



Department of Energy  
Washington, DC 20585

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MEMORANDUM FOR HUMAN RESOURCE DIRECTORS

FROM:

  
KENNETH T. VENUTO DIRECTOR,  
OFFICE OF HUMAN CAPITAL MANAGEMENT

SUBJECT:

**POLICY GUIDANCE MEMORANDUM # 31**  
PROCEDURES FOR REGULARIZING ILLEGAL OR ERRONEOUS  
APPOINTMENTS AND MANAGING PRIORITY PLACEMENTS AND PRIORITY  
CONSIDERATION CASES

**Purpose:** As part of the Department's ongoing effort to ensure the integrity of merit system principles (§5 USC 2301(b)) and to prevent the appearance of, or violation of any of the prohibited personnel practices (§5 USC 2302 (b)), this policy guidance establishes a uniform process for managing cases that result in illegal or erroneous appointments and requires priority placement and/or priority consideration for veterans' preference eligibles and/or non-veterans' preference applicants under both Delegated Examining and Merit Promotion selection cases.

**Authorities:** 5 USC 2301; 5 USC 2302; 5 USC 3319; 5 CFR 5.1; 5 CFR Part 330; 5 CFR Part 332; 5 CFR Part 337

**Coverage:** This policy is applicable Department-wide and covers all actions filled through the Delegated Examining process and Merit Promotion procedures.

Effective immediately, all Human Resource Directors must ensure that the procedures outlined in this memorandum are followed when **illegal or erroneous appointments** are identified and priority placement and/or priority consideration is required to resolve the following:

- **Lost Employment Consideration** - When a veterans' preference eligible did not appear in the correct order on the certificate (incorrectly ranked), was left off the certificate, or appeared on the certificate but did not receive appropriate consideration, AND a violation of a law is identified.
- **Lost Certification** - Lost certification occurs when a veterans' preference eligible or non-veterans' preference applicant is incorrectly ranked on the certificate or left off a certificate but correcting the error would not give them real employment consideration, and NO violation of law is identified.



Most illegal or erroneous appointments are the result of one of the following violations; however, this list is not all inclusive:

1. A veterans' preference eligible was on the original certificate of Best Qualified candidates but a non-veterans' preference applicant was selected.
2. A veterans' preference eligible was not certified due to an erroneous qualification determination or an incorrect rating or ranking.
3. An applicant in a lower quality category (veterans' preference or non-veterans' preference applicant) was selected and appointed over an applicant who appeared in the highest quality category.

In each instance described above, the hiring case must be reconstructed and the appointment must be regularized.

### **Reconstructing a hiring case**

This is the process in which a Servicing HR Office (SHRO) recreates all steps in the hiring case file to identify steps that were handled incorrectly and makes all necessary corrections to the process to create an accurate selection certificate. This process is used to determine whether a candidate selected from the erroneous certificate would have been within reach for selection from the corrected certificate.

### **Illegal Appointment**

An appointment is considered illegal when all four of the following conditions exist:

1. A selection was made from an erroneous certificate;
2. When reconstructing the case file, the SHRO discovers that an applicant who did not receive consideration would have been within reach on a properly ranked certificate;
3. The selectee is no longer within reach for consideration once the certificate is reconstructed (e.g., when veterans' preference is properly applied) and/or the selectee is taken off of the certificate for other reasons; and
4. The applicant(s) who lost consideration meets all the qualification requirements for the position.

### **Lost Employment Consideration Resulting in an Illegal Appointment**

In the event that an erroneous certification has (1) violated veterans' preference, or any other laws involving merit system principles and/or prohibited personnel practices; **AND** (2) has resulted in an illegal appointment, immediate action is required to regularize the appointment (i.e., take appropriate corrective action so that the individual on the illegal appointment can be legally retained in the position).



## Regularizing Illegal Appointments through Priority Placement

When a SHRO identifies that an illegal appointment has been made during the hiring process, and the selected individual is still in the position, the SHRO is required to follow the procedures outlined below to regularize the appointment (i.e., take appropriate corrective action so that the individual on the illegal appointment can be legally retained in the position):

- Submit to the Office of Human Capital Management, Office of HC Policy Accountability and Technology, Human Capital Policy Division (HC-11) a written explanation of how and when the erroneous certification was discovered and identify if a selection was made.
- The SHRO must reconstruct the case file to determine if the applicant who lost consideration should have been given selection preference (e.g., a veterans' preference eligible should have been selected over a non-veterans' preference applicant; or an applicant in a higher quality category should have been selected over an individual in a lower quality category).
- If the SHRO determines that the selectee would not have been within reach on the reconstructed certificate, and the SHRO cannot identify any other legal authority under which the selectee could have been appointed, the SHRO must work with the selecting official to identify a comparable position(s) for priority placement of the erroneously bypassed veterans' preference eligible(s). This is necessary in order to make the illegally appointed selectee within reach on the reconstructed certificate so they can be legally retained in the position. For selection cases in which multiple veterans' preference eligibles lost employment consideration and there was an illegal appointment, each veterans' preference eligible who lost consideration must be afforded selection preference.
- When the SHRO and the selecting official have identified a comparable position (i.e., same series/grade/full performance level, work schedule, general geographic location or other location) acceptable to the veterans' preference eligible/applicant that lost consideration they must make a tentative job offer of the position in writing.  
(Note: If the position being offered is in a different geographic location from that in which the eligible lost employment consideration, and the eligible declines the offer due to the location, the eligible still retains priority placement status until a position is offered in the same geographic location in which the eligible lost employment consideration or until the eligible accepts a comparable position in a different location.)
- If the veterans' preference eligible declines the written offer of a comparable position, a written response must be received from the veterans' preference eligible and included in the case file. No further action is required. If the veterans' preference eligible accepts the position, the SHRO must submit a formal written variation request along with the reconstructed case file to HC-11 to seek OPM approval to regularize the illegal appointment.
- Once priority placement of all veterans' preference eligibles who lost consideration has occurred, and if there are still non-veterans' preference applicants who also lost



consideration, appropriate steps must be taken to provide priority consideration to each individual impacted under the procedures below (See "Lost Certification that Results in Priority Consideration ONLY").

### **When Regularizing an Illegal Appointment Results in the Removal of the Existing Incumbent**

Every option must be attempted to regularize an illegal appointment. Removal of the illegally appointed selectee from employment is the last resort. If the SHRO determines that the selectee would not have been within reach on the reconstructed certificate, and the SHRO cannot identify any other legal authority under which the selectee could have been appointed the selectee must be separated. Since the appointment was invalid, the individual is not entitled to priority consideration and does not have appeal rights.

Once the individual on an illegal appointment is removed, the selecting official is required to provide priority placement to one of the veterans' preference eligibles and give priority consideration, as applicable, to veterans' preference eligibles/applicants that lost consideration in the erroneous hiring case for any future filling of that position.

The selecting official must comply with the following requirements:

- Voluntarily offer at least one of the veterans' preference eligibles who lost consideration the position from which the illegally hired selectee was removed.

**AND**

- In all cases CPS and CP veterans' preference eligibles must be minimally qualified for the position being offered, while TP, XP, veterans' preference eligibles must be considered at least well qualified for the position.

### **Lost Certification that results in Priority Consideration ONLY**

Lost Certification usually results in a priority consideration as a result of erroneous certification where there is no illegal appointment and no violation of law identified. Priority consideration is applicable when the SHRO discovers that an administrative oversight (that does not result in violation of law such as veterans' preference) results in missed consideration of one or more qualified applicants. For example, if the position was filled by a veterans' preference eligible, yet other veterans' preference eligibles were missed through erroneous certification, priority consideration must be given to all veterans' preference eligibles that lost consideration.

Priority consideration is applicable for current identical and/or equivalent positions within the Departmental Element for which the veterans' preference eligible is qualified (i.e., same series, grade level, full performance level, type of work, and work schedule). If there are no current (or existing) vacancies, then the veterans' preference eligible should receive priority consideration for the next identical or equivalent vacancy opportunity.

If the position being offered under priority consideration is in a different geographic location from that in which the eligible lost employment consideration, and the eligible declines due to

the location, the eligible still retains priority consideration status until a position is offered in the same geographic location in which the eligible lost employment consideration or until the eligible accepts a comparable position in a different location.

Both veterans' preference eligibles and non-veterans' preference applicants who are entitled to priority consideration receive a onetime consideration for the next identical or equivalent position by being placed on a separate selection certificate from all other applicants and provided to the selecting official before issuing any certificate from a new pool of applicants. While priority consideration does not afford candidate(s) with mandatory placement rights, however, in the event that the selecting official does not find the priority consideration candidate appropriately suited for the position, they must follow normal steps to formally request to bypass the veterans' preference eligibles.

### **Requirements for Servicing HR Offices**

Each SHRO must establish internal procedures reflecting (at a minimum) the requirements indicated in this policy guidance.

Each SHRO must notify HC-11 as soon as illegal or erroneous appointments are identified. In addition, each SHRO must maintain a consolidated listing of all applicants who are entitled to priority consideration.

Each SHRO must submit on a quarterly basis a report of their current priority placement and/or consideration activities to include the latest updates (e.g., hired, declined, etc.). All reports must be submitted to HC-11 not later than two weeks after the end of the appropriate quarter. Contact HC-11 for an electronic template to facilitate tracking and reporting.

### **Requirements for Merit Promotion Cases**

It is important to note that in rare instances, an illegal appointment and/or priority consideration case may occur through the Merit Promotion process. Examples include but are not limited to:

- Placing an applicant on an appointment that he/she is not otherwise qualified or eligible for such as those with a positive education requirement when they do not meet it, or a Schedule A, Schedule D, VEOA's, ICTAP, etc.
- Failure to provide an applicant with full consideration for a position that is outside of normal merit procedures; e.g., VEOA's when hiring from outside the agency's workforce under Merit Promotion procedures.
- Eliminating reinstatement eligibles due to Time-In-Grade restrictions when the applicant has been outside of federal government employment for 52-weeks or more.

In such cases, the aforementioned processes must be followed to regularize the illegal or erroneous appointment. And, when warranted, seek a variation approval from OPM through HC-11, and/or take the necessary steps to effectuate the priority consideration process.



As a reminder, the regulatory requirements to adhere to the Career Transition Assistance Program, the Interagency Career Transition Assistance Programs (CTAP/ICTAP), and the Reemployment Priority List (RPL) outlined in 5 CFR Part 330 will take precedence over this guidance memorandum. Specifically, *placement of CTAP/ICTAP and RPL applicants supersedes any placement resulting from an illegal appointment.*

The Department will maintain a corporate list of all priority placement and priority consideration candidates as required under 5 CFR 330.601

The procedures outlined in this document are mandatory for all Delegated Examining, Merit Promotion, and other hiring cases as applicable.

If you have any questions regarding this policy guidance, please contact Tiffany Wheeler or Jennifer Ackerman of the Human Capital Policy Division. Tiffany Wheeler may be reached on 202-586-8481 or [Tiffany.Wheeler@hq.doe.gov](mailto:Tiffany.Wheeler@hq.doe.gov) and Jennifer Ackerman may be reached on 202-586-3860 or [Jennifer.Ackerman@hq.doe.gov](mailto:Jennifer.Ackerman@hq.doe.gov)