the complainant will include:

- complainant information (name, address, phone number, etc.),
- the date the complaint was received by OPM,
- the nature of the allegation,
- the applicable law or regulation,
- the documentation reviewed as part of the complaint process,
- the decision rendered,
- the corrective action required or taken, if any, and
- the right of the complainant to seek further review of the issues by presenting them to the appropriate OPM

Regional Director or the Director, Washington Area Service Center. A request for further review must be filed within 20 days of the date of the OPM response. A decision by the Regional Director (or by the Service Center Director in the absence of a request for further review) is final.

Tracking complaints - DOL will maintain a listing of all complaints under the MOU and will share this list with OPM at the end of each calendar year. OPM will review this information to determine if there is a pattern to the complaints and if further action is needed. If a complaint is resolved without being referred to OPM, the local OPM Service Center Director will be notified.

We expect few complaints under these procedures. DOL and OPM have been processing complaints under the MOU since 1990 and to date there have been fewer than 50. Most involved a misperception of what the veterans' preference laws require and were readily resolved. Nevertheless, we see this process as an important outlet through which veterans can be assured of having their legitimate concerns addressed.

We will publicize this program through a fact sheet that will be made available to all agencies, to State Employment Offices, and to veterans' organizations.

OPM remains strongly committed to the principle of veterans' preference. We urge that agencies use this opportunity to take a fresh look at their programs for veterans -- particularly the Disabled Veteran Affirmative Action Program (DVAAP) -- and consider what steps they might take to improve their recruitment, appointment, and advancement of veterans. With the increased delegations of authority to agencies, ensuring that veterans get the preference they are due becomes all the more important.

Attachment

TEXT OF 38 U.S.C. 4103 (c) (13) and (14) AND SUMMARY OF THE  
MEMORANDUM OF UNDERSTANDING BETWEEN OPM AND THE DEPARTMENT  
OF LABOR IMPLEMENTING THIS PROVISION OF LAW

REQUIREMENT OF LAW

Section 4103 (c) (13 and (14) of title 38, United States Code,  
reads as follows:

"(c) In cooperation with the staff of the public employment  
service system and the staffs of each such other program  
in the State, the State Director for Veterans' Employment  
and Training (DVET), and the Assistant State Directors  
for Veterans' Employment (ADVET) shall...

(13) monitor the implementation of Federal laws  
requiring veterans preference in employment and job  
advancement opportunities within the Federal Government  
and report to the Office of Personnel Management or other  
appropriate agency, for enforcement or other remedial  
action, any evidence of failure to provide such  
preference or to provide priority or other special  
consideration in the provision of services to veterans as  
is required by law or regulation;

(14) monitor, through disabled veterans' outreach program  
specialists (DVOPS) and local veterans' employment repre-  
sentatives (LVERs), the listing of vacant positions with  
State employment agencies by Federal agencies, and report  
to the Office of Personnel Management or other appropriate  
agency, for enforcement or other remedial action, any  
evidence of failure to provide priority or other special  
consideration in the provision of services to veterans as  
is required by law or regulation."

These provisions are intended to ensure that agencies carry out  
their obligations to accord preference to veterans and list  
vacancies with the State employment service, as required by  
law. They require DOL to monitor these activities and report  
their findings to OPM (or other appropriate agency) for  
possible enforcement action.

MEMORANDUM OF UNDERSTANDING BETWEEN DOL AND OPM

To carry out these provisions, OPM and DOL entered into an  
agreement or Memorandum of Understanding (MOU). Under this  
agreement, DOL's Veterans' Employment and Training Service  
(VETS) will:

2.

- issue regulations to implement the provisions of title 38, United States Code, which govern the requirements of the State Employment Security Agency (SESA) to report to VETS complaints or other evidence of failure of agencies to 1) list available jobs with the appropriate local employment service office, and 2) provide veterans' preference or other special consideration, as provided by law, to eligible veterans (SESAs are State government agencies, affiliated with DOL, which administer the local employment service/Job Service offices in each State);
- issue regulations and guidance to the SESAs and VETS staff, as required, to implement this MOU;
- report to OPM any unresolved complaints received concerning failure of Federal agencies to provide veterans' preference in competitive service appointments, placement consideration under special noncompetitive hiring authorities for Veterans' Readjustment Appointment (VRA) eligibles and 30% or more disabled veterans, job advancement opportunities for qualified veterans under 38 U.S.C. 4214 (a)(1), and any failure to list employment opportunities with local employment service/Job Service offices when Federal agencies propose to fill vacancies by public announcement; and
- maintain a tracking system for complaints received and report to Congress on agency progress in carrying out these provisions.

OPM will:

- issue policy guidance to implement and explain the requirements for agencies to list competitive job openings with appropriate State employment service offices and to consider on a priority basis, as required by law, referrals of preference eligibles and other eligible veterans who apply for those vacancies;
- issue policy guidance to explain agency responsibilities under section 4214 (a)(1) of title 38, United States Code; and
- develop and implement procedures for the investigation of unresolved complaints received from VETS, for taking corrective or remedial action, as appropriate, and for providing a copy of the final action to VETS on each unresolved complaint referred to OPM.





## 2. Discussion

As you are aware, under the Veterans Preference Act<sup>1</sup> veterans are granted preferences in certain aspects of public employment. See Johnson v. Robinson, 415 U.S. 361, 381-82 (1974); Frederick v. U.S., 507 F.2d 1264, 1266-69 (Ct. Cl. 1974). For example, a preference eligible veteran "who receives a passing grade in an examination into the competitive service" receives an additional five to ten points based upon the veteran's particular military history. 5 U.S.C. § 3309. In addition, age and physical requirements are waived, whenever possible, for veterans seeking government appointments and promotions. 5 U.S.C. §§ 3312, 3363. Veterans also receive certain substantive and procedural protections in adverse actions, 5 U.S.C. § 7512, and reductions in force, 5 U.S.C. § 3501 et seq.

A preference eligible veteran is defined at 5 U.S.C. § 2108. The definition for preference eligible veterans specifically "does not include applicants for, or members of, the Senior Executive Service, the Defense Intelligence Senior Executive Service, the Senior Cryptologic Executive Service, the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service, or the General Accounting Office." 5 U.S.C. § 2108(c). An examination of the legislative histories of the several acts from which these specific exceptions to the veterans preference requirement were developed makes it clear that the Congress did not intend the preference to apply to the named agencies or portions of the named agencies. For example, the legislative history of the Senior Executive Service exception states that the relevant Act "[a]mends section 2108(3), the definition of 'preference eligible,' to exclude 'applicants for, or members of, the Senior Executive Service,' in accord with original intent to exclude application of veterans preference from SES effective with its creation . . . ." S. Rep. No. 92-276, 96th Cong., 1st Sess., reprinted in 1979 U.S. Code Cong. & Admin. News 931, 932. (Emphasis added.) Thus, it would appear that applicants for, or members of the Senior Executive Service as well as the other specifically enumerated agencies in 5 U.S.C. § 2108 are not entitled to a veterans preference.

In addition, the Office of Personnel Management can and does provide exceptions for positions so that those positions can be filled non-competitively. Executive Order 10577, sections 1.4 and 6.1-2 (attached). Notice of OPM's decision to grant an agency authority to make appointments to an excepted position are published in the Federal Register. See E.O. 10577, section

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<sup>1</sup> The Veterans Preference Act was originally passed in 1944. See 58 Stat. 387. Its provisions, as well as subsequent amendments, are now codified and scattered throughout Title 5 of the United States Code.



6.1(c). Again, such exceptions would appear to exempt those enumerated positions from the application of the veterans preference requirement. In this regard, it is important to note that the veterans preference is applied to those receiving a passing grade "in an examination into the competitive service." 5 U.S.C. § 3309 (emphasis added). In addition, VETS is only required to report to OPM or other appropriate agency any failures to provide veterans with preferences or other special considerations "as is required by law or regulation." 38 U.S.C. § 4103(c)(13). If an agency or position has been specifically exempted from the veterans preference either by statute or by regulation, it would appear that the veterans preference is no longer required by law or regulation.

In addition, the courts have generally observed that the Veterans Preference Act does not provide "penumbral" or general rights. Crowley v. United States, 527 F.2d 1176, 1182 (Ct. Cl. 1975); see also United States v. Ruppel, 666 F.2d 258, 261 (5th Cir. 1982). Instead, the provisions of the Act "are necessarily specific, and for veterans to benefit therefrom they must show themselves to be clearly within the intended ambit of those provisions." Crowley v. United States, 527 F.2d at 1182-83.

### 3. Conclusion

As indicated above, there are a number of instances when certain portions of the federal workforce or specific positions within the government are exempted from the application of the veterans preference. In cases in which VETS believes that an agency is improperly claiming an exception to the veterans preference requirement, VETS could follow a slightly different variation of its usual procedure of simply reporting to the Office of Personnel Management. Instead, it would appear that under section 4103(c)(13) and its instruction to take "other remedial action," VETS could take the additional step of consulting with the excepted agency to assert that the agency was failing to properly apply a veterans preference to a particular position or portion of the agency's workforce. VETS could also continue to report under section 4103(c)(13) the agency's alleged failure to grant a veterans preference to OPM, an agency which may be helpful in determining whether providing the veterans preference is appropriate. If the agency in question were to continue to claim that the position was excepted from the application of a veterans preference, VETS could appeal to higher authorities within that agency. In any such appeal within the subject agency, VETS should be careful to follow any appeal procedures within the agency. Eventually, however, the veteran might be forced to challenge the agency's claim that the position is excepted from the application of the veterans preference in court. However, as stated above, the veteran would have to establish that he or she "was clearly within the intended ambit" of the Veterans Preference Act. See Crowley, 527 F.2d at 1183.

I hope this memorandum is helpful. If you have any questions concerning this memorandum, please do not hesitate to call Fred Bowen or Susan Webman.

Attachment