

Date 24 March 1981

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
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Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

Harry:

Please have someone from your office highlight and make any appropriate comments for my meeting on Friday on the attached. Please return to me by Thursday, 26 March. Thank you.

[Redacted Signature]

Max Hugel

Att: DDA 81-0637

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post) Deputy Director for Administration	Room No.—Bldg. 7D 24 Hqs Phone No. [Redacted]
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5041-102

OPTIONAL FORM 41 (Rev. 7-76)
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STAT

DDA:MHugel:kmg (24 Mar 81)

Distribution:

- Orig - Adse (via tube) w/cy of att
- ✓ 1 - DDA Subj w/cy of att (Orig)
- 1 - DDA Chrono
- 1 - MH Chrono

Att: Ltr dtd 23 Mar 81 to DDA fr Director-Designate of OPM re Inter-Agency Personnel Officers Group meeting on personnel obligations and responsibilities of each agency (DDA 81-0637)

81-0637

**Office of
Personnel Management**

Washington, D.C. 20415

In Reply Refer To:

Your Reference

• March 23, 1981

Mr. Max Hugel
Deputy Director for Administration
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Hugel:

At a recent Cabinet meeting, I requested, through the Office of Cabinet Administration, individuals to be assigned to the Inter-Agency Personnel Officers Group (IAPOG). I have been advised you are that personnel contact for your agency.

An initial briefing on the personnel obligations and responsibilities of each agency, will take place in the Executive Conference Room at the Office of Personnel Management Building on March 27th, at 9:00 A.M.: 1900 E Street N.W.

As you know it is very important to get off to a good start in the complex area of government personnel. In fact, I apologize for not being able to do this sooner. We need to meet and discuss common problems; and set-up a formal procedure through the IAPOG.

I know you have a very busy schedule, but I would appreciate it if you made time available.

Sincerely,



Donald J. Devine
Director-Designate

P.S. I am including a copy of a memorandum put together at OPM on the Civil Service and Transition to a new Presidential Administration.

Enclosure

On file OPM release instructions apply.

CIVIL SERVICE AND TRANSITION TO
A NEW PRESIDENTIAL ADMINISTRATION

Each Administration has the opportunity to appoint a number of officials in the civil service essentially on the basis of their support for its aims and policies. These officials are generally those responsible for formulating, advocating and directing Administration policies and programs, or who serve such officials in a confidential relationship.

In the context of the total Government, only a relatively few positions are subject to change at the discretion of a Presidential Administration. Most executive branch positions are in the competitive civil service or are under a separate merit system. For these latter positions, it is a violation of civil service law and regulations to base personnel decisions on any factor not related to job performance. (See 5 U.S.C. 2301, 2302; 5 CFR Parts 4, 7, 1250.)

It is traditional, of course, that the vast majority of the incumbents of positions which are subject to change at the discretion of a Presidential Administration resign before any new Administration takes office or at the request of Administration officials. However, there is no legal requirement that they do so. It also is common for an incoming Administration to ask certain persons to remain on their jobs during the early stages of the new Administration to ensure needed continuity and to provide required personnel during the initial period of staffing.

In any event, employees in positions that are subject to change at the discretion of the Administration are not part of the competitive civil service. Rather, they are excepted from the requirements placed on the competitive service by statute, Executive order or regulation. There are a variety of such employees. They include Presidential appointees or direct appointees of the agency head; noncareer, limited term, or limited emergency appointees in the Senior Executive Service; incumbents of Non-career Executive Assignments; and incumbents of Schedule C positions.

Positions or Individuals Subject to Change

Positions or individuals subject to change at the discretion of a new Administration include:

- (1) Presidential appointments made with the advice and consent of the Senate to positions in which the incumbent serves at the pleasure of the President;
- (2) Other Presidential appointments to positions in which the incumbent serves at the pleasure of the President;

- (3) Appointments to positions in which the incumbent serves in the excepted service at the pleasure of the agency head. Excepted service positions in this category are those which are excepted from the competitive service by statute; and,
- (4) Individuals serving in the Senior Executive Service on either a noncareer or limited term basis.

Positions in these categories normally include Cabinet Officers and heads of other Executive branch agencies; Under Secretaries; Assistant Secretaries; Directors of Bureaus, Services, and Administrations; and Chairpersons and Members of Boards, Commissions, and Committees. Positions in all four categories are often authorized by specific provisions of law. Many are in the Executive Schedule, some are under the General Schedule or other position-oriented pay system.

In the past, categories (1) and (2) included most of the positions in Level I (Cabinet level) through Level V of the Executive Schedule. Now managerial Level IV and Level V positions (not requiring Senate confirmation) are in SES, although their titles may continue to be listed in sections 5315 and 5316 of title 5 pending revision of the statute. Also, now included in SES are most of the former managerial GS-16, 17, and 18 positions in the Executive branch and equivalent positions in other pay systems.

An executive's tenure in the former Level IV, Level V, supergrade, and other type positions now in SES is determined by the type of appointment held by the individual and not by the type of position. The positions identified in (1), (2), and (3) above and the various types of SES appointments are discussed below.

INDIVIDUALS APPOINTED BY THE PRESIDENT OR HEAD OF THE AGENCY

Officers and employees who serve "at the pleasure of" the President or other appointing official may be asked to resign or may be dismissed at any time. They are not covered by standard Civil Service removal procedures and have no right of appeal. However, under recent court decisions which may be applicable, such employees may not be discharged for political party affiliation, unless party affiliation is necessary for the performance of their job. It appears, however, that they may be discharged for the destruction of the policy determining or confidential relationship [Branti v. Finkel, decided by the U. S. Supreme Court March 31, 1980]. A sample notice of removal is included in Tab A. Agencies should consult their General Counsel or OPM's General Counsel for assistance in this area.

In limited cases, the organic statute creating a position provides that an individual appointed by the President, may be removed only for cause. These provisions are most commonly found in statutes establishing quasi-judicial entities or regulatory agencies. The Office of Legal Counsel at the Department of Justice is the expert in this field. The issue is discussed in such cases as: Myers v. U.S., 272 U.S. 52; Humphrey's Executor v. U.S., 295 U.S. 602; Wiener v. U.S., U.S. 349; and Buckley v. Valeo, 424 U.S. 1.

OTHER APPOINTEES IN THE EXCEPTED SERVICE

Noncareer Executive Assignments

Noncareer Executive Assignments (NEA) are positions at GS-16, 17, and 18 that are administratively excepted from the competitive service through action of OPM. The exception is based on the degree of involvement of the incumbent in the policies and actions of the Administration or on a confidential relationship with a political appointee. Before the Senior Executive Service was established, NEAs were the primary Administration officials below the Executive Levels. There now are very few of these positions because most were incorporated into the SES.

Except in the rare case of an NEA with status in his or her position, an NEA has no right to appeal a removal action to the Merit Systems Protection Board. Nonetheless, the removal of such an individual must be in accordance with any procedures which have been established by the employing agency. These employees may not be dismissed because of party affiliation unless such affiliation is necessary for the performance of their job. [Vitarelli v. Seaton, 359 U.S. 539 (1959); Watson v. U. S., 162 F. Supp. 755 (Ct. Cl. 1959)].

A sample notice of separation for these employees is contained in Tab A. In the rare case of an individual having status in the position, the Executive Personnel and Management Development Group of OPM will provide advice.

Schedule C Positions

Another category of individuals who are subject to change at the discretion of a new Administration are appointees to Schedule C positions, or to equivalent positions in agencies that are statutorily excepted from the competitive service. Schedule C positions consist of jobs at GS-15 and below which the Office of Personnel Management has excepted from the competitive civil service because they include policy-determining responsibilities or require the incumbent to serve in a confidential relationship to a key official.

(a) Establishment of Positions

OPM authorizes the establishment of each Schedule C position and may revoke the authority when the position changes. Additionally, several agencies have received approval to establish and maintain their own inventory of Schedule C positions via a delegation agreement negotiated with OPM. OPM does not review the qualifications of a Schedule C appointee; final authority on this matter rests with the appointing official. Currently, there are about 1,800 Schedule C positions. A list of them is published annually in Part 213 of OPM's regulations and is updated as changes occur by publication in the Federal Register.

(b) Procedures for Removal

Schedule C employees may be separated at any time if the confidential or policy-determining relationship between the incumbent and his or her superior no longer exists. They also may be removed based on political affiliation if political affiliation is required for effective job performance. Agencies should consult their General Counsel or OPM's General Counsel on this issue. The only Schedule C employees covered by statutory appeal procedures and who, therefore, may appeal removal actions to the Merit Systems Protection Board (MSPB) are those who are serving in a position in the competitive service when OPM authorized its conversion to Schedule C and who still serve in those positions (i.e., have status in the positions--c.f. Roth v. Brownell, 215 F 2d 500.)

Incumbents of Schedule C positions who have no status in those positions regardless of veterans preference or length of service in the positions, are not covered by statutory procedures and have no rights to appeal removal actions to MSPB. (Please refer to the revised FPM Chapter 752, Adverse Actions, subchapter 3-1, d(2)(A). This chapter was published in advance of incorporation in the FPM via FPM Letter 752-11 dated September 12, 1980.) However, the removal of any Schedule C employees must be in accordance with any internal appeal procedures which have been established by the employing agency [Vitarelli v. Seaton, 359 U.S. 539 (1959); Watson v. U.S., 162 F. Supp. 755 (Ct. Cl. 1958.)]

An employee who was serving in a position in the competitive service when OPM authorized its conversion to Schedule C and is still serving in that position may be removed from that position "for such cause as will promote the efficiency of the service". Moreover, the action must be taken in accordance with the procedures established by 5 U.S.C. 7511 et seq. and part 752 of OPM's regulations. These procedures provide for the right: (1) to a 30-day advance written notice which states the reasons for the proposed removal specifically and in detail; (2) to reply personally and in writing; (3) to be represented; (4) to have the reply considered; and (5) to a written decision stating the reasons for the action. The employee may appeal the action to MSPB.

In this connection it should be noted that removal for loss of confidence comes within the concept of "for such cause as will promote the efficiency of the service" when the incumbent occupies the policy-determining or confidential position, i.e., a Schedule C position. [Leonard v. Douglas, 321 F 2d 749 (D.C. Cir. June 26, 1963.)] Additionally, agencies are reminded that there are very few instances where an employee has status in his/her Schedule C position since OPM does not generally authorize conversion of encumbered competitive positions to Schedule C. Therefore, we would expect very few if any of these cases.

A sample notice of separation for all Schedule C employees except those with status in their positions is contained in Tab A. Tabs B and C contain sample letters of proposed removal for an individual with status in his/her position who is covered by part 752 of OPM's regulations.

(c) Temporary Schedule C Positions

On April 18, 1980, OPM issued a final regulation permitting agencies to establish temporary Schedule C positions at the GS-15 grade level and below following Inauguration in order to facilitate the orderly transition of duties as a consequence of a change in Presidential Administration, changes in department or agencies heads or changes resulting from the creation of a new department or agency. This authority permits the establishment of (1) positions identical to existing Schedule C positions if an intent to vacate these positions has been put in writing by management or the present incumbents, and (2) new temporary Schedule C positions when it is determined that the department or agency heads' needs cannot be met through the establishment of a position identical to an existing Schedule C position. Service under either type of position may not exceed 120 days. For more specific information on the use of this authority, please refer to FPM Bulletin 213-33 dated May 9, 1980.

Other Excepted Service Positions

In addition to the policy-determining or confidential positions described in the preceding section, certain agencies and groups of positions are also excepted by statute, Executive order, or OPM action from the competitive civil service. These exceptions have been made for a variety of reasons, none of which relate to the policy-determining factors associated with the initial three categories. Examples of positions which have been excepted by statute include doctors, dentists, and nurses in the Department of Medicine and Surgery of the Veterans Administration, the Foreign Service of the Department of State, the Federal Bureau of Investigation of the Department of Justice; and, all positions in the Tennessee Valley Authority, the General Accounting Office, the Nuclear Regulatory Commission, and the Postal Service. Most of these positions are under special merit systems and are not subject to change in a new Administration. In addition to positions excepted by statute, there are about 100,000 positions which are excepted from the competitive service by Executive order. Most of these are jobs overseas held by foreign nationals.

Finally, there are two other categories of positions which the Office of Personnel Management has administratively excepted from the competitive service. Schedule A positions are those which are not of a confidential or policy-determining character, but for which it is not practicable to hold any examination. Examples of positions in Schedule A include chaplains, teachers in military dependent school systems overseas, faculty positions of Service academies, and certain positions at isolated localities. Attorney positions are also in Schedule A because the OPM is prohibited in its appropriations legislation from spending funds to examine for attorney positions. There are about 100,000 positions in this schedule.

Schedule B positions are those which are not of a confidential or policy-determining character, but for which it is impracticable to administer open competitive examinations. However, an individual must meet qualification requirements established by OPM for the occupation and grade level in order to be appointed to a Schedule B positions. Examples include student trainee positions (co-op), National Bank examiners in the Treasury Department and loan specialists in the Export-Import Bank. There are about 17,000 positions in this schedule, over 14,000 of which are under cooperative education programs.

APPOINTEES IN THE SENIOR EXECUTIVE SERVICE

SES positions, appointments, and special features of SES tenure are discussed below. Appointees in the SES who are subject to change at the discretion of a new Administration are those in Noncareer, Limited Term, and Limited Emergency appointments. The continued tenure of these SES appointees should be examined carefully and should take into account the reasons for the appointment (including expeditious processing) and the prospect for continued contribution by the executive within the scope of the established need for the appointment.

Each agency receives a number of SES position spaces in a biennial position allocation, based on the agency's demonstrated need for the positions. The agency is then free to establish within that limit Career Reserved or General positions as appropriate. Career Reserved positions must be filled by career SES appointees; General positions can be filled by either career or non-career appointees. Since, by statute, only 10 percent of the SES government-wide may be given noncareer appointments, most General positions are filled by career appointees. Each agency is allocated a maximum number of noncareer appointments which may be in effect at any one time.

Noncareer SES Appointees

Noncareer SES appointments are made by the agency. The agency has the authority to establish qualifications, approve the candidate's qualifications, make the appointment without regard to competitive process, and fix the pay of the appointee.

A noncareer appointee may be removed following written notice, or requested to resign at any time at the discretion of the appointing authority.

As discussed previously, these employees may not be dismissed because of party affiliation unless such affiliation is necessary for the performance of their job. Lack of confidence in the relationship or in the appointee's ability to carry out present programs or policy is sufficient. Noncareer SES appointees removed from the Federal service are not entitled to veterans preference and have no right of appeal to the Merit Systems Protection Board (MSPB). Further assistance should be obtained from the agency's General Counsel or the OPM General Counsel. A sample removal notification letter is shown in Tab A.

Under the Civil Service Reform Act, the removal of a noncareer SES appointee in an independent regulatory commission may not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President. (5 U.S.C. 3392(d))

Limited Term and Limited Emergency SES Appointees

Limited Term SES appointments are made to General positions having duties terminating within 3 years of the date of appointment. Limited Emergency SES appointments are made to General positions when an unexpected situation develops that does not permit the more time-consuming process of advertising and competitive selection. Positions are established by the agency with prior OPM approval for position type and appointment involved. As in all SES appointments, the limited term or limited emergency appointee must meet the qualification requirements established for the position by the agency. A limited term or limited emergency SES appointee may serve no more than 36 months on any combination of such appointments in any 48 month period.

A special type of limited term SES appointment is available for use following Inauguration. In this special appointment, the executive may be appointed as a limited term Senior Executive to a position with duties that relate to the transition and which will terminate within 6 months. Tenure in such an appointment is the same as in any other limited term SES appointment. Presidential nominees subject to Senate confirmation may be placed in this short-term appointment awaiting confirmation, but may not "act" in the target position. Such individuals should function in an advisory or consultative capacity.

An executive holding either a limited term or limited emergency SES appointment may be removed or requested to resign at any time on the decision of the appointing authority.

The procedures for removal are the same as for noncareer SES executives. Limited term SES appointees being removed are not entitled to veterans preference and have no right of appeal to MSPB. Also, the removal of a limited SES appointee in an independent regulatory commission cannot be subject to review or approval in the Executive Office of the President.

Statutory Controls on Career SES Personnel Actions

With creation of the Senior Executive Service, it became possible for an agency to assign an executive to any position for which he or she qualified. This possibility is in contrast with the previous system in which some positions were identified as "noncareer" and only noncareer executives could be assigned to them. Now, an agency head has greater flexibility to assign either a career or noncareer SES member to a position within the statutory controls described below:

- (1) SES members may be assigned into or out of critical positions to meet the staffing needs of the new leadership, except that positions designated Career Reserved must be filled by a career executive.

- (2) A career executive may not be involuntarily reassigned to another SES position in the agency or involuntarily removed from SES within 120 days after the appointment of a new agency head or the appointment of an immediate supervisor who is a noncareer appointee and who has authority to remove or reassign the career executive. This restriction does not apply to an action already underway or being taken as a result of an unsatisfactory performance appraisal, nor generally to removal from Federal service for misconduct. However, a career executive's performance appraisal and rating may not be made within 120 days after the beginning of a new Presidential Administration.

Although Presidential appointees are among the executives subject to change in a new Administration, it should be noted that certain former SES career executives have entitlement to reinstatement and the Senior Executive Service after leaving the Presidential appointment for reasons other than misconduct, neglect of duty, or malfeasance. The number of such appointees is small and the special circumstances must be addressed individually in each case. See 5 U.S.C. 3993(b).

N O T E S

1. The involuntary separation for "discontinued-service retirement" provisions apply to Presidential appointees, NEA's, Schedule C employees, and noncareer and limited term SES appointees. Material from the FPM on this subject is included in Tab D. For additional information on eligibility for retirement, contact the OPM Compensation Group, Advisory Services.
2. In dismissal cases, Constitutional requirements oblige agencies to provide an employee with a hearing if his or her moral character is impugned by the stated reasons for dismissal. These rights arise only when the stigmatizing reasons for dismissal are recorded in any document which may be disseminated to others either inside or outside Government. For this reason, notices of separation should be mild in tone.

Date

ROUTING AND TRANSMITTAL SLIP

Approved For Release 2005/12/14 : CIA-RDP84B00890R000300090025-1

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. <i>EO/00A</i>	<i>[Signature]</i>	23 MAR 1961
2. <i>HDDA</i>	<i>H</i>	3 24
3. <i>DDA</i>		
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Approval	For Clearance	Per Conversation
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REMARKS

Mr. Hart will attend the Staff mtg.

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FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
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OPTIONAL FORM 41 (Rev. 7-76)

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Approved For Release 2005/12/14 : CIA-RDP84B00890R000300090025-1



Office of
Personnel Management

Washington, D.C. 20415

In Reply Refer To

Your Reference:

THE FOLLOWING INDIVIDUALS WILL BE AT THE MEETING TOMORROW
AT 9:00 A.M.

Jim Handley	Agriculture
Mary Knauss	Commerce
Elam Hertzler	Education
William Heffelfinger	Energy
David Newhall	HHS
Lance Wilson	HUD
Richard Hite	Interior
James Hooley	Labor
Richard Stratford	State
Max Hugel	CIA
Jackie Tillman	State
Mike Baroody	Trade
David Chew	Treasury
Stanley E. Morris	Justice
Mary Batjer	Defense
Kenneth Klinge	Transportation
Jay Morris	AID (State)
Rick Abell	Peace Corp
Robert Turnbull	SBA
Steve Thayer	GSA
Gilbert Robinson	ICA
Michael Masson	Synthetic Fuels Corporation
James Hacket	ACDA
Nick Longworth	VA
Ed Harper	The White House OMB

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