March 18, 2005

William W. Thompson, II
Executive Director
Office of Compliance
Room LA 200
John Adams Building
110 Second Street, S.E.
Washington, D.C. 20540-1999

Re: Comments on Notice of Proposed Rulemaking Implementing Section 4(c)(4) of the Veterans Employment Opportunities Act of 1998

Dear Mr. Thompson:

We submit this letter to the Board of Directors of the Office of Compliance ("the Board") in response to the Notice of Proposed Rulemaking ("NPR"), 151 Cong. Rec. S1486-02 (daily ed. Feb. 16, 2005). The NPR invites comments with respect to proposed regulations implementing section 4(c)(4) of the Veterans Employment Opportunities Act of 1998 ("VEOA"), 2 U.S.C. § 1316a, as applied to covered employees of, *inter alia*, the Senate.

Below we submit our section-by-section analysis. At the outset, however, we have two general comments. First, Section 303(b)(1) of the Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. § 1383(b)(1), requires that any proposed regulations applicable to the Senate must be recommended by the Deputy Executive Director for the Senate. The position of Deputy Executive Director for the Senate is currently vacant, although the Board states that the Acting Deputy Executive Director for the Senate has recommended the proposed regulations. (See the Board's "Procedurals Summary," 151 Cong. Rec. S1487.) The CAA, however, does not affirmatively allow delegation of the Deputy Executive Director's statutory duties. See 2 U.S.C. § 1382(b). One of those statutory duties is to recommend regulations for Senate employing offices. 2 U.S.C. § 1382(b)(4).

We located no law that addressed delegations of this type of authority. With respect to Presidential delegations of authority, there is a statute that expressly provides that the President may delegate "any function vested in the President by law if such law does not affirmatively

prohibit delegation of the performance of such function. . . ." 3 U.S.C. § 302.[1] There is no corresponding statute that applies to the Board's appointments. Because the Board's authority (as well as the Executive Director's authority) is limited by the CAA, given the absence of express authority to delegate the Deputy Executive Director's statutory duties to another person, it appears that the Acting Deputy Executive Director for the Senate is exceeding the scope of his authority in recommending regulations for the Senate. Therefore, the proposed regulations appear void as to the Senate.

Our second general comment relates to the Board's issuance of one body of proposed regulations. (See the Board's "Procedurals Summary," 151 Cong. Rec. S1489, stating "if these proposed regulations are approved as proposed, there will be one text applicable to all employing offices and covered employees.") Section 304(a)(2)(B) of the CAA, 2 U.S.C. § 1384(a)(2)(B), provides that the regulations of the Board "shall consist of 3 separate bodies of regulations, which shall apply, respectively, to– (i) the Senate and employees of the Senate; (ii) the House of Representatives and employees of the House of Representatives; and (iii) all other covered employees and employing offices." Initially, it is unclear from the NPR whether the proposed regulations are intended to be included in each separate body of regulations that cover the Senate, House of Representatives, and other Congressional instrumentalities, or whether a single regulation is being proposed. At a minimum, section 304(a)(2)(B) requires that the regulations be separate.

II. Subpart C - Veterans Preference in Appointments

A. §1.107 Veterans preference in appointment to restricted positions

Three of the four listed positions include the limiting words "primary duty" in the definition. We suggest that the definition of "guard" also include the "primary duty" limitation. We believe this is important given that the definition of "guard" includes those who "make observations for detection of fire, trespass, unauthorized removal of public property or hazards to Federal personnel or property." Generally, any manager is responsible for ensuring a safe work environment, including the detection of fire or trespass, and to safeguard Senate property. These

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[1] The full text of the statute is as follows: "The authority conferred by this chapter shall apply to any function vested in the President by law if such law does not affirmatively prohibit delegation of the performance of such function as herein provided for, or specifically designate the officer or officers to whom it may be delegated. This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President."

types of duties, however, would not be considered a primary duty of a manager's position. To avoid any confusion, the "primary duty" limitation also should apply to "guard."[2]

C. §1.110 Waiver of physical requirements in appointments to covered positions

Requiring an employing office to give an applicant the opportunity to present additional information to rebut the employing office's determination and to require another review would unnecessarily delay an employing office's hiring ability. We suggest that if a question exists regarding the veteran's ability to fulfill the physical requirements of the position, the veteran should be required to submit any information he or she wishes the employing office to consider. This proposal balances the interest of the employee in presenting information regarding his or her ability to perform the job and the employing office's interest in expediting the hiring process.

Subsection (c) of the proposed regulation provides that "nothing in this section shall relieve an employing office of any greater obligation it may have pursuant to the Americans with Disabilities Act ["ADA"]. . . ." This proposed regulation creates a conflict between the VEOA and the ADA. The ADA prohibits disability inquiries of applicants at the pre-offer stage. *See* 42 U.S.C. §12112(d)(2)(A), which is incorporated by the CAA at 2 U.S.C. §1311(a)(3). The VEOA, however, contemplates that disability inquiries are appropriate for the purpose of determining whether an applicant claiming a disabled veteran's preference is entitled to the preference. While the courts are required to give effect to differing statutes where possible, if an irreconcilable difference exists, well-recognized principles of statutory construction provide that the conflict is resolved by giving effect to the later-enacted, more specific statute. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). We submit that, relative to the ADA, the VEOA is more specific and latter-enacted as it relates to pre-offer disability inquiries of applicants who seek a disabled veteran's preference, and the VEOA, not the ADA, should control these inquiries. Because subsection (c) of the proposed regulation suggests a resolution of conflicting provisions that is inconsistent with accepted statutory construction, it should be deleted. This comment applies equally to proposed regulation §1.114(c).

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[2] We also note that the word "or" was absent following the last semicolon in the first sentence of the "guard" definition. It appears this was a mistake rather than intentional.

III. Subpart D - Veterans Preference in Reductions in Force

A. §1.111 Definitions applicable in reductions in force

Subsection (e) of proposed regulation §1.111, which defines "reduction in force," is broader in scope than the regulations applicable to the executive branch and, therefore, should be modified. Specifically, the executive branch regulations exclude any lay off where at least 180 days notice is given. 5 C.F.R. §351.201(a)(2). In contrast, the proposed §1.111 applies to all reductions without regard to the amount of notice given.

Additionally, the first sentence of §111(b) defines "competitive area" as "that portion of the employing office's organizational structure, as determined by the employing office, in which covered employees compete for retention." A later sentence, however, provides that the "minimum competitive area" shall be "a department or subdivision of the employing office under separate administration." These definitions can be interpreted to be internally inconsistent. Certain employing offices, like the Sergeant at Arms and the Secretary of the Senate, have multiple departments that are headed by different individuals, but some administrative decisions, like hiring and firing, may be centralized with the executive office of the employing office. While the above definition of "competitive area" would allow the Sergeant at Arms and the Secretary of the Senate to determine that each of their departments is a separate competitive area, the definition of "minimum competitive area" appears not to allow that. Because the functions across these employing offices are quite diverse, we suggest that the regulations should clarify that each department under these employing offices may be a separate competitive area, and delete the reference to "separate administration."

Further, subsection (b) refers to a local commuting area although all the positions of the Senate employing offices covered by the VEOA are located in one local commuting area. Therefore, this phrase appears unnecessary.

B. §1.112 Application of reductions in force to veterans preference eligibles

This regulation would make veterans preference the controlling factor in retention decisions, provided the preference eligible's performance had not been rated unacceptable. The Board's proposed regulation apparently is based upon 5 U.S.C. §3502(c), which provides that an employee is entitled to such preference if the employee's "performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title. . . ." The Supreme Court has interpreted analogous language in the predecessor legislation to mean that preference-eligible veterans have preference over all nonpreference eligible employees without regard to tenure, length of service or efficiency of performance. *Hilton v. Sullivan*, 334 U.S. 323, 335 (1948).

The Senate is not subject to the performance appraisal system set forth in chapter 43 of Title 5, and the Board has no authority to impose that appraisal system. Accordingly, it is improper to use that statutory provision as a basis to support a regulation requiring the retention of veterans over non-veterans in all cases. Rather, the regulation should be based on 5 U.S.C. §3502(a), which requires that any implementing regulation give "due effect" to tenure of employment, military preference (subject to §3501(a)(3)), length of service and efficiency or performance ratings.

IV. Subpart E. Adoption of Veterans Preference Policies, Recordkeeping and Informational Requirements

A. Section 1.116 Adoption of veterans preference policy

This section requires an employing office with covered employees to adopt a written veterans preference policy specifying how the employing office has integrated the veterans preference requirements into its employment and retention processes and to make its policy available to the covered employees, applicants for appointment to a covered position and to the public upon request. Nothing in the VEOA, however, requires this action. Additionally, there is no corresponding executive branch regulation that would require either the adoption of a written policy or its dissemination.

The Board asserts this regulation is "necessary to the implementation of the VEOA," and, therefore, permitted by section 4(c)(4)(A) of the VEOA. (See the Board's "More Detailed Discussion of the Text of the Proposed Regulations," 151 Cong. Rec. S1493.) The cited section, however, does not support the Board's position. Rather, Section 4(c)(4)(B) of the VEOA states, "The regulations issued . . . shall be the same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions . . . except insofar as the Board may determine for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section." The Board fails to identify good cause to impose an additional requirement upon the legislative branch when the executive branch apparently has deemed such a regulation unnecessary.

The regulation also is overbroad in that it would require employing offices to make its veterans preference policy available to the public upon request. Unlike executive branch agencies, Senate employing offices are not subject to the Freedom of Information Act and they have no duty to make available to the public any records regarding their employment practices. See 5 U.S.C. section 551, which defines "agency" as excluding the Congress. The Board's regulation would impose upon Congress an additional duty to the public that Congress never intended.

B. Section 1.117 Recordkeeping

Executive branch regulation 5 C.F.R. §351.505(f) requires preservation of records related to veterans preference in reductions in force for one year after the date the agency issues a specific reduction in force notice. Here, however, the Board's proposed regulation would measure the retention period from "the date of the making of the record or the date of the personnel action involved or, if later, one year from the date on which the applicant or covered employee is notified of the personnel action." The law is well established that the statute of limitations begins to run when the employee receives notice, and not some later date when the action is taken. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). Thus, for example, if an employing office gave a covered employee six months' notice of an upcoming layoff, the proposed regulation would require that the records be maintained for a minimum of one and one-half years. The proposed regulation imposes an unnecessary recordkeeping burden on employing offices and the Board fails to establish good cause to deviate from the Executive Branch VEOA regulations by lengthening the record retention period.[3]

We further submit that good cause exists to shorten the record retention period from the one-year period specified in 5 C.F.R. §351.505(f). Given the deadlines by which an employee must request counseling and mediation under the CAA, an employing office must be informed about any claim no later than eight months (approximately 240 days) after notice of hiring or reduction in force is provided to the employee. Establishing a record retention period of nine months (approximately 275 days) from the date the employee is notified of the hiring or retention decision allows ample opportunity to inform employing offices about any claim and the need to maintain records.

C. §1.118 and §1.119 Dissemination of veterans preference policies to applicants and covered employees

Sections 1.118 and 1.119 require employing offices to disseminate their VEOA policies and procedures to each and every qualified job applicant and employee in a covered position. Not only would this requirement be burdensome and unduly costly to employing offices, but also it exceeds the Board's authority because it is not based on any statutory requirement. Further, we

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[3] We note also that the Board states it relied on EEOC recordkeeping regulations in drafting the proposed section 1.117. (See the Board's "More Detailed Discussion of the Text of the Proposed Regulations," 151 Cong. Rec. S1493.) Given that regulations were promulgated specifically for recordkeeping related to veterans preference in reductions in force, the EEOC regulations are not "the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions" and should not be used.

are aware of no counterpart executive branch regulation to this proposed regulation, and the Board cites no counterpart regulation in its explanatory comments.

D. §1.120 Written notice prior to a reduction in force

Subsection (b)(7), which would allow covered employees to inspect "the regulations and records pertinent to him/her," exceeds the VEOA notice requirements and the Board's regulatory authority. Although 5 C.F.R. §351.802(a)(3) contains this provision, the Office of Personnel Management ("OPM"), which drafted the regulation for applicability to the executive branch, has expansive authority and responsibilities in administering the executive branch civil service. The Board does not have analogous authority or responsibility with respect to the legislative branch. Subsection (b)(5), therefore, should be deleted.

E. §1.121 Informational requirements regarding veterans preference determinations

The Board exceeds its authority in proposing regulation §1.121, which requires employing offices to provide written justification to applicants and employees as to why they were not selected or retained. The VEOA does not require employing offices to provide such written justification, other than the specific notice provisions set forth in 5 U.S.C. §3502, nor is there any such regulation that applies to the executive branch. Because the Board fails to set forth good cause to deviate from the executive branch regulations and to impose an additional requirement upon the legislative branch, this proposed regulation exceeds the Board's authority and should be deleted.

In conclusion, we submit that the Board should amend the proposed regulations in accordance with the comments above.

Sincerely,

Brenda J. Pence